

Administrative Law 70617

Semester 2, 2015

Table of Contents

Intro to Admin Law	4
The Executive	7
Merits review	8
Judicial Review	8
2 – Reviewing Statutory Interpretation	9
Legislation.....	9
Natural and ordinary meaning	12
Elements.....	12
Purposive Approach	15
Aids to interpreting ‘in context’	15
Checklist	18
3 – Merits Review	18
4 - Intro to the AAT	22
Jurisdiction of the AAT	25
What is a decision.....	25
AAT Process	27
5 – AAT Content.....	30
AAT – Policy	30
6 – AAT procedure	39
7 – The Ombudsman	39
Cases.....	46
8 – Freedom and access to Information	48
FOI Legislation	50
9 – Privacy	59
NSW Privacy Commissioner	64
10 – Integrity	66
Auditor – general.....	68
Definition of engages in corrupt conduct.....	71
ICAC	73
ICAC High Court Cases	77
ICAC v Cunneen 2015	78
Whistle blowing.....	81
11 – Judicial Review - Delegated Legislation	81
12 – Judicial review intro	89
Jurisdiction	91
<i>Jurisdiction - High Court</i>	91
<i>Jurisdiction - Federal Court</i>	93
Constitutional Judicial Review	95
NSW Jurisdiction.....	95
Judicial Review – Jurisdiction and standing.....	95

1. Jurisdiction HC.....	97
2. Jurisdiction (Federal Court)	100
3. CL Jurisdiction (NSW).....	102
14 – Jurisdiction of ADJR and Standing	103
1. What is a decision?.....	106
2. Administrative character	107
<i>Factors tending to show an instrument is legislative in character</i>	<i>107</i>
3. ‘Under an enactment’?.....	108
<i>Griffith University v Tang (2005).....</i>	<i>108</i>
<i>Concluding jurisdiction</i>	<i>109</i>
15. Standing and remedies	111
Standing.....	111
<i>Foundation Case: ACF v Cth (1980).....</i>	<i>111</i>
Remedies	113
Consequences of a breach	113
Project Blue Sky (1998) 194 CLR 355	114
Remedies	114
1. Prerogative writs (CL)	115
<i>Certiorari (‘c’)</i>	<i>116</i>
<i>Prohibition (‘P’)</i>	<i>117</i>
<i>Mandamus (‘M’)</i>	<i>117</i>
<i>Habeus Corpus (‘H’).....</i>	<i>117</i>
<i>Injunctions</i>	<i>117</i>
<i>Declarations (‘D’)</i>	<i>118</i>
2. Constitutional remedies (CL)	119
3. ADJR Remedies (ADJR section 16)	119
16. Errors of law	121
Grounds of judicial review.....	121
<i>Collector of Customs v Agfa Gevaert Ltd (1996) 186 CLR 389</i>	<i>122</i>
Errors of law	124
<i>Craig v South Australia (1995) 184 CLR 163.....</i>	<i>124</i>
Jurisdictional Fact	125
Jurisdictional Error.....	126
17. Grounds for Review: Procedural Fairness.....	129
Procedural Fairness Overview	130
1. Does PF apply? Threshold question.....	131
<i>Kioa v West 1985</i>	<i>132</i>
2. Has PF been excluded? Exclusion question	133
18. Procedural Fairness II	133
Content of procedural fairness (Hearing Rule)	134
Rule against bias.....	136
1. Actual bias.....	137
2. Apprehended bias	137
<i>Exceptions to the Bias Rule</i>	<i>139</i>
19. Grounds for review: Consideration and Purpose.....	139
Consideration grounds (‘reasoning ground’)	141
Relevant considerations? (s5(1)(e), s5(2)(b))	142
<i>Step 1 – failure to consider.....</i>	<i>142</i>

Step 2 – Required to consider by Act.....	143
Step 3 – Significant for the decision?	144
Irrelevant considerations? (s5(2)(a))	145
Step 1 – The DM considered the matter	145
Step 2 – This was a matter the DM was prohibited from considering under the Act	145
Step 3 – The matter was significant for the decision; it materially affected the decision.	145
Unauthorised or ‘Improper’ Purpose	145
Step 1 – Authorised purpose?	146
Step 2 – Actual purpose?.....	146
Bad faith	147
Fraud.....	147
20. Identity of Decision Maker grounds: Delegation, dictation and policy	148
Procedural error	148
Unauthorised delegation – reasoning process.....	149
Acting under dictation.....	150
Inflexible policies – reasoning process.....	151
21. Restricting JR – Privative Clauses	153
SECTION 5(1) ADJR	154
SECTION 5(2) ADJR	154
No evidence rule	155
Uncertainty – decisional ground	156
Unreasonableness – decisional ground.....	156
Irrationality – decisional ground	157
<i>Re Minister for Imm; Ex p Applicant S20/2002 (2003) (HC) [14.2.11C]</i>	157
<i>MIAC v SZMDS (2010)</i>	158
Abuse of power – decisional ground.....	158
Ending grounds of JR	158
Restricting JR – LIMITS.....	159
<i>Privative Clauses</i>	159
<i>Constitutional foundations of JR</i>	160
Revisiting JE	163
<i>Current position of PC – state level</i>	164
<i>KIRK – leading authority</i>	164
Summary and lead authorities	165

Intro to Admin Law

Nature of Admin Law

- Branch of public law dealing with:
 - actual operations of government and administrative processes and impact on citizens
 - making of decisions that affect rights, interests and legitimate expectations of citizens – (procedural fairness, due process)
 - carrying out of public works and management and provision of public services, and
 - regulating that process.

- Body of law that regulates the exercise of power and making of decisions by:
 - Executive arm of govt
 - Admin arm of govt
 - Non govt bodies – privatisation of traditional govt entities. This is problematic for admin law jurisdiction.
- No compensation in public law

Development of Administrative Law

- Old Admin Law
 - common law, entirely concerned with judicial review
 - run matter in SC, judge would make determination
 - was restrictive in challenging a decision
- New Admin Law
 - 1960s – created tribunals such as AAT, ICAC
 - more accessible and cheaper for general public to seek review of poor decision making by govt departments.
 - concerned with admin review
 - provision for stat form of judicial review
 - also concerned with:
 - human rights
 - complaint handling
 - privacy and information
 - integrity

Role of Admin Law

- Constitutional law concerned with validity of laws
- Administrative law concerned with validity of decisions and actions of executive government under valid laws
- Separation of powers - allows judiciary to review:
 - validity of laws (Constitutional Law)
 - decisions and actions of executive (Administrative Law)

Content of Admin Law

Judicial Review

- Standing
- Grounds

Extra-judicial Review

- Merits
- Complaint handling
- Privacy
- Information

Forms of accountability - different forms

- Political accountability
 - Electoral accountability
 - Parliamentary accountability – principle of ‘responsible government’
- Bureaucratic accountability
 - Appealing up the lines of superiority

- The 'Integrity Branch': Ombudsman, Independent Commission Against Corruption etc
- Legal/Adjudicative Accountability
 - Courts' oversight
 - Tribunals' oversight

Public law context

- What is public law – criminal, constitutional law.
- What is private law – corporate law, torts, contracts. Usually get compensation.
- What are the key differences – steps for challenging, what client is seeking.

Human Rights (reviewing Constitutional law topics)

- No federal bill or charter of rights. In the absence of a bill/charter, much of the human rights work is left to administrative law principles
- See, for example,
 - i.e. 'principle of legality', e.g. *Evans v NSW*
 - *Al-Kateb v Godwin* (2004) 208 ALR 124
 - *Plaintiff M61/2010 v Commonwealth* (Christmas Island case)

Rule of Law (reviewing Constitutional law topics)

- Rule of law occurs where:
 - The power exercised by government over citizens is constrained by clear rules of law
 - Those laws are applied and enforced by a judiciary that is independent to government
 - The same rules constrain the government as the citizens
 - AV Dicey, *Introduction to the Study of the Constitution* (1885)

Rule of law in terms of admin law

- Executive action is constrained by statute (usually!)
- Executive action is constrained by judicial oversight
- When a court engages in judicial review, it is assessing *whether the administrator acted properly within the power conferred (usually by statute)*

Separation of Powers (reviewing Constitutional law topics)

- Judicial, Legislative and Executive power
- Underlying principles:
 - Those who exercise power should be subject to some sort of checks and balances.
 - Each institution should specialise in the task for which it is best suited

Judicial Power

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

- Commonwealth of Australia Constitution, section 71

Legislative Power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.

- Commonwealth of Australia Constitution, section 1

Executive Power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

- Commonwealth of Australia Constitution, section 61

The Executive

- Has the role of the executive changed over time? If so, why?
- Context: increasing privatisation of government activities.
- Includes:
 - Sitting members of parliament who make up the government of the day (including Ministers)
 - Government departments: public service. See *Public Service Act 1999* (Cth)
 - Public Service includes agencies set up to conduct oversight of other agencies
 - Statutory corporations and other government owned business
 - Tribunals and other oversight agencies
- What they do:
 - Includes government activities as diverse as environmental policy, tax law and the Victorian Charter of Human Rights and Responsibilities.
 - Imagine a piece of legislation, then a decision made under that... This is potentially an administrative decision.

Exercising public authority

- Admin law is not about accountability but also its reverse: the exercise of public authority/ power

Administrative Justice

- When Parliament enacts a law which empowers an official to make decisions affecting individuals, what are the minimum criteria by which those decisions and the processes by which they are made, can be regarded as just and in accordance with the purpose for which they are conferred?
 - (French CJ, 'Public Office and Public Trust' at page 16)

- According to French CJ, a minimalist approach to administrative justice requires that when an official (officer) is empowered by law (usually statute) to make a decision affecting the rights, privileges or liabilities, they should make the decision ...
Lawfully, rationally, fairly, intelligibly

Purpose of Admin Law

- Over time, public ideals of the practice and duties of good conduct have been translated into forms of executive and government accountability.
- Both the exercise of public authority, and practices of accountability, therefore, underpins the purpose and scope of Administrative Law practice.

Scope of admin law

- Administrative law governs administrative decision-making and administrative conduct.
- This includes government activities as diverse as environmental policy, tax law, migration law, employment law, veterans law and the Victorian Charter of Human Rights and Responsibilities
- Central question is 'the decision'

Reviewing admin decisions

- Both Merits and Judicial Review, review govt decision making/action

Merits review

- Apply law to facts
- Determination of facts
- Standing in shoes of original decision-maker
- Decision is remade

Judicial Review

- Determination of law - was the decision lawful
 - Did the decision-maker act outside of power?
 - Were procedures not followed?
 - Was the decision so irrational as to be a failure to exercise lawful functions?
- Decision can be quashed and remitted to original decision-maker
- Black letter law

Historical Reforms

- MAJOR changes in Administrative Law in the 1970's
 - Kerr Committee Report 1971
 - Ellicott Committee Report 1973
- JUDICIAL REVIEW
 - *Administrative Decisions (Judicial Review) Act 1977* (Cth) codified common law judicial review (as at that time)

- Federal Court established - *Federal Court of Australia Act 1976* (Cth)
- MERITS REVIEW
 - Tribunals set up to conduct merits review , e.g. *Administrative Appeals Tribunal Act 1975* (Cth)
- OTHER OVERSIGHT AGENCIES
 - Ombudsman, Freedom of Information, privacy laws

2 – Reviewing Statutory Interpretation

Stat Interpretation

- Lord Carswell- *Smith v Smith* [2006] 1 WLR 2024 at [79]
- *“In a judicial utopia every statute or statutory instrument would be expressed with such clarity and would cover every contingency so effectively that interpretation would be straightforward and the only task of the courts would be to apply to their terms.”*
- *BUT - “Utopia has not yet arrived.”*

Aim

- The aim of statutory interpretation is to determine and give effect to the intention of the Parliament as disclosed by the language used in the statute.
- Office of parliament counsel draft legislation in clear language.
- The intention of Parliament is ascertained by determining the meaning of the statute having regard to the applicable common law and statutory rules of construction.

Legislation

- The proliferation of legislation leads inevitably to a proliferation of questions of interpretation
- Legislation is deliberately made law. Passed by the legislature, it is the express will of parliament.
- Legislation includes:
- Acts of Parliament/Statutes
 - Passed by Parliament (State, Federal, territories)
- Delegated Legislation/Subordinate Legislation
 - Regulations, by-laws, rules, notices, statutory instruments...
 - Passed by delegated authority
- Amending Legislation

Commencement date

- When an Act comes into operation & takes the force of law
- It is **NOT** the date of royal assent or enactment
- To find commencement date:
 - Commencement provisions in legislation?
 - Government gazette?

- Interpretation Acts (general provisions, default dates)

Significance of legislation

- Today, legislation – not common law – is the major source of law in Australia.
- Legislation can modify/simplify/replace/abolish common law, but it can also create.
For example:
 - Create new legislative schemes, institutions, statutory bodies etc.
 - Create and grant authority and public power and decide who can exercise that authority
 - Create procedures and processes for how authority is exercised.

Significance of Admin Law (and legislation)

- Administrative law is concerned with *legal rules* and *legal institutions* which *regulate* the exercise of *public power*, and how it provides:
 - a *legal framework* for public power to be exercised lawfully.
 - multiple *legal mechanisms* for holding those who exercise public power *accountable*
- Administrative law is about authority and its exercise.
- Legislation is integral to the institutional operation of government, and provides many of the legal rules and legal institutions that structure, ground & limit the exercise of public authority.
- Admin lawyers, concerned with how authority is exercised, need to develop advanced skills in statutory interpretation (this week), including in the context of delegated legislation

JR, Statutes & regulations

- For example, an important question in judicial review is whether the person making regulations (delegated legislation) had in fact *the power* to do so (not whether the procedure as to making the regulation is valid).
- Threshold Question: If no enabling legislation, principle of legality says regulation is unlawful (*ultra vires*)
- Subsequent Question: If the enabling Act does exist, it must be interpreted to determine scope and exercise of the regulation making power
- Often the terms in which the law-making authority is granted becomes the grounds for the basis of review.

Reading statutes

- Focus on the section
- Break it into its elements
- Determine the meaning of each of those elements
 - Context in Act
 - Judicial interpretation

Elements of a section

- The elements of a section form a checklist – not a shopping list.

- Unless it is drafted in the alternative, each element must be satisfied.
- The sub-sections of each section are to be read independently – unless the drafting clearly indicates otherwise

Stat interpretation rule

- Start from relevant section and work out – never start from the Act as a whole
- Legislation and case law.
 - Relevant legislation
 - Acts Interpretation Act 1901 (Cth)
 - Interpretation Act 1987 (NSW)
 - As interpreted by courts (common law)
 - In the context of common law principles which survive interpretation statute.

Role of cases in stat interpretation

- Cases – which interpret statutes – are examples of where the court has performed stat interpretation for us.
- S.I is used by courts and by practitioners where courts have not yet done so.

Preliminaries

- Which Parliament passed it? What jurisdiction are we dealing with – the answer to this question will determine what interpretation legislation should be used.
- When did the Act commence – this will tell us if the Act was in force at the relevant time

Commencement

- *ACTS INTERPRETATION ACT 1901*(Cth)
s 5 Commencement of Acts
(1A) Every Act (other than an Act to alter the Constitution) to which the Royal Assent is given by the Governor-General for and on behalf of the King on or after 1 January 1938, shall come into operation on the twenty-eighth day after the day on which that Act receives the Royal Assent, unless the contrary intention appears in the Act.

Acts Interpretation Act 1901

- s18A Parts of speech and grammatical forms
In any Act, unless the contrary intention appears, where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.
- S22 meaning of certain words
- S23 Rules as to gender and number
In any Act, unless the contrary intention appears:
(a) words importing a gender include every other gender; and
(b) words in the singular number include the plural and words in the plural number include the singular.
- S25E Attainment of particular age

For the purposes of any Act, unless the contrary intention appears, the time at which a person attains a particular age expressed in years is the commencement of the relevant anniversary of the date of the birth of that person.

- S35 Measurement of distance
In the measurement of any distance for the purposes of any Act, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.
- S36 Reckoning of time
- S37 expressions of time

Natural and ordinary meaning

- Dictionary:
 - Weitman v Katies Ltd (1977) ATPR 40-041
 - Oxford Dictionary – meaning of ‘misleading’ and ‘deceptive’ in s52 TPA
 - ACCC v Lux. [2004] FCA 926
 - Dictionary – meaning of ‘unconscionable conduct’ in s51AB TPA
 - State Chamber of Commerce and Industry v Commonwealth (1987) 163 CLR 329
 - Macquarie Dictionary – meaning of “fringe benefits” within ITAA

Elements

- Interpretation
- Construction promoting purpose
- Whether purpose express or not
- Preferred to construction which does not promote purpose

Common law approaches

- The literal approach – modified by the Golden Rule
- The purposive approach

Why interpret?

- Problem: Language can be unclear, ambiguous, uncertain... Start with text, but if unresolved, how clarify?
- To address this problem, principles, presumptions and approaches to statutory interpretation have developed.
- There are both common law and statutory law approaches & their relationship has changed over time.
- If any inconsistency, statutory approach to statutory interpretation prevails. Why? Parliamentary supremacy: if there is any inconsistency between legislation and common law, legislation prevails.
- But, common law approach still relevant. How?
 - Not all common law is covered by statute. No simple binary of (in)consistent