

70617 Administrative Law

Topic 1: Introduction to Administrative law

- Administrative law regulates the power of the executive branch of government (the power to administer and execute the laws of parliament and enforce judgments of the judiciary). The executive is responsible for policing the state and protecting the state (military power). It puts the laws into action.
- As the executive has such a capacity to affect individuals, it also comes with a rigorous scheme of accountability – administrative law mechanisms offer individuals affected by exercises of government power rights to review.
- Some administrative law mechanisms include:
 - The Ombudsman;
 - Royal Commissions;
 - Freedom of information regimes;
 - Merits review; and
 - Judicial review
- While the judiciary and the legislature conduct their functions publicly, the executive does so in private – they used to merely account to Parliament and judiciary for their actions, however in the second half of the 20th Century there were concerns about the ability of the legislature and judiciary to account for the executive's actions – so a new system of accountability was introduced in around the 1950s.

Administrative Law and the Constitution

- As there are two levels of government in Australia (Cth and State), individuals are subject to two legal regimes; so administrative law must exist at both levels
- Constitutional powers and constraints of the executive, parliament and judiciary have important repercussions in administrative law

Administrative Law and Statutory Interpretation

- As the majority of the executive's powers are sourced in statute, it is important that these statutes are properly interpreted. If the executive does not implement the laws made by parliament (by correctly interpreting them), as required by the separation of powers, this would mean that the executive is in essence making its own laws

Rationales for Administrative Law

- Commentators and jurists have argued that administrative law exists to protect individual rights, promote efficient and effective administration, promote integrity in governmental decision-making, increase participation in government and to promote accountability
- It is thought that the overarching principle informing administrative law is accountability
 - Accountability only exists where responsibility exists
 - It requires that action is open to inspection and challenge
 - Administrative law provides a set of legal principles that govern who can be called to account and by whom, by what criteria their conduct is accountable, and how they can be called to account through various administrative law mechanisms
 - Accountability in administrative law captures the idea of a formal, legal responsibility to both the legislature and the courts for the exercise of public power
- Four types of accountability;
 1. Political accountability (e.g. ministerial accountability to parliament);
 2. Public accountability (e.g. democratic nature of government);

3. Legal accountability to the courts; and
4. Accountability of public bodies to non-political independent bodies (e.g. provision of information to ombudsmen or auditors)

Why should governments be accountable?

Democracy

- We live in a representative democracy and electors have a right to hold their representatives to account
- Australia's representative democracy means that people elect representatives to make laws and decisions on their behalf
- Direct accountability – achieved through regular electoral processes
- Indirect accountability – government is required to take into account a range of opinions

The rule of law

- Dicey's three features of the rule of law:
 1. Supremacy of law over discretionary power to promote certainty and predictability in government action;
 2. Legal equality – legal restraints apply to citizens and government alike;
 3. Importance of the role of courts in protecting the individual against the government – role of common law in protecting rights
- Raz – legal limits must be capable of guiding behaviour of individuals and government, and should be clear, public, prospective and consistent

The separation of powers

- The idea of the separation of powers is that governments be accountable for the exercise of public powers
- The availability of a separate judiciary to review executive actions is a fundamental part of the rule of law and a fundamental protection provided to individuals in the Constitution (*Street v Queensland Bar Association*; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*)

Individual rights

- 'The primary purpose of administrative law is ... to keep the power of government within their legal bounds, so as to protect the citizen against their abuse' – Wade and Forsyth
- Where government exists to protect and further the interests and liberties of the individual, accountability of the exercise of government power to the individual is paramount
- Government power must not be exercised in a way that unduly infringes upon the rights and liberties of individuals in the community
- Individual rights facilitate rights for individual redress against government action

Values of Administrative Law

Legality

- Accountability for legality of government action is fundamental – exercise of government power within legal boundaries is paramount to the rule of law, individual autonomy and the separation of powers

Fairness

- It is important that government action is fair, considering the power imbalance between individuals and the government
- Impartiality in government action is fundamental to the rule of law

Rationality

- The government must be consistent and non-arbitrary in exercising their functions
- Rationality ensures individuals are able to predict the exercise of government power

Integrity

- The existence of executive power with fidelity to its legal limits on power, as well as to its purpose and fundamental public law values (Spigelman)
- Integrity ensures that the exercise of government power does not depart from the purpose for which it was entrusted to government

Efficiency and effectiveness

Administrative law mechanisms

- ‘It should be apparent to the world who did everything, and through whose default anything was left undone’ – John Stuart Mill
- Mechanisms to achieve transparency of government action:
 - Information disclosure regimes (including freedom of information schemes and regimes requiring the disclosure of reasons)
 - Mechanisms investigating the actions and decisions of government (Parliament, Ombudsman, royal commissions)

Organisation and Structure of Government

The Crown and the executive

- The Crown = ‘the body politic’ (*Sue v Hill*)
 - It is a tripartite institution – comprised of the executive, legislature and judiciary, each of which have separate functions (legislature makes laws, executive executes the laws, judiciary declares the laws)

The executive and the judiciary

- There is an implied separation of powers in the Constitution – s 71 vests judicial power of the Commonwealth in the courts and ss 1 and 61 vest the legislative and executive powers of Commonwealth in the parliament and the Queen respectively
- Test from *R v Kirby; Ex parte Boilermakers’ Society of Australia*:
 1. The judicial power of the Commonwealth must only be exercised by those courts set out in Ch III of the Constitution (ss 71 and 77)
 2. Commonwealth Ch III courts can only exercise Commonwealth judicial power (subject to exceptions including persona designata)
- At the state level, there is no formal separation of powers, so state executives may exercise judicial power (*Kable v DPP*)
 - However, states must retain their institutional integrity (independence and impartiality) (*Kable v DPP*) – thus, state parliaments cannot vest in state courts any powers that would be incompatible with their exercise of federal judicial power

The executive and parliament

- The constitutional doctrine of responsible government necessitates a degree of overlap between the executive and parliament – this allows parliament to hold the executive accountable on behalf of the Australian people
- There is an accepted degree of overlap between legislative and executive powers – legislative powers can be delegated by parliament to the executive

Executive entities

The Queen and her representatives

- The Queen is the head of the executive branch at the Commonwealth and State levels – at the Commonwealth level she is represented by the Governor-General, and in the states by the governor
- The role of the Queen and her representatives is to implement decisions based on advice from the Executive Council
- Thus, the Queen's representative can play an important role in checking executive power – they have 'the right to be consulted, the right to encourage, the right to warn' (Bagehot), allowing them to monitor the legality and regularity of executive conduct
- The Queen and her representatives also have some reserve powers where they can act independently of the executive ministry – these generally only come into play if the ministry's actions undermine conventions of responsible government

The Ministers and their staff

- Ministers are the high-level executive officers appointed to lead government departments – they are appointed by the Queen's representative on recommendation of the PM, the state Premiers and the Chief Minister in the NT.
- The Queen's representative will appoint the PM, Premier and Chief Minister who is the leader of the political party or coalition that secures the support of the lower house
- The PM, Premier and Chief Minister chooses the ministers and the Queen's representative will act on their advice when dismissing a minister
- Ministerial staff (appointed directly by the minister) are accountable directly to the minister who appoints them – they assist with policy roles, supplementing advice provided by public servants with political advice

The Cabinet

- Comprised of senior ministers selected by the PM (but not strictly limited to ministers)
- Not mentioned in the constitution and thus has no formal powers – instead makes the decisions that underpin the exercise of powers by other parts of the executive
- *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd*: 'It is to Cabinet that the highest decisions of policy affecting Australia are brought. Often the questions arising involve intense conflict of interests or of opinion in the community. In Cabinet these conflicts have to be resolved.'
- Cabinet decisions often implemented by the Queen's representative on the advice of the Executive Council – e.g. *Watson v South Australia*
- Informal nature of Cabinet allows it to operate flexibly and quickly

The Executive Council

- The body that the Constitution refers to instead of the Cabinet
- Advises the Queen's representative to make decisions that will have been determined by Cabinet
- All ministers are members

The departments and the public service

- Majority of the executive is comprised of departments – constituted by the public service and other public officers and headed by a minister (*Constitution* s 64)
- Departments are established by the Governor-General-in-Council, and are not legal entities and thus cannot enter into contracts or be parties to a legal dispute (therefore cannot be subject to judicial review actions)
- *Sue v Hill*: departments are 'the administrative bureaucracy which attends to [the Ministry's] business)
- Most of the day to day administration is performed by public servants at the department level
- There are special accountability frameworks that ensure the conduct of public servants is efficient, effective and maintains neutrality – e.g. public service codes and commissioners

Statutory authorities

- *Lange v Australian Broadcasting Corporation*: ‘The conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or a Minister who is responsible to the legislature.’
- Examples:
 - Director of Public Prosecutions
 - Fair Work Australia
 - Australian Securities and Investment Commission
 - Australian Competition and Consumer Commission
- Many statutory authorities have been established to scrutinise the conduct of other executive officers – e.g. administrative review tribunals, ombudsman offices, auditors-general and anti-corruption commissions
- These authorities operate as separate legal entities

Government Business Enterprises

- Bodies established to engage in commercial enterprises through legislation or incorporated under the *Corporations Act 2001* (Cth)
- Often established when the government provides services as a monopoly – e.g. energy, water, sewage services
- Examples:
 - NBN Co
 - Medibank Private
 - Australia Post
- With the increasing amount of privatisation and contracting out of government services, many GBEs have been sold by the government, e.g. Telstra

Outsourcing and privatisation

- Privatisation of government-owned monopolies has seen providers of water, energy, sewage, telecommunications and transport now operating as privately owned companies competing in a market environment
- Some sectors were historically operated as private bodies, e.g. transport, health care, education, employment services and social security operated by charities, churches or private benefactors – but were largely nationalised after WWII
- Private law accountability frameworks still apply to bodies that have been outsourced or privatised – they are subject to actions for breach of contract and in tort law (e.g. *Lennon v South Australia*) and fall under the jurisdiction of industry regulators and ombudsman offices
- Private bodies are subject to anti-discrimination regimes and consumer protection, fair trading and price control laws
- Mixed governmental methods create difficulties in identifying accountable parties – if the government contracts out of a service and that service is performed poorly or illegally, is the government or the service provider accountable?
- *Datafin* principle – the judicial reviewability of non-statutory power exercised by a non-government body turns on whether the power is properly considered to be public power or the exercise of a public function – this has been adopted by some lower Australian courts e.g. in *CECA Institute Pty Ltd v Australian Council for Private Education & Training*

NEAT Domestic Trading Pty Ltd v AWB Ltd – distinct unwillingness to extend public law remedies