

Administrative Law – Theory, History and Context

Introduction

→ Communities rely on Governments (Gov) to provide public services, e.g. transport, education, income support, allocation of land. However we now have to deal with Gov officials and agencies and their regulations for many aspects of our life. E.g. birth certificate, school, licence, car rego, marriage, housing, bank accounts, travel, child support payments. Everything is scrutinised, permitted and controlled by the Gov.

- Greater Gov control leads to higher scrutiny of Gov (accountability).
- Admin authorities – Gov departments, public corporations, local authorities; set conduct rules within scope of Gov policy.
- Admin justice – providing balance between public and Gov; protection against improper exercise of discretion; protect individual rights and interests (framework for achieving this is foundation for admin law).
- Admin law – public law, control Gov action, decision-making, public institutions, legislation/rule making, accountability.

Dichotomies in Administrative (Admin) Law Theory

Judicial regulation v legislative and executive autonomy

- Parliament, government agencies and courts and tribunals all play a role in Gov admin.
- There is discussions about how close the relationship is between each party. E.g. do the courts focus too much on policy, rather than simply solving legal disputes (Jason L Pierce, 2006)?
- Lines must be drawn about what matters fall within the responsibility of each branch, however lines are often blurred.

Intervention (activism) v restraint: red light/green light (M Taggart, 1999)

- Red light – stop Gov redistributing wealth and interfering with personal liberty and private property; controlling its power.
- Green light – use law to regulate, redistribute and provide services.

Individualism v collectivism

- Collectivist – decisions made within a framework of policy recognising broader social concerns; e.g. consistency, predictability, allocation of limited resources.
- Individualism – ensuring individual justice is achieved.

Rules based justice v substantive justice

- Ordered (people comply with defined rules) v just society (rules comply with universal norms of fairness and equity).
- Some believe rules must gain validity and authority through creation and enforcement (positivist). While others believe rules acquire meaning through their interpretation and application.
- Large scope to examine whether rules align with human rights, accepted moral principles and fundamental freedoms.
- Power is exercised within a framework of legal and political principles; giving justification and legitimisation to decisions. However these principles can vary. It is accepted however that standards of rationality, purposiveness and morality are followed. However again these are complex and vast notions. They provide a basis for guidance and discretion (D J Galligan, 1986).

Legal v non-legal paradigms

- Many accept decisions by Gov departments and agencies; and by using non-legal paradigms sloppy decision making can follow. The judiciary is at the apex of decision making; however injustice is less likely to be seen in the few cases that reach this point. Most cases initially go through a primary adjudicator. Appeals should immediately go to tribunals where judicial process is seen so that there is quality control. Judicial process provides things like opportunity to be heard, unbiasedness, articulation of issues, recognition of applicable criteria and reasons for decisions (T Ison, 1986).
- Judicial theories are hard to achieve. Administrative discretion can be threatened by procedural and substantive legal restraints. Judicial involvement must be justified (T R S Allan, 1988).

Managerialism and results v governing by the rules

- Managerialism and results – economic rationality standard for measuring success; efficiency. Thought admin law compliance slows down process, provides unnecessary formality and procedural fairness and allows others the control. However still complied with legal rules.
- Interests: efficiency, responsiveness and effectiveness.
- In some areas discretion is eliminated and ministerial power for direction strengthened. Concerns raised for admin law; e.g. law in the way of achieving goals (P Bayne, 1989).

Evolution v prescription

- Admin law doctrines have common law origins.
- Statute outlines rules to be followed by Gov as well as procedure for judicial review. However common law is still relevant.

→ Many believe that the common law allows for broader general principles to be created; therefore providing no stable basis for admin law or decision making (T R S Allan, 1988).

Public v private

- Admin law – legal control of powers exercised by public agencies and legal dispute resolution between citizen and Gov.
- Gov are subject to some of the same responsibilities as individuals; e.g. remedies, contracts.
- Hard to distinguish public and private; e.g. Gov giving private bodies government functions (delegated). Therefore many believe that any action that is public in nature should be subject to admin law principles. However others believe that treating bodies as Gov is likely to make them as like Gov (C Harlow, 1980; Sir William Wade, 1991).
- The distinction is necessary as admin law and judicial review are seen as individual avenues with freedom from Gov interaction and intrusion (C Finn, 2014).

Accountability

Accountability as a legislative goal

- Accountability through effective governance and stemming corruption.
- PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY ACT 2013 (Cth) s 5 objects are to establish a coherent system of governance and accountability, a performance framework, require Cth (and entities and companies) to meet high standards of governance, performance and accountability, provide meaningful info to Parliament and public, use and manage public resources properly and work cooperatively to achieve common objectives.
- INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988 (NSW) s 2A objects are to promote integrity and accountability of admin by consulting Independent Commission Against Corruption as an independent and accountable body to investigate, expose and prevent corruption of public authorities or official and educate such and public about corruption and its effects on public admin and community. Body can also inquire into allegations of corruption.

Perspectives on accountability

- Report of the Royal Commission into Commercial Activities of Gov and Other Matters (1992);
 - ∞ Effective accountability is an indispensable check to be imposed on those with public power.
 - ∞ It is not the purpose of accountability measures to prevent a Gov from governing. The purpose is to hold Gov, public officials and agencies to account for actions (public interest).
 - ∞ Accountability is a condition of service, on all who work within the Gov system in whatever capacity.
 - ∞ Public hold varying expectations on management and use of power. These form the criteria for accountability.
 - ∞ Accountability to public directly, to agencies acting on behalf of the public and officers to superiors and peers.
 - ∞ A variety of measures are necessary to secure effective public accountability.
- Senate Select Committee, 'Report on a Certain Maritime Incident' (2002);
 - ∞ Accountability is hard to define and often causes challenges between it and flexibility of action.
 - ∞ There is an accountability relationship between public service, Gov, parliament and public.
 - ∞ Accountability – obligations from relationship of responsibility or authority in public service, executive and parliament. Actions must be accounted for, and sanctions and redirections must be accepted.
- Australian Public Service Commission, "Delivering Performance and Accountability (2008);
 - ∞ Accountability is both outward and inward (proceeding without a visible process).
 - ∞ Statute upholds accountability; PUBLIC SERVICE ACT 1999 – s 10 values and s 13 code of conduct for public servants. External processes do as well.
 - ∞ Recent legal developments enhance accountability measures through more accountability channels and checks; e.g. ADMIN DECISIONS (JUDICIAL REVIEW) ACT 1977.
- Accountability describes a range of different relationships, requirements, obligations and sanctions.
- Defining accountability;
 - ∞ Direct authority relationship where one accounts to a person or body for performance of tasks or functions (MAB/MIAC (1993)).
 - ∞ Called to account to an authority for actions; it is external (to the person or body), involves social interaction and exchange (to rectify, respond and accept) and implies rights of authority (demands and sanctions) (R Mulgan (2000)).
 - ∞ Executive Gov and admin bodies comply with law to observe limitations of power exercise (Gaudron J (2000)).
 - ∞ Requiring explanation and justification (against criteria) of decisions and actions and fix (D Oliver (1994)).

Forms of accountability

- Political accountability (e.g. parliamentary committee, question time, letters to ministers, ministerial control of and answerability for executive Gov action);
 - ∞ Responsible Gov; moral and behavioural assumptions of how Gov functions (i.e. public interest), behave responsibly in exercising power, enforces accountability and ensures efficient function of public services (H V Emy (2978)).
 - ∞ Ministers control exec departments and agencies ensuring they carry out Gov policies.

- ∞ Directions, information, comments and answers flow between agencies, ministers, parliament and public.
- ∞ Fails to allow public scrutiny through questions and reviews of individual Gov decision making. There is a focus on policy decision making.
- ∞ Pressure to follow Gov parties and policies overrides duty to public.
- ∞ These limitations do not mean it is less important; it is still an active feature.
- ∞ Gov subject to political control (ministers accountable to parliament who are accountable to public and members).
- Financial accountability (e.g. constitutional and statutory controls on finance);
 - ∞ A function of Gov is to raise and expend money; importance of financial probity seen in Constitution s 81, 83.
 - ∞ Financial accountability – verification of official use of money from public purpose account. As well as accounting for taxes and charges by parliament.
 - ∞ Parliamentary control of finance – legislation for tax and expenditure, estimates committees examine exec and Gov activity, public accounts committee looking at long term finances and annual reports containing financial statements of agencies. Auditor General; independent officer audits financial statements of Gov agencies ensuring compliance with appropriation and legislation, and reviews and examines any aspect of a Gov agency operation looking at efficiency, effectiveness and regularity.
 - ∞ No particular focus on admin justice issues.
- Administrative law accountability (e.g. courts, tribunals, oversight bodies and legislation);
 - ∞ Admin law protects the rights and interests of people and corporations in dealing with Gov agencies; through
 - > Review of decision making – right to challenge Gov decisions; judicial review, tribunal review; internal review or agency review (Ombudsman, human rights, anti-discrim).
 - > Protection of information rights – freedom of info legislation giving right to public to access Gov documents, privacy legislation regulating handling of information, admin review legislation requiring reason for decision, and whistle-blower legislation protecting disclosure of unlawful or unethical activity.
 - > Public accountability of Gov processes – ensure Gov accountability and propriety; anti-corruption agencies, human rights commissions and specialist Gov inquiries.
 - ∞ Upholds principles and values;
 - > Public law values – RoL, protect individual rights, accountability, consistent and certain legislation.
 - > Admin law values – fairness, lawfulness, rationality, openness, efficiency, accountability.
 - > Principles underpinning admin law system – admin justice (protect individual rights and interests), executive accountability (explain and justify activity) and good admin (admin decision-making conform to universally accepted standards of rationality, fairness, consistency and transparency).
 - ∞ Technical limitations on power.
 - ∞ Allows individuals to question power and participate in decision making (Sir Anthony Mason, 1989).
- Ethics and integrity accountability (e.g. code of conduct, ethic advisory services, policies on conflicts of interest, training and Gov service charters);
 - ∞ Rules and principles explained in legislation, codes of conduct etc. explaining values underpinning public service.
 - ∞ Emphasis on responsibility of public officials to serve the public and observe principles that are core public law values; impartiality, legality, integrity, transparency, efficiency, equality, responsibility and justice.
 - ∞ Public officials own performance affects quality, integrity and accountability of the Gov.
 - ∞ Admin involves value decision making. Public administrators are expected to be responsible, responsive and accountable as well as efficient and effective.
 - ∞ This accountability and others highlighted in *Hot Holdings v Creasy (2002)* by Kirby J.
 - ∞ PUBLIC SERVICE ACT 1999 s 10 values; committed to service (APS is professional, objective, innovative, efficient, works collaboratively to achieve best results for community and Gov), ethical (demonstrates leadership, trustworthiness, integrity), respectful (respect all people), impartial (apolitical and provides Gov advice that is frank, honest, timely, based evidence).
 - ∞ PUBLIC SERVICE ACT 1999 s 13 code of conduct behave honestly and with integrity, act with care and diligence, must treat all with respect and courtesy without harassment, comply with law, take reasonable steps to avoid conflict, and uphold APS values and the integrity and reputation of agency.

The Historical Foundations of Australian Admin Law

- 1788 – CL was introduced through settlers; enabling review of Gov action.
- Commonwealth Admin Review Committee 1971 report provoked change – to our modern day admin system.
- Admin Review Council, Review of Cth Merits Tribunals (1994);
 - ∞ S 75(v) Const. HC can issue remedies of mandamus, injunction and declaration; to ensure lawful Gov activity.
 - ∞ Admin review tribunals existed before 1970s. Reformed due to complexity, cost, incoherence and secrecy.
 - ∞ 1971-74; State Ombudsman or Parliamentary Commissioner created.
 - ∞ Kerr Committee noted problems; vast range of admin discretion, mechanisms unable to adequately correct errors and ensure justice, reliance on parliamentary and judicial review inappropriate, technical remedies and procedures, ad hoc, costly, secrecy, and had privative clauses. They encouraged a coherent, comprehensive and integrated system of admin law.

∞ Bland Committee (Committee on Admin Discretions, 1973) noted problems such as lack of consistent pattern for admin review, diversity among tribunals with regards to procedure, frequent and inappropriate conferral of adjudicative jurisdiction upon courts and low provision for external review of decisions concerning social security, welfare, customs, excise and immigration compared to professional, occupational and entrepreneurial regulation.

∞ RESULTS;

> Reformed Judicial Review: ADMIN DECISIONS (JUDICIAL REVIEW) ACT 1977 (CTH) codify principles of judicial review, reform procedures for commencing proceedings, give Federal Court supervisory jurisdiction and create a right to the reasons for a decision.

> Ombudsman: OMBUDSMAN ACT 1976 (CTH).

> Admin Review Tribunals: ADMIN APPEALS TRIBUNAL ACT 1975 (CTH) president is a judge and there is one tribunal with 3 divisions (General Administrative, Medical Appeals and Valuation and Compensation).

> Supervisor Body: AAT 1975 oversee system of admin review and make recommendations for reform.

∞ Now allows review of decision making and procedure. There is no longer a single Ombudsman for Cth matters, growing number of tribunals and there is now a special and restricted review jurisdiction applying to immigration decision making (R Creyke and J McMillan, 1988).

> Not all suggestions were accepted however and high focus and importance is still placed on courts for the admin law system. There is yet to be an admin law specialist division or bench in the Federal court system.

→ Separation of powers analyses Gov legal accountability. Parliament makes law, executive administers it and judiciary decide whether law has been correctly construed and applied. This avoids undue concentration of power and an independent judiciary resolve disputes on exercise of Gov power. Now tribunals and agencies also review and scrutinise Gov decision making and ensure public law values are met in Gov processes. But which branch do they belong to? (J McMillan, 2010).

∞ National integrity system – institutions, laws, procedures, practices and attitudes promoting and encouraging integrity in exercise of power; e.g. good decision making, respect for values underpinning institutional integrity, fidelity to public interest and lack of corruption. All areas of Gov and their agencies need to work together to become strengthened.

∞ Fourth branch of Gov – legislature, executive, judiciary and integrity or oversight branch. It includes independent statutory oversight bodies. They investigate and hold to account executive agencies and have statutory independence from other executive agencies and ministerial direction.

→ Technology is ever developing and impacting the admin law and justice system. Everything is accessible online and society want things to be accessible online. The internet is powerful and provides an open market for information, ideas and action channels. The admin justice system must adequately adapt to these changing developments (J McMillan, 2013).

→ States – CL system of judicial review, ad hoc collection of statutory tribunals undertaking merit review of selected decisions, combines civil and admin jurisdiction tribunals, Ombudsman, freedom of info legislation, anti-discrimination bodies, human rights regimes, public interest legislation.

→ Admin law system offers support and opportunity for complaints from society, requires courts, tribunals, investigative bodies and ombudsman offices to administer values of fairness, rationality, transparency, impartiality and accountability and allows Gov to operate efficiently and effectively (R Creyke and M Groves, 2010).

Accountability across the Public/Private Divide

→ Most accountability comes from public sector however functions are often given to private bodies for efficiency and effectiveness. It is hard to distinguish public and private sectors.

→ Privatisation – Gov agency functions carried out by a private body under private ownership; e.g. Telstra, Cth Bank, Qantas.

→ Commercialisation – Gov imposes private sector business structure on agency owned and controlled by Gov. Known as GBE (Gov Business Enterprise); e.g. Aust Post, Health Insurance Commission. However they are not in the position to make Gov decisions, and areas for addressing concerns are limited through private sector (Admin Review Council, 1995).

→ Contracting out – Gov service delivered to public by private body through contract with Gov agency; e.g. management of immigration detention centres.

→ Due to pressure for reform new admin practices and institutional forms created to help implement public policy and deliver public services. The distinction between private and public is fundamental to legitimation of admin system (S Free, 1999).

→ Public; relationship and characteristics between state and individuals. Private; governed through market principles, self-interested relations between individuals and limited intervention of private law – but has psychological, ideological and legal limitations (limited legal and Gov incursions) (S Free, 1999).

→ Whatever the method services are delivered a Gov agency must be accountable for the efficient performance of delegated functions by Gov. Some believe a 3rd person (contracted service provider) could blur accountability for service delivery and fails to consider service quality. However others believe contracting will improve accountability as information on responsibility, services and delivery will need to be provided clearly, and criteria for performance measurement and monitoring must be specified clearly (Industry Commission, Competitive Tendering and Contracting by Public Sector Agencies, 1996).

Gov must be accountable for policy decisions on services. Contracting out however destroys accountability; ministers can pass the policy decision onto another agency therefore not accepting responsibility, public law accountability mechanisms don't easily apply to Gov decisions and access to Gov information is often restricted to public (G Airo-Farulla, 2004).