Administrative Law Notes

TOPIC 1 INTRODUCTION

Chapter 1 Introduction

What is Administrative Law

- Administrative law provides a set of legal principles that govern who can be called to account and by whom, by what criteria their conduct is accountable, and supplies its mechanisms.
- Regulating the executive/ keeping them accountable
- Administration law has emerged in a piecemeal way, thus exactly what administration law is and what its boundaries are is a topic of on contention
- Ultimately administrative law has the key theme of legal accountability of the executive branch of government.
- Primary mechanism is judicial review, however there are a range of other mechanisms beyond black letter law to soft law
    - Example: Policies and guidelines
- "Lowers the draw bridge over the mote of executive silence"

Who Is the Executive?

- The executive consists of:
    - Queen and GG
    - Ministers (PM and Cabinet)
    - Ministerial Staff (Employed under section 98 of the Public Administration Act; Employed by the premier and assigned to Ministers to assist with performing their duties)
    - The departments and the public service
    - Statutory Authorities (ASIC, ACCC, Tribunals)
    - Government Business Enterprises (e.g. AusPost)

Accountability across the public/ private divide

- There is a trend in Western countries for governments to devolve functions to private sector bodies whenever it is felt that the function can be thereby delivered more efficiently and effectively
- There are three main forms:
    1. *Privatisation*: Transfer of functions performance by publicly owned organisations to private sector bodies (Commonwealth Bank, Telstra, Qantas)
    2. *Commercialisation*: Government imposes a private sector business structure, including commercial methods and goals, on an agency that is owned and controlled by the government (Australia Post, Defence Housing Commission)
    3. *Contracting out:* A government service will be delivered to the public by a private sector body, pursuant to a contract entered into with a government agency (Job network provides and the management of detention centres)
- The dichotomy between public and private has traditionally defined admin law, however it can be difficult to identify exercises of public power in the post-modern state and to justify interference of administration law in the private sector

- The purpose of judicial review, is to control government decision-making in satisfaction of the rule of law and the separation of powers
- The blurring of the divide between the public and private sectors is a jurisdictional problem for the courts, which has not yet been resolved
- Ultimately there is a question of accountability, however there are many different ways of ensuring accountability and administrative law mechanisms are only part of the total picture
- In the private arena there are many clubs, tribunals and societies that make decisions or exercise powers and the issue arises as to whether these decisions are subject to judicial scrutiny and if so, on what basis and according to what criteria
- Courts have statutory jurisdiction to review some decisions in accordance with anti-discrimination legislation. Beyond this, judicial scrutiny of club and domestic decisions is well established at common law, especially decisions of a disciplinary nature such as an expulsion of a member. Usually the court focus of scrutiny is whether the society observed its own rules in commencing disciplinary proceedings and whether natural justice was observed in the process
- In a few decisions, the courts have sought to resolve these issues by likening the disciplinary or regulatory power of a private organisation to the public power exercised by a government agency and therefore proceed as though a public law action was being heard in the administration law jurisdiction of the court
- Case: **Datafin**
    - The UK decision in *Datafin* adopted of a **functional approach** to the question of who should be subject to administrative law. That is the judicial reviewability of non-statutory power exercised by a non-government body turn on whether, functionally, the power can properly be considered to be public power or the exercise of a public function.
    - Datafin determined justiciability through the governmental nature of power rather than the source of power
    - In light of the post-modern state it is arguable that a **functional approach is necessary** because:
        - The orthodox approach to defining 'officer of the Commonwealth' has raised the prospect that government can evade judicial scrutiny under Section 75(v) (and Section 39B (1)) by the expedient of adopting the corporate form. According to the orthodox approach to the definition, an officer of the Commonwealth is 'a person appointed by the Commonwealth to an identifiable office who is paid by the Commonwealth for the performance of their functions under the office and who is responsible to and removable by the Commonwealth concerning the office' (*Broadbent v Medical Board of Qld* (2011)).
        - Thus, Changes in governance potentially remove public functions/services from public law accountability mechanisms
        - Should be a functional shift, a shift from the idea of government as an institution to governance as an activity. To reflect the post-modern state.
- What is a public function?
    - Potential test 1: The Surprise Test (Donaldson MR)
        - No one could have been in the least surprised if the Panel had been instituted and operated under the direct authority of statue law, since it operates wholly in the public domain. Its jurisdiction extends throughout the UK. Its Code and rulings apply equally to all whose wish to make take-over bids or promote merges, whether or not they are members of bodies represented on the Panel.
    - Potential test 2: The Major Consequence Test (Lord Nicholls)

        - They (the powers of the Panel) are far-reaching and the sanctions for their enforcement are also formidable: they include suspension of a listing by the council of the Stock Exchange, in performance of its public duty in that regard.
- Case: **NEAT v AWB**
    - The decision in NEAT is the closest the High Court has come to addressing the issues illustrated in Datafin.
    - In NEAT the issue the HC faced was whether a decision by a private company that had statutory effect was a decision that was reviewable under the ADJR Act. It was held that decision was not made under an enactment and thus was not reviewable under the ADJR act and the jurisdiction under Section 39B was not available because the company was not "an officer of the Commonwealth.
        - Cf. *Plaintiff M61*, where it held that the assessments of a private contractor under executive direction were linked to the Migration Act and could be set aside for error of law and breach of natural justice. (equitable remedies)
    - Overall, AWB's decisions cannot be reviewed by courts
- McHugh, Hayne and Clainnan JJ:
    - Secondly, there is the private character of AWBI as a company incorporated under companies' legislation for the pursuit of the objectives stated in its constituent document: here, maximising returns."
    - 'Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.'

Why Do We Need Administrative Law?

- The administration law mechanisms including the Ombudsman, royal commissions, freedom of information regimes, merits review and judicial review all focus on *holding the executive and the exercise of executive power to account*

A. Unique Powers of the Executive

- The executive possesses unique and extensive powers
- The executive has significant power and affects people far more often and more directly that other forms of government
    - For example, they confer, alter and abolish legal rights, has the power to use force
- The executive has been described as "fundamentally concerned with action- carrying out things, putting things into effect, getting things done"
- The executive has the power to alter the legal rights and duties of individuals. For example, through either the creation or denial of rights in determining whether to grant a licence
- The executive is also responsible for the protection of the state. It exercises the state's military power.
- The executive has a unique capacity to affect individuals. Although the judiciary has the power to make decisions affecting individual rights, it is limited to determining disputes that are brought before it. The judiciary even depends upon the aid of the executive to enforce its judgment.
- Thus, there is arguable a need for rigorous regimes of accountability
- *Compared to the judiciary:* Judiciary only deals with disputes that come before it, allegedly passive and cannot act unilaterally. The judiciary also relies on the executive for enforcement of its decisions.

- *Compared to parliament:* Parliament makes the laws, but it is the executive that implements and enforces them, the executive executes these laws. The powers of parliament have waned, and the powers of the executive have waxed since the latter part of the 19th century (Rise of the executive power over parliamentary power). This change is due to the change in the party system, where parliamentarians are more strongly aligned with their party
- In a practical sense the relevant power of the parliament in comparison to the executive has diminished as a result of the party system introduced in the late 19th century.

B. To Keep the Executive Branch Accountable

- A second reason for having a separate body of law regulating executive power is that the courts and the parliament already have a number of accountability mechanisms suited to their institutional characteristics.
- With only a few exceptions, the courts must conduct cases in open court, provide reasons for their decisions and with the exception of the High Court's decisions, are subject to appeal
- The Constitution requires the judiciary to hold the parliament to account through judicial review of legislative action
- Parliament's proceedings are also conducted in public, the two Houses of Parliament keep each other in check, and members of parliament are directly accountable to the people through elections
- In contrast to parliament and the courts, the executive conducts its functions in private.
- Historically, there were no in-built accountability mechanisms within the executive branch of government.
- Instead, the executive was brought to account by the other branches of government.
- Accountability to parliament was achieved through the conventions of responsible government and the use of parliament's powers to question the government and to inquire into executive conduct.
- Case: **Egan v Willis**
    - A system of responsible government traditionally has been considered to encompass this means by which Parliament brings the Executive to account so that the Executive's primary responsibility in its prosecution of government is owed to Parliament.

Why should governments be accountable? (Major Admin Law Values)

- Accountability in administrative law captures the idea of a formal, legal responsibility to both the legislature and the courts for the exercise of public power. Accountability requires that action be open to inspection and open to challenge. Rudolf Klein explains that accountability is about "the construction of an agreed language or currency of discourse about conduct and performance and the criteria that should be used in assessing them." Administrative law provides a set of legal principles that govern who can be called to account and by whom, by what criteria and their conduct is accountable and supplies the mechanisms. Accountability exists in many different forms and its flexibility and breadth makes it a useful tool to understand admin law principles and mechanisms. David Feldman explained
    - *"Accountability of government is of different kinds. It may be political or legal; continuous or periodic; accountability to the electorate, to the Parliament or to the party and it may be based on moral or legal standards or party-political expediency."*

1. Democratic

- Governments should be accountable as we live in a representative democracy and that the electors have a right to hold their representatives to account
- The people elect representatives to make laws and decisions on their behalf
- Popular sovereignty dictates that the public's power is entrusted to others who exercise that power for the people therefore public trust leads to accountability
  - *"Those entrusted with public power are accountable to the public for the exercise of their trust"*
- The executive is chosen by the lower house of parliament therefore creating a line of responsibility from the executive to the people
- The concept of responsible government holds the executive accountable to the people. The doctrine of responsible government establishes parliament as a central institution of accountability. Ministers must be members of parliament and the executive must command majority support in the lower house of parliament
- Democracy implies some form of collective decision-making therefore that individuals have "a say in terms and conditions on which social rules which bind them are developed"
- Section 7 Constitution of The Senate
  - The Senate shall be composed of senators for each State, directly chosen by the people of the State
- Section 24 Constitution of House of Representatives
  - The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth

2. Rule of Law Justification

- Rule of law rather than by 'men'
- Rule of law is the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws
- **Dicey:** Identified three features of the rule of law:
  1. Supremacy: No person can be punished or made to suffer except for a distinct breach of law
  2. Legal Equality: Legal restraints must apply to citizens and government alike
  3. Courts: Dicey identified the importance of the role of the courts in protecting the individual against the government, emphasising the role of the common law in protecting rights as part of the rule of law. Rights under the Constitution are the result of judicial decisions not general constitutional principles
     - Thin/ Formal Rule of Law: The non-arbitrariness and equality conditions exhaust the definition of the rule of law
     - Thick/ Substantive Rule of Law: Non-arbitrariness and equality is not enough. We also need to protect individual rights.
- Legal limits should be capable of guiding the behaviour of individuals and government
  - For example, they should be prospective, clear and public and consistent
  - These procedural ideals ensure that accountability is practical without these characteristics legal limits would be undermined
- Through the enforcement of the rule of law the government is "prevented from exceeding the powers and functions assigned to the executive by law and the interests of individuals are protected accordingly."
- Substantive concept of the rule of law: To comply with the ideals of the rule of law, legislation must conform to fundamental individual rights and liberties.

- Natural justice: If a government decision maker is going to make a decision it cannot be arbitrary or biased and there must be opportunity for a fair hearing. When government decision makers make decision, they have to make them rationally and ought to be able to explain their decision-making process

3. Separation of Powers Justification

- Distribution of power to protect individual liberty
- The separation of powers provides a system of checks and balances
- The Court emphasises there was a need for rigidity and for aa federal government "of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them"
- To enable the federal system to work "the ultimate responsibility of deciding upon the limits of the respective powers of the government was placed in the federal judicature."
- The separation of power from the political branches ensures that there is a separate, independent arbiter of the legality of the actions of those other branches. The availability of a separate and independent judiciary to review executive action is often understood as a fundamental tenant of the rule of law and one of the most fundamental protections of individual liberty in the Constitution.
- Splitting and checking of governmental powers ensures individual freedom would be protected
  - Constitution implies a separation of powers
    - Executive
    - Legislative
    - Judicial
  - The division of the three branches of government in these chapters was identified by the High Court in the **Boilermakers' Case** for an implication of the separation of powers at the federal level in Australia
  - Although no formal separation of powers at the state level, the principle expands to **Kable** through the states
    - The **Kable principle,** protects the independence and impartiality of the judicial branch of the government in Australia
    - This has been done partly in recognition of the importance of an impartial judicial branch in achieving accountability to the constitutional framework
    - It also operates to achieve this objective in the administrative law framework

4. Individual Rights Justification

- *"The primary purpose of administrative law is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse"*
- Where government exists to protect and further the interests and liberties of the individual, accountability of the exercise of government power to the individual is paramount
- Government power must not be exercised in a way that unduly infringes on the rights and liberties of individuals within the community
- Individual rights provide us with a strong justification for accountability principles and mechanisms that facilitate individual redress against government action
- Individual rights are not universal therefore the content and extent of these rights are heavily contested. Where rights overlap and conflict, one right must yield to another or they must be balanced against each other.
- Government cannot do anything unless they are authorised by law, in the case if an individual you can do anything you want unless a law restricts this

- Mechanisms if individual redress over systemic review, particularly concerned that individuals have remedies to use if government goes beyond its powers. One approach, but there are different views about the sorts of remedies that should be available in administrative law
- Over emphasising individual rights limits one's capacity to focus on systemic review. The Ombudsmen deal with individuals as well as overall systematic issues.
- A system that simply revolves around individual redress is likely to be inefficient
- Justification supported by a lack of entrenched human rights

Minor Admin Law Values

- Legality
    - The exercise of government power within legal boundaries is vital within the concept of the rule of law wand for the protection of individual autonomy and underpins the need for separation of functions between different branches of government
    - Making sure that actions of the executive is always lawful
    - May be legal but may offend another value
    - Courts are focused on legality review
- Fairness
    - The power imbalance that exists between the individual and the government highlights the importance of fairness from a rights standpoint
    - Impartiality in government action is one of the tenets of the rule of law
    - The idea that a person should have a fair hearing before the government makes a decision or takes action that affects the functioning of a liberal democracy
    - Government must be impartial should not treat one set of citizens differently
- Rationality
    - The concepts of consistency and the removal of arbitrary exercises of power have often been used to define the rule of law
    - Rationality ensures individuals are able to predict the exercise of government power and order their affairs accordingly
    - Government should not act in an arbitrary manner and just make things up
    - One of the grounds of judicial review
    - Legal standard of rationality is set at a very high threshold
    - Must be so irrational that no reasonable decision maker could have made that decision
    - Sometimes describes as beurocratic insanity
- Integrity
    - Integrity is defined as the exercise of executive power with fidelity to tis legal limits on power, as well as to its purpose and fundamental public law values
    - The idea of integrity is to ensure that the exercise of government power does not depart from the purpose for which it was entrusted to government, either by the people directly or by the government
    - Government is responsible for what it does, carries out its functions that was entrusted to it
    - Fidelity to public services
    - Avoid conflict between private interest and the public interest
    - Range of bodies set up to ensure maintenance of high level of integrity in public decision making. These bodies have a proactive role in investigating and highlighting when there are instances when integrity standards have been breached

- Efficiency/ Effectiveness
    - We want a government that functions properly
    - We expect government to be efficient, underlying that are ideas about taxpayer's money and limited public funds, thus we expect government to be frugal and efficient in making decisions
    - Courts tend to place less emphasis on efficiency than the public service. Clash of values, how important is efficiency compared to rigorous legal standards used in court

        - Values are reflected in grounds of review
        - Accountable to parliament for efficiency and policy
        - Accountable to courts for legality
        - Integrity recent focus, emergence of bodies
        - Tension between values e.g. efficiency versus fairness and thus the values are not always easily reconcilable

How to Achieve Accountability? Administrative Law Mechanisms

- Accountability requires that action be open to inspection and open to challenge.
- This creates an important initial dichotomy between two groups of accountability mechanisms.
- The first consists of those mechanisms that promote an understanding of what is happening in government.
- As a general rule, every executive function, whether superior or subordinate, should be the appointed duty of some given individual. It should be apparent to all the world who did everything and through whose default anything was left undone.
    - Responsibility is null when nobody knows who is responsible.
- The administrative law mechanisms that achieve transparency of government action include information disclosure regimes as well as those mechanisms that investigate the actions and decisions of government.
- These include parliament, which has extensive powers to order the production of documents and appearance of witnesses to give evidence as well as more tailored mechanisms such as the Ombudsman and royal commissions. These mechanisms are able to investigate and make known to the public, more systemic failings of government, as well as to investigate individual complaints and make recommendations about how systems might be improved.
- A second group of mechanisms provide redress to an individual who has been affected by a particular governmental action.
- The Kerr Reforms: 1970s "Modern" Admin Law or "New Admin Law" Package or Kerr Reforms
    i. Administrative Decisions (Judicial Review) Act (**No need for jurisdiction error in assignment**)
    ii. Establishment of the Administrative Appeals Tribunal
    iii. Establishment of the Ombudsman
    iv. Establishment of FOI Legislation

Administrative Law and Statutory Interpretation

- Majority of powers exercised by the executive are sourced in statues. When the executive administers statutes, it is important that the statues are properly interpreted.
- When the executive exercises statutory power, it is putting into effect laws made by the peoples' elected representatives.

- There are democratic reasons for insisting that executive decision-makers interpret legislation correctly in accordance with the law that parliament has made and for which parliament is accountable
- The separation of powers requires that the executive implement the laws made by parliament. For the executive to interpret statues incorrectly would mean that the executive has made its own law. This would be in contrary to the rule of law.
- Since statutes confer rights on individuals, statutory interpretation is the key to determining exactly what those rights are