

## Topic 1: introduction to administrative law

1. Constitutional fundamentals: the rule of law, parliamentary supremacy and the separation of powers
  2. Introduction to judicial review and law/merits distinction.
- The objects of this course
    - Relationships: individuals and organisation with government
    - Accountability: of government.
    - Course focus is judicial review.
    - Statutory Interpretation.
  - We are looking at the decision making of the government. Is it valid or not? (c.f. constitutional law is about studying whether a legislation is valid or invalid based on the constitutional power).
  - Public law recap: constitutional concepts
    - Constitutionalism –limited government: that government is subject to the law. executive power is limited by s61 of the constitution.
    - Responsible government:
      - ◆ The executive is answerable to parliament for its actions
        - British version: government departments are controlled by ministers, the ministers are controlled by parliament and parliament is controlled by the electorate.
      - ◆ C.f. representative government: government is elected by the people and they should represent the people.
    - Separation of powers
      - ◆ Horizontal separation of power: judiciary, executive and legislature.
      - ◆ Lateral / Vertical; in AU: federal and state.
      - ◆ Aim: to check each other to remain accountable.
      - ◆ Legislative function: making of new laws alteration and repeal of existing ones
      - ◆ Executive (administrative) function: implement/enforce law (carrying out of actual government according to the law)
      - ◆ Judicial function: interpretation of the law and its application by rule or discretion to particular facts – adjudicate.
      - ◆ Can there be strict separation between these functions? The idea of responsible government doesn't allow this.
    - Rule of law:
      - ◆ Dicey's definition – espoused and made popular the rule of law as limitation on power. (3 essential components)
        - 1. equality before the law/ all subject to the law (which for our purpose includes government decision makers)
        - 2. certainty of the law (that law is supreme) (i.e. supremacy of regular law)
        - 3. Rights protection is an inherent aspect of the common law and Acts of Parliament rather than a requirement of a constitution. (ie. judges and parliaments are right thinking people, so no need of bill of rights)
      - ◆ Dicey's 'parliamentary sovereignty':
        - No legal limitation (i.e. absolute) on what parliament want to do (i.e. government need to self-regulate)
        - Make or unmake any law
        - No person or body can override or set aside legislation of parliament. (but judges can under s75 of the Constitution).
      - ◆ Is the rule of law and Parliamentary Sovereignty always compatible?
        - Not really...
  - Australian exceptionalism in judicial review
    - Australia has no Bill of Rights / Human rights legislation.
    - Very strict separation of judiciary from other arms.
    - We maintain the meaning of **jurisdictional error** (ie. the decision maker had made a decision outside its power).
  - What is Admin law?
    - The law dealing with government decision making

- The legal rules concerned with the relationship of government and governed
- Good government according to the law
- Protection of individuals from unlawful/arbitrary government action
- Admin law – at its core is, of course, about admin decision making: who/what do you think makes administrative decision?
  - Tribunals (they are not judiciary but they are actually executives arm)(NCAT, AAP)
  - Executives
  - Agency
  - Public officers
  - Departments-ministers
  - Where does the power come from?
    - ◆ Legislations/**statutes** mostly. Must take notice of if it is Cth or State law because the federal/state jurisdiction may differ for a matter.
    - ◆ They do have some prerogative power left but this is easily removed once the legislation is spoken about it.
- Examples of admin decision:
  - Development consent, environmental decisions
  - Compulsory acquisition
  - Medicine – what medicine is allowed / funded / prescriptive medication / parole.
  - Visa – refugees
  - Centrelink
  - Taxi – granting taxi licences.
  - Tax
  - To allow import? How to categorise the import product?
- **Limitation of powers (always start with statute!)**
  - Express statutory requirements
  - Implied statutory requirements:
    - ◆ looking at the purpose of legislation (e.g. hotel licence, legislation is passed to see how many hotels will be there, so the purpose is to allow hotel and also to allow alcohol to be sold but not too many. Stopping hotels because of alcohol sales would be against the purpose.)
  - Common law requirements:
    - ◆ we need to find the grounds of review to find the jurisdictional errors?.
    - ◆ **Procedural fairness:** 1. You cannot be biased. 2. Hearing rule; right to know the underlying reasons of a decision.
  - Note: within limits there is ‘discretions’ = actual choice between reasonable/legitimate alternative, this IS NOT arbitrary power.
- What can go wrong?
  - Administrator misunderstands the legislation
  - Administrator may not have given the person a chance to provide information
  - Administrator makes the wrong decisions
  - Sometimes it is clear that a decision is wrong but often the decision maker has a choice (discretion), when they make a choice can we say it is wrong?
    - ◆ Inconsistent with other decisions (due to discretion)
    - ◆ Does not treat like cases the same.
  - E.g, Parole board allowing parole if the session is held after morning tea. Is this wrong? Could have more prescriptive criteria/guide lines.
- If a decision is wrong how might it be remedied?
  - Ombudsman, press, representations to local member of Parliament.
  - **Or we can do judicial review/external merits review (these two are our focus).**
    - ◆ Internal merits review: making the same body who made the decision to review the decision.
    - ◆ **External merits review: - our focus**
      - tribunals created by Statute
      - jurisdiction given by Statute
      - standing specified by Statute (i.e. whether you can bring the claim).
      - tribunal assess what is the ‘**correct and/or preferable**’ decisions. (hence the component of discretion) (**note** that here there is no legal principle to be considered)
      - **Remedy:** affirms decision (original decision maker made the correct or preferable decision), substitutes (makes its own decision) or remits (sends back to the original decision maker to

make the decision again).

◆ **Judicial review: - our focus**

- Jurisdiction – statute/inherent/original? YOU MUST KNOW THIS TO KNOW WHERE TO GO – FEDERAL OR STATE?
  - Federal court is made by statute, hence their jurisdiction is statutory.
  - Inherent: State supreme court (so statutory cannot take away the jurisdiction)
  - Original jurisdiction: ie. starting the proceeding from the High Court.
- Must see if => Is the application **justiciable? – not our focus**
- Does the applicant have **standing?** (do you have a sufficient interest?)
- Was the administrative decision made **legally?** = Is a breach of one or more of the **grounds of review** established?
- Is a remedy available? Here, you have less remedy, ie. Cannot get an order which you want. The court will only order and make the decision because there is no discretion that can be given to the decision maker (i.e. only substituting the decision in exceptional cases!).
  - Certiorari – quashing the decision – **not our focus**
  - Prohibition – **not our focus**
  - Mandamus – telling them to do their duty – **not our focus**
  - Judicial discretion (e.g. the review might come back with different legal principle but the decision might be the same even if remitted).
- **Overview of grounds for executive decisions:**
  - Must have authority (jurisdiction) and authorised decision maker must make the decision (e.g. **Policy and Dictation** – the decision maker cannot blindly follow policy?).
  - Decision maker must exercise power for a **proper purpose** and consider **relevant factors** and disregard irrelevant factors.
  - Procedural grounds
    - ◆ Hearing rule: person affected by decision is given opportunity to be heard
    - ◆ Bias
  - Requirement of **reasonableness** and **certainty**.
  - Errors of Law and Fact
    - ◆ Interpreting legislation
    - ◆ **No Evidence**
    - ◆ **Illogicality and irrationality.**
- ~~**Grounds of review:**~~
  - ~~Procedural grounds~~
    - ◆ ~~Hearing rule: person affected by decision is given opportunity to be heard~~
    - ◆ ~~Bias~~
  - ~~Reasoning process grounds~~
    - ◆ ~~Decision maker must consider relevant factors~~
    - ◆ ~~Disregard irrelevant factors, etc (e.g. that your brother owns a bar next door, so not letting to build hotel for another person)~~
  - ~~Decision grounds:~~
    - ◆ ~~Decisions maker must have jurisdiction~~
    - ◆ ~~Wedensbury unreasonableness: saying that no reasonable decision maker can make that decision.~~

- Judicial review vs appeal distinction

- Review:
  - ◆ Usually refers to judicial review by courts
  - ◆ Inherent or statutory jurisdiction of the Court: e.g. Supreme Court
    - Supreme Court Act 1970 (NSW), s 69
  - ◆ Review **focuses on the grounds of judicial review**
  - ◆ Court **cannot substitute** a decision (we just send it back to the original decision maker) – a “Pyrrhic victory”?
- Appeal
  - ◆ is a statutory appeal on question of law. (so its based on legislation)
  - ◆ Granted by statute for specified decisions - a “creature of statute
  - ◆ Scope of court’s authority depends on the statutory provision enabling appeals to a court
  - ◆ Remedy depends on the statute - may include substituting a decision (ie a merits appeal)

- Law vs merits distinction

- AG (NSW) v Quin: the court can **only declare** the law.
  - ◆ Fact: lost job because the penal did not think he was fit and proper purpose. But he was never asked about this issue and lost his job. Took to HC, won on the ground of review that he was refused procedural fairness. But when the decision had to be remaid by the initial makers, the company policy changed and was no longer qualified for the job. So even if he won the judicial review, Quin did not get his job back.
  - ◆ You can have unjust decision by the executive, just because its unjust the court cannot intervene. This is because the merits are for the executives. (i.e. here the judge quashed the initial decision but the decision itself had to be reassessed by the initial decision makers)
    - “The duty and jurisdiction of the court to **review administrative** action **do not go** beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power
  - ◆ Criticism: you could argue that a merit goes to legality, hence a court can intervene it.
    - But this is not always clear according to Brennan J (slide).
  - ◆ Here a strong indication of separation of power.
  - ◆ The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone
    - ‘to the extent that they can be distinguished from legality’: what colludes the law and merits distinction.
  - ◆ Note that it is the court themselves who decide the boundaries in whether a merit goes to legality or not. Hence, here Brennan is stopping the court from expanding its power.