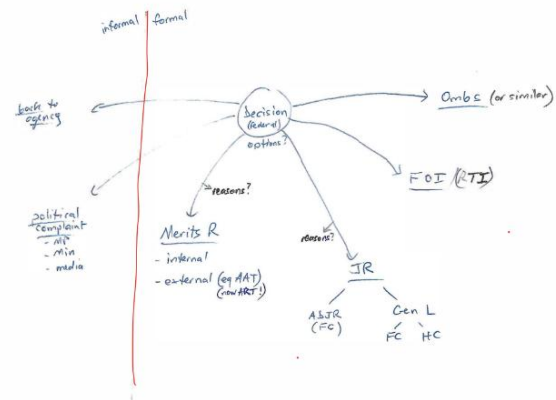


LAW2221- Administrative Law

Module 1 – Introduction to Administrative Law

- Supervision & correction of the executive “*administrative law is the body of principles and procedures by which the executive government is supervised*” ⇒.
- Origins in the notion of ‘judicial review’
- The core components:
 - Judicial review ⇒ *focuses on decisions of public officer, executive, is lawful*
 - Merits review ⇒ *This is a process whereby all aspects of the original government position are reconsidered - a decision might first go to a **merits review** at a higher level, and they completely remake the decision, and then you might end up going to court if you're still not happy.*

① The 'Admin Law' Map.



- Freedom of information ⇒ A **complementary mechanism** is what we call freedom of information, or right to information.
- Ombudsman review ⇒ *basically, this is a body that independently **investigates complaints** about executive government.*
- Supplementary measures of public accountability? ⇒ *Royal Commissions and Commissions of Inquiry. There's always a commission of inquiry going on somewhere. And joint committee, and the parliamentary Committee- we've also got things like information privacy. Whistle-blower protection*

And the integrity sector - so Crime and Corruption commissions. The Auditor-General.
Private law, contract and Tort still kick in-

The Balancing Act...

- On the one hand, admin law seeks:
 - Justice ⇒ *admin law has to be done law for citizens*
 - Accountability ⇒ *keep it open, transparent*
 - Quality and consistency ⇒ *so we have good governance*
 - Participation ⇒ *allow public to be engaged*
- But what about...
 - Efficiency ⇒ *defending merits and FOI requests takes resources,*
 - Affordability ⇒ *we are paying for court time- we can't have govts duking it out in court*
 - Other legitimate interests...? ⇒ *clear trees good for person, not for community biodiversity, or other third party interests, erosion down the creek etc*
- *Here be dragons! The workability of our system really depends on how well we strike that balance between all those factors we've just identified.*

Governments weaken links in the accountability chain at their own peril.

The Emergence of Administrative Law

- The English heritage
 - The Dicey inhibition...but distinct judicial procedures *No one is above the ordinary courts, irrespective of rank or condition?*
 - ...add tribunals...add ombudsman...add judicial reform
 - ...and finally add FOI

The Court of King's Bench began overseeing lower courts and officials by using prerogative writs—special legal orders that allowed it to supervise and control their exercise of power.

■ Development in Australia-

Similar patterns – UK reforms were closely watched

The Bland, Ellicott, and Kerr Committees, established in the late 1960s and reporting in the early 1970s, examined problems in Australia's system of government accountability and administrative law. They identified four key issues:

1. Rapid growth of government, increasing the scope and complexity of administrative decision-making.
2. Judicial review was too technical and limited, making it insufficient on its own to ensure accountability.
3. Parliamentary supervision of the executive was no longer effective for addressing individual grievances because government activity had become too extensive.
4. Concerns about the quality and consistency of government decision-making.

These findings led to a series of administrative law reforms and new statutes aimed at improving government accountability and decision-making processes.

■ Focused federal reform: AAT Act (now ART Act) / Ombudsman Act / ADJR Act / FOI Act

- The **Administrative Appeals Tribunal (AAT)** was established by the **AAT Act 1975** to provide **merits review** of government decisions.
- The **Commonwealth Ombudsman** was created under the **Ombudsman Act 1976** as a complaints-based "safety net" for investigating grievances against government administration, based on a model that originated in Sweden.
- The **Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)** reformed and simplified Australia's **judicial review** processes.

■ States incrementally followed the 'new' federal template

The Changing Nature of Government

■ Profound changes in recent decades:

- Privatization (*scaling down of bloated governments post WW2*)
- corporatisation and (*set up like a private company*)
- outsourcing (*jails, etc*)

■ The implications?

- inaccessibility of activities ⇒ *Admin law doesn't apply to us- seek Wheely bin contract example*
- accountability 'voids' ⇒ *Can't chase up*
- blurring of the public / private boundary

■ So where to for admin law? *Step back or evolve – often sectors will put in an ombudsman to fill the void, Telecommunication ombudsmen, Fair Work Ombudsmen*

■ More recent evolutions: migration and 'integrity'

Young argues that Australian administrative law has been shaped by four major forces:

- *the expansion of government,*
- *efficiency-driven government restructuring,*
- *the influence of migration law,*
- *and the rise of integrity and anti-corruption institutions.*

Working with Administrative Law in Australia

■ Choice of jurisdiction

- Federal or state? ⇒ *as per Heads of Power*

■ Division of subject matter *the division of admin law in terms of subject matter roughly follows a constitutional division of powers. Now, while we're on the constitution.*

- What is admin law's focus in each? ⇒

■ Interrelationship with constitutional law ⇒ *we sort of accept legislative validity*

- Parliamentary supremacy ⇒
- Responsible government
- The rule of law ⇒ *govt must have law for what it does*
- The separation of powers

Core Business: An Overview of Judicial Review

- The nature and function of judicial review (s 75.5 is in the constitution)

In *Kirk v Industrial Court of NSW (2010)*, the High Court held that State Supreme Courts must retain their supervisory jurisdiction to review jurisdictional error, and this power is constitutionally entrenched by implication under Chapter III. Accordingly, State Parliaments cannot enact legislation that removes or substantially restricts judicial review.

So, a strict separation of judicial power ⇒ In other words, you can't give judicial functions to bodies that aren't courts, and you can't give non-judicial functions to courts.

Admin law version of separation of powers

In administrative law, the legislature makes laws, the executive applies them, and the judiciary ensures the executive acts lawfully. This supervisory role is constitutionally entrenched, as confirmed in *Kirk v Industrial Court of NSW (2010)*, where the High Court held that State Parliaments cannot exclude judicial review for jurisdictional error.

The courts' main role is to **check that the executive is exercising power lawfully**.

☞ Separation of power gives Admin law a job- Judicial review ensures the executive acts lawfully, but courts cannot substitute their own decision, as that would breach the separation of powers. *Hamblin v Duffy* confirms that judicial review is concerned with legality, not the merits or correctness of an administrative decision.

- Common law doctrine - constitutionally entrenched
- Legitimized and limited by the doctrine of separation of powers

Hamblin v Duffy (1981); *MIEA v Wu Shan Liang (1996)*; *Wu Shan Liang* confirms that courts cannot interfere with administrative decisions unless a legal error is identified — reviewing the merits alone exceeds the proper scope of judicial review.

*Merits review tribunal can get in there and kick heads.

MIMA v Eshetu (1999) The High Court in *Eshetu* held that the Federal Court impermissibly interfered with the merits of the decision **Refugee Review Tribunal** made a decision (refused visa) without identifying a jurisdictional error, and therefore exceeded the proper limits of judicial review.

- What kinds of decisions are reviewable? “*judicial review applies to the exercise of public powers or duties*” it is not available to enforce in private law, torts and contract are required

- Basic statutory powers? most of the actions of executive government are just routine statutory powers. ⇒
- Prerogative / high level powers? ⇒ old prerogative, start a war, sign a treaty, select ambassadors etc Some of these got “statutorized” and now they have more come on- initially courts were reluctant to go there...but no longer source or decision maker isn't key0- the subject matter and nature is key

R v Toohey (1981); ⇒ establishes that a decision is invalid if a statutory power is exercised for an improper purpose, even where the decision-maker is a high-level executive authority.

SA v O'Shea (1987); ⇒ establishes that where a statutory scheme provides for a hearing before a recommending body, procedural fairness does not usually require a second hearing by the final decision-maker, unless new adverse material is considered.

Council of Civil Service Unions (1985); Thatcher tried to kick Union thugs out of secret service CCSU establishes that prerogative powers are subject to judicial review and identifies the three core grounds of review: illegality, irrationality, and procedural impropriety.

☛ Lord Diplock believed national security made it beyond the reach, not the minister.

MAHE v Peko Wallsend (1987) ⇒ (First ONE) **The test of justiciability**

Following *CCSU*, Australian courts accept that prerogative powers are not immune from judicial review; however, whether review is available depends on Wilcox J explains, the key question is whether the subject matter is justiciable
✗ Even where a prerogative power is reviewable, courts may decline to intervene where the subject matter renders the issue non-justiciable, such as matters involving national security or international relations.

The Wilcox J justiciability test

Step 1 (not the focus) Does the decision affect someone's interests?

Step 2 (THE IMPORTANT ONE) **Is there anything about the subject matter of the decision that makes judicial review inappropriate?**

■ Quasi-public powers? ⇒

Datafin (1987) ⇒ Datafin establishes that the availability of judicial review depends on the nature of the power exercised, not merely its source, allowing private bodies performing public functions to be reviewed.

Here are the 4 Datafin rules (clean + exam-ready only):

1. Operates irrespective of consent- Parties cannot opt out.
2. Performs a regulatory function → Controls and regulates behaviour.
3. Integrated into government regulation → Part of the overall public regulatory system.
4. Recognised (if not created) by statute → Has official legal recognition/support.

Neat Domestic Trading (2003) ⇒ A **private corporation (AWBI)** was given a **statutory veto power** over wheat export permits. Neat wanted a wheat licence- HC found Private body + statutory power ≠ always public → may still fall outside judicial review

Owens (2013) ⇒ It looked like a Datafin-type body with some public involvement. But the court said the ban actually came from each publican's private rights. So the arrangement stayed private in substance. ☞ Judicial review was not available..

■ Two parallel 'systems': Part 3 of the **Judicial Review Act (Qld)** provides the **statutory right to judicial review**

- General law judicial review 🖐️ *So in QLD, you often go **JRA Part 3 first**, then fall back on common law if needed.*

■ Origins in establishment of State Supreme Courts

■ Prerogative writs – Certiorari / Prohibition / Mandamus

- **Certiorari** → quashes (sets aside) an unlawful decision
- **Prohibition** → stops a decision-maker from acting beyond power
- **Mandamus** → compels a public authority to perform its duty
- These are the **old prerogative writs** — still the foundation of modern remedies

■ Equitable remedies

■ Modern federal conduits:

■ High Court – **Constitution s 75(v)** gave it general review jurisdiction

- Federal Court – **Judiciary Act 1903** Section 39B of the Judiciary Act gives the **Federal Court a general judicial review jurisdiction.**

This was introduced by later amendment (1970s), not part of the original Act.

*It effectively allows the Federal Court to hear **judicial review matters** (like the **High Court writs**).*

■ In Qld? – preserved in **Judicial Review Act 1991 (pt 5)**

■ Statutory judicial review (Kerr Committee)

- Federal - **ADJR Act (Cth)** As per Section 13 of the ADJR, reasons have to be given for a **administrative decision makers**

■ In Qld? - **JRA (pt 3)**

Part 3 of the **Judicial Review Act (Qld)** sets out the **statutory system of judicial review** (grounds and rights to apply). Part 5 preserves the **general law (common law) system**, including the old writs.

■ Note particularly:

- the 'reasons' provision here: contrast **Osmond (1986)**
- the 'jurisdictional pre-requisites'

Judicial review under the statute only applies to a **decision of an administrative character made under an enactment.**