TOPIC 1 – INTRODUCTION, OVERVIEW AND THE ROLE OF STATUTORY INTERPRETATION

The Sources of Power in Administrative Law

- Administrative law is about understanding the nature and extent of government power and how that power may be challenged or controlled.
- One form of review—**judicial review**—is conducted by the courts and comprises a set of principles (the grounds of judicial review) which reflect limitations that courts imply into the powers exercised by administrative officials
    - Those grounds of review are influenced by the statutes from which administrative officials draw their power
    - The purpose, in a broad sense, is to control government decision-making in satisfaction of rule of law and separation of powers objectives
- The other form of review—**merits review**—is conducted by tribunals and involves tribunals 'remaking' a decision by deciding what is correct or preferable
    - Tribunals exercising merits review are able to exercise the same powers as the administrative official who made the original decision
    - Any re-exercise of that power by a tribunal requires an understanding of what the relevant statute does/does not allow
- The nature of judicial and tribunal review means it is important to understand where governments and their officials draw power. This is mainly:
    - ✓ **Legislation**
    - ✓ **Subordinate (or delegated) legislation**
        - Impracticable for legislature to make all legislation hence a secondary role is played by the executive
        - Alternative methods devised to ensure executive is accountable for the way it discharges its law-making function – include requirement for executive adherence to statutory procedures, public consultation in subordinate law-making, appraisal of laws by parliamentary committees to ensure they do not exceed powers conferred by the authorising Act or unduly trespass on rights and liberties of the person, judicial scrutiny of validity of subordinate laws
        - Subordinate legislation is dependent for its validity on proper authorisation by an Act of Parliament
        - **Subordinate legislation (delegated legislation)** – a legislative rule made by an executive agency pursuant to an authority delegated by the legislature
        - The delegation of legislative power to the exe was confirmed by the HC in **Dignan**
        - The authority to make subordinate laws is usually contained in a section towards the end of a statute, delegating power to the GG, a governor, a minister or a statutory authority to make rules to supplement the Act
        - Examples of subordinate legislation include
            - Regulations – subordinate rules made by the Governor or GG and that are general in their application

        - Rules – matters of procedure made by a court (e.g. Supreme Court rules)
        - By-law – instrument limited to a specific geographic area (rules made by local government council or by university council)
        - Ordinate – laws made by the GG for the government of a territory
    - **Justifications** for delegating a law-making function to the exe are:
        - Law-making convenience and exe expediency
        - Comparative ease of amendment of subordinate legislation enables more frequent change;
        - For rules that have a special relevance to members of a particular industry or community, it enables a much higher level of participation by the members of that community in the subordinate legislation's formulation; and
        - Since subordinate legislation commonly deals with matters of detail and procedure, this makes the empowering statute easier to understand, debate and implement
    - **Disallowable instrument** – refers to a category of executive instrument that is required to be tabled in the parliament and may be disallowed by either House but usually does not have to be published in advance of being made in accordance with rules application regulation
- ✓ **Soft law/Quasi-legislation**
    - S Argument (1994) **defines quasi-legislation** as "Something *resembling* a law or which is *seemingly* a law" but "Is not *actually* legislation."
    - Includes circulars, codes, guides, instructions, evidential rules, rules of practice, policies, and taxation rulings. Also referred to as 'soft law' or 'grey law'
    - They are rules that can be prescriptive and treated as binding by those who devise and apply them, and breach can give rise to legal consequences including administrative penalties and denial of benefits and concessions.
    - **Criticisms** of hybrid/ quasi-legislation are:
        - × Streatfield J in *Patchett v Leathem* describes them as "at least four times cursed" in that they 1) see neither House of Pmt, 2) are unpublished and inaccessible, 3) are a jumble of provisions, legislation, administrative and directive in character, and 4) are not expressed in the precise language of an Act of Pmt but in the colloquial language of correspondence;
        - × They have largely by-passed Pmtary scrutiny;
        - × Their legal credentials are uncertain (ie are legal effects authorised or intended?);
        - × They may be couched in unparliamentary language (=> vague and non-justiciable);
        - × They may be inconsistent with primary legislation;
        - × Exe may take over from Pmt the function of determining general policy;
        - × "It [quasi-legislation] is like a greasy pig because, once a Pmt lets it slip through its fingers, it is very difficult to recapture. It is like a Trojan horse because often its dangers are hidden or (at best) not

easily identified. It is like an unruly child because it is in dire need of some firm discipline" (per S Argument (1994)). Argument says that the 3rd point highlights the need for education and re-education of certain parts of the Cth bureaucracy.

- **Justifications** for quasi-legislation are:
  - Decrease pressure on Pmtary time;
  - Can be used to accommodate material which is too technical or detailed to be suitable for Pmtary consideration;
  - They guide untrained officials and so facilitate planning and management;
  - They encourage consistency in bureaucratic decision-making;
  - They inform the public of official attitudes;
  - They are flexible and may be issued quickly

✓ Common law **executive power** including prerogative power and 'capacities' of the government

- **Prerogatives –** powers of government peculiarly emanating from, and associated solely with, the Crown
  - Executive prerogatives – power to enter into treaties, declare war, coin money
  - Immunities and preference – priority for Crown debts over debts due to the other creditor
  - Property rights – entitlement to royal metals, royal fish and treasure trove
- **Capacities –** refers to the ability that government shares ordinary citizens to engage in actions and transactions that do not require statutory authorisation beyond an appropriation by parliament

INSTITUTIONS

THE TRADITIONAL STRUCTURE OF GOVERNMENT

➢ Governments have traditionally been comprised of the following institutions
  ✓ Parliament, Cabinet and the Executive Council
  ✓ Ministers and Departments of Government
  ✓ Executive Government and the Crown
  ✓ Local Government

PRIVATISATION, CORPORATISATION AND CONTRACTING OUT

➢ The structure under which governments operate has changed significantly in recent years
➢ Governments have introduced corporate structures to many public agencies, sold other agencies to the private sector and used private sector bodies to provide services to government and the public
➢ This affects the operation of administrative law because public law remedies traditionally only reach public officials
➢ For the purposes of administrative law, there is an important difference between '**privatisation**' and '**contracting out**'

- Both terms suggest the involvement of a private entity in an activity that was previously performed by a public sector body
- By '**privatisation**', an activity that was conducted in the public sector is sold off by government and conducted by a private sector entity
    - Under privatisation both the function and the organisation performing the function are located in the private sector.
- In '**contracting out'**, a public agency or department enters a contract with a private entity, whereby the private entity performs a function for that public agency or department
    - Under contracting out the function remains within the public sector, but the means by which it is performed is located in the private sector

- **Privatisation –** a function formerly discharged by a government agency with be discharged by a body that is wholly or partly under private ownership, often as a result of a public share or share float of the government interest – e.g. Commonwealth Bank, Qantas
- **Commercialisation –** under this form, government imposes a private sector business structure including commercial methods and profit goal, on an agency that is owned and controlled by government. Examples include Australia Post
- **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. The delivery of the function will be funded by government but provided by a private sector body. Examples are the provision of employment services by job network providers and the management o immigration detention centres
- Privatisation and contracting out pose important challenges for administrative law because they may enable the removal of government activity from the mechanisms of administrative law accountability
- In recent years, the federal government has even started to use private contractors to assess some applications for refugee status

THE CONSTITUTIONAL BACKGROUND

- There are several constitutional and other doctrines which have special relevance to administrative law, including the rule of law, constitutionalism, the separation of powers, parliamentary sovereignty and responsible government

THE RULE OF LAW

- The **'rule of law'** is a legal and political ideal that calls for law to minimise the extent to which people are subject to the exercise of arbitrary power by fellow citizens or government
- In admin law it's about limiting discretionary power
- The ideal is said to bring more order, predictability and security to human affairs
- The rule of law is a principle of English common law inherited by the Australian common law and has assumed a strong role in Australian public law
- The administrative law inherited from England reflects the thinking of the nineteenth century jurist AV Dicey
- Dicey compared English and European public law and rejected the suggestion that England should develop a specialist body of administrative law
- He believed that the rule of law doctrine from English common law provided an adequate basis to control administrative action. Dicey's view of that doctrine had three key elements

(1) No person is above or beyond the reach of the law – government cannot take coercive action against any persons except in accordance with clear and existing legal authority (reflected most strongly in the principle of legality)
(2) All people are subject to the same law – legal equality of the government and citizens
(3) The effective remedies provided by English courts were a more useful method of protecting individual rights than the vague and abstract rights contained in many European legal systems – individual rights were not secured in a constitutional bill of rights but in the decisions of the courts elaborating the common law and in construing legislation

CONSTITUTIONALISM

- This principle is related to the rule of law. It calls for government to be limited by constitutional rules that are judicially enforceable
- In many judicial review cases, the High Court draws upon constitutional principles to explain its judicial review function and the limits of executive power
- The power exercised by parliament and the executive government is limited in two ways
  (1) By the rules such as written constitutional rules as to who and by whom laws can be made
  (2) By value or principles such as representative democracy and the rule of law

THE SEPARATION OF POWERS

- In constitutional law, questions on the separation of powers arise mainly in cases concerning the judicial power of the Commonwealth
- These issues also shape administrative law by creating important differences in the powers of courts and tribunals, and also between the legality and merits of administrative decisions
- When courts exercise judicial review jurisdiction, they examine the legality of a decision but not its substantive factual merits
- Tribunals do precisely the opposite
- According to this approach, the courts only have a limited role in reviewing administrative decisions
- They can legitimately review the legality of such a decision, to ensure that the administrative decision-maker did not exceed the lawful limits of its authority
- But courts cannot go further, and substitute their decision for those of the administrative decision-maker 'on the merits'—that is, decide whether or not the original decision was good, fair or correct, taking onto account all relevant considerations
- That would involve the court in effect exercising the same powers as the original decision maker
- Since these are administrative powers, that would breach the separation of powers doctrine
- It would also violate parliamentary supremacy, in that the courts would be usurping an authority that Parliament chose to confer on the administrative decision-maker
- Such considerations have led Australian courts to distinguish sharply between the 'legality' and the 'merits' of administrative decisions
- **The doctrine of separation of powers** stipulates that three major organs of the governmental stem each perform a single and different function
  - ✓ The legislature enacts laws
  - ✓ Executive applies/administers these laws in individual cases
  - ✓ In the event a dispute arises, about the meaning or application of a law, the dispute is resolved conclusively by the judiciary

- The objective of the separation of powers is to place checks and balances on the exercise of governmental power while at the same time ensuring that the different function of government are discharged by the arm of government that is best suited to the task
- This principle is not practised in a pure form in Australia
    - Responsible government is itself a reach since ministers bot constitute the executive and sit in the parliament
    - Another breach is the widespread delegation from the legislature to the executive of the power to make subordinate legislation
- In reality:
    - **Executive and Legislature - No pure separation** of powers since (1) under Responsible Government there is a clear link between the Legislature and Executive (Exe drawn from Lower House, PM is also an MP- member of Parliament) and (2) undermined by Executive making regulations as delegated law-maker
    - **Judiciary - Strong separation** of powers so judges can keep independence
        - Why? To avoid cronyism and ensure just outcomes; so they cannot be manipulated (especially in favour of Government or powerful individuals). We want fair and impartial justice. Non-independent judiciary could not investigate Government impropriety or make controversial decisions (e.g. Mabo)
        - Exceptions - Not pure since (1) power to remove judges rests with Legislature and (2) Legislature controls courts' money

PARLIAMENTARY SOVEREIGNTY

- **'Parliamentary sovereignty'** or 'parliamentary supremacy' is the idea that the legislative branch is ultimately supreme over the other two branches- parliament has unlimited legislative power
- Central role of courts is to interpret law and give effect to the will of the parliament
- In Australia, Parliament is not absolutely sovereign because of the Constitution - Cth Parliament is limited by those powers given to it by the Constitution
- Parliament is supreme over the executive because legislation is the main source of executive powers, so parliaments 6 can define the scope of executive power
- Parliament is supreme over the judiciary because it can change the common law via legislation, and because courts are limited to interpreting the laws enacted by parliament
- In the UK, the Parliament 'has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament' (Dicey, p 4)
- Australia inherited this principle from England, but with one important difference: our written constitution
- The Australian Constitution is the ultimate source of the Commonwealth Parliament's legislative authority, and so, is superior to the Parliament
- It also establishes a federation, which means legislative powers are shared between federal, state and territory Parliaments
- The judicial branch is responsible for interpreting the Constitution
- Therefore, Australian Parliaments are sovereign and free to enact any laws they choose, provided that they are acting within the constitutional limits of their authority, as defined by the courts

- This has several implications for judicial review of administrative action - the main one is that the role of courts in reviewing administrative action is limited. Courts must respect the choices made by Parliament. For instance, if a Parliament has chosen to grant particular powers to the executive branch, and the legislation doing so is valid, then courts must respect that choice, even if the court thinks it is unwise

RESPONSIBLE GOVERNMENT/MINISTERIAL RESPONSIBILITY

- **Responsible Government** is the term used to describe a political system where the Executive government, the Cabinet and Ministry, is drawn from, and accountable to, the Legislative branch
- Two elements
  (1) **Collective aspect** - collectively, the whole of the Executive must maintain the confidence of the Lower House; and
  (2) **Individual aspect** - This essentially means accountability in the form of the Minister's obligation to explain to the Parliament the actions of officers within his or her department - Ministers are responsible to Parliament, and Parliament is responsible to the people → 'a transmission belt process of accountability' – information flows back and forth between agencies, ministers, Parliament and the public
- **Criticisms -** Parliament is no longer able to effectively review the work of the Executive because nowadays the Executive dominates the Parliament; and its effectiveness partially hinges on the practical control that ministers can exert over executive agencies (Ministers argue that their departments are too big and complex for them to be held responsible for everything going on)
- Much of the operation of administrative law is underpinned by the doctrine of ministerial responsibility
- Ministers exercise considerable control over the administration of their departments
- In a formal sense, responsibility is imposed by the various provisions within statutes that empower Ministers, the Secretary of a Department or the Chief Executive Officer of a statutory body, to exercise power under an Act
- Most statutes simply grant power to 'the Minister', but do not name the responsible Minister
- Formal responsibility for the administration of statutes is determined by the Administrative Arrangements Act 1987 (Cth) and Administrative Arrangements Act 1983 (Vic). These Acts allow the Executive Council to make orders specify which Minister administers which statute.
- Many commentators argue that the doctrine of ministerial responsibility is an inadequate form of accountability because it assumes that Parliament can review the work of the executive (i.e. the Cabinet and its Ministers) when in fact Cabinet dominates the Parliament
- **Responsible government** entails that the ministers who control the executive departments of state are members of the parliament and their right to function as a government continues only while they have the confidence of the Lower House of the parliament

DEVELOPMENT OF ADMINISTRATIVE LAW

- The basic structures of judicial review of administrative action as we know it today developed in the supervisory jurisdiction of the common law courts during and after the constitutional struggles of the 17th century. The courts developed the 'prerogative' writs of mandamus, prohibition and certiorari, and the equitable remedies of 7 injunction and declaration as a means to question and control the exercise of official power

THE 'OLD' SYSTEM

- This 'old system' was essentially copied from the common law system of English public law that had evolved over several centuries. That system comprised several elements but their core feature was the so-called 'prerogative' writs, which were the remedies developed in common law judicial review. These were eventually supplemented by the equitable remedies of injunction and declaration, which over time the courts began to issue in judicial review cases

THE 'NEW' ADMINISTRATIVE LAW SYSTEM

- The 'old' system's complexity, combined with the growth of government and the increasing impact of administrative decision-making, led to calls for the development of a new system of administrative law
- The 'new administrative law' package of reforms include:
  - ✓ Administrative Appeals Tribunal Act 1975 (Cth) ('AAT Act'). Victoria established an AAT in 1984. The Victorian AAT was replaced by VCAT: Victorian Civil and Administrative Tribunal Act 1998 (Vic) ('VCAT Act')
  - ✓ Ombudsman Act 1976 (Cth) and Ombudsman Act 1976 (Vic). See Modern Administrative Law in Australia—ch 15 ('The Ombudsman')
  - ✓ A statutory form of judicial review, which is the Administrative Decisions (Judicial Review) Act 1977 (Cth) ('ADJR Act') and the Administrative Law Act 1978 (Vic) ('AL Act')
  - ✓ Freedom of Information Act 1982 (Cth) ('FOI Act') and FOI Act 1982 (Vic). See Modern Australian Administrative Law—ch 16 ('Freedom of Information: A new era with old tensions')
  - ✓ Privacy Act 1988 (Cth). Victoria has established a similar statutory privacy regime with the Information Privacy Act 2000 (Vic). On the operation of privacy laws, see Modern Australian Administrative Law—ch 17 ('Privacy')
- The part of the reforms on which we will mainly focus is the ADJR Act, which commenced operation on 1 October 1980.
  - The Act was intended to simplify the grounds and procedures for seeking judicial review of Commonwealth administrative decisions by overcoming many of the shortcomings of common law review.
  - The main features of the Act are:
    - the grounds of review have been codified (ss5 and 6). Section 5 allows review of decisions. Section allows review of 'conduct' related to decisions. Section 7 allows for review of a failure to make a (all are examined in Topic 2);
    - some technical common law distinctions have been eliminated - e.g. the distinction between 'jurisdictional' and 'non-jurisdictional' errors of law, and the need to identify an agency's 'record' (Topic 7);
    - there is a single administrative law remedy—an 'order of review', issued under s16 (Topic 8);
    - the rules on standing are unified and simplified (Topic 3);
    - the Act obliges decision-makers, upon request, to give reasons for decisions (Topic 4)

THE VALUES OF ADMINISTRATIVE LAW

- The central values of administrative law reflect the desire to ensure the proper exercise of public power - these values are often collectively referred to as **'administrative justice'**
- The precise content of administrative justice is difficult to define, but there is agreement that it draws from several widely accepted principles such as accountability, transparency, consistency, rationality, impartiality, participation, procedural fairness and reasonable access to judicial and non-judicial grievance mechanisms
- In recent times, efficiency has come to prominence, and it can come into conflict with the values of administrative justice
- **The broad purpose of admin law is to safeguard the rights and interests of people and corporations in their dealings with government agencies**
    - Admin law does this in 3 main ways
        (1) review of decision-making
        (2) protection of information rights
        (3) public accountability of government processes
- Three principles underpin the admin law system (according to Creyke & McMillan)
    (1) Administrative justice (= safeguards);
    (2) Executive accountability; and
    (3) Good administration (=> admin decision-making should conform to universally accepted standards such as rationality, fairness, consistency and transparency).
- In recent times, efficiency has come to prominence, which can conflict with the values above

THE ROLE OF STATUTORY INTERPRETATION

- **Government agencies need legal authority for any action they undertake**
- **The notion that government action is invalid if there is no legal authority to support it (principle of legality) permeates many of the grounds of judicial review**
    - The presumption is often associated with the protection of fundamental rights
    - See Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) – ss 5(1)(b)(c)(d)(f)
- Statutory interpretation is especially important in administrative law
- The purpose and language of the statute dictates the nature and scope of the powers of a decision maker who exercises any powers granted by the Act
- For this reason, when you consider whether one or more grounds of judicial review might be available, you must always interpret and apply the statute upon which the decision was based
- In administrative law, the powers granted by legislation are subject to the normal principles of statutory interpretation and also the constitutional presumptions developed by the High Court
- These principles of interpretation sometimes enable a court to control the powers exercised by administrative officials, by using principles to find implied limits on statutory powers
- **Principle of regularity –** it is presumed until the contrary is proven, that the decision or action of an official has been properly made or taken – all acts are presumed to have been done rightly and regularly
    - Effect of the presumption is that evidence does not have to be led proving the validity of a statutory requirement, provided it is not an essential element of an offence that has to be affirmatively established
- **Literal approach -** requires that words in a statute be given their **ordinary, natural and grammatical meaning**

- **Purposive approach –** a construction that would **promote the purpose or object underlying the Act** shall be preferred **(s 15AA *Acts Interpretation Act 1901* (Cth))**
    - To determine this, can have regard to **contemporary material that is extrinsic to the Act** (such as explanatory memoranda, second reading speeches, parliamentary debates and other parliamentary materials) **(s 15AB (Cth), s 35(b) *Interpretation of Legislation Act 1984* (Vic))**
- **Human rights** = 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is **compatible with human rights**' **(s 32(1) Charter of Human Rights and Responsibilities Act 2006 (Vic))**
- **Beneficial construction** – courts sometimes adopt a beneficial or liberal construction of legislation that confers benefits or right upon the community – the rationale is that parliament intended the particular statutory regime to be construed liberally in favour of the individual
- Pay particular attention to:
    - ✓ the **principle of implied incidental power** (recall that there is a similar principle in constitutional law);
        - common to find in statutes a provision stating that an agency can undertake any activity that is incidental to or consequential upon the functions or powers conferred on the agency by the statute
        - absent such a provision, there is ordinarily an implied power of similar effect
    - ✓ the presumption against an intention by Parliament to exceed the constitutional limits of its powers - this presumption was important in **Plaintiff S157/2002 v Commonwealth**
    - ✓ the **'principle of legality'** - a common law presumption that Parliament does not intend to abrogate fundamental rights and freedoms
        - **legislation is presumed not to abrogate a fundamental right, freedom or immunity other than by express or unambiguous language, including objective criteria to guide decision mars faced with broad statutory expressions**
        - If Parliament wishes to overturn or alter fundamental rights, it should do so with unmistakable clarity
        - This rule was used in **Saeed's case**
        - **CGA 476-7**

The Impact of Migration Law on the Development of Australian Administrative Law