

JURD7160: Administrative Law

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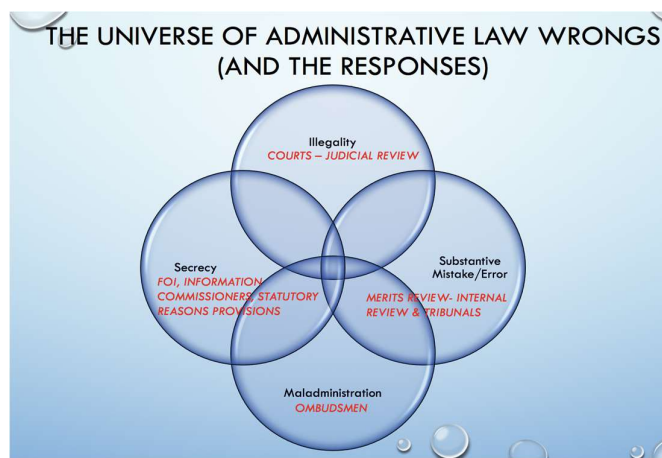
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1.1 Introduction: The Big Picture

WHY IS ADMIN LAW IMPORTANT?

- **Ubiquity of government administration**
- **5 areas of government administration that admin law can challenge:**
 - Includes: Taxation, Immigration (restrict what decisions people can appeal and take to the judiciary, there are constitutional safeguards), Medicare, Centrelink, public transport, development approvals (eg. buildings), Infrastructure (Westconnex), RMS (being refused a license); Land and Environment Court
 - Excludes: Education (but not university fee structure determined by the Legislature can't be challenged by admin law),
 - NOTE: When decisions affect everyone equally, they may be Legislative decisions and cannot be challenged by admin law. But if the decision affects 'me,' then it can be challenged by admin law.
- **Admin law and the separation of powers:**
 - Executive - challenging the decisions made by the Executive, including the Ministers, Departments (bureaucrats) – but who's decisions can we challenge? Who is part of the Executive?
 - Judiciary - judicial review
 - Legislature – we can't challenge decisions made by the Legislature because of parliamentary sovereignty, through democratic process of election through which citizens give parliamentary power.
- **Constitutional law**
 - Greens members stepped down – because they had dual citizenship
 - Elections – debate raised over the weekend for 4 year terms, currently governments stay between 2-3 years. This would involve a change to the Constitution.

THE ACCOUNTABILITY UNIVERSE



Ways to Hold the Government to Account

Individual (admin law)	Public (not admin law)
<ul style="list-style-type: none"> • Judicial Review • Merits Review <ul style="list-style-type: none"> ○ Administrative Appeals Tribunal (AAT) ○ NSW Civil and Administrative Tribunal (NCAT); QCAT, VCAT ○ Tribunals statutorily created, government decides what can / can't be reviewed ○ Can considered the 'totality' of a decision – exceptionally powerful • Ombudsman • Media • Freedom of information Act (FOI) 	<ul style="list-style-type: none"> • Elections • Responsible government / Parliament <ul style="list-style-type: none"> ○ Opposition • Regulators <ul style="list-style-type: none"> ○ ACCC ○ ASIC ○ ICAC • Auditor-General <ul style="list-style-type: none"> ○ Checks how money is spent and why • Inquiries and commissions

THINGS THAT CAN GO WRONG AND RESPONSES

- Illegality – did/did not consider relevant considerations; **judicial review**
- Substantive mistake / error – mistake of fact can be corrected through **merits review; internal review and tribunals**
- Maladministration – errors in judgments, inaccuracies in government decision making, eg. Centrelink's robo-debt; **ombudsman (bigger picture)**
- Secrecy – **FOI, information commissioners, statutory reasons provisions.**

STATUTORY INTERPRETATION AND JUDICIAL REVIEW

- Text = central
- Meaning of the text may require consideration of its context – general policy and purpose, mischief seeking to remedy
- Purposive approach

1.2 The Broad Context of Admin law

Objectives

- Understand the historical evolution of Australian administrative law.
- Understand how the ideas of rule of law, parliamentary supremacy and separation of powers underpin and shape administrative law.
- At an introductory level, understand the relationship between administrative law and the Constitution.
- Identify the main elements of the contemporary Australian administrative law system.
- Understand some of the modern challenges to administrative law, such as privatisation/contracting out and scale of decision making.

Assignment – News Article examples

- **NSW Murray Darling Basin** – environmental law, water usage in the Murray Darling basin, no admin law issues have been raised yet. Water is allocated by a notional government agency. It can potentially be challenged in an admin law context.
- **NSW Council amalgamations** – NSW govt abandoned forced council amalgamations
- **Sirius building** – Brutalist architecture was not common in Sydney and the building might need Heritage Listing. Submitted to the Heritage Council to consider whether to list it, which unanimously agreed. Minister had an overriding decision to sell the land and not follow the Heritage Council's recommendation. *"Save our Sirius"* campaign challenged the decision in the Land and Environment Court in NSW. On Tues, Court held there was an error of law. Judge decided on two issues: (1) Minister fell into error by misdirecting himself as to the words in the Act, "would cause undue financial hardship to the owner." (2) Minister failed to make a prelim determination as to whether the Sirius was of heritage significance. Thus, the Minister fell into an error of law. Therefore, the decision was invalid. The new Minister has 14 days to reconsider the decision, following the instructions of the judge or appeal to the Supreme Court.
 - "Save our Sirius" referred the matter to the Environmental Defender's Office.
 - In raising the challenge, the applicants needed to raise enough money to afford a loss.
 - Challenge was funded by a crowdfunding campaign which raised \$50,000.
- **Lawn Bowls Club – Stonnington (VIC)** – Council identified and recommended three spots to be cleared to build a new netball and basketball court complex, including the Chadstone Bowls Club. There were 400,000 shares in the media. It has been reported in the news on Channel 9, Channel 7 and the ABC.

CORE BACKGROUND CONCEPTS

- **Rule of law** – equality before the law. Even the Government, Ministers, public servants must be held accountable.
- **Parliamentary sovereignty** – The Legislature (parliament) is sovereign and supreme. Parliament makes legislation. Parliament has a direct line of responsibility as they are elected by the people. The Ministers in the Executive are not elected directly by the People, they are elected by the Party.
 - **Legislation vs. regulation** – legislations set out the law whereas regulations must be consistent with the Act. Regulations are drafted and put before Parliament for a set number of days but is not passed in the same way as legislation.
 - Constitutionality can be challenged in the High Court
 - **Statutory interpretation** - Principle of legality – if Parliament wants to take certain fundamental rights away, then it has to do so expressly and clearly. Otherwise, the Courts will be very careful in their interpretation. More related to Constitutional Law. Sometimes related to Admin law.
 - **Right to procedural fairness** -
- **Separation of Powers** – Decisions of the Executive can be challenged on legality by the Judiciary. Only legal errors can be challenged in judicial review.
 - Executive – Ministers, government departments, public servants.
 - Legislature and Executive are not completely separate.
 - Legislature provides legislation which determines what the Government has to do when it makes decisions. There are some powers of the Executive that can be exercised without legislation (not the focus of this course)
- Reasonableness
- Credibility
- Factors that must be taken into account
- Relevance

- Admin law relates to decisions that are controlled by statute, which drives what is lawful.

CLASS EXERCISE – HAMIDA

- Decision by an Officer of the Department of the Immigration and border Protection (DIBP) for a refugee visa.
- Commonwealth decision - This is a decision of the Commonwealth Government department. Therefore, can be challenged in admin law.
- Hamida's options
 - Internal review** – department has high volume of decision making and has a formal process of internal review. No cost.
 - Merits review** – Administrative Appeals Tribunal (AAT) super tribunal for the Commonwealth. NB: state decisions – NCAT. There is no right to appeal to the Merits Tribunal. The AAT Act sets out that a person can seek appeal in the AAT.
 - Substantive merits based (no error of law)
 - NB: Citizenship Act – Minister Dutton is attempting to remove the right to challenge at the AAT.
 - Judicial review**
 - Courts prefer individual to exhaust all other options for dispute resolution, such as the AAT, before reviewing cases. Courts may take cases straight away but are likely to question why merits review haven't been sought first.
 - Federal Court – use first, gives person an appeal right
 - High Court – constitutional reasons, special leave required, likely to ask
 - Question of law
 - Grounds of procedural fairness – whether the decision maker had the most up to date information when the decision was made.
 - Most costly – but usually taken up by Pro Bono lawyers.
 - Public / media – cost of privacy
 - Write to the Minister directly – if decision made by an Officer. No cost.
 - Ombudsman – not going to help with individual situations.

Datafin Case

This case considered whether the historic supervisory jurisdiction of the Queen's courts extends to the Panel discharging such functions, including some which are quasi-judicial in their nature, as part of such system.

<u><i>R v Panel on Take-overs and Mergers, Ex parte Datafin Plc [1987] QB 815 CoA (UK)</i></u>	
Facts	<ul style="list-style-type: none"> Takeovers Panel – oversees and regulates the UK financial market. An unincorporated association without legal personality and has 12 members appointed by the various banking, investment trust, insurance, stock exchange and chartered accountants associations etc. A self-regulating body – ie. a system whereby a group acting in concert to use collective power to enforce compliance with a code of conduct they devised. A remarkable body - the Panel lacks any legal authority, but exercises immense power <i>de facto</i> by devising, investing and reporting on alleged breaches of the code.
Issue	Three principle issues: <ol style="list-style-type: none"> Whether the decisions of the panel are susceptible to judicial review? If so, how in principle is that jurisdiction to be exercised given the nature of the panel's activities and the fact that it is an essential part of the machinery of a market? If there is jurisdiction available, which relief should be granted?
Held	<ul style="list-style-type: none"> The Panel on Takeovers and Mergers: <ul style="list-style-type: none"> Oversees and regulates the UK financial market; performs functions without visible means of legal support. Unincorporated association without legal personality Has no statutory, prerogative or common law powers – not in contractual relationship w/ financial market or those who deal in it. Jurisdictional issue A truly remarkable body – the Panel performs its self-regulating functions without visible means of legal support; the fact that it lacks a direct statutory base is a complete anomaly – due to 'happenstance' but would have otherwise operated under direct authority of statute law in the public domain. HCA's jurisdiction – to supervise exercise of their jurisdiction by inferior tribunals has not been dependant on the source of the tribunal's authority to decide issues except in private contracts – <i>R v Criminal Injuries Compensation Board, Ex Parte Lain [1967] 2 Q 864</i>.

	<ul style="list-style-type: none"> • Orders of certiorari extends to new kinds of tribunals created and to all persons who under authority of the Government have exercised quasi-judicial functions. • Therefore, if new tribunals are established by acts of government, the supervisory jurisdiction of the HCA extends to them if they possess the essential characteristics upon which the subjection of inferior tribunals to the supervisory control of the HCA is based. • Practical issue <ul style="list-style-type: none"> ○ A panel may subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction. ○ The court has an ultimate discretion whether to set them aside and may refuse to do so in public interest, despite that it holds and declares the decision to have been made ultra vires: <i>R v Monopolies and Mergers Commission, Ex parte Argyll Group Plc</i> [1986] 1 WLR 673 ○ The panel, as controlling body for the self-regulation of take-overs and mergers, combines the functions of <u>legislators, court interpreting the panel's legislation, consultant, and court investigating and imposing penalties</u> in respect of alleged breaches of the code. ○ The nature of the panel is special. Its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court. ○ The relationship between the panel and the court is historic rather contemporaneous. • Remedy <ul style="list-style-type: none"> ○ In the context of judicial review, it must be remembered that it is not even possible to apply for relief until leave has been obtained. • Difference between Judicial Review and an Appeal: application for judicial review is <u>not</u> an appeal. <ul style="list-style-type: none"> ○ Appeal – evaluates the evidence and finds the facts ○ Judicial Review – Court reviews decision of the Panel and consider whether there has been: <ul style="list-style-type: none"> ▪ Illegality – ie. whether the panel has misdirected itself in law. ▪ Irrationality – ie. whether the panel's decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ▪ Procedural unfairness – departure by the panel from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice. • Application rejected
Ratio	<ul style="list-style-type: none"> • Scope: Judicial Review does apply to regulation of non-state decision makers exercising public functions – admin law extends to the Panel

PROBLEM SOLVING SUMMARY

Consider each of these elements in legal problem solving:

1. **Scope / Jurisdiction**
 - a. State or Commonwealth?
 - b. Jurisdiction – does the court has the power to review the decision of the Executive?
 - c. Justiciability – whether the *matter* can be brought to court; some policy questions not appropriate for judicial review.
 - d. Legality vs. Merit –
 - i. Legality – review by Courts on *legal errors*.
 - ii. Merits – review by tribunal
2. **Standing**
3. **Grounds of Review (legal grounds)**
 - a. Procedural fairness
 - b. Relevant / irrelevant
 - c. Inflex Application of Policy
 - d. Unreasonableness
4. **Remedies**
 - a. Prohibition
 - b. Mandamus
 - c. Injunction
 - d. Certiorari