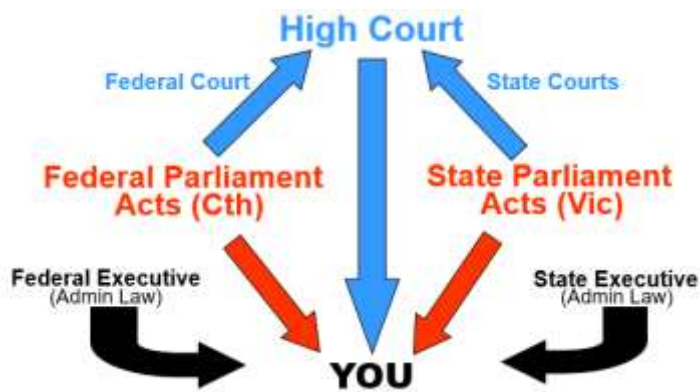


## Topic 1 – Introduction to Australian Administrative Law

### What is administrative law?

- Essentially administrative law is a body of law that regulates executive power and the relationship between citizens and government
- Administrative law is about understanding the nature and extent of government power and how that power may be challenged or controlled by people (like you and me)
- It is a branch of public law - it deals with disputes and accountability in the public realm between individuals and government
- It controls and regulates the exercise of administrative power
  - Review rights
  - FOI
- It provides the legal mechanisms which individuals can use:
  - To challenge such decisions or conduct; or
  - To hold parties to account for such decisions or conduct
- In essence, it is about regulating government decision making and allows the public to challenge the decisions made by the government
- Who is the government?
  - Governor general
  - Ministers
  - Statutory bodies (e.g. EPA, Councils, VicRoads, University Boards, Chiropractic Boards, Medical Boards etc.)
  - Government Departments
- Judicial Review vs. Merits Review
- Common law has provisions in relation to Judicial Review, legislation has been brought in to make the common law easier but it is a legislative based judicial review
- Legislative based merits review
- To challenge a review, you require legislation to enable you to have the option of doing so
- A large part of administrative law involves the regulation of government decision making
- Everyday government decision makers make decisions that affect individuals in many aspects of their lives: e.g.
  - Applying for a licence
    - Driving
  - Obtaining a permit
    - Building
  - Obtaining a passport / Visa
  - Registering births, deaths, marriages
  - Registering a business
  - Applying for government assistance
    - Unemployment
    - Child support
- It is about power



### Sources of administrative law

- What is the source of government power that can be the subject of a review?
  - Legislation
    - Subordinate (delegated) legislation
      - Quasi-legislation
- Legislation must be read in light of common law presumptions and rules of interpretation
- Prerogative power
  - Power to declare war
  - Power to dissolve parliament
  - Power to enter into treaties
  - Prerogative of mercy
  - Power to enter into a nolle prosequi (won't progress suit A-G)
    - *Nolle prosequi* is a Latin phrase meaning "will no longer prosecute" or a variation on the same. It amounts to a dismissal of charges by the prosecution
- These can be abrogated by Statute
- Abrogation must be clear and unambiguous
- Some of these powers not justiciable e.g. the exercise of prerogative powers in defence of the realm (*Coutts v Commonwealth* (1985) 157 CLR 91)

### *Coutts v Commonwealth* (1985) 157 CLR 91

- Flight Lieutenant Coutts was an officer in the Royal Australian Air Force
- In 1980 the Governor-General in Council terminated his appointment on medical grounds in accordance with Regulations 72(1) and 628(1) of the *Air Force Regulations, 1927* (Cth).
- Regulation 72(1):
  - An officer shall hold his appointment during the pleasure of the Governor-General, but the commission of an officer shall not be cancelled except for cause and after he has had notice in writing of any complaint or charge made, and of any action proposed to be taken against him and has been given the opportunity of making such statement as he thinks fit regarding the cause
- Regulation 628(1)
  - Where a member:
    - a. Is not in need of hospital treatment;
    - b. Is, in the opinion of the confirming medical authority, unfit for further service; and
    - c. Is capable at the time of engaging in civilian employment, the member shall be retired or discharged at the earliest possible date after the opinion of the confirming medical authority has been expressed
- Coutts instituted proceedings in the original jurisdiction of the High Court challenging the procedural validity of his dismissal in that he had not been accorded a hearing

- By Consent the matter was remitted to the Full Court of the Supreme Court of South Australia to decide certain points of law as preliminary issues
- The Full Court by majority (Walters and Matheson JJ, Jacobs J dissenting) found against Coutts and an appeal, by special leave, was brought in the High Court
- The High Court by majority (Wilson, Brennan and Dawson JJ, Mason ACJ and Deane J dissenting) dismissed the appeal and upheld the validity of the termination
- The absence of statute, provides the prerogative power which supports the relationship between members of the armed forces and the Crown and it is a concomitant of that relationship that none of them has at common law any right of action against the Crown for breach of contract or any right to sue for pay
- The relationship is not a contractual one

#### **Sources of administrative law**

- Power to enter into contracts
  - Contracts with the Crown
- The nature of contracts which the Crown may enter may be regulated by statute as may the procedures (tenders)
- Issues of fettering of discretion cannot enter into a contract incompatible with public power, or beyond power

#### **Development of administrative law**

- Historically, administrative law has its origins in English common law where the courts exercised a supervisory role regarding disputes between individuals and those engaged in making decisions
- Prior to the English revolution in 1688 local administration was conducted mainly by JPs, supervised by judges who acted on instructions from the Crown
- These were administrators, or members of the landed gentry, they exercised considerable control over matters such as keeping the peace, licensing of ale houses, sewerage, construction of highways
- Central control was exercised by the Privy Council acting through the Star Chamber and prerogative remedies (i.e. certiorari, prohibition and mandamus)
  - The Star Chamber was an English Court of Law which sat at the Royal Palace of Westminster, from the late 15th century to the mid-17th century (c.1641), and was composed of Privy Councillors and common law judges, to supplement the judicial activities of the common law and equity courts in civil and criminal matters
  - The Star Chamber was established to ensure the fair enforcement of laws against socially and politically prominent people so powerful that ordinary courts would likely hesitate to convict them of their crimes
- Revolves around legislation
- *Cooper* case → needed to notify the board of works that he was commencing building, they knocked the house down, he challenged and won
- After the English Revolution there was a shift of power from the Crown to Parliament
- Parliament seized legislative power
- Bill of Rights (1689) levying of money without grant of Parliament was illegal
- Star Chamber and judicial power of Privy Council were abolished during this period - Parliament had legislative control but not the means to control all the local administrators such as the JPs and the expanding number of school boards, public works boards etc.
- By the 18th century, these boards had substantial power but not until 19th century really that changes brought about by the industrial revolution began to bring about more central control over administrative matters

- With the advent of representative government and development of the party system, central control of the administrative arm of government was re-asserted in the form of the Cabinet
- Elected governments created new government departments headed by a Minister who came to be accepted as responsible to a "Cabinet" of government ministers for the actions of his department as well as being responsible to Parliament
- Cabinet was collectively responsible to Parliament for the administration of the nation's affairs
- Parliament, through the system of responsible government, has some degree of control over administrative or executive arm of government
- The Parliamentary and Judicial System we have in Australia is largely based on this system
- Common law from England formed the basis of the law brought to Australia upon settlement
- Judicial powers and statutory powers of review have substantially changed in the last century
- Government power is everywhere, and the development of legislation and specialised tribunals have increased
- Over the last 20 years alone, there has been a vast expansion and development of administrative law as a result of increasing government regulation
- A citizen may seek support of their member of parliament regarding some administrative issue, but now likely to get information through FOI or approach an ombudsman
- There are specific administrative law acts and tribunals at both Federal and State level

#### **Development of new administrative law**

- Commonwealth
  - Administrative Decisions (Judicial Review) Act 1977
  - Administrative Appeals Tribunal Act 1975
  - Ombudsman Act 1976
  - Freedom of Information Act 1982
  - Privacy Act 1988
- Victoria
  - Ombudsman Act 1973
  - Administrative Law Act 1978
  - Freedom of Information Act 1982
  - Administrative Appeals Tribunal Act 1984 (repealed)
  - Victorian Civil and Administrative Tribunal Act 1988
  - Information Privacy Act 2000 (repealed)
  - Privacy and Data Protection Act 2014
- Go to the Federal Court to get a remedy instead of getting writ
- Judicial Review → is the decision unlawful?
- Administrative Appeals Tribunal → throw out the decision and hear all the facts again
- Consider in Victoria the *Charter of Human Rights and Responsibilities Act 2006*
- Consider also the *Border Force Act 2015* (Cth)
- *Migration Act 1958* (Cth) changes every case

#### **Administrative power in Australia - Concepts and Constitutional Framework**

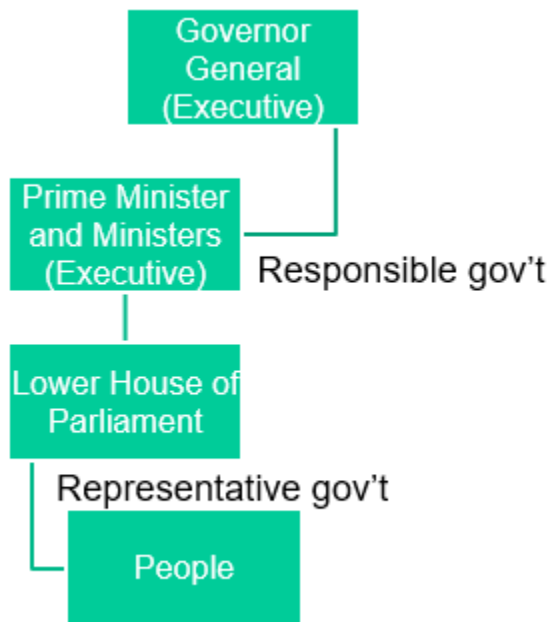
- Parliamentary sovereignty
- Responsible government
- Rule of law
- Separation of powers
- Need to consider why we have the situation where we are able to challenge decisions, and what decisions we are able to challenge

### Parliamentary sovereignty

- Parliament is the sovereign power of the state
- Have the power to make and unmake laws
- AV Dicey:
  - 'Parliament's power to 'make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'
- Federal system in Australia
- Parliaments do not have unlimited power
- They share power with judiciary and executive and subject to the Constitution
- Judiciary can:
  - Interpret laws
  - Declare laws unconstitutional
  - Determine if procedures set out in the constitutions which are required to be followed when enacting laws, have been (ref: Victorian Charter)

### Responsible Government

- The Constitution established a system of representative and responsible government
  - s.7 - senators are chosen directly by the people of each state
  - s.24 - members of the House of Representatives are directly chosen by the people of the Commonwealth
  - s.30 - Parliament can legislate about the qualifications of voters (one vote)
  - s.41 - if a person has a right to vote in a State election, they have a right to vote in a Federal election
  - s.128 - referendum to change constitution
- Representative government → government by the people, for the people
- Responsible government flows from representative government
- Elected representatives, including the government, are answerable to parliament and ultimately to the people for their actions or omissions
- Historically Parliament should provide control over the executive arm of the government
- Modern day effective power is controlled by the Cabinet - senior members of the political party in power
- New bills formulated and introduced by parliaments - majority votes - deals with minor parties
- Denning:
  - 'legal theory does not always march alongside political reality'
- So is executive arm of the government responsible to Parliament?
- Conventions
  - Cabinet and Prime Minister not in Constitution
  - Governor General (Governor) acts on advice of the Prime Minister (Premier) and Cabinet
  - GG appoints PM as the leader of the party with the majority in the lower house
  - Cabinet is responsible to Parliament and Ministers are individually responsible for their own behaviour and that of their departments
  - Convention dictates the relationship between the two houses

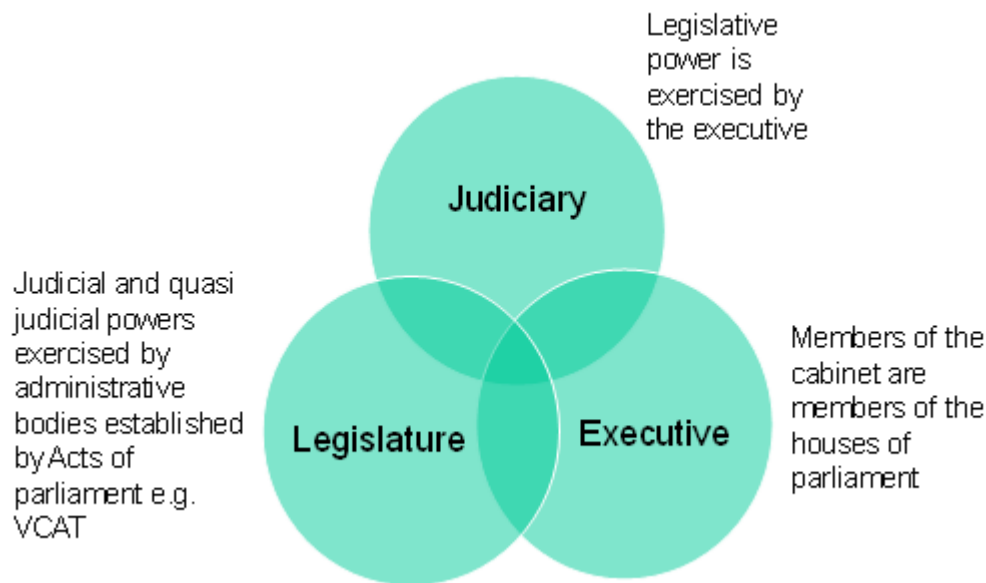


### Rule of law

- All persons should be equally subject to the same body of certain or stable law and not subjected to arbitrary rule
- AC Dicey considers the rule of law involves 3 distinct concepts:
  1. That no one was punishable unless they committed a breach of the law and this breach was established before an ordinary court of law
    - Does this still hold true today - given the Border protection issues, terrorism protection laws, the increase in Tribunals with punitive abilities
  2. That all citizens irrespective of status were subject to the law, as administered by law courts (including the PM)
    - Is there equality before the law? The Crown enjoys privileges and immunities, what about Diplomats?
    - Dicey argued equality before the law required that there be no separate system of administrative law
  3. That in contrast to America, personal liberties and freedoms derived from and were protected by common law principles and not written guarantees of freedom
    - Is the common law enough to protect rights and freedoms from incursion by legislative enactments?
    - Why now does Victoria have the Charter?
    - Aren't freedoms subject to incursions by the legislature? Again, Migration, Border Protection etc.

### Separation of powers

- What is the doctrine of Separation of Powers?
  - Executive
  - Judiciary
  - Legislature
- Why do we have the principle of Separation of Powers?
- How separate are the executive and the legislature in the Westminster system really?
- s.64 Commonwealth Constitution - ministers who make up the federal executive council are also required by s.64 of the Constitution to be, or become, members of Parliament



#### Important Cases

- Brandy
- Data Precision
- Limb

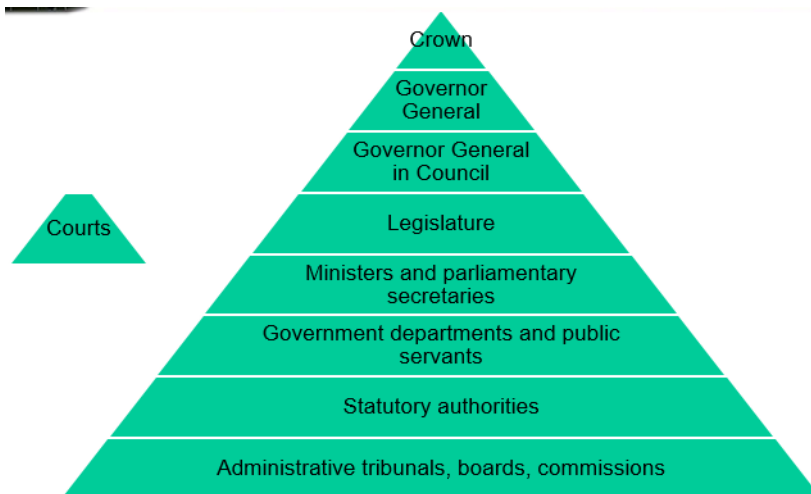
#### **Relevance to administrative law**

- Constitutional framework is important to consider in the role of administrative law
- How are decisions challenged and by whom?
- What rights does the judiciary have?
- Courts have limited original jurisdiction to deal with challenges because of separation of powers
- However, responsible government means that decisions should be challenged
- Leads to a discussion of judicial review and merits review
- *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245

#### **Who has administrative power?**

- The Crown (Queen, GG or Governor and Executive) is a separate legal entity
- s.61 of the Constitution vests executive power in Queen exercisable by the GG or G as the Queen's representative
- Governor General or Governor - Executive Council
  - s.62 Constitution (note "Governor in Council")
  - Federal Executive Council, to advise the Governor-General in the government of the Commonwealth. Members of the Council shall be chosen and summoned by the GG and sworn as Executive Councillors, and shall hold office during his pleasure
  - Federal Executive Council comprises all the ministers of the government of the day. GG is president. Council acts as formal advisory body, gives legal force or effect to those decisions of the government which require a legal basis
  - Federal Executive Council is the formal centre of power, the Cabinet is the actual centre of power
  - Formed by the government and usually consists of PM and more senior ministers
- The Government, Prime Minister and Cabinet
- Ministers and parliamentary secretaries
  - (see e.g. *Conservation, Forests and Lands Act 1987* (Vic))
- Government departments and public servants

- Department of Immigration and Border Protection
  - Department of the Environment
- Statutory authorities
  - Environment Protection Authority (Vic)
- Administrative tribunals, boards, commissions
  - VCAT
  - AAT
  - Medical Practitioners Board
- Courts



### Administrative values

- The existence and development of administrative law leads to greater accountability in government decision making processes
- There are rules
  - Natural justice
  - Procedural fairness
  - Rule against bias
  - Relevant considerations not irrelevant considerations
  - Government policy
- There is Freedom of Information
- There is internal and external review (Tribunals and Courts)
- Transparency
- Consistency
- Rationality
- Impartiality
- Participation
- Procedural Fairness

### Privatisation

- Public private partnerships
- Contracting out public services
- Challenges for administrative lawyers - public matters being dealt with by private individuals

### Summary

#### What is administrative law?

- Regulation of executive power
- Government accountability



### What are the sources of Administrative law?

- Legislation
- Prerogative power
- Contracts

### How did Administrative Law develop?

- English Common law
- Elected governments
- Parliament

### Old and new Administrative Law?

- Old → prerogative writs - judge's decisions
- New → tribunals, freedom of information, ombudsman, privacy

### Elements to consider

- Parliamentary sovereignty
  - Albert Venn Dicey
- Responsible and representative government
  - A government of the people
- Rule of law
  - Innocent before proven guilty
  - Everyone subject to the law
  - Human rights governed by common law
- Separation of powers

### **How does administrative law safeguard the rights and interests of people?**

- Review of decision making
  - Judicial review
  - Merits review
  - Ombudsman
  - Anti-discrimination or human rights commissioners
  - Internal review
  - FOI
  - Reasons
- Protection of information
  - Whistle-blower such as *IBAC Act 2011* (Vic) and *Public Interest Disclosure Act 2013* (Cth)
  - IBAC - Independent Broad Based Anti-Corruption Commission (Victoria)
  - Privacy
  - FOI
- Public accountability
  - Political
  - Financial
    - *Public Accounts and Audit Committee Act 1951* (Cth)
  - Administrative Law Remedies
  - Ethics and Integrity of Government Employees
    - *Public Governance, Performance and Accountability Act 2013* (Cth)
    - Codes of Practice for Public Sector Bodies/Directors under the *Public Administration Act 2004* (Vic)
- Holding decision makers accountable for their decisions
- Administrative law is all about public accountability

**Conclusion**

- Administrative law is a body of law which was essentially developed to ensure responsible government

Administrative law aims to promote greater government accountability and transparency