Administrative Law Notes

Unit 200013

These notes were prepared using the following texts:

Roger Douglas and Michael Head, Douglas and Jones's Administrative Law (Federation Press, 7th ed, 2014)

Sarah Anne Withnall, Administrative Law (Lexis Nexis, 1st ed, 2010)

Introduction

What is administrative law?

Scope? Administrative law involves **review** of the exercise of **public power** by **public bodies**.

Public bodies means the Executive branch of government (which implements the elected government's policy). Public bodies include:

- Government departments;
- Statutory authorities;
- Ministers; and
- Cabinet.

So administrative law includes review of:

- Social Security decisions;
- Immigration & deportation decisions;
- Taxation;
- Environment law;
- Grants & funding decisions; and
- Dismissal of public officers.

The Executive exercises certain powers:

- Statutory powers (powers conferred by statute)
  - In admin law, we are concerned with the exercise of a power already lawfully conferred on the government, rather than the validity of that conferral → different from constitutional law.
- Prerogative powers (powers once exclusive to the Sovereign, eg. powers to sign treaties & declare war/peace, prerogative of mercy)
- Common law powers (eg. contractual powers, power to own property)

Statutory & prerogative powers are **public powers** → are within the scope of admin law.

The **role** of admin law is:

- To ensure that the Executive does not go beyond the scope of its powers;
- To ensure that policy is implemented fairly, rationally and impartially;
- To encourage openness in government; and
- To encourage public participation in policy-making.

Framework

Public law – Private law

- **Private law** is characterised as a dispute between 2 private citizens (although many private matters involve the government as a party, eg. contractual dispute).
- **Public law** is characterised by:
  - the government being a party to a dispute; and

- grounds of review & remedies which are not generally available against "private" bodies (ie. it is concerned with the control of powers which are inherently governmental or public in nature, in the sense that *only* government possesses such powers).

Regulation of the executive

- What is it?
- Why do we need to make it accountable?
- How can we do this?

Accountability

There are various forms of Parliamentary review:

- Presentation of Annual Reports by Departments & Statutory Authorities;
- Investigations by Parliamentary Committees;
- Queries by MPs;
- Questions asked in Parliament;
- Reports by AGs and Ombudsmen.

In theory, Ministers are responsible to Parliament. But in practice, it is impossible for Ministers to adequately supervise all that is done by bodies they are responsible for.

Review by Executive itself

3 main types of Executive (administrative) review:

- Internal review (conducted by individual Departments);
- External merits review (conducted by an independent Panel/Tribunal);
  - these bodies are set up by statute, and usually have power (conferred by statute) to undertake full merits review.
  - tribunals are subject to further review/appeal to the Courts on questions of law.
- Review by Ombudsmen.
  - unlike tribunals, Ombudsmen do not have power to change a decision; they only recommend.

Funding

- Dependent on the political executive
- Parliament

Ministerial responsibility

- Personal attributes of Minister effect influence
- Bureaucratic culture
- Ministers responsibility to Parliament
- Responsible government

Constitutional concepts

The Australian system of bureaucratic supervision is structured both by the Constitutional framework and by a variety of "doctrines" which influence the way in which relevant Australians think about the process of supervision.

Rule of Law

Dicey (1885) - opposed to the French system of regulating administrative power

Perhaps overestimated the power of private law to regulate bureaucratic power

Dicey's theory despite criticism has had a significant impact on the development of Administrative law in England /Australia

Dicey: The law of the Constitution

No man can be punished or lawfully made to suffer except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

No man is above the law, but that here every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Individual rights are protected by the courts: the general principles of the constitution are with us the result of judicial decisions determining the rights of private person in particular cases brought before the

Responsible government

- Westminister system.
- Federal, State and Local Government.
- Australian Federal Government: hybrid of Westminister system and US Federal System.
- Governments and Ministers are responsible to Parliament.

Separation of Powers

- Legislative, executive and judicial powers.
- Regulate power and that each branch of government imposes checks and balances on the other.
- Difficult to reconcile with responsible government : overlap in personnel between the executive and the legislature.
- Difficulties: Difficult to define and separate the powers themselves. Separation of institutions easier than the separation of 'powers'. Mistrust of government implicit in the 'separation' of powers doctrine, doesn't sit well with the assumption that each branch will respect the right of the other

State level	Commonwealth level
▸ Separation of powers exists by convention. ▸ NSW Constitution provides for entrenched protection of judges, unique as to the extent it does so compared to other States.	▸ High Court drawn a sharp distinction between courts and tribunals. ▸ Judicial and excutive powers constitionally cannot be conferred on the same body. ▸ Tribunals cannot make final and enforceable decisions on questions of law

Procedural Fairness-General Principal

OVERVIEW

Procedural fairness consists of two basic rules-the hearing rule and the bias rule. The hearing rule provides that an applicant must be given a fair hearing before a decision is made that affects them. The bias rule provides that the decision maker must not be biased.

THE NO EVIDENCE RULE

Evidence provides that a decision maker must make a decision based on actual evidence as opposed to making it on the basis of a whim or speculation. The concept was recognised by Deane J *Minister for a Immigration and Ethnic Affairs v Pochi* (1980) who said a Tribunal was required to base a decision to deport the applicant on '… some rationally probative evidence and not merely raised before it as a matter of suspicion or speculation…'. In other words, the decision on facts those are proven and relevant to the issue to be determined.

***MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS v DHILLON* (1990)**

A person affected by a decision is entitled to have the case determined by reference to found facts, not suspicions or conflicts of evidence. Only if this is done is it possible for the affected person to understand precisely why the decision went as it did. Only if this is done is it possible for a judicial reviewer to determine whether there was evidence before the decision maker to support the finding.

A COMMON LAW CREATURE

In Australia, there is a common law presumption that decision makers must observe the rules of procedural fairness unless the statute under which the decision is being made states otherwise: Mason J in *Kioa v West* (1985). There is a common law to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. What is appropriate on the terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision maker is acting. However, they must then look carefully at the wording of the statute under which the decision was made to see whether procedural fairness is expressly excluded or whether its parameters are defined by the statute itself.

***RIVERSIDE NURSING CARE PTY LTD v BISHOP* (2000)**

The rules of natural justice were expressly excluded by s 67.1(2) of the Act.

STATUTORY PROVISIONS

The 'no evidence rule' is codified in s 5(1)(h) of the ADJRA which provides the following ground of review: 'that there was no evidence or other material to justify the making of the decision'.

BROADENING OF THE SCOPE-A LEGITIMATE EXPECTATION OF PROCEDURAL FAIRNESS

A person who will be adversely affected by a decision is deemed to have a 'legitimate expectation' that they will be afforded procedural fairness by the decision maker. An applicant may have 'legitimate expectation' that they will be given the opportunity to respond to allegations made against them before a renewal is denied, as in the case of *FAI Insurances Ltd v Winneke* (below).

***Kioa v West* (1985)**

Kioa's were denied natural justice because they were not given the opportunity to respond to the prejudicial statements. The court said that Kioa's had a legitimate expectation that they would not be deported until they had the opportunity of responding. Mason J stated at 582 that when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. The concept of 'legitimate expectation' extends to expectations that go beyond enforceable legal rights, provided that

they are reasonably based. The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision. Alternately the expectation may arise from the very nature of the application or from the existence of a regular practice which the person affected can reasonably expect to continue. The expectation may be that a right, interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case. Minister for Immigration and Ethnic Affairs v Teoh suggests that the concept of a 'legitimate expectation' has expanded to such an extent that administrators would be wise to afford in every circumstance were it is not a expressly excluded by statute.

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS v TEOH (1995)

Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Conventions. That positive statement adequate foundation for a legitimate expectation, absence statutory or executive indications to the contrary, those administrative decisions-makers will act in conformity with the Conventions. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it. If a decision-maker proposes to make a decision inconsistent with legitimate expectations, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

Re Minister for Immigration And Multicultural And Indigenous Affairs; Ex Parte Lam (2003)

Legitimate expectation would be better if it were applied only in cases in which there is an actual expectation, or that at the very least a reasonable inference is available that had a party turned his or her mind consciously to the matter in circumstances only in which that person was likely to have done so, he or she would reasonably have believed an expected that certain procedures would be followed. However as can be seen from the case of Lam, the person affected by the decision must suffer some detriment or unfairness in order for a claim of procedural fairness to be substantiated.

Procedural Fairness: Hearing and Bias rule

The Hearing Rule

The hearing rule provides that if an applicant is going to be detrimentally affected by a decision, they must be given the opportunity of a hearing before the decision is made. The hearing rule provides that if the applicant's rights, interests or legitimate expectations will be affected by a decision, they must be:

- informed that the decision is going to be made;
- given a summary of the case against them; and

- given the opportunity of making submissions in order to answer the case against them.

Informed that the decision is going to be made

In the case of *Heately v Tasmanian Racing and Gaming Commission* (1977) it was held that their had been a denial of natural justice because Heatley was given a 'warning off' notice to exclude him from racecourse indefinitely without being given any prior notice that the decision may be made.

Example of applicant's right to know the case against them:

In *Leghaei v Director- General of Security*[2005]:

- Applicant sough judicial review of an adverse security assessment.
- Held the Director-General owed a duty of PF but this did not mean that he had to reveal confidential information or even the gist of such information.
- " the potential prejudice to the interests of national security involved in such disclosure appears to be such that the content of procedural fairness is reduced, in practical terms, to nothingness'.

Veal v Minister for Immigration and Multicultural and Indigenous Affairs (2005):

- The RRT had received a letter, which if true would be adverse to the appellants application for a protection visa. The RRT did not provide the applicants an opportunity to respond to the allegation s made in the letter.
- 'to give the appellant a copy of the letter or tell him who wrote it would give no significance to the public interest in the proper administration of the Act which,....., required that those entitled to a visa be granted on and those not entitled be refused."
- That public interest and PF could be accommodated here by the Tribunal 'telling the appellant what was the substance of the allegations made in the letter and asking him to respond to those allegations."
- As the identity of the person making the allegations need not be disclosed, the 'appellant's response to the allegations would then have to be considered by the Tribunal in light of the fact that the credibility of the person who made the allegations could not be tested'. But this procedure 'would be fair' and accommodate also the issue of 'confidentiality'.

Given a summary of the case against them

In order the respond to adverse allegations an applicant must be given a summary of the case against them. This requirement is fundamental because, being given a summary of the case will allow the applicant to put their case forward a final decision is made. The general rule is that a person must be informed of the general scope and purpose of the hearing (*Dainford Ltd v Independent Commission Against Corruption* (1990).

In the case of *Bond v Australian Broadcasting Tribunal (No 2)* (1988) it was stated that a more general inquiry may require only a basic outline of the issues to be considered to be provided to the applicant. However if specific allegations are made against the applicant, they have the right to be informed of them so they can respond to each specific allegation.

In *Bond*, the inquisitorial nature of the inquiry made it unreasonable to require the Tribunal to given specific details of the issues that it would be considering, when these details would not emerge until the proceedings progressed and witnesses gave evidence.

However, in *Ong's* (1989) case specific allegations were made against Dr Ong concerning his competence, so it was reasonable for the decision maker to be required to given him notice of those allegations so he could respond to them.

It is evident from *Bond* and *Ong's* case that the degree to which the decision maker must give the applicant notice of the allegations made against them is one of proportionality depending on the facts and circumstances of each case.

In contrast the case of *Commissioner for ACT Revenue v Alphaone* (1994) where it would have been unreasonable to expect the decision maker to give further notice of the ground that was ultimately relied upon to deny the license because it had already been brought to the attention of the applicant.

Given the opportunity of making submissions in order to answer the case against them.

The applicant must be permitted to respond to allegations, which may result in a decision being made that it detrimental to them. In *FAI Insurances Ltd v Winneke* (1982) Wilson J said that fairness requires the person being given the opportunity to respond to the case against them. Similarly in *Kioa v Minister for Immigration and Ethnic Affairs* (1985) Mason J said that 'it is a fundamental rule of the common law doctrine of natural justice....that generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and be given an opportunity of replying to it'.

These cases are examples where a denial of procedural fairness on the basis that the applicant was denied the opportunity to make submissions in response to adverse allegations made against them.

The specifics of the hearing

If a statute is silent about the form and extent of the hearing case is helpful in examining case law to ascertain how the hearing rule has been applied in circumstances similar to the applicant's circumstances in a particular case.

Oral or written submissions

If the rules of procedural fairness apply, the applicant must be given the opportunity to make submissions in response to any adverse allegations made against them. The question is whether these submissions should be written or oral.

In *Barrat v Howard (No 2)* [1999] it was stated that a written submission may be all the applicant is entitled to for the duty to be complied with.

In *Chen v Minister For Immigration And Ethnic Affairs* (1994) it was held that it is not necessary to afford the applicants an oral hearing in every case. However, it might be necessary in some cases if there were issues regarding an applicant's credibility or if fairness in the circumstances of a particular case required it. The court said that the rules of natural justice do not mandate an oral interview by the decision-maker for every applicant however where a real issue of credibility is involved or it is otherwise apparent that an applicant being limited to submissions or responses to the decision-maker in writing, it may be that observance of the fundamental requirements of natural justice can only be satisfied by a determination made upon an oral hearing.

In *White v Ryde Municipal Council* (1977) it was decided that there was no denial of natural justice. He was able to put his case forward before the decision became enforceable. In addition, White was not disadvantaged by not having legal representation present at the hearing because there were no legal issues to be argue and there were no witnesses to cross-examine. In fact, the court commented that written submissions would have sufficed to satisfy the natural rules of justice because it was only 'factual matters'.

Ability to cross-examine witnesses

If the applicant is afforded an oral hearing, for example, before a committee or tribunal the question arises as to whether the applicant will be entitled to cross-examine any witnesses. There is generally no requirement to cross-examine witnesses in order for the hearing rule to be satisfied as in the case of *O'Rourke v Miller*.

The decision in *Hall v University of New South Wales* [2003] was that were it is apparent that the Inquiry could not require cross-examination then cross-examination will be unnecessary.

Legal and other representation

Whether the rules of procedural fairness require the applicant to be afforded legal or other representation will be determined on a case-by-case basis. There has been a tendency for courts to let the decision maker determine whether the applicant should be allowed legal representation or not.

In *Krstic v Australian Telecommunications Commission* (1988) it was held that whether representation was required depends upon the ability of the person concerned to conduct his or her own case. In *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) the court held that the applicant was seriously disadvantaged by this refusal, which amounted to a significant derogation from the rules of procedural fairness.

In Cains v Jenkins (1979) the court held that there was no denial of procedural