Administrative Law Exam Notes

Judicial Review of Administrative Decision Making

This set of exam notes is to be utilised for appeals to Courts on the State and Federal level for decisions that are made by powers which are administrative in character. As such, they are structured in proper order of assessment, and should be followed in sequence when writing exam questions.

Jurisdiction

Was the decision made under Commonwealth or State law?

Which court has jurisdiction?

- Federal decisions must go to the federal courts
- State decisions to the State Supreme Courts
    - **<u>Unless a constitutional argument is also being made => then its federal</u>**

The Jurisdiction of Courts (Cross-Vesting) Act 1987:

- Empowers State and Territory Supreme Courts to exercise the powers of the Federal Court in certain circumstances

SUPERIOR COURTS OF GENERAL JURISDICTION ➔ HAVE INHERENT JURISDICTION TO REVIEW ADMIN ACTIONS ➔ AND TO GRANT REMEDIES

The Freedom of Information Act 1982:

- Empowers the Federal Court to determine matters in 2 situations:
    - Deciding questions of law referred by the Info Commissioner (s 55H)
    - On appeal on a question of law from the Commissioner's decision (s 56)

The Judiciary Act 1903:

- High Court ➔ constitutionally created original jurisdiction
- High Court ➔ refer matters to the Federal Court (s 44)
- Federal Court ➔ appellate jurisdiction from the AAT
- Federal Circuit Court ➔ jurisdiction to hear applications under the ADJR Act & AAT appeals
- Federal Circuit Court ➔ review decisions under Migration Act 1958 Cth
    - Include:
        - Decisions made by a Minister for Immigration
        - AAT
        - Immigration Assessment Authority
    - HAS NO JUDICIARY ACT JURISDICTION

The High Court's constitutionally entrenched jurisdiction

S 75 OF CONSTITUTION PROVIDES THAT THE HIGH COURT HAS ORIGINAL JURISDICTION IN MATTERS SUCH AS:

- *WHERE THE CTH IS SUING OR THE CTH IS THE PARTY BEING SUED*
- *WHERE A WRIT OF MANDAMUS OR INJUNCTION IS SOUGHT AGAINST AN OFFICER OF CTH*

Plaintiff s157/2002 v Commonwealth (2003)

The High Court reinforced the view that all officers of the Commonwealth should be rendered accountable in the Court to the Constitution and the laws of the Commonwealth. Kirby J stated that *"being the means by which the rule of law is upheld throughout the Commonwealth, s75 (v) is not to be narrowly construed or the relief grudgingly provided."*

This case affirmed that s75 (v) effectively prevented the court's jurisdiction being blocked by the "privative clause" or ouster clause, inserted in the Migration Act 2001.

- In 2010 ➔ the High Court extended that logic and ruled:
    - That access to judicial review was also a constitutional principle at the State level

Commissioner of Taxation v Futuris Corporation Limited (2008))

The High Court majority ruled insisted that no jurisdictional error needed to be proven to obtain an injunction or declaration under s75 (v). Kirby J called for the discarding of the jurisdictional error doctrine altogether, noting that it was *"nearly impossible to explain to lay people."*

- Legislation may specify that ➔ some powers are non-reviewable

Plaintiff M61/2010E v Commonwealth (2010)

The High Court unanimously rejected an argument that s 46A of the Migration Act was constitutionally invalid because it failed to set a limit on the Minister's power to refuse to consider a visa application from a refugee arriving in Australia by boat.

That section gave the Minister a power to exempt an applicant from the section, which barred "an offshore entry person" from making a valid visa application, if the Minister "thinks that it is in the public interest to do so."

Sub section (7) of s 46A stated that the Minister "does not have a duty to consider whether to exercise" that power to grant an exemption, effectively creating a non-reviewable executive power over the plight of asylum seekers.

- Provisions such as s 46A do create ➔ "ISLANDS OF POWER":

    - *Veritable black holes where vulnerable people such as refugees detained on Christmas Island can be deprived of effective judicial review…*

Statutory Interpretation & Delegated Legislation

Within enactments the legislature builds in flexibility to allow ministerial and other bodies to amend and make regulations which are required for the day to day functions of government. These are founded under the legislation, and are supported ultimately by the referral of power from the legislature to the executive authority.

The delegated legislation may be made by ministers, departments, and heads of agencies. There is technically no limit to what can be delegated, however the ARC has recommended that significant policy matters be left to the legislature. Types of delegated legislation:

- Regulations made by GG
- By-laws
- Proclamations made by GG
- Rules
- Ordinances
- Policy directions
- Codes of practice

Constitutionality

The 2 main reasons why delegated legislation have been challenged are firstly: *delegates non potest delegare*, meaning the delegate may not delegate. The second is that by the sections and structure of the constitution, it is intended that there be a wall of separation between the legislatures and executive. The case of *Dignan* (1931) dealt with this subject matter however.

Victorian Stevedoring and General Contracting and Meakes v Dignan (1931) HCA

FACTS: Meakes and the Company were convicted of offences under s.3 of the *Transport Workers Act 1928* as they failed to give preference in employment to a statutorily privileged class of workers. The appellants claimed the legislation was beyond the powers of the legislature as they violated 3 constitutional principles: *delegates non potest delegare*, the separation of powers and the abdication of power.

ISSUE: Was the legislation valid - could parliament delegate power as such?

HELD: The HC upheld the validity of the legislation.

Dixon J:

- "A statute conferring upon the executive a power to legislate upon some matter contained in one of the legislative powers of parliament is a law with respect to that subject, and the distribution of powers in the constitution does not operate to restrain the powers of parliament to make such laws".

- His honour cautions however that it is possible that a conferral of power may be so wide as to not be valid under a s.51 head of power.

Evatt J:

- His honour held that there are some restrictions on delegation which would result in the legislature abdicating its constitutional powers and role. Stating that there are a number of factors which should be examined in testing constitutionality of conferrals.

    - The further removed the law-making authority is from the continuous contact with Parliament, the less likely it is that the law will be one with respect to any subject matter set out in s.51 or 52.

    - The greater the extent of law making powers, the less likely it will be a law with respect to any subject matter assigned to the Commonwealth Parliament.

    - The power of parliament to repeal conferrals is moot, as parliament has a general right to repeal what laws it creates. Other restrictions it places on the subordinate will be important in determinations however.

    - Relevant circumstances at the time the conferral was made may be important. Such may include war or national crisis.

    - Ordinarily powers to make regulations that are conferred upon a subordinate will be classed as consistent with the head of power in circumstances when their exercise has the purpose of carrying out a legislative scheme.

    - An enactment is valued where it is with respect to a granted subject matter, and also a law with respect to the exercise of legislative power.

    - A regulation will not be binding unless both it and the conferring law are valid with regards to a head of power under s.51 or 52. This description is met if the statute conferring power is valid and the regulation is not inconsistent with such statute.

- The Commonwealth parliament cannot abdicate power, though may delegate it through legislative enactment.

Plaintiff S157/2002 v Commonwealth (2003) HCA

FACTS: This case involved the interpretation of "ouster clauses", which sought to make it more difficult for applicants to review the refusal of visa applications. One of the commonwealth's argument was that it is within Parliament's power to delegate almost unlimited power to the executive with respect to aliens.

ISSUE: Could Parliament delegate such expansive powers and discretion to the Executive?

HELD: Following the decision in *Dignan* case, the court found that the legislature may delegate its power to make laws with respect to a head of power in s.51 of the constitution. However, as with this

case, the HC stressed that there needs to be a connection to a Head of Power to which is being delegated (not abdicated), otherwise it would endanger constitutional structures.

An analogous case was the *Work Choices Case*, *NSW v Commonwealth (2006) HCA*, whereby the legislature attempted to give the Executive wide ranging powers that bordered on what was described in *Dignan*'s case as an abdication of power.

Subordinate Legislation

Legislative Instruments Act 2003 (Cth)

There are in all state jurisdictions analogous legislation to which set up the procedures and rules regarding disallowance and making of sub-ordinate legislation. On the Federal level, it is dealt with in the LI Act, which governs whether a rule is a legislative instrument.

8. Definition of legislative instrument

(1) A ***legislative instrument*** is an instrument to which subsection (2), (3), (4) or (5) applies.

Primary law provides for something to be done by legislative instrument

(2) If a primary law gives power to do something by legislative instrument, then:

a. if the thing is done, it must be done by instrument; and

b. that instrument is a legislative instrument

Instruments registered on the Federal Register of Legislation

(3) An instrument made under a power delegated by the Parliament is a ***legislative instrument*** if it is registered as a legislative instrument.

Instruments that determine or alter the law etc.

(4) An instrument is a legislative instrument if:

a. he instrument is made under a power delegated by the Parliament; and

b. any provision of the instrument:

i. determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

ii. has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

The Legislation Act (as the LIA is now called) requires (1) public consultation in making delegated legislation, (2) registration in the Federal Register of Legislation, (3) tabling in parliament within six sitting days and (4) a 10-year sunset clause. However, the parent or enabling legislation, under which a legislative instrument is made, can modify or override these requirements. The LA largely provides default requirements, which operate where the enabling legislation is silent.

By these requirements however, there are certain consequences to breaches such as:

- s.15K - that legislative instrument not enforceable unless registered;
- s.19 - fact that consultation does not occur does not affect validity or enforceability of instrument;
- s.45 - if legislative instrument is not laid before both houses of parliament within six sitting days, or is disallowed by Parliament, it ceases to have effect, "as if it had been repealed" from that time

The Legislation also allows for declarations that an enactment isn't a legislative instrument and therefore is exempt.

> (6) Despite subsections (4) and (5), an instrument is not a ***legislative instrument*** if it is:
>
> a. declared by an Act not to be a legislative instrument;
>
> b. or prescribed by regulation for the purposes of this paragraph.
>
> (7) However, subsection (6) does not apply to an instrument that is a legislative instrument under subsection (3) by registration.
>
> (8) Despite anything else in this section, the following are not legislative instruments, and cannot become legislative instruments under subsection (3) (by being registered as legislative instruments):
>
> a. an instrument that is a notifiable instrument because of subsection 11(1) (primary law gives power to do something by notifiable instrument);
>
> b. a commencement instrument;
>
> c. a compilation of a legislative instrument or notifiable instrument;
>
> d. rules of court or a compilation of rules of court;
>
> e. an explanatory statement for a legislative instrument, or rules of court mentioned in paragraph (d).

Publication Rules

Those affected by Subordinate legislation should be able to learn of its existence and content, and the importance of such a principle is emphasised by the HC in the case of *Watson v Lee*.

Watson v Lee (1979) HCA

FACTS: The plaintiffs were charged with offences relating to taking Australian currency out of the country without the approval of the RBA. The case was moved to the High Court under the Judiciary Act 1903 (Cth), where they argued that they were unable to be charged with the laws on the basis that they couldn't access them, and thereby have known what they did was against regulations. At the time, all new regulations had to be published in the *Gazette*, to which the specific regulation they violated was not published at the time of the infringement.

ISSUE: Whether the *Acts Interpretation Act 1901* (Cth) s.48(1)(a) regarding notification of new regulations was satisfied, and secondly, if they weren't; whether failure to satisfy the requirements of notification meant that the regulations never became operative or were inoperative until notification?

HELD: Found against the Plaintiffs. The Court ruled broadly that notice and availability of new regulations were crucial aspects of the implementation process in delegated legislation.

Barwick CJ:

- "No inconvenience in Government administration can, in my opinion, be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he had no means of knowing".
- "If it is proved that copies of the regulations were not available for purchase at the place specified, the regulations would not have commenced to operate".
- His honour basically states that without knowledge being readily available regarding new regulations, it would be wrong for the court to declare those regulations binding upon people who were unable to know they were in violation.

Gibbs J:

- His honour held that if there has been notice of the place to pick up the new regulations, but that they arrive at some later date, that will satisfy notice requirements, and the regulations will come in effect at least from the date when the copies become available for purchase.

Stephen J:

- "The consequence of a failure to comply with this requirement of s.48(1)(a), that regulations, once made, should be notified in the Gazette, is in my view, that those regulations do not take effect".
- "Notification is a crucial step in the statutory process of delegated law making and without it that process is incomplete".
- His honour agreed with previous opinions in stating that notice and availability of regulations which apply to the public are necessary for a free society, otherwise there can be tyranny.

Mason J:

- There is no need for a statute to be published (and available to the public) before it comes into effect. The law may operate without such notice, and his honour argued, many laws do operate as such, without any public knowledge.

Tabling and Disallowance

In the case of bicameral legislatures, there is a requirement that all regulations created by subordinate bodies must be laid before both houses of parliament within a prescribed number of sitting days of its making. However, the dicta in *Dignan*'s case seems to indicate that their honours believed that either house could strike down the new sub-legislation within such a tabling period, or even after.

Thorpe v Minister for Aboriginal Affairs (1990) FCA

FACTS: The first elections of the Regional Councils of the ATSIC were challenged because of the failure to lay election rules before the senate within 15 days as required by the *Acts Interpretation Act 1901* (Cth) s.48.

ISSUE: Did the tabling issue void the elections process?

HELD: The appeal failed and the elections were upheld.

Sweeney ACJ:

- The Act required the commission to conduct the election from beginning to end in accordance with the rules in force at the beginning of the election period. The fact that these rules had expired following, doesn't alter the fact they were enforceable at the beginning of the election period. Therefore, the elections were well founded.

Northrop J:

- "The rules were notified in the Gazette on 18th July 1990 and therefore took effect from that date".
- In accordance with the procedure, the laws were put before the House of Representatives; but not the Senate within 15 days, therefore a breach occurred.
- "If the elections are void, much confusion would arise… the court however is required to apply law… arguments based on Inconvenience or cost cannot be used to condone the results of a failure by the Executive to comply with the law".

Sunset Clauses

Accordingly, the subordinate legislation may eventually reach a sunset clause whereby it will expire. This is in an effort to ensure that the regulations are updated and made modernised – this to reduce them becoming ineffective and stale. On the Commonwealth level this sunset clause is the 1st October following the laws 10th anniversary. Except in NSW where it is the 5th anniversary.

Duty to Act within Powers

This section is based on the fundamental premise that administrators must act according to law. It is the most basic rule of administrative law that the administrators must act within and subject to the procedures of the law. If the administrator makes an error of law, then it is unlikely to have been based on relevant and only relevant considerations.

One could say therefore, when the decision maker acts Ultra Vires (beyond power) the issue of legality comes into play. This was examined in the case of *Ruddock*.

Common Law & Constitutional Executive Powers

Ruddock v Vadarlis (2001) FCA

FACTS: A vessel holding refugees sank in the waters between Australia and Indonesia. The Australian navy despite being in the area requested that the *MV Tampa* (Norwegian ship), go to the aid of the sinking vessel. They did so, however soon realize the boat was over populated, and changed course from Indonesia to Christmas Island (Aus). The Australian authorities forbade the entry of the ship into sovereign waters, however when they did, the navy boarded the ship.

ISSUE: Was the Executive's conduct justified pursuant to s.61 of the Constitution?

HELD: The Majority found that the executive had the power to prevent and remove the aliens from Australian territory, that such was within the scope of s.61.

Black CJ (dissenting):

- His honour found that the existence of a prerogative crown power to expel aliens was unlikely to exist. Given that the last time such was utilized was 1771, his honour didn't rule it out, though was sceptical that such still existed.
- Black CJ was of the view that this prerogative power was abrogated through the imposition of the Migration Act 1958, which would signify the usurpation of such power from the crown by the legislature. Moving forward, if the executive had any such power, it would have to be granted to it by the Legislature as a 'Nationhood Power'.
- Based on the principles of parliamentary sovereignty, the test to be applied as to whether there is still a prerogative power should be whether an Act covers the same field. In such circumstances the prerogative is extinguished by Parliament.

French J (majority):

- "At the time of federation and early years of the commonwealth it seems to have been assumed that a number of the common law prerogatives of the crown such as the power to declare war, enter treaties or acquire territories, were not subsumed into s.61 but remained with the crown".
- The use of the word prerogative in his honours opinion was utilised to highlight the historical antecedent but doesn't highlight the true source of Executive power is in fact the Constitution.
- In his honours opinion, the source of executive powers was s.61 of the Constitution, and that there are no powers that don't resonate from it. Therefore, all crown powers are vested by the constitution.
- "The executive power can be abrogated, modified or regulated by the laws of the Commonwealth".
- His honour however held that to abrogate such a power required a clear intention from the Parliament. Therefore, he concluded that the migration legislation didn't sufficiently displace the Executive power to make the actions in this case illegal. Stating further that the right to exclude aliens is a fundamental right of all Governments.

Statutory Powers & Interpretation

Most administrative powers are conferred by and subject to legislation. To identify whether an administrator has certain powers, it is necessary to utilize statutory interpretation.

Principles & Maxims

There are many maxims and principles that should be utilised within the interpretation of statutes:

- **The Golden Rule Principle**: allows a judge to depart from a word's normal meaning in order to avoid an absurd result. This fundamentally means that the judge may alter the meaning of words in a statute so as to avoid unintended and absurd results.

- **The Literal Rule Principle**: dictates that statutes are to be interpreted using the ordinary meaning of the language of the statute. In other words, a statute is to be read word for word and is to be interpreted according to the ordinary meaning of the language, unless a statute explicitly defines some of its terms otherwise or unless the result would be cruel or absurd. Ordinary words are given their ordinary meaning, technical terms are given their technical meaning, and local, cultural terms are recognized as applicable.

- **The Mischief Rule Principle**: The main aim of the rule is to determine the "mischief and defect" that the statute in question has set out to remedy, and what ruling would effectively implement this remedy. In applying the mischief rule, the court is essentially asking what part of the law did the law not cover, but was meant to be rectified by Parliament in passing the bill.

- ***Noscitur a sociis* ("a word is known by the company it keeps") Maxim:** When a word is ambiguous, its meaning may be determined by reference to the rest of the statute.

- ***Eiusdem generis* ("of the same kinds, class, or nature") Maxim:** When a list of two or more specific descriptors is followed by more general descriptors, the otherwise wide meaning of the general descriptors must be restricted to the same class, if any, of the specific words that precede them. For example, where "cars, motor bikes, motor powered vehicles" are mentioned, the word "vehicles" would be interpreted in a limited sense (therefore vehicles cannot be interpreted as including airplanes).

Interpretation Statutes

Acts Interpretation Act 1901 (Cth)

15AA Interpretation best achieving Act's purpose or object

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

15AB Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

a. to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

b. to determine the meaning of the provision when:

i. the provision is ambiguous or obscure; or

ii. the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

a. all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

b. any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

c. any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

d. any treaty or other international agreement that is referred to in the Act;

e. any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

f. the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

g. any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

h. any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

a. the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

b. the need to avoid prolonging legal or other proceedings without compensating advantage.

The first section listed makes clear that interpretation of statutory provisions should be construed in a manner that gives proper meaning to the objectives the law attempts to achieve. S.15AB then goes on to list forms of extrinsic material that can be utilized to allow for the law to be given proper meaning. These provisions allow for a purposive interpretation of provisions in a statute.

Presumptions

The court subscribes to a number of presumptions in the process of statutory interpretation to which date back to the founding and even before, rooted in English Common Law courts.

Of course, these presumptions may be rebutted and don't allow for defence, therefore if a law was specifically and clearly contrary to a presumption (even conventions of common law), then the court would have to give a purposive and objective interpretation of the provision.

This is best demonstrated by the case of *Davis v Commonwealth (1988) HCA*, whereby the court had to give meaning to an act establishing a "Bicentennial Authority" to organise celebrations for the 200th anniversary since settlement. However, while the court rules that the authority wasn't proportionate (regarding implied freedoms) in its powers with regard to its purpose. It did hold that given it had no specific provision limiting free speech, the Act should be interpreted in a manner consistent with such on the basis that such freedoms are considered essential in Australia. This therefore highlights a presumption that the Parliament doesn't intend to tread on fundamental freedoms, unless explicitly stated.

Other presumptions include:

- Presumption against interference with freedom of assembly: *Melbourne Corporation v Barry (1922)*.
- Presumption against interference with enjoyment of property rights: *Ex Parte Fitzpatrick (1860 NSWSC*.
- Presumption against retrospectivity: *Maxwell v Murphy (1957)*.
- Presumption against restricting access to Courts: *Raymond v Honey (1982)*.

There is also a grey area currently surrounding the presumption that laws are intended not to violate Human Rights and International conventions, however in *Momcilovic v The Queen (2011) HCA*, French CJ warned that foreign rulings and judgements should be consulted with care, taking into account systemic and jurisprudential differences.

Presumptions however, are ultimately rebuttable.