

Topic 1: Introduction to Administrative Law

1. What is administrative law?
2. What is the executive?
3. What powers does the executive have?

What is administrative law

- **General-** Focuses on the executive branch of government (the administration) and its relationship with the people that it governs, i.e. the relationship between the 'governors' and the 'governed'
 - *'The legal principles that regulate the exercise of power by public authorities and the mechanisms that exist to remedy failures in the exercise of this power'*
- Concerned with **Accountability**
- 'Administrative' - Links in to separation of powers and theory that underlies it
 - Should not allow too much power to be concentrated in hands of individual/institution
 - Those who exercise power should be subject to some form of external check
- Admin law provides an external check on exercise of power by executive branch of government

Reasons for the existence of admin law

- **Need to hold executive to account for exercise of their powers:** *'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'*
- This is said to be important because:
 - Executive possesses **unique and extensive powers** (cf individual citizens) Æ unique capacity to affect individuals
 - Accountability mechanisms exist for courts and parliament (e.g. courts must provide written reasons, parliament is elected)
 - *'We live in a representative democracy and... the electors have a right to hold their representatives to account'*
 - The concept of the **rule of law** demands executive accountability
 - **Separation of powers** ensures that there is a separate, independent arbiter of the legality of the actions of those other branches
 - Protection of individuals against abuse of power by executive

Accountability mechanisms

- Mechanisms include judicial review, merits review, parliamentary scrutiny, ombudsmen, FOI, royal commission
 - Two general groups:
 1. Mechanisms that promote an understanding of what is happening in govt (e.g. FOI, parliamentary scrutiny etc)- **Mechanisms that investigate govt functions**
 2. Mechanisms that review individual actions or decisions taken by govt at the request of affected Individuals

What is the executive- 'Who should be accountable'

- Executive = 'the government' or 'the Crown'
 - Different level of scrutiny applies against inferior courts of admin tribunals / executive – depends on the *nature of the body*
- **Executive entities:**
 1. The Queen and her representatives
 2. The Ministers and their staff
 3. Cabinet
 4. Executive Council
 5. Departments and public service
 6. Statutory authorities
 7. Government Business Enterprises (GBEs)

Outsourcing and Privatisation (Public powers exercised by private bodies)

- Standard = govt dept headed by minister and staffed by appointed public servants
 - This model was appropriate when the '*welfare state*' was the norm, i.e. when the State was responsible for provision of public goods like education etc; **BUT**
- This model has **evolved:**
 - Describes ways that govt have changed balance between private and public activity in the economy- Æ preference for private sector over public sector
 - a. **Privatization of public assets**, i.e. economic infrastructure and business, e.g. Telstra, Commonwealth Bank of Australia
 - b. **Contracting out /outsourcing** - performance of public functions to private contractors at public expense, e.g. train systems; links to processes of competitive tendering e.g. Vic govt has a Legal Services Panel

- c. **Use of statutory corporations to perform public functions**, e.g. Australia Post
- d. **Deregulation**, i.e. removal of govt regulations over private business/individuals in the marketplace; market seen as the natural order of things
- e. **Public-private partnerships** – e.g. for provision of new infrastructure
- f. **Streamlining of govt administration** – downsizing public sector, public sector reform

- **Institutional approach**- Defining ‘**executive**’
 - a. Admin law generally understood ‘*institutionally*’
 - b. Admin law norms apply to decisions made by those people who are part of the formal Institutions of exec govt
 - c. Remains the Australian approach; **BUT**- no consensus reached re whether *Datafin* represents common law of Australia

Datafin 1987 UK

- **Issue:** Whether decisions of non-government bodies that exercise public law powers are susceptible to judicial review
- **Held:** Jurisdiction extends to bodies that have a **public element** – reviewability of power is determined by its characterisation as public
 - Panel had a public element, therefore Court had jurisdiction over it

Plaintiff M61 (2010) (Offshore Processing Case)

- **Facts:**
 - Sri Lankan asylum seekers arrived in Christmas Island
 - Not eligible to make valid application for visa unless Minister decided otherwise (RSA process)
 - Process established for deciding whether Minister would make this decision
 1. Department officer would make a refugee status assessment – in this case negative
 2. Independent reviewer (contractor) would review – in this case negative
- **Issue:** Was the conduct of the IMR in particular judicially reviewable?
- **Held:**
 - Because the Minister had considered whether to exercise his power under s46A, the RSA and IMR were ‘**steps taken under and for the purposes of the Migration Act**’
 - This meant they were judicially reviewable
 - **BUT**, didn’t answer question of whether ‘**independent contractors**’ might be subject to judicial review

NEAT v AWB (2003)

What powers does the executive have? 'WHAT should they be accountable for?'

- **Commonwealth (Cth):**
 - Section 61 of the Constitution vests Cth exec power in Queen, exercisable by GG. Includes 5 **classes** of power
 1. Power to execute any constitutional provisions conferring power on executive
 2. Power to execute any legislative provisions conferring power on executive
 3. Crown's prerogative powers as are appropriate to be exercised by fed exec
 4. Crown's common law capacities
 5. Executive nationhood power
- **State:**
 - Letters patent vested exec power with governors at federation
 - S7 Australia Act 1986 confirms state governors exercise full powers of the Queen in respect of the state
 - State exec power sourced in Cth Constitution, CL, statute

Classes of executive power

1. Constitutional power
2. Statutory power
3. Non-statutory powers

• 1. Constitutional Powers:

- Cth Const'n confers large number of powers on Cth exec (via GG), e.g. power to summon, prorogue and dissolve parl't
- GG usually exercises these powers on advice of the Exec Council (via Cabinet)
 - **Question** re the extent to which the exercise of a reserve power is reviewable through administrative law processes. Some of the GG's prerogative powers have been accepted as subject to JR, however the exercise of the reserve powers is unlikely to fall within this category because of its inherently political nature (i.e. question of justiciability)