

# LECTURE 2: INTRODUCTION TO MERITS REVIEW

## WHAT IS BEING REVIEWED

- Assume that the Act is valid
- We challenge the way that the Minister has used the power pursuant to the Act
- Delegated legislative power → Conferred power to G-G to make regulations
- Minister has delegated power onto delegate
- Not every power is allowed to be delegated → Some have to be enacted by a Minister

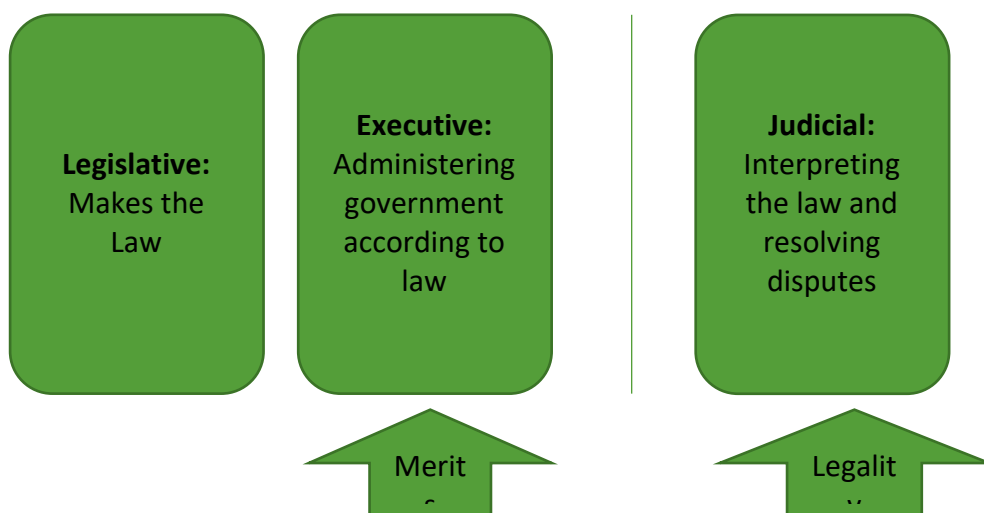
## SEPARATION OF POWERS

### Key Principles

- 1. Those who exercise power should be subject to checks
  - o In order to be a Minister you have to be a member of Parliament → Can be held accountable → Vote of no confidence → RESPONSIBLE GOVERNMENT
  - o Ability for the legislature and executive to remove judges
- 2. Each institution should specialise in the job that it has been given

### Ways Government can be held accountable:

- Courts hold judicial review to hold both the legislature and the executive accountable
  - o Legislature: constitutional law powers (ignore in this topics)
  - o Executive: the way powers are exercised → within legal limit



- No strict separation between legislature and executive
  - o Ministers sit in parliament
- Strict separation between judicial and other two arms → Gives us the basis of our merits/legality distinction
  - o Executive gets to decide the merits → How power should be exercised

- Courts are responsible for deciding the legality → Interpretation of the law and disputes before the law

## THE LEGALITY-MERITS DISTINCTION

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. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to sure administrative injustice or error. 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 → *Attorney-General (NSW) v Quin (1990) 170 CLR 1, 35-36 (Brennan J)*

Judicial Review =  
Courts

Merits Review =  
Executive bodies

- Tribunals → Executive bodies for the purpose of the separation of powers
- Ombudsmen
- Commissions of Enquiry

### MERITS REVIEW – EXECUTIVE BODIES

- Determines the facts
- Applies the law to the facts
- Stands in the shoes of the original decision maker
- Typically re-exercises the power and makes the decision afresh

Executive bodies

### JUDICIAL REVIEW - COURTS

- Determines the legality of the decision:
  - Law correctly interpreted?
  - Correct procedures followed?
  - Appropriate reasoning process adopted?
- Remedies require **original** decision-maker to act within power

Courts

### BLURRED BOUNDARIES

- “Merits review can plausibly be described as judicial review in disguise” – Peter Cane
- Merits review bodies still interpret/apply the law
- Difficulty of separating questions of facts and law
- Some grounds of judicial review allow review of factual findings
- States can have dual function tribunals (e.g. NSW Land and Environment Court)
  - States don't have entrenched separation of judicial power

### EXAMPLE

#### *Fisheries Licensing Act 2018 (Cth)*

- 12 The Director of Fisheries may cancel a fishing license if the holder of the license is not of good character.
- 13 If proposing to exercise the power conferred under s 12, the Director of Fisheries must first afford the s-holder an opportunity to make submissions

Ken receives a speeding fine after being caught by a speed camera driving 87km/h in an 80 zone.

Two weeks later Ken receives a notice from the Director of Fisheries cancelling his fishing license. The Director indicates the cancellation is based on his lack of good character, as evidenced by his poor driving record.

**Merits Review:**

- Is Ken of good character?
- Do I think a person is not of good character based on a speeding fine?
- Should I cancel Ken's fishing license?

**Judicial Review:**

- Has the Director correctly interpreted their powers?
- Has the Director followed the right procedures?
- Has the Director employed an appropriate reasoning process?

# LECTURE 5: OMBUDSMEN

## WHAT IS AN OMBUDSMAN?

*To protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration and to improve public administration while making the government's actions more open and its administration more accountable to the public* → International Ombudsman Institute

*Impartial organisations that receive and resolve complaints, and conduct inquiries into individual or systematic cases based on those complaints* → Productivity Commission, *Access to Justice Arrangements* (2014), 312

1809	Sweden appoints parliamentary ombudsman
1962	New Zealand - first English speaking nation to appoint an ombudsman
1967	UK appoints its first ombudsman
1971-1974	Australian states establish State ombudsman
1977	Fraser appoints first Commonwealth Ombudsman ( <i>Ombudsman Act 1976</i> (Cth))

## RATIONALE

The establishment of the office is directed towards ensuring the departments and authorities are responsible, adaptive, and sensitive to the needs of citizens → Prime Minister Fraser announcing appointment of first Commonwealth Ombudsman in 1977

- Mechanism for low value disputes
  - o Completely unsuitable for adversarial court process or merits review tribunals
    - E.g. Train ticket → Worth a challenge but not worth bringing to the courts/tribunal
- Overcome power imbalances between government and citizen
  - o Far less confrontational
- Simple to use and access
  - o No complicated application processes or fees
  - o Don't need to fill in complex forms → Can phone to register a complaint
  - o Informal process
- Can target systemic issues
  - o Look beyond the individual dispute and attempt to identify wider problems within the system
- Legal and non-legal disputes
  - o Issues of fairness and unfairness → Law doesn't do a very good job when dealing with unfairness

## PUBLIC V PRIVATE

### PUBLIC SECTOR (FOCUS)

- Commonwealth Ombudsman
- NSW Ombudsman

### PRIVATE SECTOR

- Financial Services Ombudsman
  - o Used for banks, etc.

## BLURRED LINES

For example: the Telecommunications Industry Ombudsman Scheme → established under legislation – carriers and providers must enter into the scheme

- Some private industry ombudsmen have public foundations → Based on legislation (public)

## FUNCTIONS

### COMPLAINTS

5(1) Subject to this Act, the Ombudsman:

(a) shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman

### OWN MOTION INVESTIGATIONS

5(1) Subject to this Act, the Ombudsman:

(b) may, of his or her own motion investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority

- Courts have to wait for issues to be brought to them → DIFFERENCE

### OVERSIGHT ROLES

#### **Public Interest Disclosure Act 2013 (Cth)**

Public Interest Disclosure Scheme → Protects whistle-blowers from reprisals

- Oversight by the Ombudsman and IGIS
  - o Providing assistance, education and awareness
  - o Monitoring agency notifications
  - o Deciding extensions of time for investigations
  - o Receiving and investigating internal PIDs
  - o Receiving and investigating complains about agencies
  - o PID handling
  - o Preparing an annual report

### USE OF COVERT AND INTRUSIVE POWERS BY LAW ENFORCEMENT AGENCIES

- E.g. Compliance with restrictions on access to telecommunications data → **Telecommunications (Interception) Act 1979 (Cth) s 186B**
- E.g. Compliance with delayed search warrant requirements → **Crimes Act 1914 (Cth) s 3ZZGB**
- E.g. Compliance with restrictions on use of surveillance devises → **Surveillance Devices Act 2004 (Cth) s 55**

### IMMIGRATION DETENTION

- Report on person in detention more than 2 years → **Migration Act 1958 (Cth) s 486O**
  - o Parliamentary report

### SPECIALTY AREAS

- Private health insurance
- Overseas students

- VET student loans
- Defence force
- Immigration
- Law enforcement
- Postal industry
- Australian Capital Territory (ACT)

Same ombudsman → wearing a “different hat”

**Complaints → Own-motion investigations**

# LECTURE 9: DELEGATED LEGISLATION

## WHAT IS DELEGATED LEGISLATION?

“Instruments that lay down general rules of conduct affecting the community at large which have been made by a body expressly authorised so to act by an Act of Parliament” → Pearce and Argument, *Delegated Legislation in Australia* (2017, 5<sup>th</sup> ed) 2

### EXAMPLES:

- Regulations
- Statutory Rules
- By-Laws
- Ordinances

Parliament Makes an Act → Confers Administrative power to a Minister

Parliament makes an Act → Confers legislative power to a Governor-General to make regulations pursuant to the Act → Regulations can confer administrative power on a Minister

- NOT challenging the validity of the primary Act (Constitutional law)
- Challenging the validity of the **regulations** or **delegated legislations** (Administrative law)
  - o If you can strike out **regulations** → also strike out conferral of power given by the regulations
  - o ALSO Exercise of administrative power pursuant to either instrument

## SEPARATION OF POWERS

Each institution keeps to their own individual role

### LEGISLATIVE

Making the law → Extent to which the executive can make the law and step into the role of the legislature

### EXECUTIVE

Administering government to law

### JUDICIAL

Interpreting the law and resolving the disputes

## PRIMARY LEGISLATION

I.e. Acts → **NO** Judicial review of legislation (constitutional law)

## DELEGATED LEGISLATION

E.g. Regulations, ordinances, by-laws, etc

- Attacking instrument itself
- Two avenues to choose:

- → A → Non-judicial accountability mechanisms
- → B → Judicial review of delegated legislation

## NON-LEGISLATIVE INSTRUMENTS



E.g. Guidelines, policies, *soft law*

- Don't challenge directly → Challenge the way it has been implemented
  - → C → Judicial review of administrative decisions
    - Inflexible application of policy
    - Procedural fairness (departure without warning)

## NON-JUDICIAL ACCOUNTABILITY MECHANISMS

FEDERAL → *Legislation Act 2003 (Cth)*

STATE → *Subordinate Legislation Act 1989 (NSW); Interpretation Act 1987 (NSW)*

 <p><b>Legislation Act 2003 (Cth)</b> Legislative Instrument</p>	<p><b>8(4)</b> An instrument is a legislative instrument if:          (a) <u>the instrument is made under a power delegated by the Parliament; and</u>          (b) any provision of the instrument:          (i) <u>determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law ... is to apply, or is not to apply; and</u>          (ii) <u>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.</u></p> <p>[see remainder of definition for further detail and exclusions]</p>
 <p><b>Subordinate Legislation Act 1989 (NSW)</b> Statutory Rule</p>	<p><b>3</b> <u>statutory rule means a regulation, by-law, rule or ordinance:</u>          (a) <u>that is made by the Governor, or</u>          (b) <u>that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor,</u>  <u>but does not include any instruments specified or described in Schedule 4 [i.e. standing rules and orders of parliament, rules of Court, university by-laws etc]</u></p> <p>[Exclusions in Schedule 4]</p>

## SUNSETTING

- Purpose: Impose a shelf life on delegated legislation
  - Expire → Executive then needs to re-make

**Legislation Act 2003 (Cth)**

**S 50** This subsection repeals a legislative instrument on the first 1 April or 1 October falling on or after the tenth anniversary or registration of the instrument, unless the instrument was registered on 1 January 2005

[see **s 50(2)** for repeal dates for instruments made prior to 2005]



### ***Subordinate Legislation Act 1989 (NSW)***

**S 10(2)** Unless it sooner ceases to be in force, a statutory rule published on or after 1 September 1990 is repealed:

- (a) On the fifth anniversary of the date on which it was published (in the case of a statutory rule published on 1 September in any year), or
- (b) On 1 September following the fifth anniversary of the date on which it was published (in any other case)

[see **s 10(1)** for repeal dates for instruments made prior to 1990]

## PUBLICITY

### PUBLIC CONSULTATION

#### ***Legislation Act 2003 (Cth)***

- **S 17:** Requirement of public consultation
- **S 19:** Failure to consult does not affect validity → NOT compulsory

#### ***Subordinate Legislation Act 1989 (NSW)***

- **S 5:** Regulatory impact statement required in particular cases
- **S 6:** Minister can certify if no need for RIS
- **S 7:** Statutory rule must not be presented to G-G without RIS or certificate
- **S 9:** Failure to comply does not affect validity → NOT compulsory

### REGISTRATION

#### ***Legislation Act 2003 (Cth)***

- **S 15G:** Legislative instrument must be lodged for registration

*15K(1) A legislative instrument is not enforceable by or against any person (including the Commonwealth) unless the instrument is registered as a legislative instrument.*

#### ***Interpretation Act 1987 (NSW)***

- **S 39:** All statutory rules must be published on the NSW legislation website
- **S 39(2A):** Failure to publish does not affect validity, but DOES affect the commencement date

## PARLIAMENTARY REVIEW

### TABLING

#### ***Legislation Act 2003 (Cth)***