Chapter 5

The Federal Court and Administrative Law: How Does the Court Deal with Findings of Fact on Judicial Review?

Justice Alan Robertson

Introduction

I begin this chapter by looking at the state of federal administrative law in Australia just before the time the *Federal Court of Australia Act 1976* (Cth) was enacted and how it was then considered that courts dealt with findings of fact on judicial review. I will next consider the Court's administrative law jurisdiction in its early years. I will then contrast the state of the law of federal judicial review of findings of fact in the 1970s with the state of the law 40 years later. The landscape has changed.

By way of definition, I am not dealing here with how a court, on judicial review, itself makes findings of fact so as to lead, for example, to a conclusion that a decision-maker has not engaged in an active intellectual process in determining whether or not to exercise a power. A recent example is provided by the decision of the Full Court in *Carrascalao v Minister for Immigration and Border Protection*.[1] In that case, the Court undertook an evaluative judgment to assess whether the Minister had properly considered the merits of the cases before him in determining whether or not to exercise the power under s 501(3) of the *Migration Act 1958* (Cth) ('*Migration Act*').

Federal Administrative Law in the 1970s

The Kerr Committee Report of 1971 (the members of the Committee being Justice Kerr, Justice AF Mason, RJ Ellicott QC and Professor Whitmore), said this about judicial review for errors of fact:

> … the following questions are amongst those generally regarded as raising questions of law:
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> (i) Whether facts found by an administrator or an administrative tribunal fall within the expression of a standard contained in a statute or regulation. The question here may be treated as one of fact or as one of law depending, it seems, on whether the court considers that the question is one which should be answered by a court or whether it

1 (2017) 347 ALR 173.