

# LAWS1160

## Administrative Law

### Comprehensive Course Notes

UNSW Law School

#### Course Structure

Topic 1 (Weeks 1-2): Introduction and Foundations of Australian Administrative Law

Week 1A: What is administrative law? Three branches of government; accountability mechanisms; timeline

Week 1B: Administrative justice; credibility assessment in tribunal proceedings

Topic 2 (Weeks 2-3): Merits Review

Week 2A: Administrative Review Tribunal (ART); jurisdiction; standing; abolition of AAT

Week 2B: Process and procedure; evidence; discretionary decision-making; policy

Week 3A: Judicial review introduction; ADJR Act jurisdiction; scope of review

Week 3B: Standing in judicial review; reasons for decisions

Topic 3 (Weeks 4-5): Grounds of Judicial Review Part 1

Week 4A: Acting without power; procedural errors; statutory interpretation

Week 4B: Jurisdictional facts; objective vs subjective jurisdictional facts

Week 5A: Procedural fairness; hearing rule; disclosure; notice

Week 5B: Bias rule; actual and apprehended bias; exceptions

Topic 4 (Weeks 7-8): Grounds of Judicial Review Part 2

Week 7A: Improper purpose; relevant and irrelevant considerations

Week 7B: Fettering discretion; acting under dictation; inflexible policy

Week 8A: Unreasonableness; irrationality/illogicality; Wednesbury principle

Week 8B: Jurisdictional error; *Craig v SA*; *Kirk v NSW*; materiality

Topic 5 (Weeks 9-10): Remedies and Statutory Restrictions

Week 9A: Remedies (certiorari, mandamus, prohibition, injunction, declaration)

Week 9B: Privative clauses; *Kirk* guarantee; constitutional constraints

Week 10A/B: Other statutory restrictions; no-invalidity clauses; time limits

# TOPIC 1: INTRODUCTION AND FOUNDATIONS OF ADMINISTRATIVE LAW

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## 1.1 What is Administrative Law?

Administrative law is the body of law concerned with ensuring that the executive branch of government acts within the limits of the powers granted to it by the legislature and the Constitution. It sits at the intersection of constitutional law and public law and performs a vital accountability function in a democratic state.

Australia has a three-branch system of government: the legislature (Parliament) enacts laws; the executive (government and bureaucracy) implements and administers those laws; and the judiciary (courts) interprets and applies the law. Administrative law is principally concerned with the relationship between the executive and the judiciary.

### The Three Branches and Administrative Law

**Legislature:** Enacts statutes that delegate powers to executive decision-makers. Parliament is the principal source of administrative power in Australia. Delegated legislation is made under authority conferred by Parliament.

**Executive:** Exercises powers conferred by statute or the Constitution. Includes Ministers, departments, statutory authorities, and tribunals. Administrative law governs how executive power is exercised and ensures compliance with limits set by Parliament.

**Judiciary:** Reviews the lawfulness of executive action. Courts do not merge with the executive: separation of powers maintains independence. Administrative law defines the scope and grounds of judicial review.

## 1.2 Historical Development: The 'New' Administrative Law

Australian administrative law underwent a transformative period of reform in the 1970s following the landmark 1971 Administrative Review (Kerr) Committee Report. These reforms established a modern and comprehensive administrative law system designed to shift focus away from courts as the primary accountability institution.

### Key Reforms Timeline

1971: Kerr Committee Report -- recommended creation of a comprehensive administrative review system

1975: Administrative Appeals Tribunal Act 1975 (Cth) -- established the AAT for merits review

1976: Federal Court of Australia Act 1976 (Cth); Ombudsman Act 1976 (Cth)

1977: Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) -- codified judicial review

1982: Freedom of Information Act 1982 (Cth) -- rights of access to government documents

2015: Tribunals Amalgamation Act 2015 (Cth) -- amalgamated Commonwealth tribunals into AAT

2019: Callinan Review of the AAT's operations

2022-2024: Abolition of AAT and creation of Administrative Review Tribunal (ART)

### 1.3 Why Do We Need Administrative Law?

Administrative law serves multiple foundational justifications rooted in Australia's constitutional and political order. The key rationales reflect fundamental values of democratic governance.

#### Justifications for Administrative Law

**Democratic justification:** in a democracy, the people elect Parliament to make laws. If executives can act beyond those laws without accountability, the democratic mandate is undermined. Administrative law enforces Parliamentary intent.

**Rule of law justification:** the rule of law requires that government power be exercised within legal limits, not arbitrarily. Administrative law gives substance to this principle by ensuring decision-makers can source their power in law.

**Separation of powers justification:** courts must be able to supervise the executive; otherwise the separation breaks down and executive power becomes unbounded. The constitutional guarantee of judicial review in s 75(v) of the Constitution reflects this.

**Individual rights justification:** individuals affected by executive decisions are entitled to fair treatment and protection from arbitrary power. Procedural fairness and grounds of review give effect to these entitlements.

**Unique powers of the executive:** the executive exercises coercive powers (arrest, deportation, licensing, etc.) that profoundly affect individuals. These powers require accountability mechanisms commensurate with their impact.

### 1.4 Accountability Mechanisms in Australian Administrative Law

Australia has developed a layered system of accountability mechanisms, operating both within and outside the executive branch. These complement each other and provide multiple avenues for affected persons to seek redress.

Mechanism	Description and Key Features
<b>Judicial Review</b>	Courts review the legality of administrative decisions. Does not examine merits (whether the decision was the 'right' one). Available via Constitution s 75(v), ADJR Act, Judiciary Act s 39B, and State Supreme Courts.
<b>Merits Review</b>	Administrative tribunals (AAT, now ART) can re-examine the facts, law, and policy of a decision and substitute their own decision. Examines whether the decision was the 'correct or preferable' one on the material before the tribunal.
<b>Ombudsmen</b>	Independent statutory officers who investigate complaints about government administration. Commonwealth Ombudsman can investigate most Commonwealth agencies (except courts and Intelligence agencies). Informal, accessible, and inquisitorial.
<b>Freedom of Information</b>	The FOI Act 1982 (Cth) gives a legal right of access to documents held by government agencies and Ministers. Promotes transparency and enables affected persons to understand why decisions were made.
<b>Parliamentary Accountability</b>	Responsible government; questions on notice and without notice; Senate Estimates; parliamentary committees. Ministers are accountable to Parliament for their department's actions.
<b>Delegated Legislation Scrutiny</b>	Senate Scrutiny of Delegated Legislation Committee examines statutory instruments for compliance with parliamentary intent. Disallowance power allows Parliament to override executive instruments.

## 1.5 Delegated Legislation

Delegated (or subordinate) legislation is legislation made by the executive under authority expressly conferred by Parliament in an enabling statute (the primary legislation). It is a necessary feature of modern government but poses democratic accountability risks.

### Types of Delegated Legislation and Key Features

**Legislative instruments:** binding rules with general application. Registered on the Federal Register of Legislation. Subject to parliamentary disallowance within a defined period after tabling (usually 15 sitting days).

**Regulations:** the most common form of delegated legislation. Made by the Governor-General in Council under explicit statutory authority. Usually subject to disallowance and sunset.

**By-laws, ordinances, and determinations:** specific forms used in particular statutory contexts. Must be within the scope of the enabling legislation or risk invalidity.

**Policy:** not legally binding in the same way as delegated legislation. Decision-makers must consider policy but cannot apply it inflexibly.

### Key Principles for Validity of Delegated Legislation

1. Must be authorised by the enabling statute: if delegated legislation goes beyond the scope of the parent Act, it is ultra vires and void.
2. Must not conflict with the parent Act: s 109 of the Constitution operates to invalidate conflicting State laws. Delegated legislation that conflicts with primary legislation is also invalid.
3. Must not be made for an improper purpose (a ground of review for delegated legislation as well as administrative decisions).
4. Must not be unreasonable or uncertain: delegated legislation that is unreasonable in the Wednesbury sense or so uncertain as to be incapable of understanding is invalid.
5. Sub-delegation: a delegate cannot further delegate power unless the enabling statute expressly authorises it ('delegatus non potest delegare').

The distinction between primary legislation, delegated legislation, policy, and administrative decisions is fundamental. Primary legislation is enacted by Parliament and overrides all other instruments. Delegated legislation has the force of law but is subordinate to primary legislation. Policy guides decision-making but is not legally binding. Administrative decisions apply legal rules to individual circumstances.

## 1.6 Administrative Justice: Values and Purposes

Administrative justice reflects the values that underpin the entire administrative law system. Different theorists have emphasised different values, and understanding these helps contextualise the legal rules.

### Administrative Law Values (Daly)

**Accuracy:** decisions should correctly apply the law to the facts. Merits review and judicial review of factual error both serve this value.

Fairness: procedures should give affected persons an opportunity to participate and be heard. Procedural fairness requirements serve this value.  
Consistency: like cases should be treated alike. Equality of treatment and the rule against arbitrariness serve this value.  
Transparency: decision-makers should explain their reasoning. Obligations to give reasons serve this value.  
Efficiency: the system should resolve disputes promptly and at proportionate cost. Tribunal informality and the emphasis on early resolution serve this value.  
Independence: decision-makers should be free from improper influence. Separation of powers and institutional design of tribunals serve this value.

Creyke's conception of administrative justice emphasises the importance of viewing the system holistically rather than focusing solely on legal rights. Administrative justice encompasses the quality of initial decisions, internal review processes, and external oversight mechanisms working together.

## 1.7 Credibility Assessment in Tribunal Decision-Making

Credibility assessment is a critical aspect of tribunal fact-finding, particularly in migration, social security, and compensation cases. The tribunal must determine which version of events to accept when parties give conflicting accounts.

### Tools for Credibility Assessment and Their Limitations (Millbank)

Plausibility: whether the account is internally logical and consistent with known facts. Risk: decision-makers may apply culturally biased assumptions about what is 'plausible'.  
Internal consistency: whether the applicant's account is consistent across different tellings. Risk: trauma and memory impair consistency; inconsistency does not necessarily indicate dishonesty.  
External consistency: whether the account is consistent with country information, documents, and other evidence. Risk: country information may be outdated or inapplicable to the specific case.  
Demeanour: whether the witness's conduct during the hearing suggests credibility. Risk: highly unreliable, particularly across cultural and linguistic differences. Courts have increasingly warned against over-reliance on demeanour.  
Testing of knowledge: whether the applicant can demonstrate familiarity with claimed experiences or associations. Risk: traumatised persons or those lacking education may not articulate knowledge effectively.

The AAT developed Guidelines on the Assessment of Credibility to address these concerns, particularly for vulnerable applicants in refugee and protection contexts. However, credibility findings are generally factual findings and are not reviewable on their merits under judicial review (which is limited to questions of law). This creates an accountability gap where inconsistent credibility findings may persist without effective challenge.

Hunter et al identified tensions between legal and therapeutic approaches to credibility: lawyers and clinical psychologists have different professional cultures and objectives, with lawyers adopting a sceptical culture while clinicians adopt a culture of acceptance. This creates mistrust when psychological reports are submitted in legal proceedings. Overconfidence in decision-makers' ability to discern truth is a persistent problem.

Abboud v Minister for Immigration [2017] FCCA 2047 illustrates the reviewability limits of credibility: the AAT made findings about sexual orientation as a matter of credibility (a factual finding), and the court confirmed these were generally not reviewable on judicial review absent a jurisdictional error in the process by which those findings were made.