

ADMINISTRATIVE LAW

Semester 2, 2015

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CLASS 1 – Introduction to Administrative Law

Course Materials	Cases
□ C&M [5.2.1] – [5.2.25], [1.3.1] – [1.3.3]	

Introduction

- Administrative law = control of government action
- Aims to **safeguard rights/interests of people and corporations** in dealing with government agencies
- **Constitution not drafted to recognise administrative law** – belief that democracy would sufficiently regulate
 - Created a Court system, giving original jurisdiction to High Court to grant remedies of mandamus, prohibition and injunction (s75(v))
 - No Constitutional foundation for administrative tribunals, Ombudsman, judicial review etc.
- More implicit relevance of Constitution to administrative law
 - SoP, particularly b/w judicial and executive power, embodies **legality/merits distinction**
 - Important unwritten principles and values such as RoL represent our govt.

CONSTITUTIONAL PRINCIPLES

1. Rule of Law

- Dicey: *‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’*
- Three core principles:
 - i. Government cannot take coercive action against any person without **clear legal authority**
 - ii. **Legal equality** of government and citizens
 - iii. Tradition of **protecting civil liberties**, through decisions of courts in construing legislation using certain presumptions of statutory construction and elaborating upon the common law
- Shares core meaning of **controlling the exercise of power by executive** with administrative law
- Used as an aid in statutory construction, often to favour individual > executive action

2. Separation of Powers

- 3 major organs of governmental system: legislature, executive and judiciary
 - Each different function of government discharged by arm best suited to the task
- System of **checks and balances**
- Difference in **method** b/w Judicial and executive decision making
 - Judicial usually considers the rights of the **individual**
 - Executive considers the **broader policy/resources**
- SoP never practiced in pure form – Australia employs **responsible government**
 - Delegation of lawmaking from legislature to executive, in terms of subordinate legislation

3. Responsible Government

- Ministers controlling government sit on parliament, and are thus responsible both to parliament and the people (aim of re-election)

4. Constitutionalism

- Encompasses principle of **limited government**
 - Limited by rules (written constitutional rules as to SoP, role of executive and legislature etc.)
 - Limited by principles – RoL etc.
- Limited government enforced through mechanisms of judicial review of both Legislature/Executive:
 - Cannot be doubted given remedies under s75(5) available against officer of Cth
 - Courts have viewed statutory construction as a conventionally judicial (not executive) task
 - Judicial statutory construction is conclusive, but not exclusive
 - Admin decision makers must form a preliminary view as to the scope of the statutory power they seek to exercise

HISTORY

- English settlers brought with them a common law system enabling prerogative writ review of government action
- Slow-moving development until 1971 report of Commonwealth Administrative Review Committee (Kerr Committee)
 - Gave rise to main features of system of judicial review, tribunal review, Ombudsman investigations and ARC oversight
- Important alterations to scheme of JR over past two decades:
 - Growth in importance of HC's original jurisdiction conferred by *Constitution* s75(v), est. of Federal Magistrates Court etc.
- Creation of many specialist and state and territory civil and administrative tribunals

CLASS 2 – Controlling the Executive 1

Course Materials	Cases
<ul style="list-style-type: none"> □ C&M [1.1.1] – [1.1.5], [1.2.1] – [1.2.7], [1.2.9] – [1.2.16], [1.2.18E] – [1.2.25E], [5.2.13] – [5.2.18], [5.3.9] – [5.3.15C], [7.4.7] – [7.4.16], [11.1.9] – [11.1.10] □ <i>Creyke & McMillian ‘Soft Law versus Hard Law’ (Moodle)</i> □ <i>Weeks, ‘The Use of Soft Law by Australian Public Authorities’ (Moodle)</i> 	<i>R v Kirby; Ex parte Boilermakers’ Society of Australia</i> <i>Kirk v Industrial Relations Commission</i>

ACCOUNTABILITY

- No universal definition of accountability – dependent on who is accountable to whom for what actions
 - Definition *could* be: there is some **relationship** requiring A to account to B and uphold certain **standards** compelling A to **accept sanctions/provide remedies** if s/he fails to act accordingly
- Political accountability, specifically that of MP’s to Parliament, no longer sufficient as sole method
- Too much accountability could reduce efficiency, too little accountability could lead to corruption > consistency

1. Political Accountability

- Implemented through parliamentary system (parliamentary committees, question time)
- In accordance with doctrines of **responsible government**, **representative democracy** and **government as a public trust**
- Refers to both accountability of Parliament to people, and govt. to Parliament
- Specific methods used:
 - **Individual Ministerial responsibility:** Ministers are responsible for actions of govt. departments, may be forced to resign
 - **Collective Ministerial responsibility:** once a decision is made by Cabinet it is backed collectively
 - **Disciplinary sanctions:** Ministers can be sacked from public service or may be **censured** for misconduct
 - **Public sanctions:** e.g. called before Royal Commissions, possible criminal penalties
 - **Representative democracy:** people would not re-elect a bad executive government
 - **Question time**
 - **Parliamentary debates**
 - **Parliamentary committee inquiries**
- Limitations of political accountability:
 - Most mechanisms are only available to persons within government itself – limited review from public
 - Issue of **practical effectiveness** – hard for MP’s/heads to effectively control matters in their departments
 - Due to increase in more independent statutory authorities and government business enterprises
 - Mason: MP’s are more concerned about “**big picture**” **policy** issues, rather than day-to-day administration
 - Overstatement to claim citizens can simply vote out MP’s they don’t like
 - System is **not a complete democracy**
 - MP is not directly elected by people
 - Often clashes with other forms of accountability

2. Financial Accountability

- Refers to verification of official use of money drawn from public account
- Auditor-General ensures appropriations of public money consistent with Constitution by requiring govt. to justify spending
 - Barratt: A-G contributes a unique blend of independence, objectivity and professionalism
 - Established under *Auditor-General Act 1997* (Cth)
 - Independent of Parliament, has two functions:
 - **Quantitative**: audit of the financial statements of government agencies
 - **Qualitative**: performance audit looking at efficiency, effectiveness and regularity of govt. programs
- Senate has an **parliamentary estimate committee** which does a similar thing in house
 - Questions MP's and public servants before committees
- Legislative approval required for taxation and expenditure
- Parliamentary public accounts committee keeps a long-term gaze on financial system generally
- Annual reports to parliament of financial statements from all government agencies
- Limitations:
 - Focus on financial probity > administrative justice issues -> partial coverage
 - Type/relevance of benchmarks used in both quantitative/qualitative aspects of audit must be questioned
 - Independent appointments can be and issue
 - Those chosen are so highly experienced they undoubtedly have friends in parliament

3. Administrative Law Accountability (Legal Accountability)

- Intended to safeguard rights/interests of people and corporations in their dealings with govt. agencies
- Courts, tribunals, oversight bodies (Ombudsman) and legislation
- Confers rights on members of public to access government docs and be provided with reasons for decisions
- 3 forms
 - (i) **Review of decision making: confers right to challenge govt. decision by which person feels aggrieved**
 - Done via JR, MR (tribunal), complaining to ombudsman or anti-discrimination agency
 - (ii) **Protection of information rights: via following methods**
 - Freedom of information: confers right of public access to govt. documents
 - Privacy legislation: regulates handling of personal info within govt.
 - Administrative review legislation: right to written statements of reasons for a decision
 - Whistleblower protection legislation: protects employees for disclosing info that otherwise attracts sanctions
 - (iii) **Public accountability of government processes**
 - Anti-corruption agencies (e.g. ICAC)
 - Human rights commissions (e.g. HREOC)
 - Specialist government inquiries
 - Law reform commissions (e.g. ALRC, NSWLRC)

- Underpinned by 3 main principles
 - **Administrative justice:** rights/interests of individuals should be safeguarded in decision-making
 - **Executive accountability:** those exercising executive powers can be called on to explain/justify
 - **Good administration:** administrative decision-making should conform to universally accepted standards
 - e.g. rationality, fairness, consistency and transparency
- Limitations
 - Courts can't substitute new decision
 - Tribunals can only review selected decisions
 - Ombudsman can only make recommendations
 - Judicial review is **time consuming, divorced from morality** and determines only if **decision is legal**
 - Access issues regarding courts (only works for very poor or very rich)

4. Ethical Responsibility and Integrity of Government Employees

- Ethical responsibilities of public servants have been made more explicit by:
 - Public service acts & codes of conduct
 - Redefinitions of those values and ethics
 - Emphasis on **responsibility of public officials** to serve the public and observe “core public law values”
- Preston: ethics/integrity are controversial, as **subjective** and **value laden**
 - Nothing is more dangerous to well-being of body politic than a public official who is technically competent but ethically illiterate
- McMillian, ‘Re-thinking the Separation of Powers’
 - Growth of non-judicial bodies has not been constrained by SoP, but does not easily fit in that doctrine
 - National integrity system with a ‘**bird’s nest**’ idea (a.k.a **redundancy model**) should be adopted
 - Where there are many strands that all support one another such that if one strand fails others pick it up
 - Tasmania has created Integrity Commission Act 2009 to educate public officials and investigate misconduct
- Spigelman: there is a 4th **integrity** branch of government
 - Consists of all the oversight type positions/bodies of administrative law mechanisms which promote fairness, impartiality, justice, responsibility
 - e.g. Ombudsman, Auditor-General, Human Rights bodies etc.
 - Integrity branch uses the three established branches to perform integrity functions
 - Prevent corruption and ensure govt. observes proper practice
 - Uses power in proper manner for which it was conferred and no other purpose
 - Merits review – concerned with *best* decision, not *just decision* which is legally correct
 - Judiciary can't do this as it has to follow precedent - limitation
 - Judiciary's integrity issue is **two-sided**
 - Must maintain integrity in order to maintain integrity of other branches, meaning it cannot comprise traditional judicial integrity by assessing merits etc.

***R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254**

- **Facts:**
 - Metal Trades Employers' Association sought to enforce a no-strike clause in an award
 - Arbitration Court ordered the union to comply with the award (this is a non judicial power)
 - Union disobeyed, court made another order fining the union for contempt (this is within the limits of a judicial power)
- **Held:**
 - Judicial power can only be vested in a Chapter 3 court (established under s71 of Constitution)
 - Means administrative tribunals cannot be invested with judicial power
 - Chapter 3 court can only be invested with **judicial power** (i.e. cannot be invested with non-judicial powers)
 - Ch 3 courts cannot exercise administrative or any non-judicial powers
 - Except for additional powers strictly incidental to its functioning as a court

Defining a Chapter III Court

- Called a 'court' (not a tribunal)
- Members appointed as per s72 of Constitution – **tenure**
- Primary function is **judicial**
- Include all the federal courts (including HC and Family Court), and Supreme Courts of states
- Operation discussed in *Kable v Director of Public Prosecutions (NSW)*
 - NSW statute **invalidated** since it purported to confer **non-judicial functions** on a Chapter 3 court

***Kirk v Industrial Relations Commission* (2010) 113 ALD 1**

- **Facts:**
 - Act which created the Industrial court in NSW purported to make its decision **final** and not subject to appeal
 - Appellant argued this was **unconstitutional**
- **Held:**
 - State legislatures do not have capacity to deprive a Chapter 3 court from its capacity of reviewing inferior courts with regards to **jurisdictional error**
 - To do so would be to alter the **character** of the Chapter 3 courts in such a way that it ceases to meet its constitutional description

Soft Law

- Refers to non-legislative rules and regulations which the government or its agencies may issue
 - e.g. codes of conduct, guidelines
- Whilst soft law is not binding by force of statute, failure to comply with it by individuals or corporations usually has ramifications
- Hard to draw a clear line b/w soft law and subordinate legislation
- Sometimes, soft law is reinforced by some mention in other legislation that its contravention might (but not necessarily) attract a sanction