Readings weeks 1-4 for LAW 315

Preface to 2009 Law Brief

- Administrative law is multifaceted, often controversial and political, and sometimes convoluted and contortionist in the application of its principles.
- It represents the interface between the three powers of government: the legislature, the executive and the judiciary.
- Main purpose of administrative law is to serve citizens when they are adversely affected by decisions made by government and government authorities, and by judicial decisions that are marred by legal errors.
- The explosion of administrative law in the last 35 years has seen three separate jurisdictions evolve at the Commonwealth level:
  - common law judicial review, primarily in the High Court through the appellate mechanism;
  - statutory judicial review, primarily through the vehicles of the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the Migration Act 1958 (Cth);
  - and constitutional judicial review, where the original jurisdiction of the High Court is engaged by a matter arising under s 75(v) of the Constitution.
- The single most significant thing in any decision is the authority under which it was made.

LAW Brief 2014 Chapter 1 extract

What is the purpose of administrative law?

- Many commentators concentrate on the judicial review aspects of administrative law when considering its function and purpose.
- Professors Harlow and Rawlings in Law and Administration (Weidenfeld and Nicolson, London, 1984) first divided administrative law analysts into two camps.
  - There were ‘red light’ theorists who saw the judiciary’s function in judicial review as paramount, serving to check excesses of executive power.
  - But ‘green light’ theorists rather emphasised administrative law as facilitating good decisions rather than controlling executive action deemed to be ‘an abuse of power’ (see also Chapter 10, page 163).
- Then in the 1990s, ‘common law constitutionalists’ emerged who see judicial review as the vehicle for establishing the ‘good constitution’ through courts guaranteeing a ‘higher order of rights’, which, while inherent in constitutional democracy are ‘not a consequence of the democratic process but logically prior to it’.
- Sedley LJ, while doubting the utility of a ‘higher-order law,’ speculated that instead of the sovereignty of parliament, there existed ‘a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable--politically to Parliament, legally to the courts.
- Some Australian legal professionals tend to focus on the idea of administrative law as enshrining ‘accountability,’ especially of the executive, drawing upon Brennan J’s observation concerning judicial review in Church of Scientology v Woodward (1980) 154 CLR 25

- Some judges perceive judicial review as filling a gap caused by what they see as the 'now generally accepted' failure of ministerial responsibility to safeguard citizens' rights, which in their view led to the expansion of administrative law (Mason J, R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170
- But Spigelman CJ in his 2004 Integrity Lectures3 articulated a contrary view that administrative law was concerned with the maintenance of 'institutional integrity', not least of which was the integrity of the courts themselves in order to sustain judicial legitimacy.
- Chief Justice Gleeson had noted in his 2000 Boyer Lectures The Rule of Law and the Constitution (136–7) that judicial legitimacy depends upon fidelity to the Constitution and to the techniques of legal methodology, and in judicial review depends as well upon the distinction between the merits and judicial review of decisions based upon principles of legality.
- Later, Gleeson CJ noted that the 'principle of legality' required that all decisions taken by any of the three arms of government must be subject to, and made in accordance with, the law and as both Gleeson CJ and Spigelman CJ pointed out, it is an aspect of the rules of statutory interpretation
- By focussing primarily on the role of the courts, many commentators' views tend to overlook the steps taken by the executive and legislature to establish vehicles for merits review as well as for judicial review.
    - Such scholars place great significance on the judicial identification of the legal error, even though this will not necessarily mean that the decision itself when lawfully remade will be favourable to the applicant.
    - Merits review, on the other hand, can change the decision even when there is no error of law.
- The combination of merits and judicial review serves to ensure that the authority vested by the people in the democratically elected legislature is used under the Constitution to promote the best interests of that people

Chapter 10: Theories and concepts of judicial review (Law Brief)

- Academics and legal professionals have tended to see judicial review as a means of ensuring government accountability. Some judges perceive judicial review as 'filling a gap' caused by what they see as the demise of ministerial responsibility (see, e.g. Mason J, R v. Toohey; Ex parte Northern Land Council (1981) 151 CLR 170
- Academics have seen the courts fulfilling a similar purpose:
  In the area of refugee law, the Australian judiciary can, quite patently, be the last bastion against executive tyranny for the dispossessed and the reviled. At risk is life, liberty and the Rule of Law—not just for the refugee, but for all of us.
- Mary Crock, 'Refugees in Australia: of Lore, Legends and the Judicial Process', paper to the Judicial Conference of Australia, 7th Colloquium, 30 May 2003, at 22 (www.jca.asn.au).
- But these days most judicial review occurs under the aegis of statutes passed by legislatures at the instigation of governments, while Ministers' responsibility, in addition to the normal multifarious aspects of electoral and parliamentary accountability, now faces perpetual scrutiny in the 24 hours news cycle.
- There are some rather arcane and colourful theories of administrative law: there are the 'red light' and 'green light' theories; there are the common law constitutionalists, referred to earlier (Chapter 1, page 11).

- In their second edition of Law and Administration (1997), Harlow and Rawlings included also ‘amber lights’ and ‘blue rinses’, but they intended such categorisations to be no more than rather rudimentary aids to assist in analysing the growing diversity in academic and judicial thinking about the purpose and function of administrative law.
- Their third edition (CUP 2009) continued with blue rinses (56ff) and the red/green dichotomy, but appears to have abandoned amber lights. However, they percipiently state:
- Lawyers, we have argued, suffer from a professional deformation; they are too easily inclined to assume a judicial answer to every problem. Equally, they show a predisposition to leave the judicial branch of government unexamined.
- As Gleeson CJ said: Contrary to an assumption popular among some lawyers, the rule of law does not necessitate an ever-expanding role for the courts and the legal profession in the affairs of governments and citizens. And the rule of law does not mean rule by lawyers.
- Murray Gleeson, Courts and the Rule of Law, Rule of Law Series Lectures, Melbourne University, 7 November, 2001: In all theories, the function and power of the judiciary through judicial review is central.

Week 3 – Principle of Legality (textbook)

- The principle of public law is that government agencies need legal authority for any action they take (principle of legality)
- This is reflected in the rule of law and constitutionalism which embody the notion that the authority of governments is limited (by constitutions, legislation and common law presumptions
- A legal authority is needed when electing a government to confer comprehensive authority over the ministry
    - Most of this authority comes from legislation, but can also be by executive authority (non-statutory source of power)
- The principle that governments require legal authority is often seen with terms such as ultra vires (excess of power)
- The scope of the principle of legality: the notion that government action is invalid if it has no legal authority permeates the grounds of judicial review but is enshrined in the Administrative Decisions (Judicial Review) Act 1977 under s 5 (1) b, c, d, f
- The ADJR Act shows many ways a breach of this legal principle can occur. This means that legislation, correctly interpreted, did not support the action taken in reliance on it. There are many cases will illustrate this:
    - Statutory power to run tramways didn’t authorise the conduct a bus service (London County Council v A.G [1902]
    - Stat power authorising customs officers to seize goods,, moveable property and monies in cash didn’t authorise seizure of money for a savings account (Vickers v Minister for business and Consumer Affairs (1982)
- ADJR Act grounds DO NOT apply to government action that doesn’t have statutory authority to support it, but relies on the executive power of government (Minister for Immigrtaion v Vadarlis (2001)

- There's a strong theme in public law that explicit statutory backing is required for executive action that's coercive in nature, which sits alongside the principle of contrasting effect (where a stat provision can sometimes authorise activity that is incidental to that which is expressly mentioned in statute)

- In applying the principle of legality, there are different forms of government entity:
  - Executive agencies (established by executive action): it can derive legal authority from legislation or from the executive power. For example, a government dept can be established by the Governer-General in Council signing an Administrative Arrangements order under s 64 of the Constit.
  - Statutory agencies/authorities/corporations: established by an act of parliament and can only exercise the powers conferred by statute (Macloed v ASIC 2002).
    = The principle of construction give statutory authorities a broad power similar to the executive power as it allows the body to exercise a power incidental to the powers expressly conferred on it.
  - Government corporations/enterprises: established in accordance to the Corporations Act 2001, which regulates the behaviour of corporations.
    = A corporation has the legal capacities of a natural person and isn't subject to the doctrine applying to statutory agencies (that their actions must be statutorily recognised).

Chapter 2: Underlying doctrines and statutory interpretation (Law Breif)

The three intertwining doctrines

- Chapter 1 noted the importance of the separation of powers doctrine in maintaining judicial legitimacy through adherence to the merits/legality divide.
- But this doctrine in Australia has seen prominence given to the judicial power over that of the executive and the legislature, and as a result can come into conflict with what A V Dicey called the 'sovereignty of Parliament'
- Judges and courts, however, see the separation of the judicial power and, in particular, the capacity to engage in judicial review, as an aspect of the 'rule of law'. The relationship between these three doctrines is not always an easy one.

The Separation of Powers

- [2.20] This doctrine was articulated by the High Court in the 1956 Boilermakers' Case (R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254).
- The Court established that, as a result of the separation of the legislature, the executive and the judiciary into three distinct chapters in the Australian Constitution (Chs I, II and III respectively of eight Chapters), at the Commonwealth level the judicial power vested by Ch III in the High Court and other Commonwealth courts cannot be exercised by either the legislature or the executive.
- As a corollary, the judiciary cannot exercise either the executive or the legislative power — there must be a strict separation between the judicial power, and the executive and legislative powers.
- However, at the Commonwealth level there is no separation of power between the executive and the legislature — s 64 of the Constitution requires the Ministerial members of the executive to be members of

one of the legislative Houses, while s 1 of the Constitution requires the Queen or Her representative holding the executive power be a component part of the Parliament (ss 1 and 61).

Separation of Powers and the States and Territories

- [2.30] State constitutions, however, do not mandate any separation of powers (for NSW, see Kable v DPP (NSW) (1995) 189 CLR 51 at 65 (Brennan CJ), 79, 81, 85 (Dawson J), 92 (Toohey J), 109 (McHugh J) ('Kable'); see also Kirk v Industrial Court (NSW) (2010) 239 CLR 531 at 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('Kirk')).
- This doctrine is inapplicable in the States other than in certain circumstances involving State courts vested with the judicial power of the Commonwealth (compare Kirk, and the actual decision in Kable). Gummow J said:
- The repugnancy doctrine in Kable does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III.
- The Kable principle has been stated as constitutionally invalidating State legislation that purports to confer upon a State Supreme Court a power or function that substantially impairs the Court's institutional integrity, and which is therefore incompatible with that Court's role as a repository of federal jurisdiction (Attorney-General (NT) v Emmerson (2014) 88 ALJR 522; [2014] HCA 13 at 533
- This Court has subsequently confirmed that Kable applies beyond its extraordinary circumstances to the Supreme Courts of the Territories5 and to all State and Territory courts as Ch III courts.6

Sovereignty of Parliament

Representative and responsible government

- [2.40] This doctrine was said by A V Dicey8 to lie at the heart of Westminster governance and law. The doctrine establishes that the elected members of the two Houses of Parliament are supreme, in that the Bills that they pass are enacted into law after receipt of the Royal Assent and represent the will of the people.
    - There is nothing that Parliaments cannot do, according to Dicey (pp 35, 30–40, 72). In Australia, however, which unlike England has a written constitution, this doctrine is ameliorated by the separation of powers doctrine as understood by the High Court.
- This means in essence that the Parliament of Australia is not supreme, since its decisions (in making legislation and in approving delegated legislation) are subject to oversight by the High Court.

The Rule of Law