Week 1: Introduction to Administrative Law, organisation & Structure of the administration, theory of administration law

Introduction to concepts

→Administrative laws falls within broad public law whereas Constitutional law regulates all branches of government, it's closely associated with administrative law.
→Constitutional law provides the framework in which administrative law operates and is an ongoing influence on the development of administrative law principles.
→Administrative law ensures **government accountability** by setting legal limits on executive power and providing mechanisms for **challenging unlawful government actions**. It operates through **judicial review, tribunals, ombudsmen, and statutory review mechanisms**.

→Key Legal Principles:

1. **Legality** – Government actions must be based on lawful authority.
2. **Procedural fairness (natural justice)** – Decision-makers must act fairly.
3. **Reasonableness** – Executive decisions should not be arbitrary.
4. **Accountability** – Administrative mechanisms ensure government compliance with the law.
5. **Transparency** - freedom of information act etc.

→Key Case Law:

- **Entick v Carrington (1765) 19 St Tr 1029 (UK)** – Established that executive power must have a legal basis and cannot act outside the law.
- **Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476** – Reinforced that legislative attempts to oust judicial review are subject to constitutional limits.
- **Minister for Immigration v Li (2013) 249 CLR 332** – Established that unreasonableness is a ground for judicial review if a decision lacks rational justification.

Some administrative law mechanisms

→The **ombudsman**

a. Purpose is to investigate maladministration.
b. Maladministration is the improper management of an organisation or system. It can include a lack of care, judgment, or honesty.
c. Concerned with systemic issues within government.

→Freedom of information legislation (**FOIA**)

d. Seek information from the government
e. Able to seek information on what grounds a decision was made per government department.

→Appellate tribunals

f. Administrative review tribunal. VCAT. ART (federal level)
g. Administrative reviews or Merit reviews.

→**Judicial Review**

h. JR is carried out by the courts.
i. Courts determine if the governmental decision was made legally / lawfully.

→**Merits Review**

- Tribunals

→ These act to regulate the exercise of power by the Executive = government.
→ Conceptually, need mechanisms and processes to ensure the Executor's powers don't go unchecked.

→ *Egan v Willis (1998) 195 CLR 424, 451 [42],* "A system of responsible government traditionally has been considered to encompass 'the 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'. (Gaudron, Gummow and Hayne JJ).

Who is the executive

→Defining the Executive: The **executive** includes government ministers, departments, and agencies responsible for implementing laws and policies. However, **the distinction between public and private power** is complex, particularly when private companies **perform government functions** (e.g., running immigration detention centres or private prisons).

→Key Legal Principles:

1. **Ministerial Responsibility** – Ministers are accountable for their departments.
2. **Separation of Powers** – The executive is distinct from the legislature and judiciary.
3. **State Action Doctrine** – Private entities exercising public functions may be subject to administrative law constraints.

→Key Case Law:

- *Australian Communist Party v Commonwealth (1951) 83 CLR 1* – Reinforced that executive power must be derived from law and cannot override constitutional principles.
- *NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277* – Considered whether a private corporation performing public functions was subject to administrative law. The High Court found that not all government outsourcing attracts judicial review.
- *Brett Cattle Company v Minister for Agriculture (2020) FCA 732* – Found that ministerial decisions can be challenged if made unlawfully, even when based on policy.

Procedural nature of JR

→ Aspects of judicial review to be considered;

1. The procedural nature of JR
    a. Concern with the procedure rather than substance. The court does not look at the result of the decision, rather, it's concerned with the steps that were taken to determine such a decision.
    b. The courts more concerned with what steps were taken to come to reach a decision.
        i. The decision maker must not take irrelevant considerations into account;
        ii. Did the decision have the authority to make the decision;
    c. Remedies available under judicial review
        iii. Decision is fraught with illegality → send the decision back to the original decision maker to be re made with the correct legal procedure.
    d. The distinction between review and appeal

2. The requirements that the court have jurisdiction
3. The requirement that the applicant for review have standing
4. The different judicial review regimes
5. Concern with procedure reflected in the grounds of review
6. Reasons for the court concern with procedure

→ Judicial review allows courts to assess the legality of government decisions but does not reconsider the merits of those decisions.

- **Judicial Review**: Examines legality, not correctness, of a decision.
- **Merits Review**: Re-examines the substance of a decision and replaces it if necessary.
- **Appeals**: Consider whether an earlier decision was legally correct.

Case Law: *Attorney-General (NSW) v Quin (1990) 170 CLR 1* – Courts cannot substitute their own judgment for that of the decision-maker.

Remedies available in JR

→Typically would result in an order requiring the decision maker to reassess their decision systematically.
→The approach adopted by the courts.
→ A significant limitation of the courts' approach.
→Tension between the concerns of the applicants and concerns of the courts.

The distinction between review and appeal

→The difference between review and appeal
→ Part of the same hierarchy
→ Why the focus on review

Jurisdiction

→Not all decisions are subject to judicial review.
→**Two Key Criteria**:

1. The decision must be public in nature.
2. The decision must be made by a public body.

→The sorts of decision subject to review

e. Decision made pursuant to statute: Made under legislation (e.g., licensing, taxation).
f. Decisions made pursuant to the Crown Prerogative: Government powers not based on statute (e.g., granting pardons, national security).
g. Decisions made pursuant to non-statutory regulatory power: Press Councils that regulate the media without a statutory basis.

→ Public power – a suitable limitation?

h. Privatisation and contracting out
i. Non-justiciability
   i. Some government decisions are not reviewable due to their political or economic nature.
   ii. Examples of Non-Justiciable Decisions:
      A. Raising income tax rates.

B. Declaring war.

iii. Courts avoid interfering in policy decisions outside their expertise.

Standing

→Legal right to bring a case.

→Two Approaches:

1. **Narrow Approach:** Applicant must have a **direct, personal** connection to the decision.
2. **Broad Approach:** Allows challenges for **public interest** (e.g., environmental cases).

→Challenges with Narrow Standing

1. Environmental Cases: A Melbourne resident challenging logging in a remote forest.
2. Privatisation Issues: Government functions outsourced to private entities (e.g., private prisons, electricity providers).

→ An Attractive requirement?

→ The Rule of law

→ Alternative models of **accountability**

a. Merits Review: Tribunals (e.g., ART, VCAT).
b. Approaching the Department: Request reconsideration (often ineffective).
c. Ministerial Responsibility: Ministers can be pressured but are rarely accountable for departmental decisions.
d. Ombudsman: Investigates maladministration but only makes recommendations.
e. Media/Public Pressure: Can raise awareness but not a legal remedy

→Count-arguments

a. Floodgates
b. Improved standard of litigation
c. Deterrence of busybodies

Accountability

→Administrative law ensures that government power is exercised transparently, lawfully, and fairly, aligning with democratic values.

Democracy

→Government actions should reflect **democratic principles** by being transparent and responsive to the public.

- *Case Law: A v Hayden (No 2) (1984) 156 CLR 532* – Held that **government officials must obey the law**, even when acting under ministerial directions.

Rule of Law

→The rule of law ensures that **no one is above the law**, including the government.

- **Case Law:**
  - *Entick v Carrington (1765) 19 St Tr 1029 (UK)* – Government actions must have legal authority.
  - *Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1* – Established that **detention without judicial review** violates fundamental rights.

Separation of Powers (SOP)

→Administrative law reinforces the **separation of powers** by preventing executive overreach.

- **Case Law:**
  - Boilermakers' Case (1956) 94 CLR 254 – Confirmed the strict separation of judicial power in Australia**.**
  - Plaintiff M68/2015 v Minister for Immigration (2016) 257 CLR 42 – Examined whether executive detention of asylum seekers was lawful.

Individual Rights

→Administrative law protects **individual rights** by ensuring that government actions are **reviewable, fair, and lawful**.

- **Case Law:**
  - *Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR **82*** – Recognised that denial of procedural fairness is a ground for judicial review.
  - Minister for Immigration v SZMDS (2010) 240 CLR 611 **–** Clarified that unreasonableness in decision-making can make a decision unlawful.

The different judicial review regimes

Commonwealth:

→ Section 75(v) of the Constitution (and Section 39B of the Judiciary Act); and

→ The administrative Decisions (Judicial Review) Act 1977 (The AD(JR) Act)

Factual vs Legal Errors

→**Errors of Law:** Subject to judicial review.

→**Errors of Fact:** Courts intervene only if a **jurisdictional error** exists.

→**Case Law:**

- **Craig v South Australia (1995) 184 CLR 163** – Distinguished **jurisdictional errors (reviewable) from non-jurisdictional errors (not reviewable)**.
- **SZBEL v Minister for Immigration (2006) 228 CLR 152** – Emphasised that **misinterpretation of statutory criteria** is a reviewable legal error.

Week 2: Jurisdiction and Justiciability

Two avenues for judicial review:

1. **Constitutional review** (High Court jurisdiction under **75(v)** & **39B**).
2. **Statutory review** (simpler ADJR Act framework).

S75(v) Constitution & s39B Judiciary Act

→ s 75 In all **matters**…
(v) In which a writ of **Mandamus** or **prohibition** or an **injunction** is sought at against an **officer** of the Commonwealth the High Court shall have original jurisdiction.

→Matter – a "matter" is "a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled": *Re McBain; Ex parte Australian Catholic Bishops Conference; Fencott v Muller*

→Officer of the Commonwealth:

Plaintiff M61/2010E v Commonwealth

Background: The court considered whether independent contractors engaged by Wizard People Pty Ltd to conduct Independent Merits Reviews could be classified as "officers of the Commonwealth" under section 75(v) of the Constitution.

Key Issues:

1. **Validity of Section 46A of the Migration Act:** The plaintiffs challenged section 46A, particularly subsection (7), arguing it stultified the constitutional jurisdiction under section 75(v) by conferring an unfettered and unreviewable power on the Minister.
2. **Procedural Fairness:** The plaintiffs claimed that the Refugee Status Assessment (RSA) and Independent Merits Review (IMR) processes were procedurally unfair and did not apply Australian legislation and case law correctly.
3. It was accepted that neither the contractor nor any of the specified persons engaged by the contractor to perform the services were officers of the Commonwealth. It was accepted that the reviewers named as defendants were not officers of the Commonwealth.

Judicial Review Findings:

1. **Section 75(v) of the Constitution:** ensures the High Court's jurisdiction to review decisions made by officers of the Commonwealth, maintaining the rule of law by restraining officers from exceeding federal power.
2. **Validity of Section 46A:** The High Court held that section 46A, including subsection (7), was valid. It did not prevent the exercise of jurisdiction under section 75(v) and did not create an "island of power" immune from supervision.
3. **Procedural Fairness:** The Court found that the RSA and IMR processes must be procedurally fair and conducted according to correct legal principles. The reviewers made errors by not treating Australian legislation and case law as binding and failing to observe procedural fairness.

Outcome: The court left open the question of whether a party identified as "an independent contractor" might fall within the expression "an officer of the Commonwealth" in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been "contracted out."
→**The Federal Court** also has judicial review jurisdiction under *s 39B of the Judiciary Act 1903 (Cth)***.**

s39B Judiciary Act:

→Original Jurisdiction (*1A*)

- Federal Court has jurisdiction for writs (mandamus, prohibition, injunction) against Commonwealth officers.
- Covers matters involving Commonwealth injunctions/declarations, constitutional issues, and Parliamentary laws (excluding criminal prosecutions).

→Civil Jurisdiction Limits (*1EA*)

- If a civil case or appeal is in the Federal Circuit and Family Court or a State/Territory court, related writs must be heard in that court.
- Federal Court does not have jurisdiction over writs related to civil proceedings already in progress.

s44 Judiciary Act: General Remittal (High Court)

→(Subsection 1):

- The High Court can transfer a pending matter (or part of it) to a federal, state, or territory court with jurisdiction.
- This can be done on application by a party or on the High Court's own motion.
- The receiving court will handle further proceedings as directed by the High Court.

→Sub 2:

- If the matter falls under s 38(a)-(d), the High Court can remit it to the Federal Court or a state/territory court.

→Sub 2A:

- If the Commonwealth (or a party suing/being sued on its behalf) is involved, the High Court may remit the matter to the Federal Court.

→ Sub 3: Effect of Remittal (Subsection 3)

- Once a matter is remitted, the receiving court:
  (a) Gains jurisdiction over the matter.
  (b) Conducts further proceedings as directed by the High Court.
- No Oral Hearing Required (Subsection 4)
- The High Court **can remit a matter without an oral hearing**.

→Section 75(v): Provides a constitutional safety net for judicial review, ensuring that all Commonwealth officers remain subject to legal scrutiny.
→Section 75(iii): Covers cases in which the Commonwealth is a party.
→Section 39B of the Judiciary Act 1903 (Cth): Extends similar jurisdiction to the Federal Court, allowing it to review government decisions.

Elements needed to challenge a decision under s75(5) or 39B Judiciary

1. **Jurisdiction**: Matters, 2 of the writs & commonwealth officer.
2. **Standing**: Special Interest test – Private & Public interest
3. **Common Law grounds of review**: Jurisdictional fact ground, unlawful decision maker, irrelevant or relevant consideration, breach of procedure, no evidence… Etc
   - must mention a Jurisdictional Error is required to pursue remedies.
4. **Is there a jurisdictional error for each Ground of review?**: Did the decision maker act outside the scope of their authority? Materiality? Would a different decision be made?

(Prerogative Writs) Available remedies

→**Prohibition** - an order prohibiting a person from taking a proposed course of action or making a proposed decision. (preventative)
→**Certiorari** - an order quashing a defective decision that has been made. (Can only be applied with another Prerogative write from 75(v)/ An ancillary Writ used in connection with another one Writ)
→**Mandamus** - an order requiring a decision-maker to exercise a discretion in accordance with the law.

Other cases:
→*Ainsworth v Criminal Justice Commission (1992) 175 CLR 564*: Established that reputation is a legally protected interest in judicial review.
→*Western Australian Field and Game Association v Minister of State for Conservation (1992) 8 WAR 64*: Considered whether an association had standing to challenge a government decision.
→F*encott v Muller (1983) 152 CLR 570*: Defined the scope of federal judicial power under the Constitution.

Prohibition and certiorari - Public power

→In order for prohibition and certiorari to operate, it is necessary that the decision that is sought to be challenged be made pursuant to the exercise of **public power**.
→A body, in carrying out a particular function, **exercises public power if,** in the absence of a private body carrying out the function, the government would invariably carry out the function *(Datafin*).

R v Panel on Takeovers and Mergers; Ex Parte Datafin Plc [1987] 1 QB 815

→Extended judicial review to private bodies exercising public functions.
→The High Court initially refused leave for judicial review, stating that the Panel's decision was not susceptible to judicial review. The applicants then renewed their application before the Court of Appeal.

Court of Appeal Decision

→The Court of Appeal granted leave to consider both the substantive application and the question of jurisdiction. The court held that the Panel's decision was subject to judicial review based on several key considerations:

1. **Nature of Functions**: The Panel performed public law duties, which affected a broad range of individuals and entities beyond its immediate members. The Panel's decisions were backed by statutory powers and penalties.

2. **Duty to Act Judicially**: The Panel was obligated to act judicially in its decision-making processes, ensuring fairness and equity between shareholders.
3. **Governmental Framework**: The Panel operated as an integral part of a governmental framework for regulating financial activities.
4. **Public Interest**: The Panel's role in maintaining the integrity and proper functioning of the financial markets was deemed to be in the public interest, supporting its classification as exercising public power.
5. **Historical Context**: The court acknowledged the historical development of the Panel and its incorporation into the regulatory network established by the government, despite its lack of direct statutory authority.

Conclusion: The Court of Appeal ultimately dismissed the substantive application for judicial review, finding no grounds to interfere with the Panel's decision on the facts presented. However, the court declared that it had jurisdiction to hear such applications, ensuring that bodies like the Panel remain accountable and subject to judicial oversight.

Certiorari – Legal effect or legal consequences

→Certiorari operates only to quash the legal effects or the legal consequences of the decision under review (See eg *Ainsworth v Criminal Justice Commission*).

- Public power exercised?
- Does it in effect the JR applicants' rights.

Mandamus – Public Duty

→An order for mandamus will lie only in respect of a public *duty* to exercise a discretion (See eg *Western Australian Field and Game Association v Minister of State for Conservation*).
→Has to be an aligned purpose between the decision and the purpose of the legislation.
→The court, in granting an order for mandamus, will never order that the decision-maker comes to a particular decision – it will merely order that the decision-maker exercises his discretion.
→ Presumed that a decision maker is under a public duty to use their discretion.

- Compare the purpose of the act with the decision being made, and state the connection between the two,
- show that the purpose is aligned and then there will be a public duty on the decision maker to exercise their discretion.

Equitable Remedies

→**Injunction** - order by the court that the respondent refrains from undertaking a particular act (a "prohibitory" injunction) or undertakes an act (a "mandatory" injunction).
→**Declaration** - order by the court which has no coercive effect, but which merely *declares* the legal rights and liabilities of the parties.

S75(iii) Constitution JR

→Section 75 - In all matters…(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party…the High Court shall have original jurisdiction.

The AD (JR) Act

→Statutory Judicial Review
→ A Judicial Review may only be sought in respect of a **decision** (**s 5**); **conduct** in relation to a **decision** (**s 6**); and the **failure** to make a decision (**s 7**).
NB: For almost any case once a decision has been made you only use s 5. It's only when a decision is still pending that you use s 6.

Three categories of reviewable actions:

1. **Decisions (s5)**
2. **Conduct taken for the purpose of making a decision (s6)**
3. **Failure to make a decision(s7)**

Elements to determine Jurisdiction under the ADJR Act

→ To be reviewable, a decision must be:

1. **Is it a final decision or (not an interim step). → Section 3 ADJR**
2. **Is the decision of an administrative character.**
3. **Made under an enactment (statutory basis required). Two Limb test *Griffith University***

Section 5: What is a Decision

→ Conduct refers to actions taken in the process of making a decision.

Decision (Australian Broadcasting Tribunal v Bond)

→a reviewable decision, for the purposes of the AD(JR) Act, will be a decision for which provision is made under the relevant statute (Mason CJ);
→A decision for which provision is made under a statute will generally, but not always, be a decision that is final and operative of the issue falling for consideration.

Section 6: What is conduct

→A conclusion that is merely reached as a step along the way in the course of reasoning leading to an ultimate decision will not ordinarily be a reviewable decision in itself unless the statute provided for the making of a finding on that particular point (Stepping stone decisions vs final decision).

1. **Is it a final decision or (not an interim step). → Section 3 ADJR**

→A "**decision**" means "a decision of an *administrative* character made, proposed to be made, or required to be made *under an enactment*".
→ Is the decision making a final and operative decision about an application? (Bond)

Section 3 'Interpretations' What types of decisions are considered in the ADJR Act:
(2) In this Act, a reference to the making of a **decision** includes a reference to:

a) making, suspending, revoking or refusing to make an order, award or determination;
b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

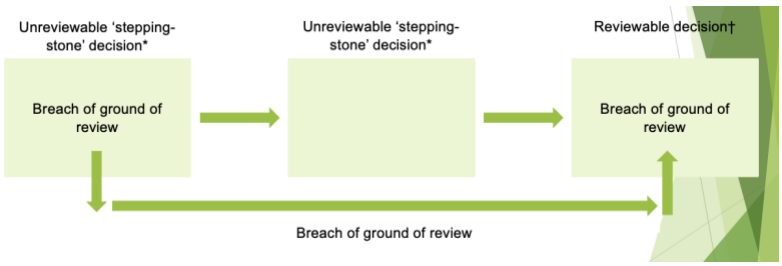
c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
d) imposing a condition or restriction
e) making a declaration, demand or requirement
f) retaining, or refusing to deliver up, an article;
g) doing or refusing to do any other act or thing.

(3)

- Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

Breaches of the Grounds of Review in Non-Reviewable "Stepping-Stone" Decisions

→ Breaches of the grounds of review that occur in respect of non-reviewable 'stepping-stone' decisions flow into the reviewable decision to which the 'stepping-stone' decision leads (and so are treated as if they were made with respect to the reviewable decision).



*The decision is unrenewable because the making of the decision is not provided for in the relevant legislation.
†The decision is reviewable because provision for the making of the decision is contained within the relevant legislation.

Decision (Australian Broadcasting Tribunal v Bond) Cnt'd:

→conduct in relation to a decision is activity, of a procedural nature, taken in relation to a reviewable decision (per Mason CJ).

AD (JR) Act cnt'd

→Schedule 1 – lists decisions to which this Act does not apply
→Section 3 – decisions of the Governor General are not subject to review.

2. Is the decision of an administrative character.

→Of an administrative character

- Legislative acts are concerned with the creation or formulation of new rules of law having *general application* while administrative acts were concerned with the application of those general rules to *particular cases: Commonwealth v Grunseit*

→*Roche Products v National Drugs and Poisons Schedule Committee*

- The decision under s 52D(2) was legislative (not administrative) because (inter alia):
  1. Applied to substance in general not just substance manufactured by *Roche*
  2. Public consultation

3. Poisons Standard an important element in national system of regulation and incorporated broad public health considerations
4. Merits review not available

3. Is the decision one made under an enactment.

→Under an enactment (Two limb Test)

▶ Enactment – includes an Act, and also, amongst other things, an instrument (including rules, regulations or by-laws) made under an Act (s 3).

→A decision will have been made under an enactment if:

1. the decision was expressly or impliedly required or authorised by the enactment; and
2. the decision itself confers, alters or otherwise affects legal rights or obligations *(Griffith University v Tang).*

Justiciability

→Not every government action is subject to JR. The doctrine of justiciability determines whether courts can review an administrative decision.

→ Does the decision consider or trigger highly political issues? If it is hardly a political decision it is justiciable, if it is highly political the decision may not be justiciable.

→Courts assess justiciability based on two key factors:

1. Source of the Power

→If a decision is made under statute, it is usually justiciable.

→If it involves prerogative powers, courts have limited jurisdiction.

2. Status of the Decision-Maker

→Public officials exercising statutory power are subject to review.

→Private or discretionary decisions are generally not reviewable.

Case Law: *R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170*

- Considered judicial review in the context of Indigenous land rights.

→Courts assess whether a decision's subject matter is suitable for review.

→Factors include:

- Political sensitivity – Courts avoid interfering in government policy.
- Institutional competence – Some matters are best left to the executive.
- Availability of statutory remedies – If legislation provides an appeal process, courts may be reluctant to intervene.

Case Law:

- *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 15 FCR 274*: Courts generally do not review political or discretionary decisions.
- *Aye v Minister for Immigration and Citizenship (2010) 187 FCR 449*: Immigration decisions remain reviewable, despite ministerial discretion.

Non-justiciability

→Non-justiciability – in the court's view the matter is not appropriate for adjudication by a court of law.

→It is no longer the case that a decision will be non-justiciable because of the high status of the decision-maker, or because the decision is made pursuant to the exercise of prerogative power (*R v Toohey; ex parte Northern Land Council*).

→Remaining bases of non-justiciability

- The subject-matter of the power being exercised, where this is highly political (*Minister for the Arts, Heritage and the Environment v Peko Wallsend*).
- Bowen CJ - "the whole subject-matter of the decision involved complex policy questions relating to the environment, the rights of Aborigines, mining and the impact on Australia's economic position of allowing or not allowing mining as well, as matters affecting private interests such as those of the respondents to this appeal. It appears to me that the subject-matter of the decision…placed the decision beyond review by the courts".

→*Aye v Minister for Immigration and Citizenship.*

- Non justiciability will only arise if, in applying a particular ground of review, the court has to pass judgment on the merits of the decision;
- If it has to do this, then the decision will be non-justiciable at least as far as that ground of review is concerned.