

# ADMINISTRATIVE JUSTICE — TOWARDS INTEGRITY IN GOVERNMENT

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*[The concept of administrative justice — justice within the administrative law system — is a relatively new one and has received less sustained attention in Australia than elsewhere. This article notes the history of the concept in Australia, how it is used, and examines which bodies should be subject to administrative justice. The most vexed issue, however, is how to assess whether administrative justice has been achieved. By what standard is administrative justice to be measured? The author has chosen a methodology based on that adopted by Australian researchers who mapped national integrity systems. Since administrative law bodies were among the government agencies selected for that research, the hypothesis is that a methodology which applies to the whole can apply equally to the parts. That methodology was used to map the strengths and weaknesses of the administrative law system, and how coherently the system operates. The results showed that the coherence of parts of the system is questionable and that there are weaknesses in the system, but at the margins, not its core. Overall, the system was providing the outcomes for which it was established. The upshot is that although the definition of administrative justice remains elusive, a start has been made. The tools to undertake the task have been identified and it is now for administrative law institutions and others in the administrative law community to build on these steps so that this concept — integral to the administrative law system — can be better understood.]*

## CONTENTS

I	Introduction.....	706
II	The Modern System of Australian Administrative Law.....	707
III	The Concept of ‘Administrative Justice’ in Australia.....	708
	A ‘Administrative Justice’ in the Literature.....	708
	1 Early Writings — The Kerr Committee Report.....	708
	2 Later Developments.....	708
	B Administrative Law Institutions in Which Administrative Justice Applies.....	711
	1 Early Writings.....	711
	2 Later Articles, Chapters and Reports.....	711
	3 Textbook Writers.....	713
	4 Courts.....	714
	C Measuring Administrative Justice.....	714
	D A Culture of Administrative Justice.....	720
IV	Administrative Justice: Key Component of Integrity in Government.....	722
	A The NISA Study.....	724
	B NISA Methodology.....	725
	1 Identification of Administrative Justice Institutions.....	725
	2 Analysis of the Strengths and Weaknesses of the Institutions.....	725
	C Coherence of System.....	730
V	Conclusion.....	732

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## I INTRODUCTION

The concept of 'administrative justice' is a relatively new one. Although the early practitioners in Australia's administrative law system used the expression, it went into abeyance in the late 1980s and did not re-emerge until the turn of this century. With its re-emergence, however, it is timely to explore its meaning. Despite its relative novelty in the lexicon, the importance of the concept has been widely appreciated. As Sir Anthony Mason put it, '[a]dministrative justice is now as important to the citizen as traditional justice at the hands of the orthodox court system'.<sup>1</sup> However, there appears to be no agreement in Australian discourse as to its meaning. The observation by Sir Anthony underlines another justification for exploring the concept. A heightened consciousness of human rights in Australia has fuelled an interest in identifying the extent to which individual elements of administrative law might be developing into some form of human right.<sup>2</sup> At the same time, there is recognition of a competing goal, namely, 'to maximise the common good' as expressed through statutory schemes affecting citizens.<sup>3</sup> The conflict between these views deserves an airing.

For the purposes of this article, it is accepted that the place of administrative justice is within that branch of the law known as administrative law. That is because it is through administrative law institutions and principles that administrative justice is provided. Independent and impartial review, and access to information held by government, epitomise elements of administrative law that contribute to just outcomes.<sup>4</sup> It is, therefore, within the precincts of administrative law that the exploration of this topic occurs.

How then is this expression understood in Australia? This article provides an historical examination of how the phrase 'administrative justice' has been used in Australian writing, including by judges and tribunal members. Next, certain questions are explored to see whether the answers assist with an understanding of the phrase's meaning. To which bodies should administrative justice apply? How should we assess whether administrative justice has been achieved? And, finally, how embedded in administrative culture is the administrative justice concept?

As an alternative approach to exploring the meaning of the concept of 'administrative justice', Part IV adapts methodology developed by Australian researchers for assessing national integrity systems. Administrative law bodies were constituent parts of the model referred to in the integrity system research, and the

<sup>1</sup> Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 130.

<sup>2</sup> A W Bradley, 'Administrative Justice: A Developing Human Right?' (1995) 1 *European Public Law* 347; John McMillan, 'The Role of the Ombudsman in Protecting Human Rights' (Paper presented at the Conference on Legislatures and the Protection of Human Rights, The University of Melbourne, Faculty of Law, 21 July 2006); Robin Creyke, 'Administrative Justice: Beyond the Courtroom Door' [2006] *Acta Juridica* 257.

<sup>3</sup> D J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) 237.

<sup>4</sup> Commonwealth of Australia, Royal Commission on Australian Government Administration, *Report* (1976) 135, 350.

hypothesis is that a methodology which applies to the whole applies equally to its parts.

## II THE MODERN SYSTEM OF AUSTRALIAN ADMINISTRATIVE LAW

Since this article is essentially about the administrative law system, a brief description of that system is provided as background. The 1970s and 1980s saw a remarkable transformation of administrative law in Australia. Under the enlightened guidance of a report by the Commonwealth Administrative Review Committee ('Kerr Committee'),<sup>5</sup> supplemented by reports of two other committees,<sup>6</sup> a comprehensive new approach to administrative law was adopted.

At the federal level, a codified form of judicial review was introduced in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'); the Federal Court was set up as a second tier judicial body below the High Court to nationally administer the newly defined judicial review jurisdiction; and a multipurpose merits review body, the Administrative Appeals Tribunal ('AAT'), was established.<sup>7</sup> There was to be a statutory right to reasons,<sup>8</sup> an Ombudsman,<sup>9</sup> and later a *Freedom of Information Act 1982* (Cth) ('FOI Act') and a *Privacy Act 1988* (Cth). The package included tribunals in a variety of specialist areas, generally where the demand for review was high, and the new structure was to be monitored by an Administrative Review Council ('ARC'). These new services and bodies were set up alongside existing common law rights of judicial review offered by courts, including the entrenched jurisdiction of the High Court to grant mandamus, prohibition and injunction.<sup>10</sup> In brief, this period in the 1970s and 1980s revolutionised the opportunities for the citizen to discover, be involved in, and challenge decisions made by government.

Subsequently, it became common practice for agencies to offer internal review as a precursor to external review. Moreover, other administrative law standards have been imposed through codes of conduct and service charters, and consultation with stakeholders has been introduced, especially in developing statutory rules. Collectively these changes have resulted in the formulation of standards for good administration which are now widely accepted and applied.<sup>11</sup> The question of the extent to which this system provides administrative justice lies at the heart of this discussion.

<sup>5</sup> The committee was set up to examine whether there should be a further avenue of judicial review by a Commonwealth superior court, and whether Australia should introduce legislation akin to the *Tribunals and Inquiries Act 1958*, 6 & 7 Eliz 2, c 66: Commonwealth Administrative Review Committee, Commonwealth Government, *Commonwealth Administrative Review Committee Report* (1971) [1] ('Kerr Committee Report').

<sup>6</sup> The Bland Committee, which produced Commonwealth, *Interim Report of the Committee on Administrative Discretions*, Parl Paper No 53 (1973) and Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973), and the Ellicott Committee, which produced Commonwealth, *Prerogative Writ Procedures: Report of Committee of Review*, Parl Paper 56 (1973).

<sup>7</sup> *Administrative Appeals Tribunal Act 1975* (Cth).

<sup>8</sup> *ADJR Act* s 13; *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

<sup>9</sup> *Ombudsman Act 1976* (Cth).

<sup>10</sup> *Australian Constitution* s 75(v).

<sup>11</sup> Robin Creyke and John McMillan, 'Executive Perceptions of Administrative Law — An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163.

## III THE CONCEPT OF 'ADMINISTRATIVE JUSTICE' IN AUSTRALIA

A '*Administrative Justice*' in the Literature1 *Early Writings — The Kerr Committee Report*

Although the expression 'administrative justice' does not appear in the reports that led to modern Australian administrative law, an embryonic form of that concept probably underpinned the proposals. Certainly, what has been accepted as a feature distinguishing 'justice' as provided by the courts, from 'administrative justice' — that justice to the individual has to be tempered by the needs of public administration — was a key principle underpinning the proposals.<sup>12</sup> As the Kerr Committee Report pointed out, the recommendations were designed to 'ensure the establishment and encouragement of modern administrative institutions able to reconcile the requirements of efficiency of administration and justice to the citizen'.<sup>13</sup>

However, despite the prominence of these underlying objectives, the Kerr Committee Report did not attempt to define 'administrative justice'. Nor did it address issues such as how to balance 'efficiency' with 'justice to the individual', whether these notions should apply across the spectrum of administrative law bodies and rights, by what criteria or standards should the balance between justice and efficiency be measured, and how to assess whether administrative justice was being achieved. These elements of administrative justice were left to later commentators.

2 *Later Developments*

The first attempt at a systematic analysis of administrative justice in Australia occurred in 1999 at the annual conference of the Australian Institute of Administrative Law, the theme of which was 'Administrative Justice — The Core and the Fringe'. Many facets of administrative justice were discussed, but as the editors of the resulting publication pointed out, the notion is an elusive one and '[t]hose seeking a definition of "administrative justice" will ... need to recognise that the essence of the concept is tempered by conflicting (and legitimate) interests'.<sup>14</sup> The closest thing to a definition is found in the introductory paper to the published proceedings, which concluded that 'administrative justice is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded'.<sup>15</sup>

The juxtaposition of 'administrative' and 'justice' makes this uncertainty inevitable, since it involves balancing the distributive justice focus of public administration against individual interests. This is the central conundrum in assessing what is 'administrative justice'. That conundrum was discussed by Professor John McMillan in the context of the place of tribunals in the system of administrative review, albeit in words which could apply equally to administra-

<sup>12</sup> Kerr Committee Report, above n 5, [12].

<sup>13</sup> *Ibid* [389].

<sup>14</sup> Robin Creyke and John McMillan, 'Administrative Justice — The Concept Emerges' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 1, 3.

<sup>15</sup> *Ibid* 3–4.

tive justice. As he pointed out, agencies must balance justice in the individual case with other imperatives, such as government policy, consistency, and the need for efficient operation within budgetary constraints.<sup>16</sup>

Others take a different view. Since ‘justice’ focuses on the recipient, it is the recipient’s interests that should predominate. It follows that ‘administrative justice’ should be equated with ‘social justice’ or ‘justice for individuals’.<sup>17</sup> That social perspective is reflected in the notion inherent in administrative justice that its purpose is to safeguard the rights and interests of individuals.<sup>18</sup> This is to be achieved by effecting just administrative outcomes and fairness in administrative law processes. An example of this perspective is found in commentary on the office of the Ombudsman, a facility of particular relevance for disadvantaged groups such as prisoners or those in remand centres:<sup>19</sup>

Because it is free of charge, non-adversarial and because the office shoulders the burden of investigating complaints rather than requiring complainants to prove any kind of formal ‘case’, the Ombudsman’s role has been emphasised as an important or potentially important tool in achieving social justice ...<sup>20</sup>

On balance, Australian writers fall into one or the other of these two camps.

The case law supports these alternative meanings. Until the 1980s, the expression ‘administrative justice’ was used regularly<sup>21</sup> by members of the Commonwealth AAT and has reappeared in the last three years,<sup>22</sup> particularly in cases involving income support agencies.<sup>23</sup> This early case law referred frequently to ‘principles of consistency, fairness and *administrative justice*’.<sup>24</sup> Although this quotation suggests that the AAT saw ‘administrative justice’ as distinct from fair

<sup>16</sup> John McMillan, ‘Administrative Tribunals’ (2000) 76 *Reform* 67, 71–2.

<sup>17</sup> See, eg, Stephen Free, ‘Across the Public/Private Divide: Accountability and Administrative Justice in the Telecommunications Industry’ (1999) 21 *Australian Institute of Administrative Law Forum* 1, 2.

<sup>18</sup> Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) 13 ff.

<sup>19</sup> Matthew Groves, ‘Ombudsmen’s Jurisdiction in Prisons’ (2002) 28 *Monash University Law Review* 181.

<sup>20</sup> A J Brown, ‘Administrative Justice for Aboriginal People — Can It Be Done?’ (1993) 3(61) *Aboriginal Law Bulletin* 21, 21.

<sup>21</sup> See, eg, *Re Buhagiar and Director-General of Social Services* (1981) 4 ALD 113, 113, 121 (Hall SM, Oxby and McLelland MM). See also *Re Emery and Director-General of Social Security* (1983) 5 ALN No 102; *Re Farah and Director-General of Social Security* (1984) S137/83; *Re Kaiser and Director-General of Social Security* (1983) 5 ALN No 176; *Re Roe and Director-General of Social Security* (1983) S82/108; *Re Keuker and Director-General of Social Security* (1984) 5 ALD 626.

<sup>22</sup> *Re Logan and Chief Executive Officer of Customs* (2005) 40 AAR 377; *Theo v Secretary, Department of Family and Community Services* [2005] AATA 699 (Unreported, Fisher M, 25 July 2005); *Jatan v Secretary, Department of Families, Community Services and Indigenous Affairs* [2006] AATA 229 (Unreported, Fisher M, 13 March 2006); *Francis v Secretary, Department of Education Science and Training* [2006] AATA 336 (Unreported, Fisher M, 10 April 2006).

<sup>23</sup> The cases up to 2007 contain over 30 references to the expression, three quarters of which appear in the decisions made up to the mid-1980s.

<sup>24</sup> See, eg, *Re Buhagiar and Director-General of Social Services* (1981) 4 ALD 113, 121 (Hall SM, Oxby and McLelland MM) (emphasis added). See also *Re Drake and Minister for Immigration and Ethnic Affairs [No 2]* (1979) 2 ALD 634, 639 (Brennan J); *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639, 647 (Deane J).

process, it is clear from these cases that the AAT also regarded a just outcome for the applicant as a measure of whether administrative justice had been achieved.

Indeed the courts have acknowledged that fair process is of the essence of administrative justice while recognising that the legal standards must be modified to take account of executive priorities and pressures. As the Full Federal Court noted in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*:<sup>25</sup>

Procedural fairness lies at the heart of administrative justice as a longstanding requirement of the common law and reflective in Australia, as in other common law countries, of ordinary concepts of justice. Properly applied it does not lay upon decision-makers burdensome procedural requirements of the kind that would be expected of a court of law. What Lord Shaw said in *Local Government Board v Arlidge* [1915] AC 120 at 138 is still valid:

‘... that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded.’

In a frequently cited passage which clearly reflects an appreciation of the ‘administrative’ element of ‘administrative justice’, Brennan J in *Attorney-General (NSW) v Quin* (‘*Quin*’) warned that courts are not well equipped to advance the competing priorities within administrative justice:<sup>26</sup>

the judicature is but one of the three co-ordinate branches of government and ... the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented as well as interests which are represented must often be considered.

Kirby J, on the other hand, has suggested that the bar should be moved towards individual interests:

It has been said that the attainment of administrative justice is not the object of judicial review. At the same time, this Court should not shut its eyes and compound the potential for serious administrative injustice demonstrated by the appellant. It should always take into account the potential impact of the decision upon the life, liberty and means of the person affected.<sup>27</sup>

These extracts indicate that courts and tribunals are alive to the central conundrum within ‘administrative justice’, that is, whether the concept should be approached on the basis of the social justice or fair treatment view of administra-

<sup>25</sup> (2002) 123 FCR 298, 447 (French J).

<sup>26</sup> (1990) 170 CLR 1, 37 (Brennan J). See also James Blackwell, ‘A Discussion of the Duty and Jurisdiction of the Courts to Review Administrative Decisions’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 182.

<sup>27</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 98 (citations omitted). Note that Kirby J dissented in that case. Kirby J was commenting on Brennan J’s remark in *Quin* (1990) 170 CLR 1, 35–6.

tive justice or the Weberian model of bureaucratic administration. At the same time, there is a dearth of judicial guidance on how to deal with the conflict and the circumstances in which either of the two should be given primacy.<sup>28</sup>

### B *Administrative Law Institutions in Which Administrative Justice Applies*

The following discussion gives an indication of the views of Australian writers and adjudicative bodies on which administrative law bodies should be striving to achieve administrative justice. The greater support appears to be for an expansive view of the relevant institutions.

#### 1 *Early Writings*

Early writings on this topic were equivocal about the appropriate location for administrative justice. Lindsay Curtis, a senior Commonwealth government official with responsibility for implementing the 1970s reforms, refers to ‘administrative justice’ in the context of discussions of the Ombudsman, the AAT and internal review.<sup>29</sup> From this it may be inferred that he saw administrative justice as limited to the executive and not the judicial arm of government.

By contrast, the recommendations of the Kerr Committee Report were not so confined. The report makes it clear that the reforms were intended to cover the spectrum of administrative law institutions. Three of the original four terms of reference of the Committee related to judicial review, while the fourth required consideration of tribunals in its reference to ‘the desirability of introducing legislation along the lines of the United Kingdom *Tribunals and Inquiries Act 1958*’.<sup>30</sup> Moreover, the reform package that emerged was a comprehensive scheme of interrelated elements including courts, tribunals, a right to reasons, procedure, an ombudsman-type body, access to information rights and a body to monitor the arrangements.<sup>31</sup>

#### 2 *Later Articles, Chapters and Reports*

Nearly 20 years later, the majority of the presenters at the 1999 Australian Institute of Administrative Law conference took an inclusive view of the field. They listed the core institutions such as courts, tribunals, anti-discrimination and other investigative agencies, Royal Commissions, parliamentary inquiries, advisory bodies which assist government in its policy-making function, and decision-makers within agencies. At the same time, their list extended to public utilities, regulatory bodies which supervise commercial conduct, and private sector decision-makers such as industry ombudsmen, and commercial and community bodies that have embraced administrative law standards.<sup>32</sup>

<sup>28</sup> Margaret Allars, ‘Book Review: D J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) and J M Evans et al, *Administrative Law: Cases, Text, and Materials* (4<sup>th</sup> ed, 1995)’ (1997) 19 *Sydney Law Review* 411.

<sup>29</sup> Lindsay Curtis, ‘Crossing the Frontier between Law and Administration’ (1989) 58 *Canberra Bulletin of Public Administration* 55, 65, 67–8.

<sup>30</sup> Kerr Committee Report, above n 5, [1].

<sup>31</sup> *Ibid* ch 21.

<sup>32</sup> The broader view is found explicitly or by implication in: 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, 60–1; Judge

This broad view is also found in other writings.<sup>33</sup> French J listed the following as relevant administrative law institutions and processes:

- internal and external review;
- the Ombudsman;
- Members of Parliament and Ministers;
- non-government organisations;
- the media;
- Auditors-General;
- freedom of information ('FOI') legislation; and
- rights to reasons and to access documents.<sup>34</sup>

In an earlier paper in 2001, French J had also applied administrative justice expansively to bodies providing both 'administrative review' and 'judicial review'.<sup>35</sup>

Law reform commissions, however, have taken opposing views. The 2005 Discussion Paper of the Queensland Parliament's Legal, Constitutional and Administrative Review Committee supports the broader view of the 'footprint' of administrative law bodies. As the report explained, in Australia administrative law encompasses:

- judicial review;
- a right to reasons;
- reviews by independent tribunals on the merits;

Kevin O'Connor, 'Defining Administrative Justice — Perspectives from a New Tribunal' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 68, 68–9; Linda Kirk, 'The Constitutionalisation of Administrative Justice' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 106; 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, 132–7; 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; Kathryn Cronin, 'The Role of Legal Education in Achieving Administrative Justice' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 163, 164, 167; Alan Cameron, 'Administrative Justice at the Fringe of Government — Corporate Regulation' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 174; Annabelle Bennett, 'Administrative Justice at the Fringe of Government — Aspects of Private Sector Regulation' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 192; Andrea Malone, 'Digital Television Regulation — Administrative Justice and the Public Interest' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 209.

<sup>33</sup> John McMillan, 'The Academic Contribution to Australian Administrative Law' (2001) 8 *Australian Journal of Administrative Law* 214, 217. See also Mason, above n 1, 130; Susan Harris, 'Another Salvo across the Bow: Migration Legislation Amendment Bill (No 2) 2000 (Cth)' (2000) 23 *University of New South Wales Law Journal* 208, 222.

<sup>34</sup> As French J noted, '[a]nd at the end of the line of official review, is judicial review': Justice R S French, 'Judicial Review Rights' (2001) 28 *Australian Institute of Administrative Law Forum* 30, 32. See also Michael Barker and Ralph Simmonds, 'Delivering Administrative Justice in WA' (2004) 84 *Reform* 23; Groves, above n 19, 183.

<sup>35</sup> French, 'Judicial Review Rights', above n 34. See also Justice R S French, 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *Australian Institute of Administrative Law Forum* 1.



- an Ombudsman;
- rights of access to government documents and to update or correct government-held personal information;
- regulation of the use and storage of information about individuals through privacy and public records legislation; and
- obligations of a substantive and procedural kind to ensure there is accountability for subordinate law-making.<sup>36</sup>

By contrast, the Australian Law Reform Commission, in its four-year survey of the Australian civil litigation system, appears to have used ‘administrative justice’ to refer solely to decision-makers within the executive branch. As the Commission noted in its final report, ‘the administrative justice system ... [included] federal and state tribunal members, registrars, case officers and federal and state agency decision makers’.<sup>37</sup>

These opposing views appear to suggest that there is no agreement about the province of administrative justice, although the majority of writers favour the view that administrative justice is required of all segments of the administrative law community.

### 3 *Textbook Writers*

An index search for ‘administrative justice’ in Australian and United Kingdom administrative texts is illuminating. There is generally no entry,<sup>38</sup> or, in the few texts where administrative justice appears,<sup>39</sup> the index does not refer to the components of the administrative law package that are subject to administrative justice. The leading Australian text by Mark Aronson, Bruce Dyer and Matthew Groves refers only to ‘administrative *injustice*’.<sup>40</sup> The reference paraphrases the outcome in *Quin*<sup>41</sup> to the effect that ‘judicial review often remedies administrative injustice or error but that this is an occasional consequence rather than its rationale’.<sup>42</sup> It is clear from that statement and the title of the text, *Judicial Review of Administrative Action*, that the authors confine their consideration of administrative injustice to judicial review.

<sup>36</sup> Legal, Constitutional and Administrative Review Committee, Queensland Parliament, *The Accessibility of Administrative Justice: Discussion Paper* (2005) [3.1].

<sup>37</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [2.222].

<sup>38</sup> In the Australian context: see Margaret Allars, *Introduction to Australian Administrative Law* (1990); Margaret Allars, *Australian Administrative Law: Cases and Materials* (1997); Roger Douglas, *Administrative Law: Commentary and Materials* (3<sup>rd</sup> ed, 1999); E I Sykes et al, *General Principles of Administrative Law* (4<sup>th</sup> ed, 1997); Roman Tomasic and Don Fleming, *Australian Administrative Law* (1991); Creyke and McMillan, above n 18, 13–14. In the UK: see Sir William Wade and Christopher Forsyth, *Administrative Law* (9<sup>th</sup> ed, 2004), which does have such an entry; S A De Smith, H Woolf and J L Jowell, *Judicial Review of Administrative Action* (5<sup>th</sup> ed, 1995); P P Craig, *Administrative Law* (5<sup>th</sup> ed, 2003).

<sup>39</sup> *Quin* (1990) 170 CLR 1, 36 (Brennan J).

<sup>40</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3<sup>rd</sup> ed, 2004) 14 (emphasis added). It is interesting to note that the index heading was not present in previous editions.

<sup>41</sup> *Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

<sup>42</sup> *NAIS v Minister for Immigration and Multicultural Affairs* (2005) 223 ALR 171. See especially: at 200–1 (Kirby J).

#### 4 Courts

A passage by Brennan J in the High Court's decision in *Quin* is indicative of the courts' views:

the duty and jurisdiction of the courts to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.<sup>43</sup>

This classic passage describing the boundaries of merits and judicial review suggests that administrative justice is associated with the outcome or the merits of the case, an aspect of the decision with which courts exercising judicial review may not engage. On that reading, only tribunals and agencies administer 'administrative justice'. At the same time, if administrative action involves egregious error, that error may properly be held by courts to breach judicial review standards and errors of this nature can amount to administrative injustice. Hence breach of natural justice<sup>44</sup> and excessive delay in a tribunal's decision-making have been said to breach administrative justice.<sup>45</sup> This supports the view of Aronson, Dyer and Groves, earlier, that the courts do engage in 'administrative justice' as a by-product of judicial review.

So, on balance, while courts exercising judicial review may not intrude into the merits of the decision, this does not confine administrative justice to the executive arm. Breach of judicial review standards is seen by courts as leading to administrative injustice, a form of legal error on which they do make findings.

#### C Measuring Administrative Justice

There is little point in requiring that bodies provide administrative justice if there is no way of assessing whether administrative justice has been achieved. Indeed, the development of standards by which that assessment can occur in turn gives meaning to the expression 'administrative justice'. As one writer put it, 'administrative justice cannot be measured without defining what it is'.<sup>46</sup> So both meaning and measurement are closely interrelated.

As the earlier discussion indicates, in Australia the meaning of the expression is contested. Even in the UK, where recently 'administrative justice' has received a more sustained analysis,<sup>47</sup> this continues to be an area in which much work needs to be done. The rhetoric that administrative justice means fairness is insufficiently precise to be helpful. Nonetheless, it is common to see the test for

<sup>43</sup> (1990) 170 CLR 1, 35–6.

<sup>44</sup> See, eg, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 507 (Kirby J), although the majority also found that delay constituted a breach of natural justice; *Griffith University v Tang* (2005) 221 CLR 99, 137 (Kirby J); *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* 198 ALR 59, 98 (Kirby J).

<sup>45</sup> *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 502 (Kirby J); *Jago v District Court of New South Wales* (1989) 168 CLR 23, 26 (Brennan J).

<sup>46</sup> Neave, above n 32, 124.

<sup>47</sup> See the continuing series of seminars on administrative justice sponsored by the Economic and Social Research Council (the paper on which this article is based was given at the first of these in Edinburgh in 2006), which are being undertaken by Michael Adler and Richard Whitecross.

administrative justice stated in these terms. Indeed, until the late 1990s Australian authors frequently referred to administrative justice as ‘code’ for a just outcome<sup>48</sup> or for the rules of fair process.<sup>49</sup>

They were not alone. D J Galligan, in an English text, suggested that the principal concern of administrative justice is:

To treat each person fairly by upholding the standards of fair treatment expressed in the statutory scheme, together with standards deriving from other sources. The primary object is still an accurate proper application of authoritative standards but the emphasis now is on accuracy and propriety in each case, not just in the aggregate.<sup>50</sup>

Although this passage does refer to ‘standards derived from other sources’ and ‘authoritative standards’, it is not clear what these standards entail. Do they include judicial review standards, or broader administrative law standards such as equality, diligence and efficiency, independence, integrity, accountability and human rights principles?<sup>51</sup> Returning to an Australian context, French J derived administrative justice standards of ‘lawfulness, fairness, rationality and intelligibility’ from what he described as the ‘basic and well-established grounds of judicial review’.<sup>52</sup> There would be few who would cavil at that list. At the same time, his Honour also acknowledged that the attributes of accessibility, affordability and timeliness were desirable features of administrative justice not provided for by the courts, although they may be imposed on decision-makers and tribunals.<sup>53</sup> However, even with these additions, the list is not sufficiently concrete. Performance measures need to be prescriptive to be helpful.

In 1994, the Access to Justice Advisory Committee attempted to categorise what was required for an effective administrative justice system. The report concluded:

an administrative justice system fails if it does not provide:

- A comprehensive, principled and accessible system of merits review;
- A requirement that government decision-makers inform persons affected by government decisions of their rights of review;

<sup>48</sup> See, eg, Mary Crock and Mark Gibian, ‘Before the High Court: *Minister for Immigration and Ethnic Affairs v Eshetu*’ (1998) 20 *Sydney Law Review* 457, 463; Mary Crock, ‘Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law’ (2004) 26 *Sydney Law Review* 51; Michael Chaaya, ‘Proposed Changes to the Review of Migration Decisions: Sensible Reform Agenda or Political Expediency?’ (1997) 19 *Sydney Law Review* 547; Transcript of Proceedings, *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (High Court of Australia, I R L Freckelton, 10 October 2000).

<sup>49</sup> See, eg, Crock, ‘Judging Refugees’, above n 48; Chris Finn, ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ (2002) 30 *Federal Law Review* 239.

<sup>50</sup> Galligan, above n 3, 237.

<sup>51</sup> See, eg, *Legislative Standards Act 1992* (Qld) s 4, which requires that drafters of legislation strive not to breach common law principles enshrining rights such as the right not to be self-incriminated, the principle that legislation not be retrospective, and that natural justice be accorded.

<sup>52</sup> French, ‘Judicial Review Rights’, above n 34. In 2003, his Honour truncated the list to ‘lawfulness, fairness and rationality in the exercise of public power’: see French, ‘The Equitable Geist in the Machinery of Administrative Justice’, above n 35, 1.

<sup>53</sup> French, ‘Judicial Review Rights’, above n 34.

- A simplified judicial review procedure by comparison to judicial review under the common law;
- A right for persons who are affected by decisions to obtain reasons for those decisions;
- Broad rights of access to information held by government; and
- An adequately resourced ombudsman or commissioner of complaints with a general power to review government action.<sup>54</sup>

While prescriptive as to institutions and access rights, the list provides little guidance as to how these institutions should operate or how rights are to be provided in order that the outcome and the process can be seen to be administratively just.

There have been other studies. For example, the Commonwealth Ombudsman's office identified independence, jurisdictional certainty, investigative and coercive powers, accountability, an ability to make statements in the public interest, accessibility, impartiality and fairness as essential features of an effective ombudsman's office.<sup>55</sup> Other commentators have listed as equally important: flexibility and informality; confidentiality; externality; discretion to refuse to investigate; accountability to the Parliament rather than the executive; and having the ability to undertake 'own motion' inquiries and to possess determinative not just recommendatory powers.<sup>56</sup> Again, these are a valuable collection of principles but they require translation into more concrete performance indicators to be effective.

The ARC's report on the federal tribunal system identified as objectives of the tribunal system: fairness, accessibility, timeliness, informality and having effective mechanisms to ensure that agencies become aware of and comply with tribunal decisions.<sup>57</sup> The ARC noted, however, that there was a lack of reliable and comparable statistical information on evaluating tribunal performance against these measures.<sup>58</sup>

An attempt to identify methods of measuring administrative justice was made at the 1999 conference. Although what follows does scant justice to the relevant papers, in summary their conclusions were:

- What is needed is a suite of indicators, particularly when there are multiple and competing objectives, as for example, with the measurement of 'administrative justice'.<sup>59</sup>

<sup>54</sup> Access to Justice Advisory Committee, Commonwealth Parliament, *Access to Justice — An Action Plan* (1994) [13.9].

<sup>55</sup> Bruce Barbour, 'What Are the Essential Features of an Ombudsman?' in Robin Creyke and John McMillan (eds), *Administrative Law: The Essentials* (2002) 53, 58–9, paraphrasing 'The Ombudsman' (1994) 39/40 *Admin Review* 59, 60–1.

<sup>56</sup> Barbour, above n 55, 58–9.

<sup>57</sup> ARC, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) [2.10].

<sup>58</sup> *Ibid* [5.88].

<sup>59</sup> Lawrence McDonald, 'Measuring Administrative Justice — Lessons from the Report on Government Services' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 138, 142.

- Indicators must be expressed in terms of desired outcomes or outputs, that is, performance measures or benchmarks.<sup>60</sup>
- When competing objectives such as ‘administrative efficiency’ or ‘justice’ are being measured, the indicators are likely to produce different answers.<sup>61</sup>
- The indicators will vary with the perspective of the views being measured, be they official, citizen, court or tribunal. A social security recipient is likely to have a different view of whether they have been offered administrative justice from the public official who is subject to government fiscal and other policies and efficiency and effectiveness constraints. To take a more controversial example, a person seeking refugee status is likely to have a view of administrative justice which differs from that of a Department of Immigration that is alert to preventing unlawful entrants coming into the country. Similarly, a lawyer, court or tribunal is likely to consider independence, compliance with procedural protections and legal standards, and the availability of broad grounds for challenge as more likely to meet the standard, whereas timeliness or courteous treatment may be the paramount interests of an applicant.<sup>62</sup>
- Good examples of these competing objectives can be discerned in the increasing number of legislative objectives,<sup>63</sup> mission statements, agency objectives and performance indicators being produced.
- Although the competing objectives are often identified, generally no attempt is made to reconcile them. This difficulty was adverted to in relation to a migration tribunal faced with the legislative objective of being ‘fair, just, economical, informal and quick’. As the Court noted: ‘the objectives referred to [in the relevant legislation] will often be inconsistent as between themselves. In particular, a mechanism of review that is ‘economical, informal and quick’ may well not be “fair” or “just”’.<sup>64</sup>
- It is relatively common to find quantitative measurements, for example, of costs and delays,<sup>65</sup> but relatively uncommon to find figures on qualitative

<sup>60</sup> Ibid 142.

<sup>61</sup> Creyke and McMillan, ‘Administrative Justice — The Concept Emerges’, above n 14, 6–7.

<sup>62</sup> Neave, above n 32, 132–5.

<sup>63</sup> For example, key Australian tribunals are charged with the object of making decisions which are ‘fair, just, economical, informal, and quick’:

- AAT: see *Administrative Appeals Tribunal Act 1975* (Cth) ss 2A, 23(12);
- Social Security Appeals Tribunal: see *Social Security (Administration) Act 1999* (Cth) s 141; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 110;
- Migration Review Tribunal and Refugee Review Tribunal: see *Migration Act 1958* (Cth) ss 353, 420; and
- Conscientious Objection Tribunal: see *Defence Act 1903* (Cth) s 61CP.

<sup>64</sup> *Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324 (Unreported, Lindgren J, 6 May 1997) [1.1.3], approved by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 643 (Gummow J), 628 (Gleeson CJ and McHugh J), 668 (Callinan J).

<sup>65</sup> For example, such statistics were provided for courts and tribunals in the 1990s: Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings*, Issues Paper No 24 (1998) [11.4]; Australian Law Reform Commission, *Managing Justice*,

aspects of administrative justice, including whether decisions have been 'fair and just'. This recognises the difficulty of devising standards for measuring complex notions such as 'justice'.<sup>66</sup>

Apart from the difficulties of assessing 'complex and contested objectives',<sup>67</sup> other identified objectives of performance measurement in this area were that:<sup>68</sup>

- the costs of performance measurement should not outweigh the benefits;<sup>69</sup>
- 'efficiency' should not be privileged over 'effectiveness';<sup>70</sup>
- prescriptive performance measures should not lead to 'goal displacement', such as emphasising 'output targets over accuracy';<sup>71</sup>
- external factors which can adversely affect measurements, such as barriers to review, the absence of legal aid, or the quality of representation, must be allowed for;<sup>72</sup> and
- performance measures should be used to produce genuine improvement and accountability, not symbolic ends.<sup>73</sup>

The Productivity Commission does produce some qualitative data in the Justice segment of the annual *Report on Government Services*. This takes the form of one-page commentaries on courts from each Australian jurisdiction, detailing steps taken to improve court administration. Examples include the provision of specialist support services for aborigines and those involved in Family Court proceedings, electronic access schemes, the introduction of e-filing and special programmes for particular groups such as minor offenders.<sup>74</sup> At the 1999 Administrative Justice conference, the Productivity Commission indicated its intention to provide future data on justice outcomes in courts, including representation of indigenous people and culturally and linguistically diverse groups, the availability of interpreters, empathy by, access to, and ease of communication with court staff, use of alternative dispute resolution ('ADR') mechanisms, and the fairness of the process for unrepresented litigants.<sup>75</sup> These aspirations were identified eight years ago but have not yet been realised.<sup>76</sup>

A more comprehensive study, again focused on general court process, was a project of the Centre for Court Policy and Administration at Wollongong

above n 37. However, there is less information on comparable figures for primary decision-makers. In addition, the Productivity Commission provides in its annual *Report on Government Services* a snapshot of court administration for courts throughout Australia. Figures in the report, however, relate only to numbers of cases, finalisation and clearance rates, and costs: see Productivity Commission, *Report on Government Services* (2006) [6.7].

<sup>66</sup> Neave, above n 32, 125–6, 130–2.

<sup>67</sup> *Ibid* 127.

<sup>68</sup> McDonald, above n 60, 142–3; Neave, above n 32, 127, 140.

<sup>69</sup> McDonald, above n 60, 139–40; Neave, above n 32, 126.

<sup>70</sup> Neave, above n 32, 128–9.

<sup>71</sup> McDonald, above n 60, 140; Neave, above n 32, 127.

<sup>72</sup> Neave, above n 32, 127.

<sup>73</sup> McDonald, above n 60, 147; Neave, above n 32, 128, 137.

<sup>74</sup> Productivity Commission, above n 65, [6.44]–[6.52].

<sup>75</sup> McDonald, above n 60, 146.

<sup>76</sup> Productivity Commission, above n 65.

University. Researchers used the Trial Court Performance Standards,<sup>77</sup> developed in the United States, to develop performance measures for the delivery of services to clients of New South Wales Local Courts.<sup>78</sup> The Trial Court Performance Standards involved five principles:

- access to justice;
- expedition and timeliness;
- equality, fairness and integrity;
- independence and accountability; and
- public trust and confidence.

The Centre derived specific standards from these principles and from these it has gone on to craft benchmarks for each standard. For example, a standard for access to justice includes physical access. So, for example, a standard is: ‘The public and all court users have access to the court and its services when they need them’. In turn, the benchmarks to meet this standard are: ‘The doors to public waiting areas, conference rooms, victims’ rooms and toilets are open’.<sup>79</sup> These are examples of the prescriptive and practical development of criteria that is needed if administrative justice is to be achieved.

Measurement, if conducted appropriately, also has the advantage that it encourages government to consult user groups. Such practices reflect the values of participatory democracy and are capable of resolving some of the tensions inherent in the dichotomy between administrative and justice values. Consultation identifies what priorities different players in the system would give to different aspects of administrative justice, with sometimes unexpected results.<sup>80</sup>

This is illustrated by two Australian studies. A Senate inquiry into the Commonwealth Ombudsman’s office concluded that ‘complaints predominantly are about delays, errors and misunderstandings’ rather than correct outcomes, and that ‘financial implications, where they exist, are typically small’.<sup>81</sup> Equally unexpected were the findings of the 1996 federal *Administrative Appeals Tribunal Client Satisfaction Survey*. The respondents indicated that they valued speedy resolution of disputes, client-centred premises and speedy responses to telephone calls and letters over independence of the Tribunal and ‘clear reasons for decision’.<sup>82</sup>

This analysis has indicated that, although a start has been made on the measurement of administrative justice, much remains to be done. The methods by which benchmarks or indicators of performance are identified are an important

<sup>77</sup> Commission on Trial Court Performance Standards, National Center for State Courts, United States, *Draft Trial Court Performance Standards* (1994).

<sup>78</sup> Law Reform Commission, *Review of the Adversarial System of Litigation*, above n 65, [11.5].

<sup>79</sup> See Richard Mohr, Brendan Condie and Helen Gamble, *Principle 1: Access to Justice* (February 2001) Client Services in Local Courts: Principles, Standards and Benchmarks <<http://www.uow.edu.au/law/crt/clientsservices/access/index.html>>.

<sup>80</sup> See, eg, Koller, above n 32; Malone, above n 32.

<sup>81</sup> Senate Standing Committee on Finance and Public Administration, Commonwealth Parliament, *Review of the Office of the Commonwealth Ombudsman* (1991) 57.

<sup>82</sup> Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, above n 65, [11.41].

part of the process, not least when objectives or principles, such as ‘administration’ and ‘justice’, may conflict.

#### D *A Culture of Administrative Justice*

Having appropriate rules, standards and institutions is not enough.<sup>83</sup> Unless the ethos of administrative justice is embedded, the system will be ineffective.<sup>84</sup> As French J expressed it:

what administrative justice means in practice depends upon the culture reflected in the practices and attitudes of ministers, departments, authorities, statutory office holders and individual departmental officers, administrative review tribunals and the courts. The vast majority of official decisions which affect people will not go to review and their compliance with standards of administrative justice will depend on the attitudes of the people who make them.<sup>85</sup>

There is a dearth of empirical work on such issues.<sup>86</sup> However, there have been two major studies in Australia on executive perceptions of administrative law. The studies provided insights into how well officials, at least at the federal level, have embraced the underlying principles of administrative justice and how agencies have reacted to findings by courts in favour of applicants for judicial review.<sup>87</sup>

The first study involved 40 government agencies and over 360 federal government official decision-makers. Questions referred principally to the impact of external review by courts and tribunals. The overall picture was gauged best by the question ‘does administrative law achieve its core objectives?’ That question was designed to test, for example, whether:

- decision-makers give consideration to the impact of their decisions on those who are affected, a key aspect of ‘administrative justice’;
- the executive explains and justifies its exercise of power (executive accountability); and

<sup>83</sup> It is for this reason that codes of conduct and service charters such as the *Australian Public Service Code of Conduct* and *Australian Public Service Values* are imposing new standards of professionalism on officials: see, eg, *Public Service Act 1999* (Cth) ss 10, 13. See also *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 465–7 (Kirby J).

<sup>84</sup> The embedding of culture is a product of administrative law rules, but is reinforced by notions of officials upholding values of professionalism, which includes adherence to law in their work. Assistance to achieve this outcome has been aided by the Australian Public Service Code of Conduct and Australian Public Service Values provided by: *Public Service Act 1999* (Cth) ss 14–16; *Public Service Regulations 1999* (Cth) pt 2.

<sup>85</sup> Justice R S French, ‘Administrative Justice in Australian Administrative Law’ in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (2000) 9, 20–1.

<sup>86</sup> Australian Law Reform Commission, *Managing Justice*, above n 37, [1.27]–[1.46].

<sup>87</sup> Creyke and McMillan, ‘Executive Perceptions of Administrative Law’, above n 11; Robin Creyke and John McMillan, ‘Judicial Review Outcomes — An Empirical Study’ (2004) 11 *Australian Journal of Administrative Law* 82. See also Robin Creyke and John McMillan, ‘The Operation of Judicial Review in Australia’ in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 161, in which the Creyke and McMillan study of judicial review was the most extensive empirical analysis.



- administrative law review has a normative impact on the way in which decision-making is carried out (good administration).

As the study notes, these objectives were too broad for a single question, but the responses to the question gave an indication of attitudes towards administrative law and its aims.

There was a surprisingly high level of agreement that external review met its core objectives. Some 93.7 per cent of officers concluded that external review was an important mechanism for ensuring that decision-makers were accountable.<sup>88</sup> Individual comments to the effect that external review is ‘crucial to honest and sound decision-making’, that it is a ‘safety valve’, that it ‘keeps us honest’ and that ‘without it consistency across the agency would be abysmal’ are indicative of this support.<sup>89</sup> Eighty-five per cent of officers perceived external review as an important mechanism for ensuring that officers complied with the law, and 79.7 per cent agreed that administrative law beneficially directs the attention of decision-makers to the impact of their decisions on individuals.<sup>90</sup>

Other relevant responses were that external review does not undermine government policy (81.7 per cent of respondents) and that external review bodies do not give too much emphasis to individual rights when making decisions (62.7 per cent).<sup>91</sup> Nonetheless, only 51.1 per cent agreed that external review bodies adequately understand the context for and pressures on government decision-making. However, in relation to whether administrative law has drawbacks in its impact on agency resources, procedures and processes, 67.3 per cent of officers rejected the proposition that external review redirects resources unacceptably to the resolution of individual complaints. At the same time, only 45 per cent of respondents agreed that the benefits of external review justified the costs to the agency — a statistic generally at odds with the previous responses. It was noteworthy that the answers to this question were more positive from service delivery agencies than from policy departments.<sup>92</sup> On the whole, the responses indicated a high degree of approval for, and hence acceptance of, the benefits of review by courts and tribunals.

Even more striking was the parallel 10-year study into the outcomes of judicial review before the Federal Court and the High Court. The judicial review study measured the final outcome in cases where an applicant had been successful before the court, and was verified by both the applicant or their legal representative and the agency. The findings are a testament to a culture of compliance. Since success in a judicial review hearing results only in an order remitting the application to be decided afresh in accordance with law, the ultimate finding may in fact be the same as the original decision. There is no requirement to find in favour of an applicant. Indeed, the authors expected that in most cases the final decision would confirm the original result. Contrary to that expectation, the results showed that in most cases (80.1 per cent for agencies; 74.8 per cent for

<sup>88</sup> Creyke and McMillan, ‘Executive Perceptions of Administrative Law’, above n 11, 167.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* 169.

<sup>92</sup> *Ibid.* 168–71.

applicants) not only did the agency reconsider the application in accordance with the court order, but that in possibly as high as 78 per cent of cases, the outcome for the applicant was favourable.<sup>93</sup> This indicates that not only was a win in a judicial review hearing likely to lead to a favourable outcome for the litigant, but findings adverse to an agency were often a precursor to wider systemic benefits. As the study noted: ‘Individual rulings are frequently followed by other governmental action to amend legislation, change policy, rewrite manuals or alter decision-making procedures and practices’.<sup>94</sup>

Overall, the study reflects a perception within public administration of the legitimacy of judicial review and the willingness to comply with court rulings. The study also demonstrates the immense value to applicants of one of the key planks of the administrative law edifice — judicial review.

#### IV ADMINISTRATIVE JUSTICE: KEY COMPONENT OF INTEGRITY IN GOVERNMENT

The findings in Part III above chronicled the understanding, at best imperfect, of what is covered by ‘administrative justice’. This Part discusses an alternative approach to analysing the concept which ties administrative justice to integrity in government. The hypothesis is that there is an integrity arm of government which embraces the administrative law institutions. A related rationale ‘is the potential contribution [the new approach] may make toward the enhancement of our society’s systems of democratic accountability’.<sup>95</sup> This too provides a link to administrative justice since, as Groves put it, ‘accountability fosters the values of administrative justice by ensuring that public officials are answerable to those who are affected by administrative decisions.’<sup>96</sup> As he went on:

Effective mechanisms of accountability also provide an important source of moral and political legitimacy to administrative officials, by ensuring that they may be seen to act according to the values and standards that are generally accepted as applying to the exercise of public powers.<sup>97</sup>

Those values and standards are of the essence of administrative justice. It is for this reason that effecting administrative justice places administrative law institutions within the integrity arm of government and that it is legitimate to adapt the methodology of the NISA study<sup>98</sup> — which focused on integrity in government institutions — to administrative justice.

<sup>93</sup> Creyke and McMillan, ‘Judicial Review Outcomes’, above n 87, 86–7.

<sup>94</sup> *Ibid.* 98.

<sup>95</sup> A J Brown and John Uhr, ‘Integrity Systems: Conceiving, Describing, Assessing’ (Paper presented at the Australasian Political Studies Association Conference, University of Adelaide, 29 September – 1 October 2004) 8.

<sup>96</sup> Groves, above n 19, 184.

<sup>97</sup> *Ibid.*

<sup>98</sup> 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) (‘NISA Final Report’).

The concept of an integrity arm of government was first publicised by Bruce Ackerman, a US academic, at the turn of this century.<sup>99</sup> The idea was promoted in Australia by Spigelman CJ of the NSW Supreme Court in a national lecture series<sup>100</sup> in 2004 and, more recently, by Professor John McMillan, the current Commonwealth Ombudsman.<sup>101</sup> To chart the link to administrative justice it is first necessary to explain the theory, and in particular, what is meant by ‘integrity’.

‘Integrity’ is broader than the absence of corruption. As Spigelman CJ explained:<sup>102</sup>

The role of the integrity branch is to ensure that that concept [‘of how governance should operate in practice’] is realised, so that the performance of governmental functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.

As his Honour went on:

[Integrity] is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.<sup>103</sup>

These purposes go beyond legality to include broader rights-based values: ‘First, the maintenance of fidelity to the public purposes for the pursuit of which the institution is created. Secondly, the application of the public values, including procedural values, which the institution [is] expected to obey.’<sup>104</sup>

Since the province of administrative law is to keep decision-making in the public sector within lawful boundaries, these descriptions establish a discernible link with administrative law. So described, the definition of integrity ‘resonates with words frequently deployed in administrative law discourse’.<sup>105</sup>

Before embracing the analogy, however, a warning is required. The link between ‘integrity’ and ‘administrative justice’ is not exact. Both concepts are multifaceted, as the earlier discussion has illustrated. Integrity, if Spigelman CJ’s definition is accepted, is designed to ensure institutions and personnel undertake their functions with probity, according to law, and to achieve specified purposes.

<sup>99</sup> Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 633, 694–6. At the same time, it is notable that Bruce Topperwien, the Registrar of the Australian Veterans’ Review Board, used the expression in an article: see Bruce Topperwien, ‘Separation of Powers and the Status of Administrative Review’ (1999) 20 *Australian Institute of Administrative Law Forum* 32.

<sup>100</sup> Chief Justice James Spigelman, ‘Jurisdiction and Integrity’ (Speech delivered at the National Lecture Series of the Australian Institute of Administrative Law, Adelaide, 5 August 2004). See also Chief Justice James Spigelman, ‘Judicial Review and the Integrity Branch of Government’ (Speech delivered at the World Jurist Association Congress, Shanghai, 8 September 2005).

<sup>101</sup> John McMillan, ‘The Ombudsman and the Rule of Law’ (2005) 44 *Australian Institute of Administrative Law Forum* 1, 11–13.

<sup>102</sup> Chief Justice James Spigelman, ‘The Integrity Branch of Government’ (Speech delivered at the National Lecture Series for the Australian Institute of Administrative Law, Sydney, 29 April 2004).

<sup>103</sup> *Ibid* 2–3.

<sup>104</sup> *Ibid* 2.

<sup>105</sup> *Ibid* 3.

These purposes do not coincide with the objectives of ‘administrative justice’, which are to balance ‘efficiency and effectiveness’ and ‘individual justice’. These differences must be borne in mind when assessing the usefulness of transposing the methodology for assessing integrity to administrative justice.

#### A *The NISA Study*

The five-year study which culminated in the NISA Final Report<sup>106</sup> developed a methodology to study the interrelationships between the institutions and processes on which integrity depends. The methodology was then applied as part of an innovative and ambitious project to map the health of integrity systems in Australia, to gauge their effectiveness, highlight their strengths and weaknesses, and propose refinements and improvements.

The NISA Final Report notes that no single institution can assure integrity.<sup>107</sup> What is needed is a mix of ‘institutions, processes, people and attitudes’,<sup>108</sup> a conclusion which led the NISA study to adopt a bird’s nest as the integrity model.<sup>109</sup> The ‘bird’s nest performs a vital function of securing something delicate, important and easily shattered’, and the ‘materials from which nests are constructed are usually individually weak, and incapable of providing any significant support by themselves’<sup>110</sup> but collectively provide a system of mutual accountability.<sup>111</sup> As the authors note, ‘[l]ike nests, integrity systems also need constant tinkering and repair’.<sup>112</sup> That in turn means ‘that development lies in innovation, diversity and adaptation of old institutions to contemporary challenges in ways that ensure solutions are durably embedded in local political culture.’<sup>113</sup> As these descriptions indicate, the metaphor is peculiarly suitable to public administration. The way in which governments operate is constantly changing and administrative justice needs to be equally fluid.<sup>114</sup>

The NISA study points out that an integrity system operates in the government, business and civil society sectors. That too makes it suitable for assessment of administrative justice. Although it is principally the government sector with which administrative justice is concerned, administrative justice principles apply to some degree to all three sectors. For example, standards on complaint-handling, whistleblower protection, codes of conduct and fraud corruption controls are applicable to the business and regulatory sectors,<sup>115</sup> natural justice

<sup>106</sup> NISA Final Report, above n 98.

<sup>107</sup> *Ibid* i.

<sup>108</sup> *Ibid* 110.

<sup>109</sup> *Ibid* 17.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid* 15.

<sup>112</sup> *Ibid* 18.

<sup>113</sup> *Ibid*.

<sup>114</sup> Australian Law Reform Commission, *Managing Justice*, above n 37, [2.224]–[2.225].

<sup>115</sup> For example, Standards Australia has developed standards applicable in the private sector on complaints-handling, whistleblowing, codes of conduct and control of fraud corruption: see Standards Australia, *AS ISO 10002-2006: Customer Satisfaction — Guidelines for Complaints Handling in Organizations* (2006); Standards Australia, *AS 8002-2003: Corporate Governance — Organizational Codes of Conduct* (2003); Standards Australia, *AS 8004-2003: Corporate*

principles, anti-discrimination, rights protection and privacy laws apply broadly in the community, and the ombudsman concept has become ubiquitous.

### B *NISA Methodology*

The methodology uses three approaches for the assessment of the health of the system. Applying these approaches to the administrative justice system, the first step is to identify the elements of the system that bear on the ability of administrative justice to develop and flourish. The second step is to analyse the strengths and weaknesses of the institutions. The third is to examine how well the elements work as a coherent system.<sup>116</sup> The methodology will be applied principally to the Australian federal system of administrative law.

#### 1 *Identification of Administrative Justice Institutions*

The first step requires the identification of the institutions subject to the methodology. The elements of the Australian system of administrative law were outlined earlier and do not need repetition. The core administrative law bodies identified in the NISA Final Report are anti-corruption commissions, ombudsman offices, public service commissions, auditors-general (particularly in their performance audit role) and tribunals.<sup>117</sup> These are the bodies whose main function is the pursuit of integrity. Others are clearly contemplated by the NISA case studies.<sup>118</sup> These include integrity commissioners, public service merits protection and equity bodies, courts, information and privacy commissioners, internal complaint-handling systems, whistleblower schemes, rights to access information held by government and to consultation, and bodies to enforce agency codes of conduct and public sector values.

From an administrative justice perspective, to that list should be added regulatory bodies, which are increasingly being subjected to administrative law standards,<sup>119</sup> and audit programmes that conduct performance audits to test the accuracy and lawfulness of agency decision-making. As McMillan noted: ‘compliance auditing ... is a highly effective and low cost mechanism for ensuring strict compliance with statutory procedures that are grounded in the ideas of rule of law and rights protection’.<sup>120</sup>

#### 2 *Analysis of the Strengths and Weaknesses of the Institutions*

The second step is to identify the strengths and weaknesses of the institutions identified. Analysing the comprehensive collection of institutions and rights referred to in the previous Part is beyond the scope of this article — only an indicative examination of key institutions is essayed. The earlier discussion in

*Governance — Whistleblower Protection Programs for Entities* (2003); Standards Australia, *AS 8001-2003: Corporate Governance — Fraud and Corruption Control* (2003).

<sup>116</sup> NISA Final Report, above n 98, 119–121.

<sup>117</sup> *Ibid* 12.

<sup>118</sup> *Ibid* pt II chs 3–5.

<sup>119</sup> See, eg, Justin Gleeson, ‘Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?’ (2005) 46 *Australian Institute of Administrative Law Forum* 28; John Tamblyn, ‘Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?’ (2005) 46 *Australian Institute of Administrative Law Forum* 39.

<sup>120</sup> McMillan, ‘The Ombudsman and the Rule of Law’, above n 101.

Part III(C) indicated some of the strengths and weaknesses of the system of review by courts and tribunals. The following material will focus most on the role of ombudsman offices.

(a) *Strengths*

As earlier material indicates, Australia has a wealth of administrative bodies for the pursuit by citizens of their rights against government.<sup>121</sup> The administrative justice nest in this country is blessed with its variety of institutional twigs, including its collection of administrative law rights. That does not mean there are no weaknesses in the 'nests' of each jurisdiction, but it does mean that, comparatively speaking, administrative justice appears to be well-served in Australia.

How strong is the nest? There has been little attempt to assess the effectiveness of the system. Anecdotal evidence appears to be positive, but the reports are patchy. In an early report, the benefits were said to:

range from quite practical matters relating to improvements in primary decision making as manifested by changes to procedures, manuals and policies stimulated by external review; improved filing procedures encouraged by FOI; the greater emphasis placed on training of staff and monitoring the quality of their work; the greater care and precision which is undoubtedly being taken in administrative review decision making because of the discipline of external review, FOI, and the obligation to provide reasons for decisions; to more abstract, but equally important benefits, relating to the provision of individual justice to persons aggrieved by administrative action, and the importance of the availability of effective external review and public accountability in adding legitimacy to executive government in our complex and heavily regulated society.<sup>122</sup>

Others, including recent commentators, have noted the higher quality of submissions from departments when advice is sought on the exercise of statutory powers.<sup>123</sup> One official, who had been head of seven federal government agencies, concluded that 'decision-making in the [Australian Public Service] ... is more professional' since the administrative law reforms.<sup>124</sup>

(i) *Ombudsmen*

The effectiveness of Ombudsman processes in meeting administrative justice goals is illustrated by the following extract:

First, the investigation of individual decisions ensures that they will be examined to determine whether they have been made according to law, by reference to guidelines that are fair, lawful and applied in a reasonable manner. Secondly, the role of Ombudsmen in identifying systemic flaws in administrative practices and policies or, in some cases, the problems that are caused by the absence

<sup>121</sup> The provision of rights of these kinds is supported by recommendations in the NISA Final Report, above n 98: see, eg, recommendation 5 (at 94–5) in relation to access to administrative justice and recommendation 14 (at 99) in relation to FOI.

<sup>122</sup> John Griffiths, 'The Price of Administrative Justice' (1989) 58 *Canberra Bulletin of Public Administration* 34, 36; Anthony Blunn, 'Administrative Decision-Making — An Insider Tells' (2003) 37 *Australian Institute of Administrative Law Forum* 35.

<sup>123</sup> Curtis, above n 29; Blunn, above n 122; Michael D'Ascenzo, 'Effectiveness of Administrative Law in the Australian Public Service' (Paper presented at the Australian Institute of Administrative Law National Administrative Law Forum, Canberra, 14–15 June 2007).

<sup>124</sup> Blunn, above n 122.

of an appropriate policy, increases the likelihood that the sources of unfair and arbitrary decisions will be detected and corrected. Thirdly, Ombudsmen are often directly involved in the formation or revision of administrative practices, to ensure that agencies adopt fair and lawful procedures. It should also be noted that the informal negotiations used by Ombudsmen often convince administrative officials to acknowledge and correct errors. A mechanism that enables administrative officials to detect and voluntarily correct errors is a useful supplementary means of ensuring rationality in decision making.<sup>125</sup>

Coercive or investigative powers possessed by ombudsman offices<sup>126</sup> can also provide protection for witnesses and bestow on these institutions functions akin to those of a Royal Commission without its attendant costs. This facility was graphically demonstrated by contrasting the Palmer<sup>127</sup> and Alvarez<sup>128</sup> inquiries into the immigration department's wrongful detention of two Australian citizens, Cornelia Rau and Vivian Alvarez (or Solon) respectively. The first was an executive inquiry with no legislative backing, and the report noted that 'a small number of people declined to be interviewed'.<sup>129</sup> By contrast, when the Ombudsman took on the related Alvarez inquiry, the report pointed out that 'the authority provided by the *Ombudsman Act 1976* (Cth) meant that all relevant witnesses could be interviewed' and the inquiry examined a wide range of relevant files, including those held by the private contractor responsible for the detention centre.<sup>130</sup>

The private sector ombudsman offices are also proactive. This is illustrated by an electronic complaint line for Australian consumers with links to private sector ombudsman offices, statutory ombudsman offices and government consumer affairs agencies, as well as ADR schemes, the benchmarks for industry-based customer dispute resolution schemes,<sup>131</sup> and a step-by-step guide to access their services.<sup>132</sup>

(ii) *Tribunals and ADR*

The increased number of tribunals reflects governments' attempts to provide cheaper and simpler avenues for review. This has seen the introduction of two tiers of merits review in high volume decision-making areas such as income support. At the same time, there has been an increasing reliance on ADR. For example, up to 80 per cent of cases are settled at the preliminary conference

<sup>125</sup> Groves, above n 19, 204.

<sup>126</sup> Paul Craig, 'Three Perspectives on the Relationship between Administrative Justice and Administrative Law' in Robin Creyke and John McMillan, *Administrative Justice — The Core and the Fringe* (2000) 28.

<sup>127</sup> Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report* (2005).

<sup>128</sup> Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report No 03 (2005).

<sup>129</sup> Palmer, above n 127, [1.5].

<sup>130</sup> Commonwealth Ombudsman, above n 128, [1.5].

<sup>131</sup> The benchmarks are familiar to administrative lawyers, being accessibility, independence, fairness, accountability, efficiency and effectiveness.

<sup>132</sup> See Complaint Line <<http://www.complaintline.com.au>>.

stage at the AAT, a clear indication that this is an effective mechanism for solving grievances.<sup>133</sup>

(iii) *Internal Review*

There is a growing focus on internal review reflecting its value as a management tool and an accessible, cheap means of correcting error. As one commentator noted, there is an

abundance of evidence ... that internal review prior to an external appeal being heard frequently results in a department modifying or reversing a significant number of decisions thereby obviating the need for and expense of formal external appeal in those cases.<sup>134</sup>

In summary, many of the administrative law mechanisms have developed beyond expectations. For example, the Kerr Committee Report assumed that the AAT 'would be mainly concerned with review as to fact-finding and improper or unjust exercise of discretionary power'.<sup>135</sup> However, as Curtis remarked in a 25-year retrospective view of the Kerr Committee reforms:

This expectation has not, I think, been borne out. Particularly when the AAT acquires a new jurisdiction, issues of law arise frequently and legal expertise on the Tribunal has provided a means of satisfactory resolution of many of these issues. The views of the Tribunal have generally been accepted by agencies, even though they are not binding in the same sense as a judicial decision is binding.<sup>136</sup>

These developments have enabled the AAT to become a premier administrative law institution providing effective guidance to agencies on the more than 400 pieces of legislation which now allocate jurisdiction to the Tribunal.

(b) *Weaknesses*

Particular elements of the system have suffered from being underfunded. As John Griffiths noted, '[n]o other single issue dominates current debate about Commonwealth administrative law more than the comparative costs and benefits of the present system'.<sup>137</sup> Although that comment was made in 1989, it resonates equally today. The comment signifies that the 'efficiency' or 'administrative' element of the 'administrative justice' equation has tended to predominate to the detriment of the effective operation of the system. As Griffiths noted:

The Government's concern to ensure that the administrative law system operates as efficiently, economically and equitably as possible is understandable.

<sup>133</sup> AAT, *Annual Report 2005–2006* (2006) 28.

<sup>134</sup> Griffiths, above n 122, 37; Robin Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' in John McMillan (ed), *Administrative Law under the Coalition Government* (1997) 20, 45–9.

<sup>135</sup> Kerr Committee Report, above n 5, [299].

<sup>136</sup> 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* (1998) 36, 47. This view was supported by the results of the empirical study referred to in Creyke and McMillan, 'Executive Perceptions of Administrative Law', above n 11, 173.

<sup>137</sup> Griffiths, above n 122. The current focus of governments on resource constraints is illustrated by an examination of Department of Finance and Administration, Australian Government, *Commonwealth Procurement Guidelines — January 2005* (2004) 6.



No one could reasonably argue that administrative law enjoys some sacrosanct quality which exempts it from a general scrutiny of levels of public expenditure. It must be accepted that areas of waste or abuse should be identified and eliminated. It must also be accepted that a difficult political judgment is ultimately involved in determining what finite resources should be devoted to administrative law. Stark economic realities dictate that we cannot expect to have an ideal system and critical political decisions will have to be taken in determining the shortfall from that ideal.<sup>138</sup>

The absence of funding has also impacted adversely on merits review tribunals. Inadequate resourcing has prevented tribunals from operating in an inquisitorial fashion as intended. The consequence has been that the parties have had to shoulder the burden of providing supplementary information or evidence in support of their case.<sup>139</sup> This may account for the lower stature of tribunals as compared with ombudsmen, privacy, human rights and anti-discrimination offices, which investigate on behalf of the complainant.<sup>140</sup>

Other defects in the system are that:

- The increased use of common law avenues for review, particularly in the migration jurisdiction, has led to a marked decline in the use of the *ADJR Act*.<sup>141</sup> This threatens to sideline the painstaking drafting of the 18 grounds of the Act and the even more insightful analysis of each of the grounds by the courts over nearly 30 years.
- The dual entry points for judicial review, which depend on whether the application is made under the judicial review statutes or by means of the common law remedies, have created jurisdictional traps that are barriers to access.<sup>142</sup>
- There has been dissatisfaction with the operation of the privacy legislation. The *Privacy Act 1988* (Cth) has been used to inhibit the release of informa-

<sup>138</sup> Griffiths, above n 122, 35.

<sup>139</sup> *Re Rowlands and Commissioner for Superannuation* (1988) 16 ALD 589. See also Narelle Bedford and Robin Creyke, *Inquisitorial Process in Australian Tribunals* (2006).

<sup>140</sup> See Creyke and McMillan, 'Executive Perceptions of Administrative Law', above n 11, 163, 167–71.

<sup>141</sup> For example, in combination, the annual reports of the Federal Magistrates Court and the Federal Court stated that there were some 176 administrative law actions in 2005–06: see Federal Magistrates Court of Australia, *Annual Report 2005–2006* (2006) 16; Federal Court of Australia, *Annual Report 2005–2006* (2006) 34. Since the Federal Magistrates Court was designed as a high volume adjudication body, the overall numbers are relatively modest — indeed, administrative law actions made up just 0.5 per cent of general federal law applications filed in the Federal Magistrates Court in 2005–06: at 16. These figures do not include *Migration Act 1958* (Cth) applications.

<sup>142</sup> For the purposes of the *ADJR Act*, there is a need to establish the existence of a person who has been 'aggrieved' by a 'decision' (at s 5) or 'conduct' (at s 6) of an 'administrative character', that the action or conduct has been 'made under an enactment' and that the decision has not been made by the Governor-General nor that it falls within the exemptions in sch 1: at s 3(1). For the common law remedies, it must be established that the action involves a 'matter' or a 'law[] made by the Parliament' and also 'a Commonwealth authority' or an 'officer of the Commonwealth': see *Australian Constitution* s 75(iii), (v); *Judiciary Act 1903* (Cth) s 39B.

tion and to impede efficient business practices, such as data sharing between agencies.<sup>143</sup>

- FOI reform has not been concluded, as is indicated by the regular calls for a FOI Commissioner to act as a coordinating body.<sup>144</sup> Other suggested reforms would deal with the disclosure of personal information, FOI training, records management, the restriction of the Act to ‘documents’ rather than ‘information’, and the extent of the exemptions.

In summary, there are weaknesses in the system, although more at the margins than at the core of the mechanisms. On balance, the weaknesses are outweighed by the strengths of the system.

### C Coherence of System

If coherence is a measure of the effectiveness of administrative justice, how well does the Australian system rate?

The Kerr Committee intended to establish an integrated, coherent system of administrative law. All forms of review — judicial review, merit review and administrative investigation by means of the Ombudsman — were covered. Each was intended to be national and comprehensive; access to the courts was simplified; the judicial review statute painstakingly codified the grounds of judicial review in substitution for the archaic prerogative remedies; the right to reasons was the key to exposing errors in decision-making; FOI opened the window for Australians into information held by government; and a body, the ARC,<sup>145</sup> was introduced to monitor the system. Subsequent institutional protections for privacy and human rights and anti-corruption schemes have only enhanced the comprehensiveness of the system. The appropriateness of the package is demonstrated by its progressive adoption by most Australian states and territories.<sup>146</sup>

There are, of course, cracks in the framework and the structure has not developed as expected. Some of these have been listed earlier under ‘weaknesses’. There was little focus in the Kerr Committee Report on the broader normative goal of improving decision-making at the primary level. There has also been a reorientation of the importance of some administrative law institutions. For example, the Kerr Committee saw the general jurisdiction merit review tribunal as the central component of the system.<sup>147</sup> Thirty years later, the way in which the public perceives administrative law institutions has changed.

<sup>143</sup> Rachel Lebihan, ‘Hiding behind the *Privacy Act*’, *The Australian Financial Review* (Melbourne), 12 April 2005, 32; Luke McIlveen, ‘Privacy Law Barred Wave Rescue Effort’, *Herald Sun* (Melbourne), 16 March 2005, 34.

<sup>144</sup> See, eg, Law Reform Commission and ARC, *Open Government: A Review of the Federal Freedom of Information Act 1982* (1995); Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, Report No 2 (2006) 30.

<sup>145</sup> Kerr Committee Report, above n 5, recommendation 12.

<sup>146</sup> Creyke, ‘Administrative Justice: Beyond the Courtroom Door’, above n 2, 258–9.

<sup>147</sup> ‘The basic fault of the entire [1970s] structure is ... that review cannot as a general rule ... be obtained “on the merits” — and this is usually what the aggrieved citizen is seeking’: see Kerr Committee Report, above n 5, [58].

This is illustrated by the NISA study, which rated the relative importance of integrity bodies to the business of NSW agencies. The results show that the Ombudsman outranked the other institutions, followed in descending order by the Independent Commission against Corruption, the Audit Office, the Premier's Department, Parliamentary Committees, the courts, the police force, and the Administrative Decisions Tribunal. The Police Integrity Commission, the Health Care Complaints Tribunal and the Privacy Commissioner were ranked even lower.<sup>148</sup>

Even allowing for the focus on integrity rather than administrative justice, the relatively poor perception of the courts (sixth in the list) is surprising. The result is, however, supported by a further NISA national study of public confidence in key institutions. Here, 69.4 per cent of the more than 4000 respondents concluded that they had 'not very much confidence' or 'no confidence at all' in the courts and the legal system. The results for the court system are comparable to the results for the public service (65.1 per cent had 'not very much confidence' or 'no confidence at all' in the public service). Both are less favourably viewed than the police (70.5 per cent said they had 'a great deal of confidence' or 'quite a lot of confidence' in the police).<sup>149</sup>

There are other signs of the diminishing importance of the courts. The former President of the Victorian Civil and Administrative Tribunal noted that his tribunal is 'becoming the *central* pillar of administrative law in Victoria' and is 'gradually replacing judicial review ... as the principal method of resolving issues between citizens and government'.<sup>150</sup> Other judges are also prepared to concede that judicial review plays a less central role than hitherto. As French J noted at the annual conference of the Australian Institute of Administrative Law in 1999: 'When regard is had to the many layers and mechanisms of accountability in Australia, judicial review may be seen as occupying a fairly limited territory for the implementation of appropriate standards of administrative justice.'<sup>151</sup>

The previous Commonwealth Attorney-General, Daryl Williams, noted too that although courts 'have an important role in holding governments to account for the lawfulness and fairness of their actions ... their intervention is episodic and unsystematic' and that '[f]or a cure for administrative injustice, most people, most of the time, must look to review tribunals'.<sup>152</sup> That view is also borne out by the reduction in the number of cases, migration aside, being heard by the Federal Court.

In coherence terms, these findings indicate that the structure is not operating in accordance with the initial conceptions of the administrative law system. The

<sup>148</sup> NISA Final Report, above n 98, 25 table 6.

<sup>149</sup> *Ibid* 55 table 9.

<sup>150</sup> Justice Stuart Morris, 'The Emergence of Administrative Tribunals in Victoria' (2004) 41 *Australian Institute of Administrative Law Forum* 21 (emphasis in original).

<sup>151</sup> French, 'Judicial Review Rights', above n 34, 21.

<sup>152</sup> D M Williams, 'Justice and Accountability: The Establishment of the Administrative Review Tribunal and the Model Litigant Obligation' (Speech delivered to the Government Law Group, Canberra, 12 September 2000).

analysis does indicate, however, the value of the NISA methodology with its recognition of the organic nature of political and legal systems.

## V CONCLUSION

The Kerr Committee identified the central elements of administrative justice — efficiency and justice to the individual — but failed to spell out how the two would coexist. The subsequent attempts to explore the notion suggest that it is unlikely that any conclusive test for administrative justice can be identified. Rather, reliance must be placed on the wisdom of officials, tribunal members and courts to judge which of the elements are to be advantaged in particular circumstances. There must also be an acceptance that both elements are relevant, as the chameleon-like ‘administrative justice’ takes its meaning from its context.

To do this requires the executive, the courts and the tribunals to be clear about their understanding of ‘administrative justice’. That in turn requires attention to two other considerations: (1) since administrative justice can only be effected through institutions, the powers and functions of each institution will impact on that understanding; and (2) in addition, the values which that concept embodies must also be identified.<sup>153</sup>

Those values will need to encompass both the ‘administrative’ and the ‘justice’ elements of ‘administrative justice’. It is not possible in the abstract to decide on the balance between the two. Which element takes precedence will depend on the circumstances, and providing guidance on those circumstances requires the development of benchmarks. In turn, these benchmarks can be mapped, whether by a performance indicator approach or by the methodology outlined in the NISA Final Report. Those measures, developed for each administrative law institution, will provide the blueprint for administrative justice in Australian administrative law. It is that task which now faces Australian researchers.

<sup>153</sup> Creyke and McMillan, *Administrative Justice*, above n 14, 3–4.