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1. Introduction

Thursday, 13 July 2017 10:00 AM

What is Administrative Law?

- Administrative Law: **challenging decisions and actions** taken by official authority (usually executive government)
- **Political battleground** (not purely legal issue)
- **Oscar Wilde**: "wherever there is a man who exercises authority there is a man who **resists authority**"
- Constitutional law questions legislation, admin law asks whether action is **authorised** under the legislation
- **Administrative Review Council (2001)**: five **core values** of commonwealth administrative system:
 1. **Lawfulness**
 2. **Fairness**
 3. **Rationality**
 4. **Openness** (transparency)
 5. **Efficiency**
- "Quiet revolution" in administrative law (**Re Pochi and Minister for Immigration and Ethnic Affairs (1979)**)
- **Airo-Farulla (2000)**: **good governance** includes:
 1. **Interdependence**/coproduction between public and private actors in policy networks
 2. **Collaboration** and trust between parties (problem-solving oriented, accountability)
 3. **Distrust** and separation of powers (mutual non-hierarchical accountability, including public interest groups)

How to Approach Administrative Law

1. **Context**: not just "red light-green light" judges/critics (**Harlow and Rawlings (1984)**)
2. **Critically**: not assuming anything, consider underlying factors
3. **Rigour**: exact and probing

Contexts

- **Policy** dictates: **Green v Daniels (1977)**
 - **ISSUE**: Tasmanian school leaver denied **dole** over summer based on government policy
 - **LEGISLATION**: **Social Services Act 1947 (Cth) s107(c)**: must be "**satisfied**" of criteria
 - **OUTCOME**: decision was **outside discretion** given to the minister by the legislation
 - **IMPLICATION**: **criteria in act** has to be applied
- Administrative **necessity**
 - Additional **policy** often necessary/beneficial for applying statute in practice
 - **BUT** "if in the course of doing this, he issues instructions ... **inconsistent** with a proper observance of the statutory criteria he acts unlawfully" (**Green v Daniel at 467**)
- **Economic** or business interests
 - **Peko** (mining interests valued more highly than Aboriginal land claim)
- **Political** pressures
 - Some issues historically considered "non-justiciable" but becoming more fluid (e.g. war)
 - **M64/2015 v Minister for Immigration and Border Protection (2015)**: government **priorities policy** satisfied act criteria even though designed to "visit a punitive consequence" on irregular maritime arrivals

- **Expanding** executive power/'national security' (e.g. in the name of the "war on terror")
 - **Church of Scientology v Woodward (1982) at 76**: "the public interest in national security will seldom yield to the public interest in the administration of justice"
 - **Traljesic v Attorney-General (Cth) (2006)**: no access to ASIO documents, couldn't rebut
 - **Thomas v Mowbray (2007)**: "national security" can be used domestically (e.g. "military and naval defence")
 - **Pape v Commissioner of Taxation (2009)**: GFC considered an "**emergency**" allowing the executive to act
- **Privatisation**
 - **Yarmirr v Australian Telecommunications Corporation (1990)**: Telstra's obligation to provide telephone service to remote Aboriginal community **not enforceable**
 - **Managerialism**: evaluates on output not fairness (e.g. annual quotas of visa vs right to fair hearing)
 - **Bayne (1988)**: managerialism **inconsistent** with admin law values (e.g. focuses on cost efficiency)
 - **Allars (1991)**: managers and administrators actually very **similar**
 - **Tomasic (1987)**: admin law benefits primarily the state (legitimises government decisions and "routinisation"/rationalisation of decisions)
 - **Performance indicators** can be problematic (quality harder/more expensive to measure than quantity, management priorities can be different to community priorities)
 - Private bodies with **statutory power** treated public where exercising said power
 - **NEAT Domestic Trading v AWB (2003)**: public law and private interests **incompatible**
- Curtailing (cutting off) **judicial review** (e.g. privative/ouster clauses)
- **Funding**/fees and charges (e.g. Ombudsman and legal aid funding cuts)
- **Human rights** laws (very limited)
 - **Pearce and Geedes (2001)**: statutory interpretation "common law **bill of rights** - a protection for the civil liberties of the individual against invasion by the state"
 - **Freedom of speech** = "right to know" = FOI
 - **Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)**: new bills and disallowable legislative instruments assessed on **compatibility** with HR instruments (court can report to parliament, doesn't effect validity)

Administrative Law

- Generally **public**: relations between individual/company (within the jurisdiction) and State
- Sometimes **private** (e.g. procedural fairness in unions/churches)
- **Haneef v Minister for Immigration**
 - **ISSUE**: Doctor detained on suspected terrorism, charges dropped, **visa revoked**, detained on "bad character"
 - **RULE OF LAW**: court had granted bail but executive blocked bail order
 - **LEGISLATION**: **Migration Act s501**: Minister must have "reasonably suspected" Haneef had "association" with people involved in terrorism (Haneef's cousins) (doesn't define "association")
 - **OUTCOME**: Minister misinterpreted "association" too broadly and "completely innocent" people could fail
 - Unnecessary to consider improper purpose issue
- **The Mutitjulu Case**

- **ISSUE:** Mutitjulu Community Aboriginal Corporation only **one day notice** of appointing administrator
- **LEGISLATION:** **Aboriginal Councils and Associations Act 1976 (Cth) s71(1):** 'reasonable period' to show cause
- **OUTCOME:** couldn't be considered a reasonable period, **urgency** irrelevant
- **IMPLICATION:** court decision based on interpretation of **legislation** (even if politically sensitive)
- **"Malaysian Solution"**
 - **ISSUE:** government refusal to consider claims of asylum seekers arriving by boat, transfer to Malaysia
 - **LEGISLATION:** **Migration Act s 198A(3):** protections required in Malaysia, reflecting **1951 International Refugee Convention** (protection, human rights etc.)
 - **DECISION:** minister had not met requirements to **investigate** legal protections in Malaysia

Common Law Inadequacies and New Admin Law

- Traditional appeal through **legal review**:
 - Limited **grounds** (unlawful/beyond power, i.e. misinterpretation of power in Act)
 - Limited **powers** (could only order decision be made again)
 - Technical **remedies** (prerogative writs, needed legal and jurisdictional error)
 - **Expensive** and **slow**
 - No **right to reasons** (court couldn't compel, important for determining if challengeable)
- **New administrative law**
 1. Steps by **courts** to extend/regularise judicial review (natural justice (rights and property) to procedural fairness)
 - **Minister for Immigration and Citizenship v Li (2013):** circumstances of "**unreasonable**" decisions
 2. **Legislation** simplify judicial review (e.g. **Administrative Decision Judicial Review Act**, codified standings, remedies etc., reduce technicalities)
 - **FOI Act 1982 (Cth)** (access to government information, personally effected or community interest, exceptions)
 - **Reasons for decision (AAT Act s 28)**
 3. **Non-judicial review** (accessible, greater possibility of outcomes, retroactive, public (can be closed)
 - **Ombudsman** ("watchdog", persuasive, systematic problems, treatment not just final decision)
 4. **Administrative Review Council** (regular structural review of federal admin law, disbanded in 2015)
- **Factors** that led to change
 1. **Welfare state** (after WWII and great depression, more effected by government decisions)
 2. Demand for recognition of **basic rights** (governments should be held to account)
 3. Perceived loss of **parliamentary power** ("ineffective" in reviewing executive decisions)
 4. Demand for **access, uniformity, flexibility** and **certainty** (should be more open for challenging decisions)
 5. Application of **international law** via UN Covenants (indirect effect)

Merits vs Legal Review

- **Attorney-General (NSW) v Quin (1990) per Drennan J:** "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"

- **Courts**
 1. **Legality**/*ultra virus* (beyond power, not merits of the decision, i.e. bad/poor/inappropriate etc.)
 2. **Procedural** (not substantive) fairness
 - **Limitations**: set aside decision but can't re-make (**Green v Daniels**), requires standing (personally impacted)
- **Tribunals**
 1. **Accessibility** (rules of standing a little broader, can keep confidential)
 2. **Grounds** ("correct and preferable" = legality and wisdom, not just legal issues, FOI, available to all)
 3. **Remedies** (substantive outcomes, legally binding, position of original decision-maker)
 - **Limitations**: legislative limits, facts/law may have changed (decide at time they convene), decides afresh (can be different grounds)

Constitutional and Legal Framework

- **Parliamentary rule/sovereignty** (since 1640s English Revolution - monarchy overthrown)
- **"Rule of law"**: **Dicey (1885)**:
 1. "No man is punishable... except for a **distinct breach of** law established... before the ordinary courts of the land"
 2. "**No man is above the law**... every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"
 3. "The **general principles** of the Constitution... are with us the result of judicial decisions determining the rights of private person in particular cases"
 - **Plaintiff M61/2010E (2010)**: judicial review and procedural fairness available within **Australian jurisdiction**
 - Legal equality doesn't equate to **social equality** (e.g. mandatory detention and Indigenous offenders)
 - **Administrative detention** = executive detaining = no procedural fairness/hearing by a court
 - **Unequal accountability** (e.g. non-justiciable or hesitant, secrecy of documents, can't compel to attend)
 - **Arthurs (1979)**: executive can be in **better place** to resolve disputes than courts (within judicial review)
- **Separation of powers**
 - **Minister for Immigration and Border Protection v WZARH (2015)**: "in the absence of a clear, contrary legislative intention, administrative decision-makers must accord **procedural fairness** to those affected by their decisions"
 - **Kable Principle**: "**functions** could not be conferred on State courts exercising federal jurisdiction if doing so would undermine the **court's authority**"
 - Judiciary should **limit interference** with executive and judiciary (separate/independent bodies)
 - **Incomplete**
 - **Cabinet members** must be in parliament and cabinet usually **controls** parliament
 - **Delegated legislation** (**Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931)**), regulations had status of laws when there was contrary legislation, decision part political)
 - **Tribunals** ("quasi-judicial" powers, e.g. legally binding decisions)
 - **Blurring** between administrative and judiciary decisions
 - **"Borderland principle"**: **overlapping** between judicial and administrative functions

- "Chameleon principle" (per Kirby J): powers to executive that **would be judiciary** if performed by courts (parliament to decide constitutionality not the courts)
- **Contrast (imbalances)**
 - Judiciary more strictly **protected** than legislature (Brandy - Human Rights Commission can't enforce)
 - Same strictness not applied to delegation of **legislative power** to executive (e.g. Dignan's Case)
- **Responsible Government**
 - "Governments and ministers are - and should be - **answerable** to parliament"
 - Thynne and Goldring (1987): Power, Accountability and Control
 - RG should be given both a **normative** and **descriptive** context
 - Ministers are only **answerable** for what they can reasonably be expected to answer
 - **Responsibilities:**
 1. **Task** (to complete the task, e.g. issuing license)
 2. **Appropriate** (be responsible and responsive to community interests)
 3. **Accountability** (institution or person)

Moves to Curtail Judicial Review

- **Privative**/ouster clauses
- Limits of **grounds of review**
- **Conclusive certificates** (authorise certain decision)
- "**Not invalid**" clauses (decision not invalidated if requirements not met)
- **Time limits** on challenges
- "**No duty to exercise**" clauses
- **Tailoring discretion** (legislation gives authority broad powers, harder to challenge)
- **Privatisation**
 - Reviewable -> **unreviewable** (belief that accountability can be achieved through the market)
 - When still reviewable rights and duties have **changed**
 - Table on p 69 re *The Contracting Out of Government Service (ARC 1997)*