

## MODULE ONE – INTRODUCTION TO ADMINISTRATIVE LAW

### What is Administrative Law?

- supervision and correction of the Executive branch of government – public authorities must act in a lawful, fair and transparent manner
- origins in the notion of “judicial review” – person aggrieved by executive government decision can challenge its legality before the court

### Administrative Law v Constitutional Law

- constitutional law is about:
  - systems of government (unitary, federal)
  - structure and role of each branch of government
  - validity of the law-making process
- administrative law is about:
  - the powers and procedures of the executive branch
  - the lawfulness and limits of executive action

### Core Components:

- judicial review – review by courts of the legality of decision
- merits review – appeal before a tribunal ‘on the merits’
- freedom of information – right of access to government-held documents
- ombudsman review – investigation and report

### The Balancing Act

- on the one hand, administrative law seeks to ensure:
  - lawfulness
  - accountability
  - quality and consistency in government decision-making
  - participation
  - justice for aggrieved persons
- but what about...
  - efficiency
  - affordability
  - other legitimate interests?

### The Emergence of Administrative Law

- the English common law heritage – originally judicial review (review by courts) based on Dicey’s concept of the ‘rule of law’ added tribunals, ombudsman, judicial reform and freedom of information
- development in Australia – similar origins, then major federal reform: *AAT Act*, *Ombudsman Act*, *ADJR Act* and *Freedom of Information (FOI) Act*

### **The Changing Nature of Government:**

- profound changes in recent decades:
  - outsourcing – to private sector providers
  - corporatisation – government owned corporations
  - privatisation – ‘sell off’ to the private sector
  
- implications for administrative law?
  - inaccessibility of activities
  - accountability ‘voids’
  - blurring of the public / private boundary

### **Working with Administrative Law in Australia**

- choice of jurisdiction – federal or state
- division of subject matter
  
- interrelationship with constitutional law
  - parliamentary supremacy
  - the rule of law
  - the separation of powers

### **An Overview of Judicial Review:**

- the nature and function of judicial review
  - common law doctrine of judicial review – legitimized and shaped by the ‘rule of law’ and separation of powers
    - *Hamblin v Duffy* (1981)
    - *MIEA v Wu Shan Liang* (1996)
    - *MIMA v Eshetu* (1999)
  
  - Constitutional entrenchment – separation of federal judicial power under Chapter III of the Australian Constitution
  
- what kinds of decisions are reviewable?
  - basic statutory powers
  
  - prerogative / high level executive power
    - *R v Toohey* (1981)
    - *SA v O’Shea* (1987)
    - *Council of Civil Service Unions* (1985)
    - *MAHE v Peko Wallsend* (1987)
  
  - quasi-public powers
    - *Datafin* (1987)
    - *Neat Domestic Trading* (2003)
    - *Owens* (2013)

## Two Parallel 'Systems' of Judicial Review

- general law judicial review
  - origins in establishment of State Supreme Courts
  - prerogative writs – especially Certiorari / Prohibition / Mandamus
  - equitable remedies – injunction and declaration
  - federal conduits: High Court (*Constitution*) and Federal Court (*Judiciary Act*)
  - state level – Queensland (*Judicial Review Act 1991*)
- statutory judicial review
  - federal – *ADJR Act (Cth)*
  - state level, Queensland – *Judicial Review Act 1991*
  - note particularly:
    - the 'statutory right to reasons' contrast *Osmond* (1986)
    - the necessary 'jurisdictional pre-requisites'

## The Grounds of Judicial Review: Taxonomy and Overview

- the grounds of review – 'unlawfulness'
- developed under common law – codified in statutory systems
- terminology:
  - 'natural justice' v 'procedural fairness'
  - 'ultra vires' and 'jurisdictional error'
  - 'privative clauses'
  - 'error of law on the face of the record'
- judicial review v merits review ('legality-merits')
  - problematic – more than simply law v fact
  - an uncertain boundary – but absolutely critical