## Administrative Law Notes

1A – INTRODUCTION

1B – FRAMEWORK FOR JUDICIAL REVIEW

2 – MERITS REVIEW AND ADMINISTRATIVE TRIBUNALS

3A – OTHER METHODS OF ADMINISTRATIVE LAW REVIEW

3B – CONSTITUTIONAL CONSIDERATIONS

4A – RULE-MAKING AND CONTROL OF SUBORDINATE LEGISLATION

4B – FOUNDATION CONCEPTS OF JUDICIAL REVIEW

5 – UNAUTHORISED DECISION-MAKING

6A – STATUTORY PURPOSE AND RELEVANT CONSIDERATION

6B – NATURAL JUSTICE

7A – EXECUTIVE POLICIES, DIRECTIONS AND REPRESENTATIONS

7B – LAW, FACT AND EVIDENCE

8A – FAILURE TO PERFORM A STATUTORY DUTY

8B – WEDNESBURY UNREASONABLENESS, GOOD ADMINISTRATION

9A – EXECUTIVE POWER AND DECISION-MAKING

9B – THE CONSEQUENCES OF UNLAWFUL DECISION-MAKING

10A – JUDICIAL REVIEW REMEDIES

10B – STANDING

11A – ACCESS TO INFORMATION

11B – PRIVACY

12 – OBTAINING REASONS FOR GOVERNMENT DECISIONS

Page 1 of 7
Introduction

- What is administrative law?
  - Previous examples about individuals and decisions made by an arm of government
    - Local e.g. renovations
    - State e.g. ICAC
    - Commonwealth e.g. tax, pensions
  - Public law ⇒ the relationship between individuals, citizens and the state
  - NOT private law (relationship between individuals e.g. contract, torts), although some scholars say the difference is or should be broken down
- Three main arms of government
  - 1. Executive
    - Decisions by Governor General, Governor, Ministers, public servants or public bodies usually authorised by a particular statute, but sometimes taken under the prerogative ⇒ most admin law applies to this
    - E.g. application for pension with claim that aged 100. Decision maker knocks back and says documents indicate age is 61
    - Options:
      - Go back to original decision maker/manager and say looking at wrong birth certificate and you have made a mistake
      - Or go back to original decision maker and say I gave you wrong birth certificate and I made a mistake
    - Decision maker & manager using same power – the exec power – statute gives to Min or delegate capacity to grant pensions. – This is called merits review where merits of decision are reviewed & can be made again in your favour
  - 2. Legislature
    - E.g. when it gets to statutory interpretation, practically every statute passed by legislature/parliament included as its last provision the GG or Gov can make regulations ⇒ these regulations are enabled so that the nitty gritty of legislation proper can be set out clearly and these are called “subordinate legislation” and “delegated legislative decisions”
    - Because legislature delegates law making power to someone like those made by GG/Governor or Minister under particular statute, and usually take form of decisions to make regulations, by laws or other legislative instruments
      - Regulation may be disallowed by Parliament by scrutinising it
      - Or decision made under regulation reviewed by commonwealth in so far as concerned error of law
    - For delegated legislation that Parliament reviews which it has to review under statute (has to be laid before both houses of Parliament and both houses must agree, otherwise it’s disallowed) so that’s merits review of delegated legislation by Parliament
  - 3. Judiciary
    - Under s 73 of the Constitution, High Court has appellate jurisdiction, can hear appeals from single judge or judges of High Court, federal court decision, state or territory judgments, of judges that may be reviewed for error of law, as opposed to appeals from judicial decisions ⇒ superior can overturn judgement of inferior court
    - Merits review because both courts have same power
Also relevant decision can be replaced, changed or affirmed

**NOTE: Appeal is not the same as judicial review**
- Judicial review cannot replace the decisions whereas appeal can
- Appeal of decision on pension can be appealed to social security appeals tribunal, or administrative appeals tribunal as part of the Executive
- If not happy with decision tribunal, go to federal court or federal circuit court if there is an error of law
- If court finds there was an error of law e.g. not given proper hearing, then send decision back to tribunal to remake decision according to law

Introductory comments
- The relationship between government and the community is complex and multi-faceted.
- Given this complexity, no single theory ofadminlaw can adequately explain the legal accountability and responsibility of government
- Australians are heavily reliant on government to provide services and are subject to ever increasing government regulation
- Government activity and control has led to a demand for heightened scrutiny of, and accountability by, government
- There are four (main) theoretical dimensions underlying the operation of administrative law:
  - Administrative law theory
  - Accountability
  - Historical foundations of Australian admin law
  - The public / private divide in admin law
- Theories of admin law reflect different assumptions about the role of government and how the exercise of governmental power should be controlled. Consider the following dichotomies in admin law theory
  - **First**, judicial regulation versus legislative / executive autonomy: – What is the proper role for the courts in overseeing legislative / executive autonomy?
  - **Secondly**, red light versus green light theories:
    - Red light theorists want to stop government from redistributing wealth and interfering with personal liberty and private property. Favour using law to constrain government power.
    - Green light theorists want government to regulate, redistribute and provide services to the community. Favour using law to facilitate government exercising such power.
  - **Thirdly**, individualism vs collectivism:
    - Collectivism: decisions have to be made within a framework of policy that recognises broader social concerns, such as the rational allocation of limited resources and the need for consistency and predictability in government administration.
    - Individualism: ensuring a fair and just decision is made in individual cases after due consideration of the person’s circumstances
  - **Fourthly**, rule-based v substantive justice:
Week 6A

Statutory Purpose and Relevant Consideration

- Introduction
  - Concern in administrative decision-making – whether legislation that is being administered provides authority for decision that is being made and by the person who is making it.
  - Does situation come within the scope of Act?
    - look beyond language of Act to context and purpose
    - look at legal setting in which the Act is to operate.
- Main criteria:
  1. Statutory powers be exercised for an authorised purpose
  2. Irrelevant matters are not taken into account
  3. Relevant matters are taken into account.
- Person or body upon whom a statutory power is conferred can lawfully exercise that power only for the purpose for which it was conferred. Exercise of the power for different or ulterior purpose will be invalid.

Acting for an unauthorised purpose
- In applying this principle, question –
  - For what purpose can the statutory power lawfully be exercised? → This is an issue of law resolved by construction of the statute which confers the power.
  - For what purpose was the power actually exercised? → This is primarily an issue of fact answered by analysis of documents and other statements that record how and why the decision was made and by inference from the facts.
- The authorised statutory purpose
  - Commonly statute will define purpose for which a power can be exercised: Municipal Council of Sydney v Campbell [1925] AC 338.
  - Absent express purpose, possible to imply purpose, using statutory interpretation - looking at the title, structure and text of an Act, and the nature of the power that is being exercised. R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170.
- Difficulty where statutory power said be unconstrained:
  - Where statutory power to be exercised in ‘public interest’.
  - Issues re statutory powers exercised at high political level – eg appointment to an officer held ‘at pleasure’ or where the decision is being made to achieve a political objective.
  - Where statutory power exercised in overly political context.
  - Issues where legislation, eg tax law, is complex, involves polycentric considerations, and difficult to ascertain a range of permissible purposes.
- The actual purpose for the decision
  - Decisions openly announcing or disclosing purpose - Brownells Ltd v Ironmongers’ Wages Board (1950) 81 CLR 108 at 120
    - Burdensome rate of overtime payment stipulated by a wages board
    - Court decided board improperly used power of setting wages to control shop-opening hours.
  - Purpose of subordinate legislation may be apparent from the face of the instrument.
  - Purpose for which decision made - by inferences from matters such as conduct or documentation of government agency.
  - Multiple purposes
Application of criterion of legal validity vexing when established that decision-maker aware that multiple purposes would be achieved by exercise of the statutory power, one or more of which, would be unauthorised purpose.

- Decision not necessarily invalid.
- Was unauthorised purpose substantial or dominant purpose? – ie power would not have been exercised had there not been a desire to achieve the unauthorised purpose.
  - *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710: a decision, which is otherwise invalid, cannot be saved by proof that the decision-maker's motive was laudable, sensible or economically rational.
    - A decision to raise revenue by letting a private university to use national park was incompatible with a statutory scheme
    - University agreed to pay for improvements and share with the public
    - Court dismissed this line of reasoning -> irrelevant to whether the use of the park was for a good reason, the decision was outside the statutory purpose
  - Statutory indeterminacy:
    - Assumption that statutory purpose can be identified with reasonable certainty by application of principles on unauthorised purpose - not always so.
  - Commonly conflicting purposes in one statute e.g. freedom of information statutes - declare a dual theme:
    - to promote public disclosure of government documents,
    - to preserve official secrecy in areas where there is a legitimate public interest in so doing.
  - E.g. *Project Blue Sky v Australian Broadcasting Authority*
    - HC detected at least three statutory objectives that could guide a decision by the ABA
    - ABA was required by the Acts to ensure that Australian television was controlled by Australians for the benefit of Australians and to perform the functions in accordance with International Law Obligations -> including providing equal market access to NZ providers
    - Broadcasting that gave preference to Australian content was inconsistent with that purpose
Week 9B

The Consequences of Unlawful Decision Making

Introduction: Rival theories of invalidity
- What is the consequence when established that government decision-maker broke one criteria for lawful decision-making?
- A single rule (or theory of invalidity) will not adequately resolve all problems. But there are 2 general rules:
  - 1. Principle of legality – government agency must have proper legal authority for any action that it takes, particularly action that is coercive in nature.
  - 2. Doctrine of separation of powers – commits to court exclusive function of deciding whether official action is unlawful. Implies others must presume regularity of official action until set aside by court.

The principle of legality and its consequences
- Government decision-makers need legal authority to support action they undertake.
  - Authority gained by legislation or executive power. Legislative authority essential to support administrative orders coercive or punitive in nature, or impose financial impost.
  - If legal authority absent, or if the decision-maker oversteps the limits of that authority, following principle of legality, resulting action will be unlawful.
- Consequences:
  - 1. action undertaken without proper legal authority – ‘invalid’ or ‘unlawful’. Many terms to describe ‘invalid’. See:
    - Wattmaster Alco Pty Ltd v Button.
    - MIMA v Bhardwaj.
  - 2. Invalidity will usually date from time action was undertaken, sometimes described as:
    - being ‘void ab initio’ (Wattmaster),
    - ‘no decision at all’, as if it never occurred: Plaintiff S157, Cooper v Board of Works for the Wandsworth District, Park Oh Ho v Minister for Immigration and Ethnic Affairs.
- Judicial review remedies discretionary, but discretion does not fit easily principle that invalid action leads inexorably to a void outcome.
  - Practice is that court should not refuse a remedy on discretionary grounds unless there are special reasons.
- Reluctance of courts to forgo the exercise of their jurisdiction. Often decline to give full effect to privative or ouster clauses that prevent party from challenging validity of decision by judicial review action:
  - Plaintiff S157
  - Bodruddaza and
  - Kirk.

Separation of powers and the presumption of regularity
- Contrasting approach – grounded in separation of powers doctrine – task of deciding whether administrative action is invalid, is a judicial function to be exercised by a court.
  - Premise underpinning – administrative action regarded as valid until set aside by court.
Illustration – statutory appeal can be brought against a decision that is allegedly to be invalid (Lawlor and Macksville) and the appeal can ‘cure’ the legal defect in the decision.

Only court can determine validity of administrative action – sometimes invalidity cannot be asserted in collateral proceedings. *L Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295 – Plaintiff could not ignore prices order (which it alleged invalid) but must institute judicial review proceedings to test that claim.

Sometimes only by certiorari: Craig.

Declaration of invalidity made by a court only applies to decision that was challenged and binds only parties to the proceeding.

In practice, government agencies generally do apply a court ruling to other citizens in same position.

S 16 ADJR Act – gives broad, flexible power to the Federal Court to order review.

- *Wattmaster* (dealing with the date from which an invalid decision could be set aside)
- *Park Oh Ho* (dealing with the associated orders that a court could make to resolve the dispute between the parties and avoid unnecessary relitigation of issues)
- *Jadwan* (concerning choice of a date of operation of an order, relying on s 16, when none had been specified).

General rule – decision once made is final. The court in *Wattmaster* decided that the declaration of invalidity should operate from the date of the minister’s decision.

Exception – *Bhardwaj* – decision affected by jurisdictional error can be remade but only ‘in the very clearest of cases’. Note competing pressure with doctrine of functus officio

**Breach of associated statutory requirements**

- Often statutory steps to be observed or fulfilled in making decision. Consequences for breach of an associated statutory requirement?
- Legislation may stipulate principles or objectives to be met when decision is made. *Project Blue Sky*.
- Different points in decision-making process at which question can arise:
  - at preliminary stage – prevents decision being made;
  - later – invalidates decision on the basis that preliminary statutory step not observed.
- *Project Blue Sky* – legislative purpose test.
- Important *Project Blue Sky* factors include:
  - statutory language,
  - subject matter,
  - consequences,
  - nature of the requirement and
  - who is responsible for ensuring compliance.