

## ADMINISTRATIVE LAW NOTES

### Assessment

Exam (60%)

Essay (30%) – due end of wk8

- **Take a position and argue for it throughout entirety of paper**
- **Tell from introduction what you think (whether you agree or disagree)**
- **Not good argument to list everything in favour of agree and disagree and then say**
- **Dismiss counter arguments (why arguments on other side are not as good as your argument)**

Tute Participation (10%)

- Texts
  - Creyke, R, McMillan, J, Smyth M, *Control of Government Action: Text, Cases and Commentary*, 4<sup>th</sup> ed: LexisNexis 2015 (CM&S)

NB also:

- Lane, W. B. and Young, S. *Administrative Law in Australia*: Thomson Lawbook Co. 2007 (L&Y) (clearest)
- Aronson, M. et al. *Judicial Review of Administrative Action and Government Liability*, 6th edn: Thomson Lawbook Co. 2017 (Aronson and Groves)
- Pay attention to the context in which specific administrative law principles and rules are applied
  - Policy context
  - Statutory context
    - Stat interpretation resources: Michelle Sansom, *Statutory Interpretation*; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (on High Demand)
- Read the cases Ambelin, Alex and Richard tell you are important (marked with an asterisk and/or emphasised in lectures)
  - Be conscious of why you are reading the case

### TOPIC 1: AN INTRO TO ADMIN LAW AND JUDICIAL REVIEW (JR)

What is Administrative Law?

- “...*the body of principles and procedures by which the exercise of executive government power is controlled and supervised*” (Lane & Young, p 1)
- “...*with power comes responsibility and accountability*” (CM&S, p 3)

The nature of executive power  
(administers laws)

- *Committee on Ministers Pwrs, 1932 (UK)* (as adapted by C&M 3<sup>rd</sup> edition, see extract on LMS under Additional Resources):
  - *The legislative function involves the making of a new rule of general application*
  - *The executive function involves the application of a general rule to a particular case or situation [plus formulation of policy]*
  - *The judicial function presupposes that there is an existing dispute between two or more parties that is resolved by the presentation by the parties of their cases to an adjudicator....[and is] resolved by the adjudicator applying the preexisting law of the land*

- Or: Legislative makes the laws, judiciary interprets the laws and resolves disputes, executive administers (implements) the law
- BUT NOTE:
  - Starting point for understanding
  - No hard and fast distinction, can be difficult to distinguish between the three categories of pwr in practice

*“Defining administrative law is a topic on which few commentators can reach agreement, because it ultimately depends on what they want out of administrative law. We know what we want. As a minimum, we want a legal system which addresses the ideals of good government according to law. We take those ideals to include openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.”*

- Aronson and Groves, 5<sup>th</sup> edition, p1

### **Components of contemporary administrative law**

- The core components:
  - Judicial review (Admin)
  - Merits review (FPL)
  - Freedom of information (FPL)
  - Ombudsman review (FPL)
- other measures of public accountability

*“We have no illusions that judicial review is administrative law’s most important component...Judicial review requires some level of accountability to those prepared to sue for it, but the ombudsman, FOI, consultative and parliamentary committees, and Auditors-General frequently prove more effective.”* Aronson and Groves, 5<sup>th</sup> ed, p 2.

### **Balancing of Purposes and Interests**

- Justice/accountability/consistency/participation
  - (justice: provision of accessible and effective justice for individuals, enhance openness and accountability, encourage public participation in gov)

BUT...

- Efficiency/affordability/other legitimate interests
  - Efficiency: Need to maintain administrative and fiscal efficiency
  - Affordability of public law dispute resolution

### **History of Admin Law**

- Origins in JR
- Changing nature of government
- Contemporary Aust framework emerged in 1970s
  - Committees: Kerr, Bland and Ellicott committees (see L&Y pp 8 – 9)
  - Federal reforms: *Administrative Appeals Tribunal Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Freedom of Information Act 1982* (Cth)
  - WA: *Parliamentary Commissioner Act 1971* (WA); *Freedom of Information Act 1992* (WA); *State Administrative Tribunal Act 2004* (WA).

### **Challenges for Admin Law**

- Privatization (gov sells off), corporatization (retain ownership but structure like corporation) and outsourcing (or contracting out) – start to remove it from reach of admin law
- Public? Private? None of the above?
- Private ombudsmen increasing

*“Should the body discharging the function or delivering the service be accountable? To whom? For what? And according to what standards? ...the answers to those questions can be as varied as the new arrangements themselves.” (CM&S, p 44)*

## JUDICIAL REVIEW

- What is judicial review?
  - *“Judicial review of executive action is the means by which courts determine whether or not administrative bodies and officials have properly respected the boundaries of the powers and functions formally assigned to them. In the broadest sense, this process is based on the notion that government holds power on behalf of its citizens and must therefore account for its exercise.” (L&Y, p 1)*
- The rule of law: applies to everyone, even gov
- Separation of powers: judiciary reviewing executive decisions
- Merits/law distinction: courts don’t want to consider merits, that is job of parliament – whether decision maker made decision according to law. JR: generally send decision back, whereas merits review will make a new decision.
- What kinds of decisions are reviewable?
  - Basic statutory powers
  - **Prerogative / high level powers:** don’t have statutory source, high level powers inherent in nature of government e.g. power to declare war, appoint ambassadors. Courts not keen to review prerogative powers.

### Prerogative / high level powers

#### *R v Toohy (1981);*

- Concerned high level statutory power (NT Administrator ie Governor)
- In course of review HC confirmed that it was prepared to review exercise of power by vice regal official
- Chip away at which high level decision makers were unreviewable

#### *Council of Civil Service Unions (1985);*

- Employment conditions re. union membership changed (4000 public servants)
- Done using prerogative power
- Prerogative decision making powers are not immune to JR
- While non statutory source of power didn’t exclude JR, but the public servants were spies and decision concerned national security matters so it was non justiciable

#### *MAHE v Peko Wallsend (1987) FFC*

- Exercise of prerogative power, decision by cabinet to nominate Kakadu national park for inclusion in world heritage list
- Peko challenged decision concerned that listing would affect future opportunity to mine
- Wilcox J: just because power is prerogative doesn’t mean it cannot be reviewed, however is there a feature of decision that makes JR inappropriate? In this case, the international relations dimension to this decision meant it shouldn’t be reviewed.

Historical reluctance to review these powers however now the source of power isn't a bar to prerogative powers being reviewed. There must be a special feature that makes decision unreviewable (e.g national security)

- **Quasi-public powers:**

*Datafin* (1987); English Approach

- Decision of panel on takeovers and mergers
- Hard to work out where power came from, panel not set up by gov, it didn't have a prerogative or statutory source of powers
- *Datafin* complained about breach of code, panel rejected complaint
- Held: panel was exercising public power and could be judicial review
- It was public because the panel operates irrespective of consent of parties, existence of the panel was part of way gov was regulation of the field, panel was recognised by statute in that it was supported and sustained by a periphery of statutory powers and penalties.
- Not just looking at source of power, looking at the nature of the power

*Neat Domestic Trading* (2003) Australian Approach

- FACTS
- Cth Wheat Marketing Act established a marketing scheme whereby it was an offence to export wheat without consent of wheat marketing authority (WMA). WMA was created by the statute.
- WMA couldn't give its consent unless Australian Wheat Board International (AWBI) had given its consent. AWBI is a company owned by wheatgrowers. Private body with significant role in exercise of public power.
- *Neat* challenged decision when it wasn't given consent
- HC said this was not reviewable, looked more to body exercising power than the nature of the power (cf *Datafin*)

### Systems of Judicial Review

- General law judicial review
  - Establishment of State Supreme Courts
  - Federal conduits:
    - High Court – Constitution s 75(v): original jurisdiction for JR
    - Federal Court – *Judiciary Act 1903* s 39B: JR jurisdiction
    - Note also the Federal Circuit Ct (formerly Fed Magistrate's Ct)
- Statutory judicial review
  - ADJR Act (**Cth**)
  - States: ACT, Qld, Tas

Let's take a closer look at Administrative Decisions Judicial Review

- Allows review of:
  - Decns [s 5, codification of CL grounds]
  - Conduct [s 6]
  - Failure to make a decn [s 7]
- Right to reasons s 13
- Simplified remedies [s 16]
- Note jurisdiction
- Advantages/disadvantages

- Codification of grounds
- Operation of ‘jurisdictional pre-requisites’
- Right to reasons
  - *Osmond* (1986)

#### **NB THERE IS NO ADJR LEGISLATION IN WA**

- **CANNOT USE ADJR ACT IN PROBLEM QU WITH WA DECISION MAKER RE WA LAW**
- **ADJR ACT ONLY APPLIES TO CTH LEGISLATION!!!!!!**
- **ADJR RUNS PARALLEL TO COMMON LAW, IT DOES NOT REPLACE IT**
- **ADJR Act has simplified remedies, and right to reasons**
- **Reasons why you may be unable to use ADJR Act**
- Jurisdictional Pre-requisites: General Law
  - State/Territory
  - Federal
    - HCA JR jurisdiction revisited
    - Fed Ct JR jurisdiction revisited
    - General law jurisdictional pre-reqs
- Jurisdictional Pre-requisites: ADJR
  - Introduction
  - ‘decision’
  - ‘administrative character’
  - ‘under an enactment’

#### Jurisdictional Pre-reqs – General Law

- General law – State/Terr
  - Limitations inherent in prerogative writs (to be dealt with when we get to remedies)
  - WA SCA s 16
  - No real prerequisites
- General law – Federal
  - Again, limitations inherent in prerogative writs (to be dealt with when we get to remedies)
  - PLUS: *Constitution* (HC); *Judiciary Act* (Fed Ct)

#### **Federal JR jurisdiction revisited – High Court**

- Section 71: judicial pwr of the Cth vested in HCA and such other cts as the Parl establishes
- Appellate jurisdiction [s 73] + original jurisdiction [s 75]

*Section 75(v)*

*‘In all matters:*

...

*(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;*

*the High Court shall have original jurisdiction. ‘*

....

## **ADMINISTRATIVE LAW SUMMARY NOTES**

**NO ADJR LEGISLATION IN WA**

**CANNOT USE ADJR ACT IN PROBLEM QU WITH WA DECISION MAKER RE  
WA LAW**

## **ADJR ACT ONLY APPLIES TO CTH LEGISLATION!!!!!!**

## **ADJR RUNS PARALLEL TO COMMON LAW, IT DOES NOT REPLACE IT**

### TOPIC 1: AN INTRO TO ADMIN LAW AND JUDICIAL REVIEW (JR)

#### What is Administrative Law?

- “...*the body of principles and procedures by which the exercise of executive government power is controlled and supervised*” (Lane & Young, p 1)

#### Balancing of Purposes and Interests

- Justice/accountability/consistency/participation
  - (justice: provision of accessible and effective justice for individuals, enhance openness and accountability, encourage public participation in gov)

BUT...

- Efficiency/affordability/other legitimate interests
  - Efficiency: Need to maintain administrative and fiscal efficiency
  - Affordability of public law dispute resolution

Fair process is of the essence of administrative justice while recognising that the legal standards must be modified to take account of executive priorities and pressures.

Standards of admin justice:

- Lawfulness, fairness, rationality and intelligibility (French CJ)
- Accessibility, affordability, timeliness

### **JUDICIAL REVIEW**

*“Judicial review of executive action is the means by which courts determine whether or not administrative bodies and officials have properly respected the boundaries of the powers and functions formally assigned to them. In the broadest sense, this process is based on the notion that government holds power on behalf of its citizens and must therefore account for its exercise.”*

**JR:** Assume that legislation itself is valid, how the decision maker has used legislation to make a decision. Ensures that executive action is exercised within the applicable legal limits. Look at legislation, is there a checklist of factors they must consider.

generally send decision back, whereas merits review will make a new decision.

#### **Systems of Judicial Review**

- General law judicial review
  - Establishment of State Supreme Courts
  - Federal conduits:
    - High Court – Constitution s 75(v): original jurisdiction for JR
    - Federal Court – *Judiciary Act 1903* s 39B: JR jurisdiction
    - Note also the Federal Circuit Ct (formerly Fed Magistrate’s Ct)
- Statutory judicial review
  - ADJR Act (**Cth**)

## What kinds of decisions are reviewable?

- Basic statutory powers
- **Prerogative / high level powers:** don't have statutory source, high level powers inherent in nature of government e.g. power to declare war. Courts not keen to review prerogative powers.

## Prerogative / high level powers

### *MAHE v Peko Wallsend (1987) FFC*

- Exercise of prerogative power, decision by cabinet to nominate Kakadu national park for inclusion in world heritage list. Peko challenged decision concerned that listing would affect future opportunity to mine
- Wilcox J: just because power is prerogative doesn't mean it cannot be reviewed, however is there a feature of decision that makes JR inappropriate? In this case, the international relations dimension to this decision meant it shouldn't be reviewed.