

LAW4331 Administrative Law

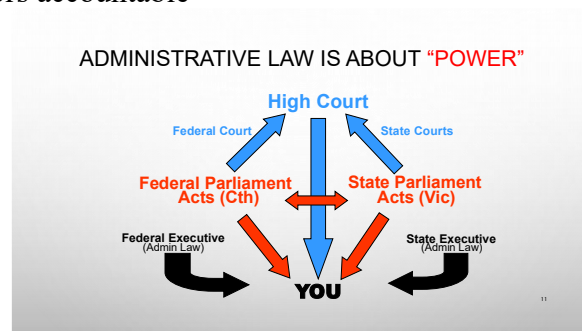
Topic 1: Introduction Law and Overview

What is Administrative Law

- A branch of public law
- controls and regulates the exercise of administrative power by the Executive arm of government. Ensures Government is accountable for decisions it makes.
- Provides the legal mechanisms which individuals can use:
 - to challenge such decisions or conduct; or
 - to hold the Executive to account for such decisions or conduct.
- Linked to constitutional law

Who is the Executive?

- Executive develops policy and implements legislation
- Legislature passes legislation to give effect to policy
- Judiciary holds the other actors accountable



Scope of Executive Power

Customs duties	Taxation	Land use decisions
Broadcast licensing	Workplace rights	Child welfare
Immigration	Indigenous affairs	Energy policy
Welfare payments	Animal welfare	Airline policy
Insurer licensing	Environmental approvals	Parole decisions
National security	Sport integrity	Telecommunications
Medical approvals	Television content	Gaming approvals
University admission	Public health directions	Bankruptcy

Sources of Executive Power to Make Decisions

- Constitution – Chapter II, section 61
- Legislation/ statutory powers:
 - subordinate legislation and quasi legislation
 - Primary & delegated legislation
- Common law powers, powers government can exercise in common with other legal persons
- Prerogative powers; powers only sovereign governments can exercise
- Nationhood powers; powers commonwealth gains from its status as a national policy

Fundamental Constitutional Concepts

1. Parliamentary Sovereignty

- Idea that Parliament is sovereign and under the Constitution, has supreme law making powers
- Application to administrative law:
 - Through enacting legislation, Parliament gives power to make a decision on the merits to a particular person/entity.
 - If the courts were to examine the merits of that decision, this would be inconsistent with Parliament's intention as manifested in legislation → what is the purpose of the Act?

2. Rule of Law

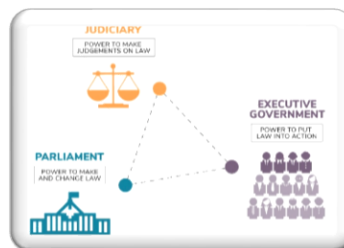
- Principle of English common law inherited by the Australian common law.
- Reflective of philosophy of 19th century jurist AV Dicey:
 - (i) No person is above or beyond the reach of the law
 - (ii) All people are subject to the same law
 - (iii) Protection of individual rights are the result of judicial decisions based on common law and principles of statutory construction (rather than imposed from above)

3. Responsible Government & Ministerial Responsibility

- Ministers are individually responsible for the activities of their department
- Public servants responsible to Minister
- Minister responsible to Parliament
- Accountability cycle. Is this adequate?

4. Separation of Powers

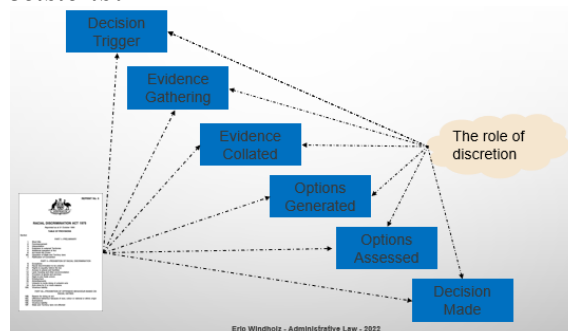
- Parliament makes the law
- Executive applies the law
- Judiciary interprets the law
- Implied in the Constitution (Ch I, II, III)
- Crucial to the **legality/ merits distinction**



How Should Decisions be Made?

- Accountability
- Transparency
- Consistency
- Rationality – reasonable and based on evidence
- Impartiality
- Procedural fairness
- Access to justice

How Does the Executive Make Decisions?



Administrative Power is Discretionary

Dixon J in **Swan Hill Corporation v Bradbury (1937)**

- ‘In the course of the modern attempt by provisions of a legislative nature to reconcile . . . the enjoyment of . . . private rights with . . . the pursuit of the common good, it has often been thought necessary to arm some public authority with a discretionary power to allow or disallow the action of the individual, notwithstanding that it has been found impossible to lay down . . . any definite rule for the exercise of the discretion.’
- ‘The reason for leaving the ambit of the discretion undefined may be that legislative foresight cannot . . . formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves. [Or] it may be because no general principles or policy for governing the particular matter it is desired to control are discoverable, or, if discovered, command general agreement.’
- The exercise of discretion is an ‘active intellectual process’
- **Carrascalao v Minister for Immigration and Border Protection; Chetcuti v Minister for Immigration:** It requires the decision maker to give ‘*meaningful*’ - “*proper, genuine and realistic*” – consideration to the relevant facts and applicable law when making a decision
- Discretion can be **BROAD** or **NARROW**:
 - **Broad:** ‘Minister may approve X if satisfied the approval is in the public interest.’ (No criteria specified to guide the exercise of discretion.)
 - **Narrow:** ‘Minister must approve X if satisfied the approval is in the public interest having taken into account – a, b, c

Discretion and the Role of Policy

1. What is policy? And what policies are we talking about here?
2. Why do we need policy? enhance consistent administrative decision?
3. What limits attach to policy making? must be properly made, and consistent with the legislation under which the decision is made - cannot not alter or usurp the law (**Green v Daniels (1977)**).
4. If properly made, must policy be followed?
 - ‘... the authorities make it plain that the Tribunal is to take policy into account and give it an appropriate level of weight. ... To do otherwise would be to permit “administrative chaos” and inconsistency in administrative decision making ...’ (**Hneidi v Minister for Immigration and Citizenship (2010)**)
5. But policy cannot unduly fetter the decision maker’s discretion and prevent him/her deciding each case on its merits.
 - an uncritical application of government policy by the Tribunal would be an abdication of its function to reach the correct or preferable decision (**Drake v Minister for Immigration and Ethnic Affairs [Drake No. 1] (1979)**)

Green v Daniels (1977)

S 107 of the Social Services Act 1947 (Cth) provided:

‘a person ... who -

(a) has attained the age of sixteen years ...;

(b) is residing in Australia ... ; and

(c) satisfies the Director-General that he -

(i) is unemployed ...;

(ii) is capable of undertaking, and is willing to undertake, work which,

in the opinion of the Director-General, is suitable to be undertaken by that person; and

(iii) has taken reasonable steps to obtain such work,

shall be qualified to receive an unemployment benefit.

- Karen Green, a 16 year-old Hobart girl who had left school at the end of the school year and who had been unable to obtain employment, applied for unemployment benefits from the (then) Department of Social Security.
- The Department refused to allow her the benefit as there was a government policy that no school leavers were to be paid benefits during the summer vacation. Benefits for school leavers, the government decided, were only to be paid after February of the next year.

Development of Administrative Law

Old System

- Based on English common law prerogative writs (mandamus, prohibition, injunction)
- Eventually supplemented by equitable remedies (injunction, declaration)
- Technical and complex- procedure for seeking each writ was different
- Practical impediment to seeking judicial review of decisions

New Admin System

- Developed to overcome problems with the old system
- 1972-1973: Kerr, Bland and Ellicott Committees
- New Administrative Reform Packages – Cth – Various elements:
 - Statutory Judicial Review
 - Cth: **Administrative Decisions (Judicial Review) Act 1977**
 - Vic: **Administrative Law Act 1978**
 - Our focus will be on **ADJR Act** commenced operation from 1 October 1980.
 - Merits Review
 - Cth: **Administrative Appeals Tribunal Act 1975 (new tribunal as of Oct 2024, Administrative Review Tribunal)**
 - **Administrative Review tribunal act 2024 (ART Act)**
 - Vic: **Victorian Civil and Administrative Appeals Tribunal Act 1998**
 - Freedom of Information Legislation
 - Privacy Legislation
 - Ombudsman

Challenging Decisions

- Can either challenge the **substance** of the decision (merits of the decision) or the **process** which the decision maker adopted to arrive at making the decision (error of law)
- This is referred to as the **merits/legality** dichotomy

Review of Legality: Judicial Review

- Undertaken by a court
- Examines the legality of a decision- questions the lawfulness of a decision → was the law correctly applied?
- Focus on law and procedure which was adopted by the decision maker, not the decision itself → was the decision made within the lawful limits of the decision maker's authority, and in accordance with the law (procedure and criteria)
- Does not result in a new decision → courts can set aside the decision, but will not remake it
- Grounds of review capture focus on procedure and legality
- Asks: was the procedure stipulated in the legislation correctly followed?
- Courts do not review the merits of the decision, to do so would substitute their decision for the decision of the decision maker to whom parliament delegated the responsibility → breaches separation of powers, violates parliamentary sovereignty and would be inconsistent with responsible government

Merits Review

- Undertaken by a tribunal/review body
- Looks at the substance of the decision (ie. Was the decision which was arrived at the correct or preferable decision?)
- Focus on the facts/merits of decision
- May result in a new decision
- No inherent jurisdiction- power to review found in legislation
- Asks: what's the right decision on the material before me?

Distinction Between Merits Review & Judicial Review

- Courts cannot perform merits review because of parliamentary sovereignty and separation of powers → in relation to administrative decisions ONLY

Ground for Judicial Review

- Split into two streams:
 1. Common Law – Two main grounds:
 - Ultra Vires (beyond power)
 - Breach of procedural fairness (Natural Justice)
 2. ADJR Act Judicial Review – codifies the common law grounds of review (there are 10)
 - Jurisdictional error: way of classifying common law errors of law
- Go through ADJR Act first, if cannot be successful then go through common law

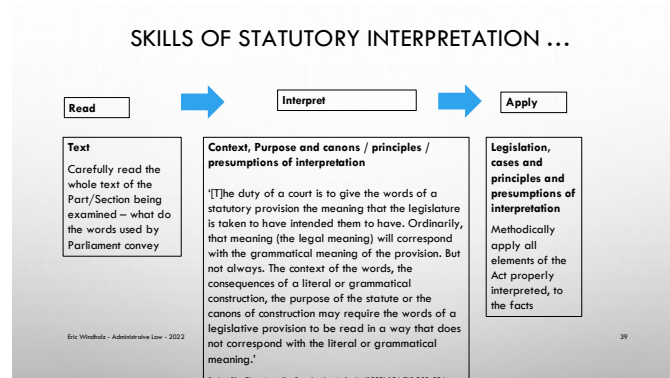
Aspects of Judicial Review to be Considered

- The procedural nature of review
- Remedies available under judicial review
- The distinction between review and appeal on merits
- The requirement that the court have jurisdiction (topic 2)
- The requirement that the applicant for review have standing (topic 3)
- The different judicial review regimes
- Concern with procedure reflected in the grounds of review
- Reasons for the courts' concern with procedure

The Role of Statutory Interpretation

- Fundamental to the application of administrative law
- The power to make a decision (in the context of this unit) is found in legislation. We must apply normal principles of statutory interpretation and common law presumptions when examining whether these powers were exercised properly.
- The **language, context and purpose** of the legislation dictates the nature and scope of the powers of a decision-maker.
- **Remember seminal HC decision PROJECT BLUE SKY CASE Text, Context, purpose**
- **Don't forget** Intrinsic materials; Extrinsic materials; Common law principles/presumptions eg. Principle of legality (legislation is presumed not to abrogate a fundamental right, freedom or immunity)
- 90% of appeals on points of law involve statutory interpretation.
- The courts are called on to rule upon the meaning of legislation in 50% of cases

Skills of Statutory Interpretation



Pintarich v Deputy Commissioner of Taxation – AI Systems

- Taxpayer received a computer-generated letter from the Australian Taxation Office (ATO) ostensibly waiving most of the general interest charge (GIC) on a tax debt.
- The ATO subsequently advised the taxpayer that he was, in fact, liable to pay additional GIC as the letter had been issued in error.
- The majority of the Full Federal Court found that no decision had been made as the automated letter was not accompanied by the requisite mental process of an authorised officer
- A valid decision requires two elements to be satisfied:
 1. There must be a ‘mental process’ of reaching a conclusion; and
 2. There must be an objective manifestation of that conclusion