Week 1 – Lecture

Part 1 - Recorded - Theory, History and Context

Administrative Law - What is it and why do we need it?

The Law governing Decision-Making

- Administrative law is the law governing the decision-making of the three arms of government: the Legislature, the Judiciary, and in particular, the Executive
- Which legislative decisions are reviewed in Administrative Law (rather than scrutinised in Constitutional Law)?
    - The decision to make subordinate legislation
        - These are delegated legislative decisions being made by the Executive - the Governor or Governor-General, or the relevant Minister, provided they have been authorised to do so by the Legislature
        - Usually take the form of decisions to make regulations, by-laws, or other legislative instruments
- Which executive/ administrative decisions are reviewed in Administrative Law?
    - The decisions taken by Governors or the Governor-General, Ministers, public servants or public bodies
        - Usually we are talking about decisions that have been made under legislation
        - Sometimes we are talking about decisions made in exercise of the prerogative, although these are typically not reviewable
- Which decisions of the Judiciary are reviewed in Administrative Law?
    - Decisions of judges that may be reviewed for error of law by a superior court, as opposed to appeals from judicial decisions following the appellate system. the supervisory jurisdiction of a superior court is different to the appellate jurisdiction of a superior court.

Why do we need Administrative law? - What unique function does it serve

- Administrative law evolved from the English Chancellor's use of the prerogative to supervise the administration of law and justice by common law courts.
- Overtime, as Government grew in power and size, and the relationship between Government and the community grew more complex, so too scrutiny of government grew in line with the principle of responsible government
    - Take away point: Government Accountability
- What is the function of Administrative Law:
    - To review decisions for legal error or mistake

How do we review decisions? Three main types of review we consider in this unit

- Formal Merits Review
    - To review administrative decisions for legal error or mistake, to either affirm, change, or replace the decision. This type of review can look at the merits of the decision, and the reviewer is placed in the same power or authority of the original decision-maker, meaning that the reviewer can replace the decision if a mistake is found. This is therefore wider than judicial review
- Internal or informal merits review
    - Seeking a review from the original decision-maker, or the office of the original decision-maker. If they find/ admit a mistake, this is a much simpler, quicker, and cheaper option
- Judicial Review
    - Judicial review applies to administrative (executive) decisions, judicial decisions of inferior courts, and delegated legislative decisions
    - Someone affected by the decision can assert that an error of law was made, prompting a court to examine the decision. Those errors of law relate to the authority of the decision-maker, and whether the decision was made consistently with the authority
    - If an error is made, the court can order the decision to be remade (correctly on law, not merits), but cannot substitute its own decision (as that would be an exercise of non-judicial power)

Theory, History and Context of Administrative Law - Understanding its role and purpose in public law

The Theory of Administrative Law - there is no singular comprehensive theory

- There are 4 main theoretical dimensions underlying admin law:
    - The historical foundations, which are essential to understanding how Admin law works and what it can and cannot do;
    - A general theory that encapsulates several different dichotomies;
    - The notion of accountability, and the different form this takes; and
    - The public/ private divide and how this influences Admin Law

3 Underlying doctrines - constitutional principles relevant to administrative law

1. Separation of Powers
    - Articulated in Boilermakers, the separation of the three branches of Government into three distinct Chapters in the Australian Constitution means that the separation of judicial power and the judiciary from the other branches is fiercely defenced
    - However, at the Commonwealth level we know there is no strict separation between the Legislature and the Executive (s 64 of the Australian Constitution; the making of delegated legislation)
    - Therefore, particular regard to responsible government is needed
2. Sovereignty of Parliament and Representative and Responsible Government
    - Houses of Parliament are supreme; the laws they pass represent the will of the people
    - However, this is ameliorated by the SOP doctrine - the decisions of Parliament (to pass laws or authorise delegated legislation) are subject to oversight by the HC, which examines those decisions for conformity with the written Constitution
    - HC reviews decisions (by Ministers and other members of the Executive) made pursuant to statutes or the prerogative to ensure that those decisions are lawful. The HC will also examine whether the parent Act authorises the Executive to make delegated legislation
    - These are Administrative Law questions
3. Rule of Law
    - We know that AV Dicey said that no person can be punished except by due process of law, and that everyone is to be equal before the law
    - Significantly for this course, another major tenet of the rule of law is that all authority is subject to and constrained by the law. This informs Administrative Law because all decisions taken by any of the three branches of Government must be subject to and in accordance with the law
        - This is the 'principle of legality'
            - See Hon Murray Gleeson, Legality - Spirit and Principle, Second Magna Carta Lecture, NSW Parliament House, 20 November 2003)

Historical Foundations of Administrative Law - The History and Evolution of Administrative Law

- Equity and the common law as the origins of the means for testing the legality of government decisions
    - This was to ensure the monarch's prerogative of doing justice with equity according to law was being observed;
    - From the 18th century, superior courts were reviewing the decisions of inferior courts AND those bodies authorised by law to make decisions that affected subjects of citizens;
    - This is why the main remedies are known as the 'prerogative writs' and 'equitable remedies'
- The prerogative writs:
    - Certioari (means to be informed of or to be certified of)
    - Mandamus (translates to being commanded or we command)
    - Prohibition (meaning prohibit or forbid)
    - Quo warranto (by what authority or by what warrant)
    - Habeas corpus (we command you that you must have the body) - must bring the person before the court
- The equitable remedies
    - Injunction (in joint a course of action, restrains the decision maker from implementing the decision)
    - Declaration (make the record clear)