

LAWS5102: ADMIN LAW

key

Start of topic

Section in code

Element

case

or (case)

***CF = compare

NATURE AND THEORY

Defining administrative law

- Administrative law encompasses the legal principles that regulate the exercise of power by public authorities and the mechanisms that exist to remedy failures in the exercise of that power.'
- '...the body of principles and procedures by which the exercise of executive government power is controlled and supervised'
- '[we do not] believe in the utility of searching for a single overarching account of public law or its values. We eschew grand theory at that level, partly because we find it too abstract for our purposes, but also because we do not believe that the fields of law which we discuss can comfortably be squeezed into a single, intellectually coherent unity. The administrative state manifests in many ways, administered by different institutions, with different and sometimes conflicting mission statements, and differing levels of interaction between the state and its subjects.'
- Mainly about controlling government action

A contested history

- In 1964 England still had no 'developed system of administrative law'
- Australia's mixed UK/USA constitutional heritage, particularly our written Constitution and the entrenched role of the High Court under s 75(v), meant it emerged (and we were willing to admit it) earlier here than in the UK
- Here the question was less 'does it exist?' and more 'what are its constitutional foundations?'

Theoretical foundations

- 'Behind every theory of administrative law there lies a theory of the state.'

Redlight theory

- Administrative law is about controlling power

Green light Theory

- Administrative law is about facilitating good government

The central tension

- Democratic legitimacy: elected governments should implement their mandate
- Rule of law: no one, including the government, is above the law
- Separation of powers: each branch of government has distinct roles and limits

Ultra vires theory (red light)

- The Traditional View:
 - Courts simply enforce Parliament's will
 - When Parliament grants power, it sets (express or implied) limits
 - Courts don't impose their own values—they find and implement what Parliament intended
- Legitimacy: Democratic—courts are servants of the elected Parliament
- Problems with this theory:
 - Struggles to explain judicial creativity (new grounds of review)
 - Parliament often says very little about limits

- What about review of non-statutory powers?
- Courts sometimes ignore clear Parliamentary attempts to exclude review

Common law constitutionalism

- The Judicial Creativity View:
 - Courts develop administrative law principles independently
 - Based on fundamental constitutional values: rule of law, fairness, reasonableness
 - Parliament can't exclude these principles (they're more fundamental than statute)
- Legitimacy: Constitutional—courts protect fundamental principles
- Strengths:
 - Explains judicial innovation and creativity
 - Accounts for review despite Parliamentary objection
 - Protects fundamental rights and principles
- BUT one big problem:
 - Democratic concern: Unelected judges imposing their values on elected government?

Delegation theory

- The Accountability View:
 - When Parliament or Crown delegates power, delegates have moral duties
 - Courts hold administrators accountable to their duties as delegates
 - Combines Parliamentary intent with constitutional principles
- Legitimacy: Delegates must be faithful to both their instructions and constitutional framework
- Key Insight: Delegates aren't just rule-followers, they're responsible for exercising power consistent with constitutional values.

Constitutional entrenchment

- Australia's Distinctive Framework:
 - Section 75(v) of the Constitution guarantees judicial review jurisdiction
 - Unlike UK parliamentary supremacy, Australia has constitutional supremacy
 - Separation of judicial power requires courts to define limits of executive power
- Legitimacy: Constitutional mandate: courts must review executive action
- Practical implications:
 - Privative clauses (Parliament trying to exclude review) have limited effect
 - Courts don't need to find Parliamentary permission—they have constitutional duty
 - Judicial review is part of constitutional structure, not Parliamentary grace
- Key difference from UK: Australian courts don't just implement Parliament's will, they enforce constitutional limits on all government power. Constitutional framework solidified in cases like Plaintiff S157/2002 v Commonwealth (2003) and Kirk v Industrial Court of NSW (2010)

Why theory matters for practice

- If Ultra Vires dominates:
 - Courts focus on statutory interpretation
 - Narrow approach to new grounds of review
 - Deference to clear Parliamentary exclusions
- If Common Law principles dominate:
 - Courts more willing to develop new principles
 - Broader interpretation of existing grounds
 - Resistance to Parliamentary attempts to exclude review
- If Constitutional entrenchment dominates (Australia):
 - Courts focus on constitutional limits and separation of powers
 - Robust review despite Parliamentary objections
 - Constitutional values shape interpretation of statutory powers

Current Australian position

- Synthesis in practice:
 - Starting point: Constitutional duty to review (s 75(v))
 - Method: Primarily statutory interpretation, but...
 - Background: Constitutional principles shape how statutes are interpreted
 - Result: Courts enforce both Parliamentary limits AND Constitutional principles
- Practical advice:
 - Always start with careful statutory interpretation
 - Consider what Parliament intended (express and implied)
 - Remember Constitutional principles provide interpretative background
 - Understand that Australian courts have a Constitutional mandate to review

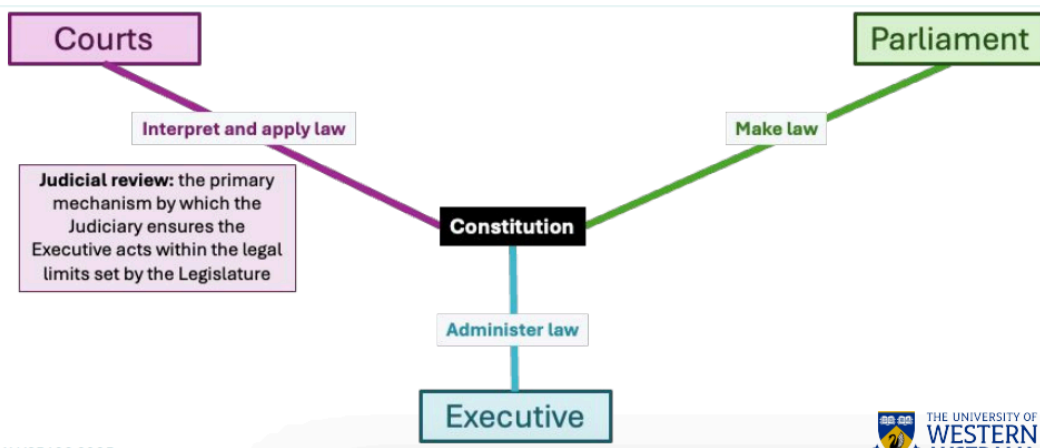
Why its so complex

- 1. Legislative detail matters enormously
- 2. Administrative law pursues a variety of normative goals
 - Origins of admin law's values are varied
 - Beneficiaries of admin law are also varied
- 3. Applicants sit in different kinds of relationship with the administrative decision-makers they seek to challenge
- (4. Australian context) 'Constitutionalisation' of Australian administrative law

The accountability landscape: core constitutional values

- Federalism: power is divided and shared between different levels of government
- Rule of law: no one, including the government, is above the law. Government cannot act without authority
- Separation of powers: each branch of government has distinct roles and limits. Our constitutional system checks and balances power between the three branches

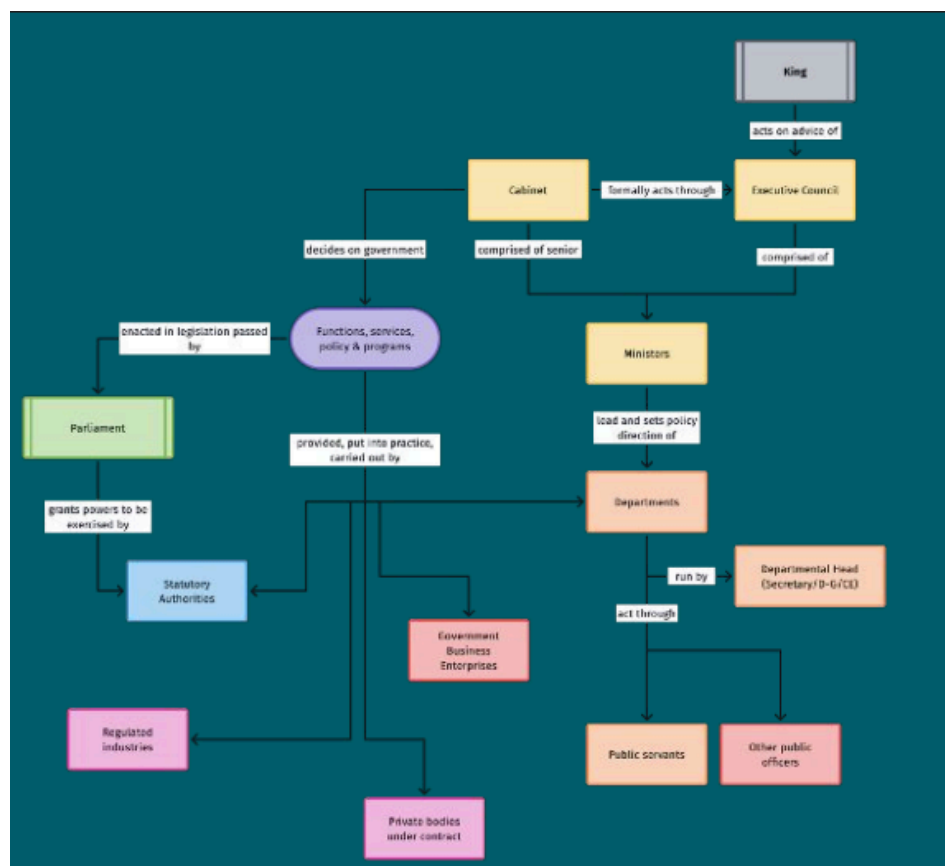
Separation of powers



Executive power

- Executive draws its power from the Australian Constitution, common law, and statutes, including the State/Territory Constitutions
- System of executive power influenced by both the American and British constitutional traditions
- Easier to define executive power by outlining its limitations than explicitly defining its scope
- Executive branch does not have inherent power over the rights or obligations of individuals – must be sourced in Constitution, statute or prerogative power
- Structure
 - King
 - Represented by Governor-General (Cth)
 - Governor (States)
 - Acts on advice of Executive Council
 - Cabinet
 - Informal body, usually senior ministers
 - No formal powers, so usually it's the implementation of a Cabinet decision that's under review
 - Ministers
 - Elected members of Parliament (in practice)
 - Lead government departments
 - Responsible for directing policy in their department and implementing the government's broader policy agenda
 - Responsible government – ministers are accountable for the actions of their departments
 - Departments
 - Public service and other (usually) public officers, lead by a minister
 - Departmental head is the Secretary (Cth), or Director-General/Chief Executive (other jurisdictions)
 - Most day-to-day administration happens at the departmental level

- Ministers may delegate powers to public servants (where the statute allows)
- Accountability frameworks for the public service
- Statutory Authorities
 - Created by statute to carry out specific functions
 - Degree of independence from central government
 - Examples: DPP, ASIC, ASIO, Ombudsman, Human Rights Commission
- Other bodies
 - Government Business Enterprises
 - Contracting out
 - Privatisation



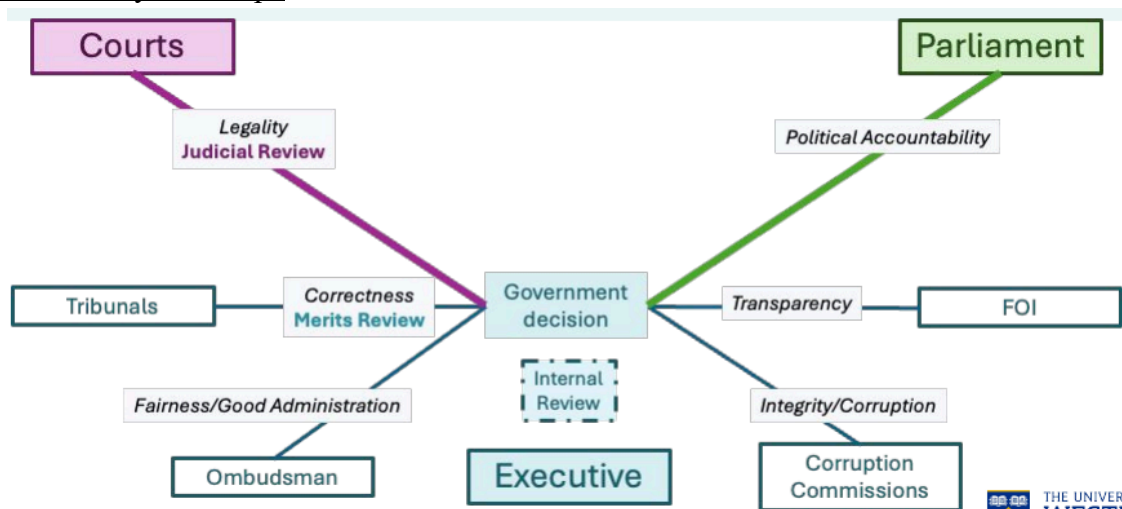
Holding the executive accountable

- Government action should be open to inspection (eg):
 - FOI schemes
 - Statutory requirements to provide reasons
 - Parliamentary investigation
 - Ombudsman investigation
 - Royal Commissions
- Government action should be open to challenge (eg):
 - Merits review
 - Judicial review

The most important distinction in administrative law

- Legality:
 - How: judicial review
 - Who: courts
 - Question: was the decision made lawfully?
 - Remedy: quash and remit. Cannot substitute
- Merits
 - How: merits review
 - Who: tribunals
 - Question: was it the correct or preferable decision?
 - Remedy: can affirm, vary or substitute a new decision

The accountability landscape



Australian administrative law framework

Commonwealth

Starting point

- High Court's original jurisdiction – s 75 (later conferred by statute on other Federal courts)

Reformed framework (1970s →)

- *Administrative Review Tribunal Act 2024* (Cth) (recent significant reforms)
- *Ombudsman Act 1976* (Cth)
- *Administrative Decisions (Judicial Review) Act 1977* (Cth)
- *Freedom of Information Act 1983* (Cth)

Western Australia

Starting point

- Inherent power of superior courts to conduct judicial review

Reformed framework (1970s →)

- *Parliamentary Commissioner Act 1971* (WA)
- *Freedom of Information Act 1992* (WA)
- *State Administrative Tribunal Act 2004* (WA)

Administrative justice

ADMINISTRATIVE

public interest

efficiency, consistency,
implementing government policy,
budgetary limits

JUSTICE

individual interest

fairness in the specific case,
protecting individual rights,
achieving a just outcome



- Core values in principled tension
 - Minimum requirements: lawfulness, rationality, fairness, intelligibility
 - Broader values: accessibility, timeliness, consistency, flexibility, transparency, accuracy

Judicial review in the administrative law system: executive power

- The executive branch does not have inherent power over the rights or obligations of individuals
- Power to act must be sourced in the Constitution, statute or the prerogative powers of the Crown
- This power may be conferred subject to express conditions
- (Almost) all executive power is subject to implied conditions

What is judicial review

- The process by which courts review the legality of administrative decisions and action
- Action seeking a judicial remedy directed to declaring the illegality of government action or inaction, and on that illegality's immediate consequences
- Legal process for seeking: certiorari(quash), prohibition (stop), mandamus (compel), declaration, injunction

How is judicial review different from...

- Civil actions?
 - Remedies, parties, purposes(?)
- Constitutional cases?
 - Approach to legislative validity
- Appeals?
 - A court conducting review can't substitute judgment
- Merits review?
 - JR: Court asks if the decision was lawful, and can give public law remedies
 - MR: Tribunal asks if the decision was the 'correct and preferable' one, and has remedial flexibility (including substitute decision)

Australian judicial review framework

- General law judicial review
 - State level
 - Supreme Courts – inherent powers
 - Federal level:
 - High Court – Constitution s 75
 - Federal Court – Judiciary Act 1903 s 39B
 - (plus jurisdiction conferred on FCC in specific circumstances)
 - Statutory judicial review schemes
 - Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)
 - Some States (ACT, Qld, Tas)

Jurisdiction

- “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 simply to cure administrative justice 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. The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.” Attorney-General (NSW) v Quin (1990) 170 CLR 1, 35-6 (Brennan J)

Power

- “Power is the central legal theme of the law of judicial review. One, and usually two, questions arise when a superior court is asked to give a ruling on the legality of the act or omission of an official or other body or institution within the public domain. First, what is the court’s power to respond to the request? Secondly, if the court has the power, what is the public body’s power in relation to that of any other person or body, including the courts themselves?” Aronson, Groves and Weeks, 21

Legality

- “The overall ground of judicial review is that the repository of public power has breached the limits placed upon the grant of that power.” Aronson, Groves and Weeks, 178
- “The notion of unbridled discretion has no place in the Australian universe of discourse.” Wotton v Queensland (2012) 246 CLR 1, 10 [10]

Disappointment

- “While judicial review’s purpose is to define and police the legal boundaries of public law, the control of public power is not necessarily (and, we would submit, rarely) the ultimate goal a judicial review applicant has in mind. Judicial review can ‘cure’ unlawful decision-making by requiring that decisions be made (and re-made) according to the law, but it is never a mechanism for applicants to obtain the thing that they want or expect.” Ellen Rock and Greg Weeks, ‘Getting what you want from administrative law’ (2023) 108 AIAL Forum 88, 89

Key points

- All public power has its limits
- Courts can define the scope of a power and the limits of its exercise
- Courts can only grant review if the public body exceeds the scope or limits of its power
- Courts will not ‘re-make’ the decision under review
- Courts’ judicial review jurisdiction is constitutionally protected

Statutory interpretation

- Judicial review is (in my opinion) applied statutory interpretation with some extra bells and whistles
- Almost all the decisions we’ll look at involve statutory powers

- Statutory context is everything in applying the legal principles
- In every case there's interaction between
 - Horizontal (general) principles and remedies of judicial review; and
 - Vertical (specific) requirements of a particular regulatory or power-conferring statute

FIVE ELEMENTS OF JUDICIAL REVIEW

1	Justiciability When is it appropriate for a court to review?
2	Standing Who can bring an action?
3	Jurisdiction Which Government? → Which avenue of review (general law or ADJR Act)?
4	Ground(s) of review How did the decision-maker err in the decision-making process?
5	Remedy What do you want the court to do?

Step One: Justiciability

When is it appropriate for a court to review

Step Two: Standing

Who can bring an action?

Step Three: Jurisdiction

Which government? → which avenue of review (general law or ADJR act)

Step Four: Grounds of review

How did the decision-maker err in the decision-making process?

Step Five: Remedy

What do you want the courts to do?