



HD APPROVED

ADMIN LAW

MLP424

COMPREHENSIVE NOTES

-UPDATED FOR 2026-



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# 1 INTRODUCTION TO ADMINISTRATIVE LAW

## WHAT IS ADMINISTRATIVE LAW?

- Regulating the executive/keeping them accountable
- Admission to practice
- Immigration law
- Basically regulating what the executive can do, including their powers and asking have they done it properly?
- Inclusive of stat interpretation
- Aim: keeping the government accountable
- As a discrete discipline, admin law is of relatively recent origin in the common law world

## Why do we need admin law?

- Regulates the exercise of power by the executive branch of government
- IT IS ALL ABOUT FOCUSING ON HOLDING THE EXECUTIVE AND THE EXERCISE OF EXECUTIVE POWER TO ACCOUNT
- The executive's power is to administer and execute the laws of parliament and to enforce the judgments of the judiciary
- The executive has been described as fundamentally concerned with action – carrying things out, putting things into effect and getting things done. In a liberal democracy, where individual freedom is seen as fundamental, it is paramount that the executive's exercise of power is accompanied by an appropriately rigorous regime of accountability
- Another 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. Admin law does this for the executive as unlike the parliament and courts, the executive conducts its functions in private

## Admin law vs constitutional law

- Admin law is intimately link with constitutional law
- Our admin law principles rest in a unique constitutional framework
- Admin law falls within the broader area of public law
- Admin law must exist at both levels of parliament
- Constitutional law provides the contextual framework in which admin law operates and is an ongoing influence on the development of admin law principles

## WHO IS THE EXECUTIVE?

Consists of anyone exercising power under a legislative body, including –

- Queen and Governor General: The queen is the head of the executive branch at the commonwealth and state levels. At the commonwealth level, the queen is represented by the GG and in the states by the governor. The role of the Queen's representative is largely formal: implementing decisions on the advice of the executive council. In this way, the Queen's representative gives effect to the policies of the democratically elected ministers who are responsible to parliament. Within this formal role, the Queen's representative can play an important part in checking executive power.

- Ministers (PM and Cabinet): Ministers are responsible for deciding the policy direction of their department and implementing the broader policies of the government within their department.
- Ministerial staff
- The department and the public service
- Statutory authorities
- Government business enterprises
- The cabinet
  - At the commonwealth level, the cabinet is comprised of senior ministers within the government and includes portfolios such as the treasurer and the attorney-general.
  - Lacking legal recognition, the Cabinet has no formal powers. Instead, it makes the decisions that underpin the exercise of powers by other parts of the executive – whether that be through the introduction of a Bill to parliament, the act of the Queen’s representative or a decision of a minister

## OUTSOURCING AND PRIVATISATION

### Deconstructing the public/private divide

- Recently, there has been an increasing number of private bodies exercising power more traditionally associated with government bodies due to outsourcing.
- Outsourcing and privatization raise questions about the applicability of public law accountability mechanisms to bodies operating the private market that either provide public functions or remain part of the government.
- There have been suggestions that administrative law mechanisms need to be updated to apply to these bodies because of shortcomings associated with private law remedies.

Example: body set up by the government –

#### Plaintiff M68/2015

- Outsourcing to Nauru (and some other private entities for running of detention centre)
- Government argued that if they’re not physically detaining them then they are not the ones detaining them

French CJ, Kiefel and Nettle JJ:

“The plaintiff...was detained in custody under the laws of Nauru, administered by the Executive government of Nauru [there are Nauru laws that regulated the centre]...No Commonwealth officers were appointed as authorised officers by the Secretary for the purposes of the RPC Act [the Nauru Act that regulated the centre]...The Commonwealth concedes the causal connection between its conduct and the plaintiff’s detention. It may be accepted that its involvement was materially supportive, if not a necessary condition of Nauru’s physical capacity to detain the plaintiff. But, for the reasons given above, it cannot be said that the Commonwealth thereby authorised or controlled the plaintiff’s detention...”

Gordon J in dissent pointed out the major role in which the Commonwealth acted:

- ‘making ... decisions...pursuant to s 198AD(5) of the Migration Act ...to which particular classes of unauthorised maritime arrivals must be taken and stipulating that Nauru was such a country’
- ‘signing the [MOU] with Nauru, whereby the Commonwealth could decide to transfer unauthorised maritime arrivals to Nauru’
- ‘providing the ‘security infrastructure’ at the Nauru RPC’
- ‘having significant governance responsibilities and control at the Nauru RPC, including participation in the Joint Committee, participation in the Joint Working Group [etc]...’

Example: body set up privately –

### R v Panel on Takeovers and Mergers: Ex parte Datafin Plc

Panel in UK operates stock takeovers etc; Panel was not created by the government, created by private bodies; Someone had issue with decision made by panel, but had no private law (e.g. contract) grounds to argue, so wanted to argue public law ground

Issue – can you argue public law ground when this is actually a private body

Held – Look at the function of the entity. Is it a public one (i.e. do they do public things?). This case, their function is something the government would do, so it is a public function – can argue public law ground

### **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 statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its Code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the Panel.

### **Public function Potential Test 2: The Major Consequences 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

- This is a better test. Evaluates what consequences are, etc

### **Public law remedies against private bodies**

- Today, the question of whether public law remedies lie against private bodies has been framed by reference to whether the English Court of Appeal case of R v Panel on Takeovers and Mergers: Ex parte Datafin Plc applies in Australia. The CoA held that the judicial reviewability of non-statutory power exercised by a non-government body turns on whether the power is properly considered to be public power or the exercise of a public function. The CoA held that the Panel on Takeovers and Mergers – an unincorporated, non-statutory association that administers the city code on takeovers and mergers – was subject to judicial review
- The principle from Datafin, that the reviewability of power is determined by its characterization as public – has been applied by some lower Australian courts
- The Datafin principle is essential in enabling superior courts to continue to perform their vital role of protecting citizens from abuses in the exercise of powers of governmental nature
- The availability of review under s 75(2) of the Constitution and s 39B of the Judiciary Act turns on whether the power is being exercised by an ‘officer of the commonwealth’
- The joint majority judgment of McHugh, Hayne and Callinan JJ described the scheme as giving AWBI – a private corporation – a role in a scheme of public regulation, which presented the question as to ‘whether public law remedies may be granted against private bodies’

### NEAT v AWB

Government body trying to get permission from AWBI to get licence to export wheat. AWB said no

Issue – can you challenge the decision of AWBI as a private body?

Held – No, AWB’s decisions **cannot be reviewed by courts**.

McHugh, Hayne and Callinan JJ: ‘First, there is the structure of s 57 and the roles which the 1989 Act gives to the two principle actors.’; ‘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’

### AWB vs Datafin –

- In Datafin, private nature of panel doesn’t matter – was what the panel was **doing** that mattered

- AWB – private nature of the company matters
- Can arguably make this consistent with Datafin
  - Ask: what's the function of AWB?
  - AWB main function = maximise returns (primary private function)
  - Similar to Datafin – also primary private function

## ACCOUNTABILITY

### Accountability as the underlying rationale:

**Legal accountability:** Accountability through mechanisms of law

**Administrative accountability:** Accountability to superiors or other government bodies

**Political accountability:** Accountability to the parliament (and ultimately the electorate)

**Public accountability:** Accountability to the people (through elections)

Pretty much, **how can the intervention of the courts and other review bodies in the workings of government be justified?**

- When accountability is discussed in the context of administrative law, it is more likely that what is being referred to is a calling to account for one's actions by an external person or body with legal authority to scrutinise and, in many instances impose sanctions.
- 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 how they can be called to account through various administrative law mechanisms.
- Accountability in admin law captures the idea of a formal, legal responsibility to both the legislature and the courts for the exercise of public power

## Major admin law values

### 1. Democracy (parliament house)

- Individual rights
- It is only through the combination of representative and responsible government in Australia that the executive is held to account to the people
- Ministers must answer personally to parliament for the actions of their departments
- By publicly investigating government action, demanding reasons, disclosing information to the public, reconsidering specific decisions on their merits and ensuring that the exercise of public power is maintained within the limits of the law, these administrative law mechanism strengthen the democratic process

### 2. Individual rights

- Protect the citizen against abuse

### 3. Rule of law

- People should be not subject to highly arbitrary laws and everyone should be subject to the same "ordinary" laws (equality)
- Certainty and equality is not enough. We also need to protect individual rights
- The core idea is the idea of rule by law and not by men
- Rule of law brings with it ideas of legality and accountability of the exercise of power to legal norms
- The classic liberal justification for the rule of law has been the protection of the individual autonomy. Through the enforcement of the rule of law, Brennan J explained that the government is prevented

from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

- Dicey –
  - **Non-arbitrariness:** No person can be punished or made to suffer except for a distinct breach of a law
  - **Equality:** All persons are subject to the ordinary laws
  - **Judge made:** 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
  - E.g. law “all babies with blue eyes should be killed” – thin rule of law would allow that to happen as killing babies would be seen as following the law.
  - Argument thin rule of law is not enough
  
- **Thick/Substantive Rule of Law** – Non-arbitrariness and equality is not enough. We also need to protect individual rights

#### 4. **Separation of powers**

- Justifying accountability
- Mechanisms to enforce accountability
- The separation of power – and specifically the separation of judicial power from the political branches – ensures that there is a separate, independent arbiter of the legality of the actions of those branches

#### **Minor admin law values**

**Legality:** making sure that actions of the executive are always lawful. This is really a subset of the rule of law.

**Fairness:** government must be impartial should not treat one set of citizens differently

**Rationality:** government shouldn't act in an arbitrary manner and just make things up. Rationality ensures individuals are able to predict the exercise of government power and order their affairs accordingly.

**Integrity:** government is responsible for what it does, carries out its functions that it was entrusted to do. 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 parliament.

**Efficiency/effectiveness:** we want a government that actually functions properly. It must be remembered that the government's power is exercised on behalf of the community. Therefore, its efficient and effective exercise should be of equal concern.

These values actually affect how we do things.

- Statutory interpretation as crucial to administrative law.
- The court decide that in some cases we can have *ex parte* hearings (e.g. to do with information on criminal investigations)
- Government creates streamlined processing which does not take into account every individual matter.
- Arguments against Bill of Rights.

### Example: Fairness vs efficiency

Exam = can fully moderate an exam to make sure it's absolutely fair, but would be inefficient. Or could not moderate at all to ensure efficiency, but would be unfair. Need to find middle ground.

Visa application = could take into account every single aspect of a person's life for absolute fairness, but would be inefficient. Need to balance fairness and efficiency.

If defending government – argue efficiency is important etc – efficiency > fairness

### **Mechanisms for achieving accountability**

Accountability requires action to be open to inspection and open to challenge. The admin law mechanisms that achieve transparency of government action include information disclosure regimes (including freedom of information schemes and regimes that require the disclosure of reasons) as well as those mechanisms that investigate the actions and decisions of government.

Methods –

- Review versus other mechanisms (**topic 9**)
- Judicial (**topics 2-7**) vs merits (**topic 8**) review
- Internal vs external review
- FOI and ombudsmen

### **The Kerr Reforms**

1970s: “Modern” admin law or “New Admin Law” Package or Kerr Reforms

- *AD(JR) Act*
- Establishment of the Administrative Appeals Tribunal
- Establishment of the Ombudsman
- Establishment of FOI Legislation

### **SUMMARY**

- Admin is law is about what the **executive can and cannot do**.
- Understand the general public law values at play.
- For now, remember that the Kerr reforms occurred (We shall get back to this in topics 8 and 9)



## 2 SOURCES AND ELIGIBILITY OF JUDICIAL REVIEW

### JUDICIAL REVIEW

**Note:** the general principle is that judges can review errors of law and NOT errors of fact

- Judicial review is the process by which courts can review decisions of executive decision makers
- Judicial review can be initiated in either the State or Federal courts and, depending on the forum, review may be initiated under the following sources:
  - o **s 75(v)** of the **Constitution**;
  - o The common law; and
  - o Statute (e.g. **ADJR Act**).

### REVIEW VS APPEAL

When talking about review/appeal to another executive body, no real difference.

When talking about a court:

- (a) Review – refers to judicial review, has the executive gone beyond power.
- (b) Appeal – when some decision has gone from a statutory authority/court to a court.

Osland v Secretary, Department of Justice: appeal from VCAT to court is only for questions of law.

### LEGALITY V MERITS

Merits Review	Judicial Review
Review by the Executive	Review by courts
Hearing de novo of the facts	Review <u>lawfulness of a decision</u> – whether decision is within legal limit
Substitution of a <u>correct and preferable decision</u> by a new decision maker	Statutory interpretation is very important
	May quash a decision and remit to original decision maker

- **Legality Review** = Review of errors of law
- **Merits Review** = Review of the facts
- Distinction: At FEDERAL level: **Chapter III** courts cannot exercise non-judicial power: **Boilermakers**

Judicial review is done upon the rule of law and when engaging in JR courts are performing the function of ensuring the executive acts lawfully. They are based on legal errors in the decisions (can only review errors of law). In JR the court cannot cure admin injustice or error.

### 1<sup>st</sup> attempt: LEGAL V GOOD

**Legality:** Is this decision made pursuant to law?

**Merits:** Is this a good decision?

Example: **s 2 of the *Imaginary Act 2018***

The director has the right to ban materials that the director believes to be immoral.

## 2<sup>nd</sup> attempt: LAW V FACT

Fact and law is related but not identical to legality and merits.

**Legality:** questions of law

**Merits:** questions of fact

**Note:** text books says legality / merits distinction not identical to law-fact distinction, but I think the latter still helps us to understand the former

Example: s 2 of the *Imaginary Act 2018*

The director has the right to ban materials that the director believes to be immoral.

- In Judicial Review (JR); is it a review of **ERRORS OF LAW, not FACT**
- **Exceptions to the Rule [Errors of Law will consider Facts where]:**
  - o Jurisdictional Fact = Where a decision-makers power depends upon the existence of a particular fact and he/she wrongly determines the fact exists: ***Green v Daniels***
  - o No Evidence = DM makes a finding of fact where there is no evidence to support that finding
  - o Unreasonableness = DM finds that a fact is unreasonable, incorrect or irrational

## REVIEW

**Legality review:** review of errors of law

**Merits review:** review of the facts

### Must distinguish merits and judicial review –

**Merits review** is a decision but not by a judge, say a tribunal or by the executive.

**Judicial review** is a review by the courts about lawfulness of a decision.

## TEST:

Has the decision maker made some legal error?

**If so**, then yes judicial review, **if not** then no judicial review.

**Note:** Don't worry too much about defining "merits"

Example: *Liquor Control Reform Act 1998 (Vic)*

**s17 (1) Late Night Permits:** ... it is a condition of every licence... that the licensee does not cause or permit undue detriment to the amenity of the area to arise out of or in connection with the use of the premises to which the licence relates...

Example A: Jackie has a late night permit and runs a nightclub. Its premises and the surrounding areas are always kept safe and clean. Jackie's license is re-approved.

*Has there been a legal error?* No, there has been no undue detriment

Example B: Jocelyn runs a bar and has a late night permit. Her patrons often get quite rowdy. The authority says that the rowdiness is jeopardising safety and thus causing an undue detriment to the area.

*Has there been a legal error?*

Example C: Deakin LSS applies for a late night permit. At one of the LSS events, a stressed constitutional law student who was partying at this event vomits in front of the Deakin library. This is quickly cleaned up. No one knows any better the next morning, and everyone had a great time. The license is cancelled due to undue detriment to the area.

*Has there been a legal error?*

## What has the High Court Said?

Attorney-General (NSW) v Quin (1990) 170 CLR 1

Brennan J –

“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 so doing, the court avoids administrative injustice or error, so be it; but **the court has no jurisdiction to simply cure 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”

Statutory is key...

Project Blue Sky

- **First look at the words, but also need context, purpose and statutory canons.**

“the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to mean. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning”.

**Question of Law vs Fact Propositions:** Agfa-Gavaert citing Pozzolanic

1. The question **whether** a phrase should be **given an ordinary or technical meaning** is a **question of law**.
2. **Determining the ordinary or technical meaning** of a phrase is a **question of fact**.
3. The **meaning** of a **technical legal term** is a **question of law**. [exception to 2]
4. The **effect of a term**, once the meaning is established, is a **question of law**.
5. The question whether facts fully found **fall within the provision** ( / reasonable interpretation) ...is generally a **question of law**. [i.e. what are the range of relevant facts.]

E.g. Fruit

- if question is **whether to apply** scientific or ordinary meaning = question of law (proposition 1)
- if question is simply **what is** the scientific or ordinary meaning = question of fact (proposition 2) **UNLESS** technical legal term re fruit (proposition 3)
- the effect of the meaning applied to fruit is a question of law (proposition 4)
- if whether some fruits e.g. pears, stone fruit etc, fall within the definition, this is a question of law (proposition 5).

Example: proposition 5 –

Hope v Bathurst

– case re agistment (pay someone to take your animal to graze)

- Basically, primary judge said deciding what ‘commercial grazing activities’ are is a question of fact
- Held – not correct – there is still a legal issue / something to decide (e.g. what reasonably counts as insulting?)
- “[Business of grazing] denotes grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis.”
- “the critical issue for decision is whether the material before the Court reasonably admits of different conclusion on the question of whether the appellants activities constitute a ‘business’”.

## Why can judges only review legal error?

### Separation of Powers

#### Federal Level

1. Courts cannot exercise Non-Judicial Power (*Boilermakers*)
2. Non-Courts (e.g. tribunal) cannot exercise judicial power (*Wheat* case)

#### State Level

Courts cannot be given powers that impairs their institutional integrity (*Kable*)

## STEPS FOR GETTING JUDICIAL REVIEW

1. **Identify jurisdiction / Source of JR**
2. Make sure you have **standing** and the matter is **justifiable** (not assessed in A1)
3. **Identify Legal Error** ('ground of review') – topics 3-5
4. **Ensure no privative / invalidity clause** (not assessed in A1)
5. **Identify remedy**

### Pros and cons of judicial review

**Pro:** less technical than the other avenues of review

**Pro:** grants jurisdiction to Federal Court and FCC

**Cons:** exposes public authorities to unwarranted litigation that delays the workings of government

**Cons:** criticism of judicial activism by unelected judges as their decisions set aside the actions of the gov.

**Remember:** unlike parliament, the courts do not get to choose what matters come before them.