

LAW4331 – ADMINISTRATIVE LAW

TOPIC 1 – INTRODUCTION AND THE ROLE OF STATUTORY INTERPRETATION

1.1 INTRODUCTION

- **WHAT IS ADMINISTRATIVE LAW**

- Administrative law is all about power, politics and people – that is, preventing people in positions of public power from making dodgy decision
- **Definition:** Admin law can be described as a branch of public law concerned with making government accountable for the decisions it makes.
 - Regulates the exercise of power by the executive arm of government
 - Encompasses the different mechanisms that enable people who are affected by decisions to challenge those decisions.
- Linked to but separate from Constitutional Law.
- Everyday the government (people in positions of public power) make administrative decisions that affect individuals, citizens and visitors to Australia. Some administrative decisions include
 - The tax office saying that you owe them more money than you think you do
 - Centrelink says that you are no longer eligible for the youth/parent allowance
 - On a student visa and the Department of Home Affairs revokes your visa
 - You own a café the council revokes your permit for chairs on footpath
 - Neighbours build an apartment building that blocks out all of your sunlight
 - Minister gives consent for mining company to mine in a national park
- Examples from the news: Covid curfews challenged, Novak visa cancelled, Candace Owens visa rejected, sacred tree cut down for highway (6 others saved)
- This unit is about how you might go about challenging these decisions
- There are various mechanisms in admin law that help make the government accountable for its decisions including:
 - judicial review where people can go to court to challenge the legality of a government decision that affects them
 - the ombudsman who can investigate complaints and look into bad administration practices
 - freedom of information legislation which allows people to get hold of certain types of government documents
 - appellate tribunals like the Administrative Review Tribunal and in Victoria is equivalent is VCAT – where people can seek to have bad decisions which affect them set aside and remade (this is a merits review – in contrast with a judicial review)
 - *this course focuses mainly on judicial review but spends some time on tribunals/merits review
- There are a number of questions that you need to ask yourself when you are thinking about when you are thinking about these sorts of decisions – what was the nature of the decision maker/decision, what was the source of the power to make that decision
- **SOURCES OF POWER TO MAKE DECISIONS**
- There are two main sources of power to make decisions

- 1. Statute, subordinate legislation and quasi legislation

- Qu: what is subordinate legislation and quasi legislation?
 - Subordinate legislation = regulations/delegated legislation (about half of government law is delegated legislation like regulations)
 - Quasi legislation/soft law = guidelines, rules, policies, procedures
- Qu: who makes subordinate/quasi legislation?
 - Public servants or the executive
 - Regulations will be made by high level public servants like the Governor General or Minister
 - For this subordinate legislation the power to make this is usually contained in the Act itself, usually towards the end
 - E.g. may say: the GG/Minister may make regulations prescribing matters required or permitted to be required by this Act or necessary or convenient to be prescribed
 - In terms of quasi legislation and guidelines, sometimes that can be contained in an Act of Parliament
 - E.g. Privacy Act s26V gives the Commissioner the power to make guidelines to assist companies to develop privacy codes
 - Sometimes they are simply just devised by a government department or bureaucrat of some kind
 - Collectively they are referred to as the executive, so it is the executive which makes subordinate and quasi-legislation rather than parliament
- Qu: what are the justifications for making subordinate/quasi legislation?
- Why does Parliament delegate power to make subordinate legislation to the executive/to departments to develop guidelines and policies
 - Efficiency, access
 - Easier to amend regulations/draw up a new policy as you don't have to go through all the parliamentary processes and tie up parliament (who only has a certain number of sitting days and does not have the time to make all of the rules)
 - People who it is delegated to might have specialised knowledge
- Qu: what are some concerns with subordinate/quasi legislation?
 - May mean someone who is not actually voted in is making decisions
 - Bureaucracy
 - Less oversight by Parliament (although in terms of regulations there is the capacity for the Senate to disallow regulations – BUT regulations have to be made in the first place to be disallowed and this is not a very efficient way of doing things)
 - In terms of policies and guidelines (not delegated legislation which we have a register for) it might be hard to locate them
 - Could be inconsistent with primary legislation
 - *keep these things in mind when talking about the use of delegated legislation and the role of policy in decision making
- Overall, decisions made under statute are the most common types of decisions subject to judicial review – so the vast majority of cases that we look at in the context of judicial review are decisions made under statute

- E.g. decisions on whether or not to grant or revoke visas are made pursuant to powers contained in the **Migration Act**
 - Decisions in relation to youth allowance would have a particular Act under which those decisions are made (**Social Security Act**)
 - Under the **National Parks Act s40** a Minister can allow mining in a national park
- **2. Common law executive power including prerogative power; *Constitution, s 61***
 - The prerogative power is a power vested in the Crown that permits the undertaking of certain functions and the source of the prerogative power is not contained in a statute but is a power that courts have historically recognized the crown to have
 - In Aus, **s61 of the Constitution** is understood to encompass the Commonwealth's prerogative power – so it has a Constitutional basis in Australia
 - Qu: what are some examples of a prerogative power/crown or royal prerogative?
 - Declaring war, signing treaties, prerogative of granting mercy to people
- **DECISIONS MADE BY WHOM?**
 - The power being exercised is by government in one form or another
 - Specifically, the executive arm of government
 - Cabinet, Executive Council, Ministers
 - Government departments, agencies and individual officials
 - Local government
 - Basically, it is the exercise of public power
 - E.g. Social Services Australia is the government department which deals with the sole parent allowance
 - E.g. The Department of Home Affairs deals with all visa applications
- **PRIVATISATION, CORPORATISATION AND CONTRACTING OUT**
- Government structures have changed significantly and many government agencies have been corporatised and privatised and contracted out their functions to private entities
- This is an important issue in admin law because traditionally the remedies available are only available against public officials, not against private entities
- There is a difference between privatisation and contracting out because when something is contracted out the body is still performing the function on behalf of the government
- Privatisation:
 - where government sells off an activity to a private corporation, it divests itself of the function.
 - What was originally done by a particular government department gets divested to an entity
 - Basically, the government is saying that it does not think that the government should be performing that function and rather that it is something that is better left to the private sector

- E.g. licencing aspect of VicRoads, Telstra, Commonwealth Bank (used to be a government bank), Medi Bank (used to be public health insurance until it was corporatised in 1998 and became a government business enterprise where the government was the sole shareholder – and was eventually privatised), Qantas
- Contracting out ('outsourcing')
 - where a private entity is contracted to perform the functions of a government agency, some control remains with government.
 - E.g. yarra trams, metro, private prisons
 - E.g. in terms of private prisons, The Corrections Act requires the contractor/prison operator to comply with the relevant provisions of the Corrections Act, and they are still subject to judicial review of the decisions made under that Act
- Privatisation and contracting out is a problem in admin law because it fragments a government process and reduces both accountability and transparency
 - This also means that if a decision is not made by government then judicial review might not be available

● THE CONSTITUTIONAL BACKGROUND

- There are 5 constitutional doctrines that are relevant to admin law

● Rule of Law

- A V Dicey said that the rule of law involved 3 main elements:
- (1) No person is above or beyond the reach of the law.
- (2) All people are subject to the same law.
- (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.
- What this means in relation to admin law is that government decision makers are also subject to the law and must make their decisions in accordance with the law – and if they do not make their decisions in accordance with the law then it is admin law that provides the methods by which those decisions can be challenged
- The rule of law doctrine is particularly relevant to the topic on standing (topic 3)
- There are some tensions between the rule of law and standing
- Standing says that a person who is bringing the application must have some kind of link or connection to the decision being challenged and if your link or connection is not sufficient or close enough to the decision being challenged then you wont be able to make an application for review of that decision
- How close does your connection need to be to the decision before you can seek judicial review of that decision?
- Further, why should you even need to have a connection to the decision – shouldn't anyone be able to make sure that the decision maker complies with the law?
- The requirement of standing is a way of limiting who can go to court to challenge a decision
- This creates a tension with the rule of law

- The requirement for standing can be either broad or narrow, liberal or strict and if the standing requirement is too strict then the ability to make the government comply with the law becomes more difficult
- This creates a real risk that the government would be able to get away with acting illegally
- If the government can get away with acting illegally without fear of being challenged, then that would be flouting the rule of law
- The principle of the rule of law is therefore an argument in favour of having a broad/a more open and liberal standing requirement
- But one of the arguments against a more liberal standing requirement is that if anyone can challenge a government decision the floodgates will open and the courts will be overwhelmed and every person who has nothing better to do with their time than find government decisions that they disagree with will clog the courts
- Not only will courts be clogged but we will see government grinding to a halt as it tries to respond to all of the judicial review applications
- In the topic on standing we look at cases where the court is trying to reconcile these competing arguments
- It is mainly in the environmental area where the courts have been prepared to relax the standing requirements so that they are a bit broader

• Constitutionalism

- This is another doctrine of relevance to admin law – this doctrine basically says...
- A principle that government is limited in what it can do:
 - By written rules (ie the *Constitution*); and
 - Unwritten principles, such as the 'Principle of Legality'.
- Very linked to the concept of Rule of Law:
- 'The Australian Constitution is framed upon the assumption of the rule of law.' (Gleeson CJ, *Plaintiff S157/2002* @ [31])
 - Gleeson CJ being very clear about the link between constitutionalism and the rule of law
- Constitutionalism also encompasses the principle of legality which includes the notion that fundamental rights must not be abrogated without clear and plain intention
- The HC will often refer to constitutional principles like this to explain its function in relation to judicial review and the limits of executive power

• Separation of Powers

- Under this doctrine we have 3 arms of government and each arm has a specific function:
- (1) Parliament makes the law.
- (2) Executive applies the law.
- (3) Judiciary interprets the law.
- These functions are entrenched at Commonwealth level in the *Constitution* in section 1, 61 and 71.