

LAW00 – Administrative Law

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Topic One – What is admin law

What is admin law

- Political character of administrative law
- Political institutions: methods of accountability
- Legal institutions: methods of accountability
- The rule of law
- Separation of power
- *Haneef v Minister for Immigration and Citizenship* (2007)

Political character

- Administrative law as restraint on the administrative state – a body of legal principles and doctrines which regulate the executive branch of government
- Inexorable rise of post-WWII executive power: facilitating the new social contract
- Migration cases now the seminal area of public policy at issue in Australian administrative law
- Application of the principle of legality to administrative power

Political institutions

- Ch.2 Cth Constitution: much left unsaid as to how the federal executive is to function
- A reflection of the constitution's peculiar Westminster – 'Madisonian' hybrid settlement
- Reference to a 'Federal Executive Council': but not Cabinet
- Government formation: the product of legislative elections
- Responsible government: cabinet is accountable to parliament + adheres to votes of no confidence
- Particular powers of accountability rest with the lower house
- Government departments: exercise substantial public power / civil servants have enormous influence on ministers; politically neutral but powerful
- Further raises profound questions on accountability – especially given unelected status of civil servants
- Convention is that minister will ultimately be held responsible for departmental mistakes, illegality
- 'Government' in its broader sense: governance by non-departmental agencies: statutory agencies, e.g. ABC, ATO, ACCC

Legal institutions

- Hotop:
 'The primary task of the administrative lawyer must be to ensure that the rights of the citizen are protected against executive action not authorised by legislation; and, indeed, to ensure that such rights are not unnecessarily infringed by excessive grants of power to administrative authorities by Parliament.'
- Administrative law as a method or technique of judicial control of administrative power, or the body of law that establishes and organises such power
- Mechanisms of control: freedom of information requests, entitlement to reasons, ombudsmen, anti-misconduct commissions, tribunals, judicial review
- The 'new administrative law': while judicial review is the oldest of these legal mechanisms, many others were established recently: at Commonwealth level by the Fraser govt. in late 1970s/early 1980s following the Kerr Committee report (1971), e.g. *ADJR Act 1977*

- Cane *et al* described 'bureaucratic accountability' – in addition to legal and political means, i.e. constraints *within* executive branch

The rule of law

- The rule of law sits in contrast to supremacy of arbitrary rule
- Ancient provenance, but emanates sharply as a 17th + 18th century aversion to divine right
- Given its most luminous expression by AV Dicey:
 - Predominance of the regular law (i.e. not prerogative)
 - Equality before the law
 - Constitution results from the ordinary law/courts of the land (therefore rights cannot be suspended)
- Rule of law given its most profound meaning with the holding of executive power to account by the ordinary courts of law
- Critique of the Diceyan articulation:
 - Third observation as normative or merely 'paraphrases a British legal tradition', i.e. protection of rights embodied in common law actions of tort, false imprisonment, etc. (Hotop)
 - In tension with parliamentary sovereignty
 - Rise of post-war administrative state = huge swathes of discretionary authority rest with executive
 - Aversion to admin. courts / admin. law – 'stultifies development of Anglo-Australian admin. law for almost 100 years' (Hotop)

Separation of power

- Separation of powers: reflects the 'Madisonian' aspect of Australia's constitutional settlement
- Influence of Montesquieu: liberty preserved by dispersal and strict separation of power, functions, and personalities through our governing institutions
- Fusion of executive/legislative power: but separation of power pronounced between judicial and other two branches
- The HCA has read into the Cth Constitution's structures a rigid division of powers – and a very strong doctrine of the separation of judicial power
- Little judicial inclination to uncover underlying/implied structural principles or rights within existing constitutional provisions – 'higher' law-making thought to reside with 'the people'
- Absence of a rights-centred approach to judicial review
- The result = a narrow, extremely complex (convoluted?), & austere/formalistic understanding of the nature of judicial power e.g. *Boilermakers* case (1956) – this becomes clearer when we look at privative clauses and jurisdictional error