Among the many constitutional developments of the past century or so, one of the most significant has been the creation and proliferation of institutions that perform functions similar to those performed by courts but which are considered to be, and in some ways are, different and distinct from courts as traditionally conceived. In much of the common law world, such institutions are called ‘administrative tribunals’. Their main function is to adjudicate disputes between citizens and the state by decisions of government agencies — a function also performed by courts in ‘judicial review’ proceedings and appeals. Although tribunals in aggregate adjudicate many more such disputes than courts, tribunals and their role as dispensers of ‘administrative justice’ receive relatively little scholarly attention.

This, the first wide-ranging book-length treatment of the subject for many years, compares tribunals in three major jurisdictions: Australia, the UK and the US. It analyses and offers an account of the concept of ‘administrative adjudication’, and traces its historical development from the earliest periods of the common law to the twenty-first century. There are chapters dealing with the design of tribunals and tribunal systems and with what tribunals do, what they are for and how they interact with their users. The book ends with a discussion of the place of tribunals in the ‘administrative justice system’ and speculation about possible future developments.

*Administrative Tribunals and Adjudication* fills a significant gap in the literature and will be of great value to public lawyers and others interested in government accountability.
For Mike Taggart

Inspiring colleague, firm friend, outstanding scholar
Preface

This book is the main fruit of a major research project generously funded by the Australian Research Council (Discovery Project DP0558688). The project presented me with significant challenges. My undergraduate study of administrative in law at Sydney University pre-dated the major reforms initiated by the publication in Australia of the Report of the Kerr Committee (the Commonwealth Administrative Review Committee) in 1971, which took effect in the mid–late 1970s. Public law played no part in my graduate legal studies at Oxford. Nevertheless, I started teaching both administrative law and constitutional law to Oxford undergraduates in 1978 and did so until the mid-1990s. I was dimly aware in that period of developments in Australia but paid them little attention. By the time I returned to Australia in 1997 I had forgotten most of the Australian constitutional law I had learnt as a student, and I knew almost nothing about the dramatic changes in the law and institutions of administrative adjudication that had taken place in Australia during my absence and which are commonly referred as the ‘new administrative law’ or the ‘federal administrative law package’.

In 2000 I organised a colloquium entitled ‘Administrative Law in a Federal System’ in honour of Sir Anthony Mason,¹ whose term as a National Fellow of the Australian National University had recently ended. A National Fellowship is the most prestigious visiting academic post at the ANU, and in that capacity Sir Anthony had been attached to the Law Program in the Research School of Social Sciences, of which I was at that time the Head. Honouring Sir Anthony in this way was particularly appropriate. As Solicitor-General of the Commonwealth of Australia in the late 1960s he was instrumental in the establishment of the Commonwealth Administrative Review Committee (of which he was a member). As Justice and then Chief Justice of the High Court of Australia in the 1980s and 1990s, Sir Anthony played a central role in judicial development of administrative law in a critical period of creative energy. Extra-judicially, he has also written extensively on public law in general and administrative law in particular.² With the hubris of the neophyte, and in a blissful state of ignorance, I contributed to the Colloquium an essay³ that made a radical and heterodox argument about the

¹ Papers given at the Colloquium were published in the Federal Law Review (Vol 28, No 2).
² A selection of these writings can be found in G Lindell (ed), The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE (Sydney, The Federation Press, 2007).
relationship between judicial review and merits review, and the role of the Administrative Appeals Tribunal, which Sir Anthony thought (and, I gather, still thinks) seriously wrong-headed.

In 2003, when I was casting around for a project that might prove attractive to the Australian Research Council, I hit upon the idea of studying merits review and the peak federal merits review tribunals – the Administrative Appeals Tribunal (AAT) – in much greater detail, partly with the objective of determining whether my earlier speculations on the subject would withstand closer and more sustained analysis. As would be expected, there is a very large Australian literature concerned with merits review and tribunals (the AAT in particular), but much of it is quite practical and institutional in approach. At the time I began thinking about writing my grant proposal there was no book-length academic account that tried to make sense of what had happened on the tribunal front since 1971. The first edition of my colleague, Dennis Pearce’s invaluable book, *The Administrative Appeals Tribunal* was published in 2003, and I have relied on it much more heavily than is indicated by the frequency of citation of the second edition in this volume. Without it, coming to terms with the complex technical law of merits review would have been a mammoth task.

As originally conceived, the project had an analytical and an empirical component. The former focused on the principles, theory and practice of merits review, and the latter was concerned with the dissemination of knowledge about merits review and the AAT within four government agencies that together account for about 90 per cent of the AAT’s caseload. In the event, for various logistical reasons the empirical component had to be abandoned. In the attempt to turn a problem into an opportunity (and to justify the money and effort already expended on the project), I decided to supplement my research and re-orient the project as a study of administrative adjudication with the AAT at its centre, but moving out from there in historical and comparative directions. This book is the product of that re-orientation. I was relieved to discover that my basic instincts about merits review and the AAT were broadly correct, although the lack of sophistication and nuance in my earlier efforts now make me cringe.

One of the aims of this book is to introduce to a wider audience in the common-law world some of the distinctive features of Australian public law and legal institutions. Although it has often been observed that the federal administrative law package was unique and extremely innovative, it is relatively little known or understood outside Australia. Although Australian public law is built on solid British foundations, at federal level it is also significantly informed by American ideas, and this dual heritage makes it a particularly fascinating and fruitful topic for study not only conceptually but also institutionally, historically and comparatively. For many academic administrative lawyers, tribunals are of only peripheral interest. This, I have come to appreciate after many years of ignoring them as much as I could, is a blinkered point of view and an extremely

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unsatisfactory state of affairs. It was not until I started to study Australian public law in earnest and to think about administrative adjudication historically5 and comparatively that I began to value tribunals not only for their practical importance but also for their theoretical and constitutional significance. This process has required me to negotiate some very steep learning curves.

Although this book is relatively short, it is based on a very great deal of research, much of it invisible beneath the surface of the text. In doing that research I have been greatly assisted by a succession of fine, young scholars: Zoë Guest, Tal Karp, David Ananian-Cooper, Glyn Watson, Wendy Kukulies-Smith and Yee Fui Ng. I owe large debts to many academic colleagues, and in particular to John Allison, John Bell, Carol Harlow, Leighton McDonald, Jerry Mashaw, Genevra Richardson, Mike Taggart and Nick Wikeley not only for their help with this project but also for many years of stimulating intellectual interchange, and warm friendship and support. I am grateful to an anonymous reviewer for many perceptive and constructive comments. I remain, of course, responsible for all errors of fact, emphasis and interpretation, and for all infelicities of expression.

Finally, I want to pay special tribute and convey warm thanks to all those at Hart Publishing who have been involved in various ways with the production of this book. I have known Richard Hart and Jane Parker as close friends for more than 20 years, and this is the third of my books that their press has graciously agreed to publish. It is a delight to me to observe the success of Hart Publishing as it goes from strength to strength. The service that Richard has done for the legal profession generally and for legal scholars in particular is inestimable. Long may it continue!

Peter Cane
Canberra
5 January 2009

5 In this respect, I was extremely fortunate that Chantal Stebbings' excellent book, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge, Cambridge University Press, 2006) had been published before I decided to broaden my historical canvas.
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Abbreviations

AAR  Administrative Appeal Reports
AAT  Administrative Appeals Tribunal
AAT Act Administrative Appeals Tribunal Act 1975 (Cth)
ABA  American Bar Association
ACUS Administrative Conference of the United States
ADJR Act Administrative Decisions (Judicial Review) Act 1977 (Cth)
ADR  alternative dispute resolution
ADT  Administrative Decisions Tribunal (NSW)
AIT  Asylum and Immigration Tribunal
AJ   administrative judge
AJTC Administrative Justice and Tribunals Council
ALD  Administrative Law Decisions
ALJ  administrative law judge
APA  Administrative Procedure Act 1946 (US)
ARC  Administrative Review Council
ART  Administrative Review Tribunal
CCCA Commonwealth Court of Conciliation and Arbitration
CO   Commonwealth Ombudsman
ECHR European Convention on Human Rights
FIADRWG Federal Interagency Alternative Dispute Resolution Working Group
FTC  Federal Trade Commission
ICC  Interstate Commerce Commission
JAC  Judicial Appointments Commission
JP   Justice of the Peace
MRT  Migration Review Tribunal
MSPB Merit Systems Protection Board
OPM  Office of Personnel Management
PDR  proportionate dispute resolution
PHSO Parliamentary and Health Service Ombudsman
RRT  Refugee Review Tribunal
SAT  State Administrative Tribunal (WA)
SSAT Social Security Appeals Tribunal
SSCSC Social Security and Child Support Commissioners
TCE Act Tribunals, Courts and Enforcement Act 2007 (UK)
UK   United Kingdom
US   United States
VCAT Victorian Civil and Administrative Tribunal
VRB  Veterans’ Review Board
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