

ADMINISTRATIVE LAW

Lecture One

Nature of Administrative Law

Admin law provides an avenue for review whose executive decisions have adversely affected an individual, or a group of individuals – in all areas of law where decisions are made under statute or common law.

Admin law makes executive decisions makers accountable as to how they made their decisions. It relates to the executive arm of the government - but also to administrative – departments, local government – in theory also courts.

Development of Administrative Law

1) 'Old Administrative Law' → judicial

- Common law
- People go to courts to seek review of legality of a decision process

2) 'New Administrative Law' → judicial + executive

- Since 1970s
- Also concerned with:
 - Human rights
 - Complaint handling
 - Privacy and information
 - Integrity

Role of Administrative Law

Constitutional law concerned with validity of laws

- Not an administrative decision

Administrative law concerned with validity of decisions and actions of executive government under valid laws

Doctrine of Separation of powers - allows judiciary to review:

- Judiciary cannot “re-make” the decision because the judiciary would be making an executive decision
- validity of laws (Constitutional Law)
- decisions and actions of executive (Administrative Law)
- Executive can look at merits and re-make the decision

Purpose of Admin Law

- Balance between:
 - Individuals and rest of public – role of admin law
 - Accessible and effective justice for aggrieved individuals
 - Openness and accountability of govt
 - Quality and consistency of govt decision
- And
 - Administrative and fiscal efficiency
 - Cost and complexity in dispute resolution
 - ‘Collective’ public interest and individual interest

Judicial Review

1. Scope of Judicial Review

- Concerned with legality of decisions, not merits
 - Acted unlawfully
 - Acted 'irrationally'
 - No reasonable decision maker could have made that decision – so absurd it is illegal (even when it is within power). It is not merits, because the courts say so.

Limitations of Judicial Review

- No review of merits
 - Separation of powers (Cth Const)
 - Courts avoid politics
 - Mason J – *"It is not the function of a court to substitute its own decision for that of an administrator ..."* Peko-Wallsend

2. Jurisdiction (What court?)

What legislation, under which the decision was made, are we looking at?

Cth = Cth court and tribunal jurisdiction. State = State courts, which may get to the High Court.

- NSW Act: NSW jurisdiction, no state equivalent of ADJR so go to CL. General jurisdiction of Supreme Court – s 23 Supreme Court Act
 - Should it go on appeal: Appellate Jurisdiction of the HC: s 74 Const & s 35 Judiciary Act
- Cth Act: **DO BOTH ADJR & CL**: Cth jurisdiction, FCA primary venue for judicial review granted by ADJR s 16 & s 39B(1) of the Judiciary Act 1903
 - Can also go to Federal Magistrates Court (under Fed. Magistrates Act 1999)
 - HC's original jurisdiction means appeals from the FCA can be commenced in this court: s 73 of the Const.
 - Officer of the Cth: High Court – original jurisdiction from Constitution – ss 75 - 77
 - s 75(v) - "In all matters in which a writ of mandamus or prohibition or an injunction is sought against an **officer** of the **Commonwealth**"
 - If unsuccessful under ADJR, will initiate judicial review under CL

3. Justiciability

This requirement focuses upon defining which situations are appropriate for judicial review.

- I) **ADJR** → go to ADJR lec 2 for justiciability: a decision of an admin character made under enactment – s 3.
- II) **CL** → Factors such as standing, the ground of legal error asserted, the nature of the DM's power, the status of the DM and the relief claimed are all considered when determining justiciability – there is no precise definition.
 - *McBain*, *CCSU* and *Peko EZ* all emphasise that judicial review is restricted to cases that require a determination of an individual's legal rights and

interests. *Peko EZ* requires the decision to have direct and immediate consequences for the legal rights and interests of the party.

- Type of power exercised
 - Cannot be an opinion, must be facts
 - Determination of legal rights and interests
- Nature of power
 - Some decisions may be made under prerogative power (not statutory executive power)
 - Equivalent of CL, as opposed to decisions under statute. Decisions made under these prerogative power – sometimes this power will limit the court's power to engage in judicial review
 - High level decisions where it is not for the judiciary to sit in judgment of those decisions. The executive (even though part of executive administrative arm of the government) they are part of the legislature which is answerable to the public.
 - It is a prerogative power which is a non-justiciable issue: *CCSU*
- Status of decision maker
 - Gov Gen once outside judicial review
 - ADJR codified CL, still says GG cannot be judicially reviewed by CL has moved on & you can, but only under CL: *R v Toohey*; *Ex parte NLC*

Limitations on justiciability

- Non-justiciable powers
 - Not advisory opinion
 - *Re McBain*; *Ex parte Australian Catholic Bishops Conference*
 - No manageable legal standards
 - Unfettered power
 - National security, defence etc – preclude judicial investigation
 - Capacity to function

4. Limitations on judicial review: Private Bodies, Societies & Privative Clauses

Govt outsourcing to private sector

- Bodies that have been outsourced with government power
 - UK – amenable to judicial review – *Datafin*
 - WAS amenable to judicial review, even though body wasn't established by government
 - Why? The **nature** of the power exercised was governmental.
- Aust – no judicial review – *NEAT v Domestic Trading & AWB*
 - AWB had veto power from the Corporations Act: HC didn't really address as to whether there is judicial review when there is a public power
 - HC has not followed UK *Datafin*.

Clubs & societies etc

- *Forbes v NSW Trotting Club*
 - Club was required to observe the rules of natural justice

- Judicial scrutiny under CL in relation to disciplinary matters (if the club has followed its own rules and procedures – has it acted legally)
- Some scope for review

Statutory restrictions – privative clauses

- See Lec 6

5. Standing

- Affected party has to prove that he/she has a right to commence legal proceedings *Locus standi*.
- ADJR, AAT etc have different stat prescriptions for standing
 - ADJR → person aggrieved, s.3 & s 5: go to lec 2
 - CL → special interest
 - AAT → different tests, easier.

Common Law Standing

Special Interest

- Separate from merits, to satisfy the threshold of standing, the applicant needs to have a special interest in the subject matter of the litigation: *ACF. Boyce* requires 'special damage particular to himself.

Intellectual, philosophical and emotional concern

- Cannot be a busybody: *Hussein v Sec DIMIA*
- Strong philosophical view will not give standing
- Public interest organisation? *Right to Life v DSHS*
- More than 'mere intellectual, philosophical or emotional concern'
- *ACF*: Mason J refers to a person who is 'likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest'

Subject Matter

- *Onus*: Gibbs CJ – subject matter is critical. LStephen J: closeness to subject matter. *ocus standi* in relation to the subject matter?
- Standing has developed into a restrictive test – who *doesn't* have standing.
 - Satisfy Brennan J's criterion of being affected to a 'substantially greater degree' than the public?

Remedy

Standing test varies with remedy sought

- Declaration & Injunction Standing
 - Equitable remedies require the applicant to have a special interest in the subject matter: *Onus*
 - Originally as preserve of AG, however *Boyce* outlines two exceptions: decision interferer's with P's private right or P suffered special damage 'peculiar to himself.
- Mandamus Standing
 - Sufficient interest or specific legal right is demonstrates to enforce a public duty (the Minister's duty) – quite restrictive
 - Receive pecuniary interest, special to oneself?
- Certorari & Prohibition Standing

- A stranger may have standing for a writ of certiorari (Shop Distrib. Anv MIA), however a Court has discretion and will be less likely to grant standing where the person is not a 'person aggrieved': Re McBain
- Party aggrieved; court discretion
- A-G
 - Should applicant not establish locus standii, the AG can initiate proceedings ex meru motu of ex ratione of applicant
- Habeas corpus
 - Low threshold; court has discretion – *Vadarlis*

Standing and Public Body?

ACF v Cth

- Standing denied
 - Gibbs J
 - 'Special damage' not limited to pecuniary loss
 - Had to be more than a mere intellectual or emotional concern
- Murphy J
 - Dissented
 - Rules should operate to give a wider range of people standing, otherwise many decisions would go through without review
 - Wider than property
 - Political and environmental interests

ACF v Minister for Resources (1989)

- Davies J – political perception had changed
- Role played by ACF increased
- ACF has standing

North Coast Environmental Council Inc v Minister for Resources

- Sackville J – factors to get special interest:
 - Peak environment body in Northern NSW
 - Recognised by Cth – financial grants
 - Recognised by NSW as advisory bodies
 - Projects and conferences
- Gave them special interest, which gave them standing

Right to Life Assn (NSW) v SDHRH

- Lockhart J – right to speak out on certain matters did not transmute into right of standing
 - Just because you spoke publicly on these views doesn't mean you automatically get standing
 - Intellectual, philosophical and emotional concern
 - Did not get standing

Shop Distributive & Allied Employees Association

- Wanted review to grant Sunday retail trading
 - Special interest rule is flexible
 - **Nature and subject matter** of legislation dictates what a special interest may be
 - The union did get standing because the people would be affected by the introduction of Sunday trading