

FINDING AN INDIGENOUS PERSPECTIVE IN ADMINISTRATIVE LAW

ALEXANDER REILLY*

I INTRODUCTION

Administrative law is not traditionally used in law school curricula as a means to expressly incorporate Indigenous content or perspectives into law degrees, or as a vehicle for discussing broader issues regarding the impact of the Australian legal system on Indigenous law and culture. This paper examines why this is so and proposes a method of teaching administrative law that continues to address the traditional concerns of an administrative law course, while deepening students' appreciation of the role of law in regulating government decisions that affect Indigenous interests in land and culture.

Administrative law regulates the relationship between State and Commonwealth executive governments and the Australian people. The relationship is one of power and accountability. On the one hand, there is the power of government to make decisions that affect people. On the other hand, government is held accountable through the requirement that the power be exercised lawfully. Historically, government power is responsible for the extent to which Indigenous rights have been affected and protected. Indigenous people have been particularly reliant on the power of government to protect their interests as historically they have had very limited private power and therefore a limited capacity to protect their rights. Administrative law would seem, then, a useful vehicle for considering the interaction of law and Indigenous people. Perhaps not surprisingly, many of the major administrative

law cases involve Indigenous litigants, and are cases at the heart of major historical claims in defence of Indigenous land and culture. Despite this, none of the major administrative law textbooks use these cases specifically to consider the interaction between administrative law and Indigenous people,¹ and administrative law courses do not incorporate an Indigenous perspective as is often the case in courses on criminal law, constitutional law, property law or evidence.

This article explains the absence of a direct engagement with Indigenous issues in administrative law. The answer lies in a combination of factors, including the teaching methodology in law degrees in general and administrative law in particular, and philosophical choices law schools have made both consciously and unconsciously in relation to the teaching of Indigenous legal issues in their degrees. These choices have tended to leave administrative law narrowly focussed on canvassing the organisation and structure of the administration, with a particular emphasis on judicial review remedies at common law and in State and Commonwealth statutory regimes, as is required for accreditation.

After discussing these pedagogical and philosophical issues, the article proposes a way to teach administrative law that engages with the historical and political impact of the law on Indigenous peoples and their cultures, and that still adequately addresses the specific principles of a conventional administrative law course.

II WHAT ARE INDIGENOUS ‘PERSPECTIVES’?

At the outset, it is important to clarify what is meant by Indigenous ‘perspectives’. The minimal approach to incorporating Indigenous material into a subject is to draw on cases with Indigenous content; that is, cases with Indigenous litigants and which deal with matters of Indigenous significance. It is, of course, possible to cover Indigenous content without introducing Indigenous perspectives. In fact, as discussed below, many administrative law cases involve Indigenous litigants who have brought an action in defence of land or culture, and yet these cases are rarely, if ever, used as a vehicle for elucidating the broader historical and political context in which the law is utilised. *Onus v Alcoa*, for example, stands for the principle that a cultural interest in an area of land is sufficient to confer standing to bring an action

challenging a government decision that affects the right of others over that land.² The exposition of this principle is usually achieved without discussing the identities of the applicants (Lorraine Onus and Christina Frankland), their cultural interest in the land, and the broader political struggle between the Gournditch-jmara people, the government and the Alcoa mining company over access and use of land around Portland, Victoria in the late 1970s.

To provide Indigenous perspectives, there must be some attempt to understand the significance of applicants' claims, or to provide some context to the broader historical and political debates relating to the role of law in continuing Indigenous struggles for recognition and rights. In relation to land and cultural rights, Indigenous perspectives would require providing an insight into the history of Indigenous dispossession, resistance to this process, and how Indigenous peoples have utilised administrative law as a tool in this resistance.

III WAYS OF INCORPORATING INDIGENOUS PERSPECTIVES INTO LAW DEGREES

The incorporation of Indigenous perspectives into law degrees depends very much on choice of teaching methodology. There is a wide range of literature explaining and critiquing the conventional doctrinal focus of law degrees.³ Law degrees are driven by content over context, doctrine over theory, and exposition and analysis of existing legal principles over critique of those principles within a broader historical, sociological or philosophical framework.⁴ The focus of legal education is highly influenced by the profession, which has established accreditation requirements for law degrees that focus on the teaching of core areas of legal doctrine. Nonetheless, law schools understand that their mission is broader than merely training professionals. Located in universities, they are concerned with the intellectual formation of both academics and students, and with advancing knowledge.⁵ Law schools are concerned then with educating their students as citizens as well as professionals, which requires a broader understanding of their teaching mission.⁶ Consistent with this broader mission, all Australian law schools have their own sense of what a law degree ought to incorporate outside the requirements for professional accreditation, and all law degrees in Australia, to a varying extent, address Indigenous perspectives. The following section discusses where Indigenous perspectives usually appear in law degrees.

IV CONVENTIONAL COVERAGE OF INDIGENOUS ISSUES IN THE CORE CURRICULUM

Indigenous perspectives conventionally arise in a foundation law course (a component of the core curriculum) as part of the story of colonisation and the introduction of British law to the new colonies. Prior to *Mabo*,⁷ this was a short story — influenced by the work of legal historians such as Alex Castles — which explained the common law and international legal justifications for the claim to British sovereignty through settlement of the colony.⁸ With no legal case to challenge this version of the legal impact of colonisation, courses moved swiftly to a discussion of the mechanisms for the introduction of British common law and statute, followed by the development of colonial Parliaments and their laws.

Just as *Mabo* shook the foundations of property law in Australia, it revolutionised the teaching of the legal story of British colonisation in first-year law courses. *Mabo* is unique among law cases for the amount of academic analysis carried out on it from various disciplinary and theoretical perspectives. There are articles, books and films devoted to a legal analysis of the case and the response of the federal government in establishing the native title legal regime;⁹ to the significance of the case for Australian history and the broader land rights movement;¹⁰ and to Eddie Mabo the man.¹¹ *Mabo* provides a vehicle for explaining Indigenous sovereignty and the failure of the law to recognise it. *Mabo* is also an excellent case for raising a broader theoretical consideration of law as an exercise of power in the colonial context and for discussing Indigenous resistance to the hegemony of the law. The case is used to introduce a broader jurisprudential consideration of the nature of law and custom, to question the legitimacy of the British assertion of sovereignty, and to consider the extent of past and continuing legal pluralism in Australia.¹²

As well as arising in first-year courses, Indigenous perspectives are often present in constitutional law courses. By its nature, constitutional law focuses on broad themes including the formation of the nation; the relationship between the core institutions of government, the Parliament, the Executive and the Courts; and the relationship between Commonwealth and State governments and legislative power. To understand these themes, it is necessary to

provide an expansive political context. Constitutional law, perhaps like no other subject in the core curriculum, is told through the significant stories of nation building. Introducing a significant Indigenous perspective into constitutional law is a matter of choosing the right stories.

The establishment of the colonies, and later of the Commonwealth and the States, was based on the subjugation of Indigenous people legally and politically. The story of Australia's constitutional history cannot be told without explaining the reasons why there was no original compact with Indigenous people. The express exclusion of Indigenous people from the *Commonwealth Constitution* in ss 25, 51(xxvi) and 127 is explicable only if the position of Indigenous peoples in the colonies, and later the Commonwealth, is given some context. The story of Indigenous voting rights in State and Commonwealth law is a significant part of any discussion of citizenship in Australia; in particular, the achievement of universal, non-discriminatory adult suffrage.

Discussions of s 128 and constitutional change will inevitably make reference to the 1967 referendum amending s 51(xxvi) — the 'race' power — to include Indigenous people. It is the change to the *Constitution* that has garnered the most popular support.¹³ There is a political story to be told to explain this, as well as a story of the perception of the state of contemporary Indigenous policy. Also, the race power is often among the heads of Commonwealth legislative power chosen in constitutional law courses to explain the processes of constitutional interpretation and characterisation. The interpretation of the race power requires a detailed consideration of the original intention of the wording of the section and how the meaning has changed, if at all, as a result of the referendum in 1967. This draws attention to the insignificance of Indigenous people in the formation of the *Commonwealth Constitution*, at a time when the predominant policy approach of the colonies was based on assimilation or even miscegenation. Any explanation for the constitutional change in 1967 cannot avoid at least a minimal consideration of policy under State legislation prior to the referendum to account for the desire of the Australian people to extend Commonwealth legislative power to cover Indigenous issues.

A consideration of two High Court decisions interpreting the race power since the referendum, *Western Australian v Commonwealth*¹⁴ and *Kartinyeri v Commonwealth*,¹⁵ introduces students to two important contemporary issues facing Indigenous people — native title and heritage protection. Providing even a minimal context to *Western Australian v Commonwealth* introduces students to the concept of native title and the politics surrounding the passing of the *Native Title Act 1993* (Cth). The context to *Kartinyeri* introduces students to the struggle of Indigenous people to prevent the building of the Hindmarsh Island Bridge in South Australia, which is discussed in detail below.

It is all too easy to provide an Indigenous perspective in criminal law and evidence courses, as Indigenous people are such visible participants in the criminal justice system. Their involvement is partly explicable as an over-represented national minority. Any deeper consideration of this over-representation leads to the revelation of contemporary Indigenous disadvantage, with its roots in past government policy. Indigenous involvement in the criminal justice system also requires a consideration of Indigenous people as a culturally distinct group. Epistemological differences reveal the culturally specific nature of criminal laws and the rules of evidence, such as why conduct is designated criminal, what is an appropriate punishment for a crime, and what is required by way of proof of a crime. Exploring these issues is fertile ground for a significant Indigenous perspective, and one that is evident in all criminal law and evidence courses at least to some degree.

Finally, in the wake of *Mabo*, property law courses commonly include a discussion of native title, a unique, *sui generis* interest in land. *Mabo* is revisited as a significant case in the discussion of the history of property law in Australia. It clarifies the extent of the radical title of the Crown over land, describes the nature of the Australian land tenure system, and focuses attention on the extent to which statutory and common law interests in land can coexist. In the context of a property law course, native title law can also be used as a means of providing a broader historical and political perspective on Indigenous land rights.

V EXPLAINING THE ABSENCE OF AN INDIGENOUS PERSPECTIVE IN ADMINISTRATIVE LAW

As stated in the introduction to this article, administrative law courses and textbooks do not incorporate an Indigenous perspective. This is so, despite the fact that some of the leading administrative law decisions involve Indigenous litigants. So why are Indigenous perspectives absent?

Administrative law courses focus on locating and understanding the various types of legal challenge to the exercise of government power. The challenges are to the legality of the decision-making process and not to the merits of decisions under review. As a result, the analysis of cases focuses on technical and subtle distinctions, which are often described in a unique administrative law terminology. These distinctions are developed within a particular and highly theoretical framework of the separation of powers and the rule of law. Since administrative law challenges are not dependent on the content of the issue at stake in the original application, there is no need to provide a broader context to the particular issue, as is so crucial to a proper understanding of cases in other areas of law. On its face, then, administrative law is not conducive to the telling of stories in the same way as these other courses. To the extent that there is a thematic dimension to administrative law courses, it relates to the creation and subsequent development of administrative law regimes in the United Kingdom and in Australia in the 1960s and 70s. The recent advent of administrative law is yet another reason that an Indigenous perspective is absent. There is no story to be told about how administrative law has developed in response to its encounter with Indigenous people and their cultures.

The most popular topic in administrative law courses to introduce social or political perspectives is refugee law. There is a highly developed administrative process for making refugee decisions. The preponderance of High Court authority in this area is a result of efforts by successive federal governments to limit the administrative law rights of refugees, and the use by courts of administrative law principles to preserve fundamental procedural rights.¹⁶

VI THE POTENTIAL ROLE OF ADMINISTRATIVE LAW

AS A VEHICLE FOR INCORPORATING INDIGENOUS PERSPECTIVES IN LAW DEGREES

Although its subject matter is narrow and technical, the purpose of administrative law is deeply political — challenging the exercise of government power and protecting the procedural rights and liberties of individuals subject to the exercise that power. In the introduction to his textbook, Michael Head suggests that ‘understanding the scope of administrative law is enhanced by placing it in its historical, political and socio-economic context’.¹⁷ If Head is right, there is potentially great value in exploring the particular political context behind administrative law decisions. An effective way to introduce an Indigenous perspective is, then, to provide a broader context to some of the major cases that have involved Indigenous applicants using administrative processes either to protect their rights or to challenge government decisions affecting them.

For example, two decisions involving challenges to ministerial decisions to protect Indigenous land in Kakadu National Park and the Alligator Rivers Region in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and under the *National Parks and Wildlife Conservation Act 1975* (Cth) were subject to challenges by the mining company Peko-Wallsend in the 1980s. These cases stand for very different administrative law principles, which arise at different points in administrative law courses. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,¹⁸ the High Court held that a new Minister was bound to consider further representations by Peko-Wallsend in response to a report provided to the Minister by the Aboriginal Land Commissioner. Failure to take into account the new recommendations which had a bearing on the facts of the case amounted to a failure to consider a relevant consideration. *Minister for Arts, Heritage and Environment v Peko-Wallsend Pty Ltd* is authority for the fact that Cabinet decisions are justiciable and therefore are not necessarily immune from judicial review.¹⁹ Dealing with these cases in isolation renders invisible a more protracted struggle between a major mining company and Indigenous communities in the Northern Territory, and the role of the then new administrative law regime in facilitating and resolving these struggles.

There is scope for a broader contextual analysis of a number of

other cases that are standard inclusions in administrative law courses. *Onus v Alcoa* was mentioned in the introduction. Another example is *Bropho v Western Australia*, which modified the presumption that the State Crown is not bound by Commonwealth legislation unless it is expressly stated to be so bound. In isolation, this principle gives no sense of the extent of the legal struggle to protect Indigenous land in central Perth, or the role of administrative law in this struggle.

There are other ways of perceiving administrative law which takes it beyond the conventional analysis of cases and statutes. Administrative law remedies are often called upon when governments are operating at the outer limits of their legitimate authority. As a result, administrative law has been used as a form of resistance to the exercise of government power. For example, in South Africa in the 1980s, at the height of resistance to the Apartheid regime, administrative law remedies were often used to challenge actions of the Apartheid government which targeted the black majority. Hugh Corder developed a dynamic administrative law course at the time around the struggles for administrative justice of the black majority in South Africa.²⁰ Administrative law has not played such a dynamic role in Australia. For one thing, the Australian government has not exercised extreme power under the guise of a 'state of emergency' as regularly occurred in South Africa in the 1970s and 80s. Examples of the extreme exercises of power have occurred, if at all, in the area of refugee law, leading to creative judicial interventions in this area.²¹

Despite the more benign role of administrative law in Australia, its political role could be drawn on to good effect to highlight aspects of Indigenous law and policy. Administrative law was developed to improve administrative efficiency and fairness. Its role as a product of law reform can be used as a platform to consider whether it has been an effective means of achieving administrative justice for Indigenous peoples, and how it could be further developed to advance this cause.

One issue of current interest that could be discussed within this context is the issue of establishing a compensation tribunal for the Stolen Generations in response to the Rudd government's national apology in February 2008. In considering the design of a compensation tribunal, administrative law students could be required to turn their minds to the relative merit of tribunals and

courts in delivering a compensation scheme, the powers of a compensation tribunal, and the avenues of review and appeal issuing from decisions of the tribunal. Students could consider how to frame procedural rights before such a tribunal, considering the particular needs of natural justice of members of the Stolen Generation and their families, and of any persons who may be opposing their claims. Students could consider whether or not tribunal rights would replace the right to seek compensation at common law, and the implications of this. Students could also consider federal issues; in particular, whether there should be a single Commonwealth tribunal or multiple State tribunals, and the factors that would determine this. All of these issues are within the province of administrative law. Focusing student's minds on these issues through the development of an administrative structure of contemporary relevance has the potential to transform at least part of an administrative law course into a broader exercise of applying principles in a creative way. Doing so will deepen students' understanding not only of the form and application of the principles, but also of their significance. Such an approach to administrative law is in line with the wider set of pedagogical concerns that legal education scholars have long encouraged legal academics to embrace, including a focus on enquiry, the development of research skills, and the development of ethical thinking skills.²²

The final sections of this paper describe how a single comprehensive case study might be used as a vehicle for providing an Indigenous perspective in an administrative law course while maintaining the central focus on providing students with an intelligible overview of the organisation and structure of administrative law.

VII CASE STUDY — ADMINISTRATIVE LAW IN THE RESOLUTION OF THE HINDMARSH ISLAND BRIDGE DISPUTE

Tickner v Chapman is a case discussed in all but one of the Australian administrative law textbooks in relation to the 'Abuse of Discretion' ground of review in administrative law.²³ It is authority for two significant principles: the extent to which a Minister can delegate part of his or her decision-making authority to another

person (in the case of *Tickner*, to the Minister's adviser); and the degree of conformity with the notice requirements in a statutory scheme that is required for a report to a Minister to be valid and able to be used by a Minister as the basis of an administrative decision. To make sense of these points, the most that can be expected of students in the context of a conventional coverage of this case is that they read the judgments of the Full Federal Court in *Tickner v Chapman* and possibly the judgment at first instance, *Chapman v Tickner*.²⁴ These judgments give a brief summary of the history of the dispute with a particular focus on the heritage protection application; but, as Burchett J points out in the Full Federal Court, an application for judicial review does not involve 'reconsideration by the Courts of the facts of the decisions under review, but supervision by the Court of the legality of those decisions'.²⁵ As a result, Burchett J states that it is appropriate only to set out the facts in 'bare outline'.²⁶ Although this is clearly an appropriate approach for the Court to take in a judicial review application, the bare facts do not give students sufficient context to understand the full operation and significance of the legislative scheme and the role the application for judicial review plays within that scheme. Furthermore, as the case did not in itself resolve the administrative claim, students have not had the benefit of tracing the application through to its conclusion.

Tickner v Chapman was a challenge to an application of members of the Ngarrindjeri Aboriginal community under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('Heritage Protection Act') to prevent the building of a bridge in South Australia connecting the mainland to Hindmarsh Island on the grounds that the bridge would cause harm to Indigenous culture and spirituality. An in-depth analysis of the Hindmarsh Island bridge dispute provides an excellent opportunity for tracing an administrative law application from beginning to end. This has value in an administrative law course regardless of the additional potential of the case study for providing an Indigenous perspective. For example, the case study involves applications under State and Commonwealth legislative schemes — at the State level, applications under the Planning Act 1982 (SA) s 40, *Aboriginal Heritage Act 1988* (SA) ss 7, 13, 23, 24; and at the Commonwealth level, under the Heritage Protection Act. The relationship between these legislative schemes provides an opportunity to discuss the

federal dimension of administrative law processes. In most administrative law courses, this dimension is largely absent, with Commonwealth and State administrative regimes discussed in isolation. Only by providing the full context of a dispute does the federal dimension reveal itself. Also, students will gain a deeper understanding of the judicial review application in *Tickner v Chapman* if subsequent challenges to the same application, which were constitutional in nature, are also considered. The demise of these further applications under the Heritage Protection Act, also for reasons not related to the merits of the application, demonstrates that administrative law is not the only legal means of resolving administrative disputes.

In addition to these conventional uses of the Hindmarsh Island Bridge dispute, it has potential for introducing a significant Indigenous perspective into an administrative law course. The dispute is one of extraordinary significance in the relations between Indigenous and non-Indigenous Australians. Hilary Charlesworth has described it as an event which 'will surely enter Australian folklore as one of the most complex, and litigated, of disputes'.²⁷

The dispute was a complex intersection of Indigenous culture, anthropology, history and law. It was a paradigmatic example of the tensions between development and heritage, and between competing understandings of Indigenous culture, and of the role of law in both protecting this culture and facilitating its destruction. The political contest over the building of the bridge created a suite of litigation, raising a number of significant legal issues which have been the subject of superior court judgments²⁸ and extensive academic commentary.²⁹ There has also been a large volume of critical commentary written about the South Australian government's Hindmarsh Island Royal Commission.³⁰ These cases and texts create an important opportunity to reflect on the authenticity of beliefs and how these can and should be legally questioned, and the requirements of procedural justice.

Hindmarsh Island is located at the mouth of the Murray River, just inland from where it enters the sea. The town of Goolwa is located at the western tip of the Island at a point where the waterway is at its narrowest. Before the bridge was built, access to the island at this point was by ferry. In 1989, developers proposed to build a large tourist development on Hindmarsh Island, including a marina. The viability of the project was dependent on improved

access to the island. The South Australian Government backed a proposal to construct a bridge between Goolwa and Hindmarsh Island in partnership with the developers.³¹

From November 1989, when the initial development application process began, the bridge construction was subject to state planning and heritage laws.³² The Aboriginal Heritage Branch of the Department of Environment and Planning commissioned an archaeologist and an anthropologist to produce the necessary reports under these laws.³³ The research in these reports indicated that there were mythical associations for the Ngarrindjeri people with the area in the past, but that these were not evident in present day mythology.³⁴ Nevertheless, an Assessment Report attached to a draft Environmental Impact Statement recommended that the developers be required to consult with the Ngarrindjeri people over matters of heritage, particularly in relation to skeletal material discovered during the site survey.³⁵ The developers undertook this consultation and, although the outcomes were inconclusive, believed that they had satisfied their legal obligations and moved ahead with their plans to build the bridge.³⁶

In 1993, the Lower Murray Heritage Committee expressed concern that the Bridge may affect Indigenous sites, and community opposition began to be voiced for the same reason. The State Labor Government then ordered its own anthropological report. This report uncovered a number of different indigenous sites and reported that the fundamental objection to the bridge was that it constituted a desecration of mythical traditions, and that these traditions could not be disclosed for cultural reasons. The report indicated that the details of the beliefs and traditions were held only by female traditional custodians.

By April 1994, it was clear that the anthropological evidence accumulated in response to State legislative requirements consistently indicated that the development site had cultural significance for Ngarrindjeri, although the reports varied as to its scope and substance. It was also clear that the State government was contractually obliged to build the bridge. At this juncture, the Aboriginal Legal Rights Movement in South Australia, acting for some members of the Ngarrindjeri community, wrote to the Federal Minister for Aboriginal Affairs, Robert Tickner, seeking heritage protection for the area via a ministerial declaration under the Commonwealth Heritage Protection Act.

The Minister was required by the Act to appoint a reporter to investigate whether the site was in fact able to be protected by federal law which, if applicable, would override any findings to the contrary made by the State Government under their own protection and heritage regime. Tickner appointed Cheryl Saunders, an eminent constitutional law academic, to undertake the required report, a process that began in June 1994. Professor Saunders' report stated that the beliefs of the representative Ngarrindjeri women were genuinely held and satisfied the requirements of the Act. Saunders appended two envelopes to her report which contained information on what became generally known as 'the secret women's business'. Tickner's female ministerial advisor read these envelopes and informed him that they contained nothing that was at odds with the content of the Saunders report. Following the recommendations of the Saunders report, the Minister made a declaration preventing the construction of the bridge. The developers successfully challenged the Minister's declaration in *Tickner v Chapman*, which is discussed above.³⁷

During this time, another group of Ngarrindjeri women (the 'dissident women', as they became known throughout these events) publicly claimed that the secret women's business was a fabrication. Their disclosure resulted in the Premier calling a State Royal Commission to inquire into the issue of 'secret women's business' and its veracity. Ngarrindjeri women who claimed the existence of secret women's business refused to appear before the Commission and instead delivered a statement to the court expressing their anger and hurt that their beliefs were being subject to a State-funded inquiry. In December 1995, the Commission found that the secret women's business was a fabrication.

Parallel to the State Royal Commission process, the Federal Minister for Aboriginal Affairs announced a new inquiry under the Heritage Protection Act and appointed Justice Jane Mathews as the reporter. Before her report was released, it was successfully challenged on the ground that her position as a Federal Court judge was incompatible with her appointment as a reporter answerable to the Minister under the Heritage Protection Act. For a federal judge to be a reporter under the Act was a breach of the separation of judicial power in the *Commonwealth Constitution*.³⁸ Justice Mathews' report was never officially released, though it was later revealed that Mathews had reported to the Minister that the

women's undisclosed knowledge would indeed make the area significant, but not sufficiently to allow a declaration under s 10 of the Act.

With the Mathews report unusable by the Minister, the Ngarrindjeri people still had no Commonwealth government response to their heritage protection claim. Before a third reporter could be found under the Act, there was a change in federal government in March 1996. The new Minister for Aboriginal Affairs, John Herron, introduced special legislation, the *Hindmarsh Island Bridge Act 1997* (Cth) ('Bridge Act'), which designated the area around Hindmarsh Island to be outside the purview of the Heritage Protection Act. As a result, the Ngarrindjeri could no longer pursue their claim to heritage protection under the Act. Doreen Kartinyeri challenged the Bridge Act as unconstitutional on the basis that the race power could not be used to pass laws that were detrimental to Indigenous people.³⁹ The Court held that the Act was a valid exercise of the race power and, with this decision, the Ngarrindjeri people had exhausted all possible challenges to the building of the bridge under Commonwealth and State legislation. The bridge was completed in October 2001.

VIII THE PEDAGOGICAL LESSONS FROM THE CASE STUDY FOR AN ADMINISTRATIVE LAW COURSE

The above case study can be used to demonstrate the importance of State and Commonwealth administrative remedies for Indigenous people. It was only in the 1980s, for example, that heritage protection legislation directed at Indigenous cultural heritage was introduced in South Australia and the Commonwealth.⁴⁰ Both schemes were of central importance to the Hindmarsh Island Bridge dispute, with both developers and Indigenous claimants being frustrated by potential inadequacies in the legislative schemes and the review processes through the Courts.

The case study also highlights the difficulties in dealing with sensitive cultural materials in legislative processes. *Tickner v Chapman* held that the male Minister was required to consider information regarding secret women's business before making a declaration under the Heritage Protection Act. He was not able to delegate consideration of this information to a female staffer.⁴¹ This decision on the non-delegation of authority is particularly dramatic in the broader context of the Bridge dispute.

The case study demonstrates the vulnerability of administrative and procedural rights more generally. Ultimately, while the claim of the Ngarrindjeri women was still ongoing and unresolved, the federal government was able to remove the legislative basis for the claim.⁴² This raises a question of the potential of administrative law processes to protect procedural rights if governments are able to simply amend those processes when accountability is at hand. But the use of the race power to achieve this result is particularly significant in the context of Indigenous and non-Indigenous relations in the wake of the 1967 referendum.

Despite the devastating losses of the Indigenous people objecting to the building of the Bridge, the court cases reveal a sensitivity to the question of Indigenous cultural heritage that was absent in the highly charged political arena. The final chapter of the Bridge dispute in fact occurred after the Bridge was built — in an action for damages brought by the developers against the first reporter in the heritage protection application, Cheryl Saunders, and an anthropologist who had assisted Saunders in compiling her report.⁴³ The basis of the claim was that the reporting of secret women's business to the Minister was negligent and had caused the developers financial loss. The claim relied on the secret women's business being fabricated, for only if it was could the reporter have been negligent in reporting that it was a genuine Ngarrindjeri tradition.⁴⁴ The Federal Court revisited the question of the veracity of the secret women's business and, in dismissing the developer's claim, explained in detail why it did not accept the findings of the Hindmarsh Island Royal Commission.⁴⁵

In the context of an administrative law course, this final case in the Bridge dispute raises the question of the responsibilities and potential liabilities of statutory officer holders under legislative schemes: to what extent should people enlisted to assist in administrative processes be protected from liability for losses suffered by a party as a result of a recommendation they have made to a Minister? The case is also of interest in the broader discussion of the role of law in relation to Indigenous issues. It illuminates the paradoxical nature of the relationship between law and history, offering a reinterpretation of the Royal Commission of the 1990s, and it stands as the final and therefore particularly authoritative statement on the events that occurred when Indigenous and Western beliefs collided over the building of the Bridge.⁴⁶

There is a broader question about administrative law and Indigenous rights that emerges from the case study. What is the role of law in protecting or undermining Indigenous rights and autonomy? The Ngarrindjeri experienced a certain loss of autonomy by engaging in the administrative law process. In the course of their claim, their beliefs were exposed and their community divided. Of course, these outcomes were probably an inevitable consequence of the dispute over the building of the Bridge, but there is an important debate to be had over whether the law contributed to the harm, or alleviated it. In answering this question, it is necessary to consider how the dispute might have been resolved in the absence of Heritage protection law. Despite losing the case, was the administrative process established in the Heritage Protection Act nonetheless the best means for raising the issue of Indigenous cultural heritage in and around Hindmarsh Island?

IX CONCLUSION

There is no question that the broader analysis of a single case as proposed here will affect the depth of coverage of traditional topics in an administrative law course. A careful assessment is required to ensure that, in incorporating the case study, adequate space is available to cover the core topics of the organisation and structure of the administration, administrative law theory, and judicial review grounds and remedies. However, the benefits of incorporating the case study into an administrative law course are considerable. They include a broader understanding of the political, cultural and historical context in which government decisions are made and challenged, the place of litigation in the scheme of government accountability and, of central importance to this discussion, a significant Indigenous perspective.

* Associate Professor, Law School, University of Adelaide, Australia.

¹ See, eg, Peter Cane and Leighton McDonald, *Principles of Administrative Law* (2008); Robin Creyke and John McMillan, *Control of Government Action* (2nd ed, 2009); Roger Douglas, *Douglas and Jones's Administrative Law* (6th ed, 2009); Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007); W B Lane and Simon Young, *Administrative Law in Australia* (2007); Michael Head, *Administrative Law: Context and Critique* (2nd ed, 2008).

² *Onus v Alcoa* (1981) 149 CLR 27.

³ See, eg, John Biggs, *Teaching for Quality Learning at University* (2003); Marlene LeBrun and Richard Johnstone, *The Quiet Revolution* (1994); William Twining, *Blackstone's Tower: The English Law School* (1994).

⁴ See, eg, Fiona Cownie, 'The Importance of Theory in Law Teaching' (2000) 7 *International Journal of the Legal Profession* 225; Ian Duncanson, 'Broadening the Discipline of Law' (1994) 19 *Melbourne University Law Review* 1075.

⁵ See generally John Henry Newman, *The Idea of the University* (1960); Edward Shils, *The Academic Ethic* (1983).

⁶ See generally Fiona Cownie, *Legal Academics: Culture and Identities* (2003); Fiona Cownie (ed), *Stakeholders in the Law School* (2008); Twining, above n 3.

⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁸ Alex Castles, *An Australian Legal History* (1982).

⁹ Peter Butt and Robert Eagleson, *Mabo, Wik and Native Title* (1998); Margaret A Stephenson and Suri Ratnapala, *Mabo: A Judicial Revolution* (1993).

¹⁰ Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (1996); Henry Reynolds, *The Law of the Land* (3rd ed, 2003).

¹¹ Noel Loos and Koiki Mabo, *Edward Koiki Mabo: His Life and Struggle for Land Rights* (1996); Trevor Graham (dir), *Mabo: Life of an Island Man* (Film Australia, 1997).

¹² See, eg, Adelaide University's 'Introduction to Australian Law' course, 2008; University of New South Wales' 'Foundations of Law' course, 2010.

¹³ Overall, 89.34 per cent of Australians voted in support of the amendment to s 51(xxvi).

¹⁴ (1995) 183 CLR 373.

- ¹⁵ (1998) 195 CLR 337.
- ¹⁶ The native title regime may have provided a similarly extensive framework for the determination of native title trials had the High Court not limited the potential scope of tribunals in *Brandy v Human Rights and Equal Opportunity Commissioner* (1995) 183 CLR 245.
- ¹⁷ Head, above n 1, 2.
- ¹⁸ (1986) 162 CLR 24.
- ¹⁹ (1987) 15 FCR 274.
- ²⁰ For Corder's analysis of the role of administrative law in the resistance to the Apartheid regime in South Africa, see Hugh Corder, *Empowerment and Accountability* (1991).
- ²¹ See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 128; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- ²² See generally, Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) *Sydney Law Review* 38; Roger Brownsword, 'Law Schools for Lawyers, Citizens and People' in Fiona Cownie (ed), *The Law School: Global Issues, Local Questions* (1999); Alice Thomas, 'Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy' (2000) 6 *Widener Law Symposium Journal* 49.
- ²³ (1995) 57 FCR 451. For a list of the major administrative law textbooks, see above n 1. The exception is Head, above n 1.
- ²⁴ (1995) 55 FCR 316.
- ²⁵ (1995) 57 FCR 451, 467.
- ²⁶ *Ibid.*
- ²⁷ Hilary Charlesworth, 'Little Boxes: A Review of the Commonwealth Hindmarsh Island Report by Jane Mathews' (1997) 3(90) *Aboriginal Law Bulletin* 19.
- ²⁸ The main cases that derived from the dispute include: *Conservation Council of SA Inc v Chapman* (2003) 87 SASR 62; *Kartinyeri v Commonwealth* [1998] HCA 22 (1 April 1998); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Tickner v Chapman* (1995) 57 FCR 451.
- ²⁹ See, eg, Margaret Simons, *The Meeting of the Waters: The Hindmarsh Island Affair* (2002); Hilary Charlesworth, above n 26 ; Deane Fergie, 'Secret Envelopes and Inferential Tautologies' (1996) 48 *Journal of Australian Studies* 4; Steve Hemming 'Inventing Ethnography' (1996) 48 *Journal of Australian Studies* 25; Diane Bell, *Ngarrindjeri Wurruwarrin: A World That Is, Was, and Will Be* (1996); Marcia Langton, 'The Hindmarsh Island Bridge Affair: How Aboriginal Women's Religion Became an Administrable Affair' (1996) 11(24) *Australian Feminist Studies* 211.
- ³⁰ Greg Mead, *Royal Omission: A Critical Summary of the Evidence Given to the Hindmarsh Island Royal Commission with an Alternative Report* (1995); Bell, above n 28; Chris Kenny, *Women's Business* (1996).
- ³¹ The description of the events surrounding the legal challenge to the building of the Hindmarsh Island Bridge in this and the following paragraphs are adapted from Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous Peoples* (2008) ch 7, and draws on the judgment of Justice Von Doussa in *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62, 77–102. The events are also well-described in Simons, above n 28.
- ³² *Planning Act 1982* (SA) s 40; *Aboriginal Heritage Act 1988* (SA) ss 7, 13, 23, 24.
- ³³ *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62, 78–9.
- ³⁴ *Ibid.* 80.

- ³⁵ Ibid 80–1.
- ³⁶ This history of these administrative processes is set out in *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62.
- ³⁷ (1995) 57 FCR 451.
- ³⁸ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
- ³⁹ The *Heritage Protection Act* was one such piece of legislation passed under the amended s 51(xxvi), as was the *Native Title Act 1993* (Cth) and the *ATSIC Act 1989* (Cth). See also n 3.
- ⁴⁰ *Heritage Protection Act; Aboriginal Heritage Act 1988* (SA).
- ⁴¹ *Tickner v Chapman* (1995) 57 FCR 451, 462–3 (Black CJ); 479 (Birchett J).
- ⁴² Through the passing of the *Bridge Act*. The Act had the effect of removing the area around Hindmarsh Island from the general protection of the *Heritage Protection Act*.
- ⁴³ *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62.
- ⁴⁴ Ibid 158.
- ⁴⁵ Ibid 157–81.
- ⁴⁶ For an in-depth analysis of the case and its significance, see Curthoys, Genovese and Reilly, above n 30, ch 7.