

# 1. ADMINISTRATIVE LAW

## Context of Admin Law

### Rule of Law

- **Rule of law:** The principle that every person and organisation, including the government, is subject to the law.
- In Australia, rule of law primarily requires that exercise of official power (legislative, executive or judicial) must be supported by constitutional authority or law made under such authority. Secondly, disputes about limits of legislative and executive power can only be determined in final and binding manner by exercise of judicial power. (French)
- **AV Dicey's Three Concepts:** absolute supremacy of the law (no breach unless established under ordinary legal manner; not administered arbitrarily); equality before the law (including govt. officials); and the rights and freedoms of the citizen being protected by the common law rather than constitutional bill of rights.

### Parliamentary Supremacy

- **Parliamentary Sovereignty:** The principle that Parliament may make or unmake any law it wishes. Legislature is sovereign and supreme.
- Parliament is held accountable directly to the people by democratic process of election. However, the Executive (Ministers) are elected by the Party, therefore accountable under administrative law.
- **Statutory interpretation:** Judges power of interpreting statutes is the most frequent and effective means by which parliamentary sovereignty is reconciled with the rule of law.
  - Principle of legality: Presumption that Parliament does not intend to interfere w/ common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate.' *Potter v Minahan* (1908) cited by French. I.e. requires statutes to be construed to avoid or minimise encroachment upon rights and freedoms at common law.
  - Statutory abrogation applies to procedural fairness – *Miah* (2010).
  - Statutory power is confined by subject matter, scope and purpose of the legislation by which it is conferred.

### Separation of Powers

- **Executive:** challenges decisions made by the Executive (ie. Ministers / Departments) on legality by the Judiciary.
- **Judiciary:** judicial review of administrative action (JRAA) – only errors of law can be challenged by JR.
- **Legislature:** cannot challenge decisions made by the Legislature under the notion of parliamentary sovereignty which means the Legislature has power to enact laws under which the Judiciary has the power to make decisions on the basis of legality. Citizens give the Legislature power through democratic process of election.

### The Australian Constitution

- *Australian Constitution* defines, separates and limits the legislative, executive and judicial powers of the Commonwealth.

### Modern Challenges

- **Privatisation / Outsourcing of Decision-Making:** Decisions made by non-governmental bodies cannot be reviewed under s 75(v) as they do not meet the requirement for 'officer of the commonwealth.' Whilst some non-governmental bodies have a sufficiently close connection to the execution of statutory and executive powers to satisfy the requirement, the constitutional text is unlikely allow the HCA to adopt the *Datafin* (UK) public function test.
- ***Plaintiff M61 (2010)*** – there was no specific answer to the questions of whether the HCA's supervisory jurisdiction covered an Independent Merits Review process undertaken by persons not officers of the Department but engaged by a private company contracted by the Department for review of 'offshore' refugee visa applications.
- **Privatisation removes government accountability:** Outsourcing to private providers removed government accountability for public services; no ability to challenge decisions through admin law. Eg, Internet – policy decision to privatise the national broadband network (NBN) to a privacy company NBN Co to install infrastructure to provide a 'public service.'

## Administrative Law Values

### Themes and Values

#### R. S. French, 'Administrative Law in Australia: Themes and Values Revisited' in M. Groves (ed.)

- **Narrow approach – Rule of law:** Values that reflect community expectations that representative and responsible government in a democracy will act within the law, honestly, sensibly and fairly in its dealings w/ citizens in operation of the rule of law:
  - Lawfulness: compliance w/ legal requirements for exercise of the power

- Good faith: honest action and fidelity to the purposes and criteria that govern the exercise of statutory power.
- Rationality: decisions must be reached by reasoning which is intelligible and reasonable and directed towards the purposes of the power.
- Fairness: procedural fairness regulates the exercise of power unless excluded by plain words. Includes fair hearing rule and bias rule.
- **Broad approach – Government accountability**: accessibility, openness, participation and accountability. Purpose of admin law to control government power in protection of individual rights; rules designed to ensure administration effectively performs assigned tasks; ensures govt. accountable and fosters participation by interested parties in decision-making process.
- S 7 directly confers upon the HCA original jurisdiction in all matters in which a writ of mandamus, prohibition or injunction is sought against an officer of the Cth

### Allsop 'Values in Public Law' (2016) 13 *The Judicial Review* 55

- **Key Values**: fairness, reasonableness and justice in framing the legal rules and exercise of power.
- **Values in public law**: reasonable certainty; honesty and fidelity to the Constitution; rejection of unfairness unreasonableness, arbitrariness; equality; humanity and the dignity and autonomy of the individual (mercy)
- **Mercy**: refers to a need for a capacity of mercy as 'a capacity in special circumstances to avoid the rigidity of inexorable law is the very essence of justice.'
- **Broader application of admin law values**:
  - Bankruptcy Act – impact of bankruptcy on individuals to 'crush lives'; competing considerations between providing (1) fair, equal, orderly system to regulate distribution of assets to creditors (ie. certainty); (2) treating the bankrupt with humanity and dignity by preferring rehabilitation over punishment (ie. protecting the bankrupt from inherent vulnerability from impoverishment).
  - Criminal law – Court emphasised the necessary individuality and humanity in sentencing process, rejecting staged approach to sentencing in preference for individualised justice (*Markarian*); but competing considerations of principle and rule, consistency, fairness and equality. Sentencing requires consistence of principle.

### Issues with a value-based theory of administrative law

- The evaluation of administrative law effectiveness depends on how the values of admin law are defined; many of them are also conflicting values between accountability to the law, parliament, individuals and the general public.

## Purposes of Admin Law

### Two Different Approaches

#### Legal Approach (Accountability Mechanism)

- **Purpose**: provide complainant with redress for past breaches of administrative law; retrospectively holds decision-makers accountable for breaches; expresses and promotes admin law values of legality, rationality, procedural fairness etc.

#### Regulatory Approach (Regulatory Tool)

- **Purpose**: influence the way decision-makers exercise their powers in the future; prospective effect on bureaucratic behaviour; promotes process related values (ie. procedural fairness and legality).
- **Three components of a Regulatory System**:
  1. Standards: influence how decision-makers exercise their functions
  2. Compliance mechanism: affected individuals have incentive to monitor compliance through availability of complaint mechanisms for breach of admin law.
  3. Mechanism for promoting future compliance: Courts, tribunals, ombudsmen to enforce admin law by providing qualified complaints with redress and incentive to comply in future.

# Effectiveness of Admin Law

## Developments in Administrative Law since 1990s

### McMillan, 'Ten Challenges for Administrative Justice,' *AIAL Forum No 61*

- **Overview:** McMillan describes the developments that pose challenges to administrative law since it came to light in the 1990s.
- **Major changes:**
  1. Increased Complexity – applicants do not understand complex government requirements; eg. immigration visa, welfare benefit schemes etc.
  2. Administrative penalties – penalties strictly apply without procedural safeguards such as in criminal law; admin law can review penalties but cannot relieve personal harm already suffered; eg. benefit payment suspension.
  3. Consequences that cannot be undone – eg. follow-on effects of receiving letter late leading to a penalty.
  4. Delay and 'administrative drift' – from inefficiency, misplaced priorities, movement of difficult files between officers
  5. Poor decision making and human frailty – misinterpreting legislation, incorrectly analysing information or evidence, inappropriately applying penalties; where cases corrected on individually, does rectify incompetent officers
  6. Technology / Computerisation – officers may accept erroneous information and making incorrect decisions; poor system design or implementation causes administrative errors – eg. storage of information, miscalculations of entitlements, sending letters to wrong addresses.
  7. Outsourced service delivery – eg. internet; benefit distribution, utilities; public transport. Services are set by contract and offer less public protection than if govt provided; more focussed on commercial drivers than admin law values. Dispute resolution mechanisms underdeveloped, or responsibility divided between govt and non-govt parties; ie. no one well placed to address a person's grievance timely or effectively.
  8. Multiple agency action – in single decision / providing a service; difficult for individual identify which agency responsible for a decision.

## Definition of 'Administrative Justice'

### French, 'Administrative Justice – Words in Search of Meaning,' *AIAL Forum 2010*

- **Overview:** French has a high opinion of administrative justice and argues that it should be applied more broadly at the primary decision-making level in particular, as well as merits review and Ombudsmen (ie. not limited to judicial review) to safeguard individuals from Government administrative action.
  - Development of admin law: relatively new area of law – 'administrative law' term arise in the 1990s.
  - Considers 'administrative justice' values should be applied broader than just judicial models (curial) to other methods (inc. primary decision-making, merits review and Ombudsmen); as judicial review is limited to the legality of decisions only.
  - Overall, administrative justice means 'justice' to the individual and the process; however, there is tension b/w consistency and flexibility to apply justice to individual cases.
- **Administrative Justice:** 'at its core, administrative justice is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded'; ie. decisions should be able to be reviewed (C&M)
  - **Minimalist approach:**
    - At minimum, assuming all laws are just, are applied rationally and fairly in accordance with legality. However, where there is broad administrative discretion, there is tension between consistency and flexibility necessary in the particular circumstances of an individual. Argues internal and external merits review have an important role.
    - Other basic aspects of administrative justice:
      - Efficiency: cost imposed from process reflects equitable distribution of burdens between community and individual
      - Timeliness
      - Accessibility and affordability by citizens: inc. simplicity of process and forms.
  - **Separation of powers:** Administrative justice features the availability of a review system; ie ability to challenge decisions of the Executive.
    - **JR** – remedies errors of law, procedural fairness and certain forms of irrationality
    - **MR** – enables cases to be dealt with on individualised basis on its merits giving appropriate weight to policy. MR provides mechanism for diffusion of power so primary decision-maker's decision will not always have the last word.
  - **Focus on Primary Decision-Maker:**
    - Halliday: Qualities of decision process determine acceptability of decision (eg. rights perspective – winning the decision)

- Mashaw: bureaucratic rationality model (efficiency, accuracy, cost effectiveness); professional treatment model (service to clients); moral judgment model (court-centred adjudication)
- Adler: managerialism (responsibility assigned to public sector managers to achieve standards); consumerism (citizen consumers of public services w/ accountability through complaints); market system (citizen consumers in free market).
- **Constitutional view**: 'Administrative justice' is a basic human right based on the Constitution, rule of law and common law rights and freedoms; human rights guaranteed by ICCPR are met with observance of minimum standards of legality, rationality, fairness, accessibility, affordability and efficiency.

**Prosser, 'Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors,' *British Journal of Law and Society* (1977)**

- **Overview**: Prosser takes a very distrustful view on welfare tribunals arguing that it legitimises state decisions (ie. lacks independence from the Executive) and prefers judicial review for its independence (ie. separation of powers).
- **Whole of society**: Argues that 'administrative justice' can be viewed on a 'whole of society' level (eg. social welfare).
  - 'Administrative justice' focusses on the individual challenging the decision, however, it does not address broader society level issues (eg. individual benefit decisions vs. poverty and who/why individuals are claiming benefits)
  - Administrative system is reacting to the consequences of wider issues in society (eg. unemployment).
- **Prefers Judicial Review (independence)**: considers that judicial review is a better means of administrative justice because of its independence from the Government.
- **Legitimizing the system by oppression**: Argues through merits review system, the Government is able to make policy decisions and implement social control. The system of review legitimates an individual's oppression.
  - Tribunals are corrupted by the 'middle class': members from a certain class with shared values exercise discretion in decisions which impact individuals (eg. who deserves welfare)
  - Disengagement of applicants 'as an object': judicialization of MR involves lawyers; applicants have no participation; disconnected from government; at appeal individual disengaged 'as an object' when decision made about the person; implies system of social control.

### Methods to Challenge Decisions

- **Internal Review**: merits review within the same department, or write directly to the Minister; no cost.
- **Merits Review**: external merits review for substantive mistake / error; AAT for Commonwealth matters; NCAT (NSW Civil and Administrative Tribunal) for State matters.
- **Judicial Review**: courts prefer individuals to exhaust all other options for dispute resolution before reviewing cases (ie. internal MR and external MR).
- **Ombudsman / FOI**
- **Public / media**: cost = loss of privacy

**Values in Admin Law**

Judicial Review	Merits Review	Ombudsman	FOI
Legality Fairness Accessibility Accountability Consistency Rationality	Fairness Efficiency Accessibility Participation Flexibility Individualised justice Redressing Grievances Normative Impact	Accountability Institutional / systematic change Impartiality Participation Openness Accessibility	Transparency Openness Secrecy
Law	Private individuals	Parliament	Private Individuals