

ADMINISTRATIVE LAW THEMES

THEME 1: Outsourcing Executive Function

- Administrative law is concerned with the accountability of the Executive
- Question as to who it applies to is contentious as a result of **changing nature of governance**
 - E.g. **privatisation**: preference for private sector over public / selling public assets to private organisations

Private bodies / contractors

Issue: Are private bodies that are outsourced by the government / the Executive subject to Administrative Law?

Issue: How should the High Court approach the question surrounding the application of *Datafin*?

Issue: What are the arguments for/against private bodies exercising public functions to be subject to administrative law norms?

References:

- *Datafin 1997 UK*
- *NEAT v AWB (2003)*
- *Plaintiff M61 (Offshore Processing Case) (2010)*
- Kyrrou Article
- Textbook pp 54 – 64

Defining the 'executive' for the purposes of Administrative Law –

1. Institutional approach

- Traditional model
- Administrative law applies to decisions that are made by those within governmental institutions
- If this approach is continually used, Administrative law will diminish over time because there will be less accountability under judicial review due to government outsourcing and preference for the private sector
- *NEAT v AWB (2003)*
 - AWBI a private body but had public functions; could decide on who was able to export wheat (thereby could greatly favour themselves by rejecting competitors)
 - Distinct unwillingness of the court to extend public law remedies to private bodies

- Majority held the view that private bodies had objectives that could not be satisfied if they had additional Administrative obligations (e.g. objectives to maximise profits, private nature of the body)
- Also, no statutory authority on AWBI to make the decision
- Kirby J: Dissent – **Functional approach**: should be categorised as being a decision under an enactment; the decisions of AWBI were provided for and required by the statute (i.e. executive function, therefore subject to judicial review)
- Gleeson CJ:
 - To describe AWBI as representing purely private interests is inaccurate

2. Functional approach

- Administrative law applies if **carrying out a government function**
- Accountability for governance – rather than government
- **Datafin**
 - Bodies with public elements subject to judicial review
 - Here, the panel on takeovers and mergers was acting within the public domain; public law functions, but not a public body
 - The panel **was** subject to judicial review
 - Applied by some lower Australian courts (Supreme Court: **Mickovski**)

→ Not clear which approach Australia takes

3. Middle ground (unclear whether institutional or functional approach)

- **Plaintiff M61 (Offshore Processing Case)**
 - Minister decided to exercise decision making power
 - Therefore, every step after becomes judicially reviewable
 - Utilised an independent contractor to assist with decision
 - Left open whether the individual decision of the contractor would be subject to judicial review
- **Kyrou Article**
 - It is only a matter of time before the High Court is directly confronted with the question of whether the *Datafin* principle applies in Australia.

Arguments for functional approach:

- Ensures accountability of bodies exercising a public function where private law remedies may be insufficient (e.g. may not compel DM to re-make the decision)
- Government can evade judicial scrutiny under s75(v) and s39B by the expedient of adopting the corporate form; this is because the orthodox position to interpreting 'officer of the Commonwealth' is:
 - a person appointed by the Commonwealth to an identifiable office who is paid by the Commonwealth for the performance of their functions under the office and who is responsible to and removable by the Commonwealth concerning the office':
Broadbent
 - BUT High Court is yet to rule authoritatively on this issue: *Plaintiff M61*
- Performing a public duty
- Rights of citizens are affected by its decisions

Arguments for institutional approach:

- Accountability frameworks in private sector; e.g. contract and tort law, consumer protection regimes etc.
- Private (commercial) objectives (to maximise profits) could not sensibly be accommodated with any admin law obligations: *NEAT*
- Even if the High Court decides that Datafin does not apply, however, that will not mean that no form of review by the courts will be available against private bodies: *Kyrou Article*

Response to outsourcing:

- **ARC recommendation (1995)**: The contracting out of government services should not result in a loss or diminution of government accountability or the ability of members of the public to seek redress where they have been affected by the actions of a contractor delivering a government service
- **FOI** extended to documents in the possession of private contractors delivering government services in 2010
- Recipients of contracted-out services able to complain to the **Commonwealth Ombudsman** in addition to private avenues of complaint in 2005

Limitations of judicial review due to outsourcing:

- **ADJR Act**: Decisions made under an enactment
- **S 75(v) of C and 39B of JA**: power must have been exercised by an 'officer of the Commonwealth'