LPAB 09: Administration Law – Summer 2025

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Topic 1: Introduction to Admin Law

Key cases/legislation

The Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act)

The Ombudsman Act 1976 (Cth)

The Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)

Administrative Review Tribunal Act 2024 (Cth).

Main concept

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 exercising of that power = accountability.

The core elements of administrative justice are lawfulness fairness and rationality in the exercise of public power.

Overview

The purpose of administrative law is to:

1. **Safeguard the rights and interests** of individuals and corporations in their dealings with government agencies.
2. **Define the values or principles** that administrative law is designed to uphold, often described as "openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality".

The traditional view of administrative law is that it should aim to bolster the rule of law, and ensure the accountability of Executive government to the will of Parliament and, at least indirectly, of the people.

- On the one hand, it serves to legitimate exercises of government power and authority where that is both legal and justifiable.
- On the other hand, it enables challenges to be made to the exercise of such power or authority directed to the attainment of justice for a person in the circumstances of their case.

The foundations that underpin the control and regulation of public power are complex; a mix of historical, political, societal and, to some extent, cultural factors.

- The political foundational feature is that the law that controls public power must conform to the Constitutional framework under which the Executive is responsible and accountable to Parliament based on observance of the Rule of Law framed constitutionally, for public power purposes, *by s 75(v) of the Constitution*.
- the role and duty of the courts is to exercise a kind of 'supervisory' control over the exercise of executive and legislative power by lawful constraint, also observing relevant constitutional limits.

Topic 4: Procedural Fairness

Key cases and legislation

Administrative Decisions (Judicial Review) Act *1977 (Cth) (ADJR Act).*

Kioa v West (1985)

Kioa v West (1985) 159 CLR 55
The fair hearing rule applies when a certain 'threshold' has been met; where a decision made under statute, affects the rights, interests or legitimate expectations of an individual in a direct, immediate way.

What does 'interests' mean?
- Falls short of rights
- Includes proprietary and financial interests, and reputation
- Can apply to systems employed by the govt, which do not have any direct legal affect, but can still have an impact on the rights or interests of an individual – *Offshore Processing Case (2010) 243 CLR 319*

'Direct and immediate' effect
- Principles applied similar to standing principles
- Needs to be some limits to ensure efficiency of government processes
- Procedural fairness is particularly important when personal or individual factors play a large role in the decision making compared to when a decision affects the general public or is based on broad policy factors

Main concept

Procedural fairness requires that:
- **Hearing rule**: a person whose interests will be affected by a proposed decision receives a fair hearing, including the opportunity to respond to any adverse material that could influence the decision
- **Bias rule:** a decision-maker is impartial, and free from actual or apparent bias, and
- **Evidence rule:** findings are based on evidence that is relevant and logically capable of supporting the findings made

The right to procedural fairness arises only in relation to a person whose rights or interests may be adversely affected by a decision.

A person may seek judicial review of an administrative decision on the basis that procedural fairness has not been observed.

Procedural fairness

Historically, procedural fairness thought only to apply to decisions affecting legal rights made by courts or bodies under a duty to act judicially

However, HCA in *Kioa v West (1985)* abandoned previous narrow focus on legal rights and established that procedural fairness applies to administrative decisions affecting individual rights or interests.

Key principles:
- Applies to decisions impacting rights, interests, or legitimate expectations.
- The duty to act fairly depends on the circumstances of the case.
- Affected individuals must be given an opportunity to respond to adverse information.
- The duty exists unless clearly excluded by statute.

- Can apply to a range of issues eg *FAI Insurances Ltd v Winneke (1982)* – procedural fairness applied to the renewal of a license.
- Procedural fairness applies at each stage of incremental decision-making processes. *Applicant VEAL (2005)* – fairness required for subsequent stages of decision-making.

The Implication Principle

- The principle that procedural fairness is implied into statutory decision-making. Procedural fairness applies where decisions affect rights, interests, or legitimate expectations.
- Certain procedures or actions must be followed in decision-making processes, even if not explicitly stated in the relevant legislation.
- This principle implies that the requirements of procedural fairness or natural justice are inherently necessary, regardless of whether the statute or regulation directly prescribes them.
- Can be explicitly excluded by the legislation.
- *Annetts v McCann (1990)* – natural justice implied unless excluded by clear statutory language.

Courts are increasingly interpreting legislation to imply a duty to provide procedural fairness. This trend follows the High Court's statement in *Saeed v Minister for Immigration and Citizenship*, which established that procedural fairness is protected by the principle of legality. This has made legislative exclusion very difficult in practice.

The Interaction Between Statutory Processes and Natural Justice

- Procedural fairness supplements statutory processes unless explicitly excluded.
- *SZBEL v Minister for Immigration (2006)* – statutory processes must not override fundamental fairness.

Procedural fairness & interaction with the ADJR Act – ss 5 & 6

- The ADJR Act allows for review on the grounds that
  - A breach of the rules of natural justice as occurred / is occurring / is likely to occur
  - Procedures that were required by law to be observed in order to make the decision were not observed
- There is an emerging consensus that this allows for review of procedural errors which
- would not result in the retrospective invalidity of a decision at common law

Hearing Rule

- Requires that a person who may be affected by a decision be given a reasonable opportunity (but not perfect opportunity – objective standard) to present their case prior to the decision being made and to understand and respond to information that is adverse to the affected person's interests.
- Generally this requires the decision-maker to provide adequate notice that an adverse decision-may be made, disclose prejudicial allegations and information.
- In determining the content of the procedural fairness obligation in a particular case, decision- makers and courts will look to the statutory context of the decision-maker's power to make the decision. Factors such as:
  - the nature of the decision being made,
  - purpose of the legislative scheme, and
  - any statutory procedural fairness processes prescribed by the legislation

  will affect the precise content of the procedural fairness obligation.

- The specific content of the hearing rule will vary according to statutory context. However, a fair hearing will generally require the following:
  - Prior notice that a decision that may affect a person's interests will be made. This has been referred to as a 'fundamental' or 'cardinal' aspect of procedural fairness.
  - Disclosure of the 'critical issues' and adverse information to be addressed, and of information that is credible, relevant and significant to the issues. *Kioa v West, Plaintiff S10/2011 v Minister for Immigration* – fairness requires disclosure of adverse information to be able to rebut.
  - Opportunity to respond
  - A substantive hearing—oral or written—with a reasonable opportunity to present a case. The decision-maker must genuinely consider the submissions made. *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003)* – a hearing must be meaningful, not tokenistic. That there are consistent procedures and adherence to stated procedures or commitments. *NAFF of 2002 v Minister for Immigration* – failure to follow promised procedures breached procedural fairness.

Other issues:

- **Disclosure of preliminary findings:** Transparency of reasoning allows parties to address concerns. *Drake v Minister for Immigration and Ethnic Affairs (1979).*
- **Oral hearings** not universally required but necessary where credibility is at issue. *SZBEL v Minister for Immigration (2006)* – oral hearings necessary in complex credibility cases.
- **Legal representation may be necessary for complex or serious matters**. Applicant *NABE v Minister for Immigration (2004)* – fairness required access to legal representation.
- **Urgent Decisions:** Procedural fairness may be modified in emergencies but not eliminated. *Minister for Immigration v Xiujuan Li (2013)* – urgency justified limited fairness.
- **Areas of High-Volume Decision Making:** High-volume areas like immigration require efficient yet fair procedures. *Minister for Immigration v SZSSJ (2016)* emphasized balance.
- **The balancing of issues to determine what fairness** requires in a particular case may have the result that the content of procedural fairness is greatly reduced. National security: in *Leghaei v Director-General of Security (2005)*, the Federal Court considered the duty to afford procedural fairness in the making of an 'adverse security assessment' by the Australian Security Intelligence Organisation (ASIO).

Contrasting Examples

Jarratt v Commissioner of Police for NSW (2005): Procedural fairness breached when a Deputy Commissioner was dismissed without being heard.

Barratt v Howard (2000). Adequate opportunity to respond provided; no breach found.

SZBEL v Minister for Immigration (2006) Procedural fairness breached due to failure to disclose adverse information.

Minister for Immigration and Citizenship v Xiujuan Li (2013) Failure to allow sufficient time to respond to adverse material was procedurally unfair.

Notice

- Affected parties must be informed of decisions that may impact them.
- Adequate notice enables preparation and response.
- A notice must provide sufficient information and detail for an affected person to make effective use of the right to make representations in opposition to the proposed exercise of power.
- The notice should:
  - outline the nature of the decision and its possible consequences;

Topic 6: Judicial Review

Key cases and legislation

Ss 5, 6, 7 AD(JR) Act.

Main concept

Judicial review is a process by which courts examine the lawfulness of decisions or actions made by government officials, public authorities, or tribunals.

1. Does the court have jurisdiction? (authority to review)
2. Is the application justiciable? (claims suitable for judicial review)
3. Does the applicant have standing? (does the applicant have sufficient interest in the issue? – directly affected)
4. Is a breach of one or more of the grounds of review established?
    a. Jurisdictional error (exceed legal authority)
    b. Procedural grounds
        i. Statutory requirements which must be followed while performing an administrative task
        ii. Procedural Fairness (duty to give a fair hearing and not be biased)
    c. Reasoning process grounds (correct reasoning)
    d. Decisional grounds (is the decision itself reasonable?)
5. Is a remedy available?

Key characteristics

- **Legality Over Merits**: Courts assess the legality of a decision, not whether it was the "right" or "best" decision based on the facts.
    - **Judicial Review**: Focuses on legal errors such as jurisdictional error, procedural fairness, or failure to consider relevant matters.
    - **Merits Review**: Conducted by tribunals (e.g., the Administrative Appeals Tribunal), which reconsider decisions on their merits and substitute their own decision if appropriate
- **Supervisory Function**: Judicial review ensures that decision-makers act within their lawful powers and fulfill their legal duties.
- **Constitutional Basis**: The High Court's jurisdiction for judicial review is enshrined in **Section 75(v)** of the Constitution, which safeguards the availability of review for jurisdictional error.
- Judicial review serves broader public law values:
    - Rule of Law: Ensures government actions comply with the law.
    - Accountability: Holds decision-makers accountable for lawful decision-making.
    - Safeguarding Individual Rights: Protects individuals from unlawful or unreasonable decisions.
    - Consistency and Certainty: Promotes uniform interpretation and application of laws.

Jurisdiction

High Court of Australia

- Has original jurisdiction for judicial review under *section 75(v)* of the Constitution, which allows challenges to actions by Commonwealth officers.
- Under **Section 75(v)** of the Constitution, the High Court has original jurisdiction over:
  - **Writs of Mandamus**: Compelling a decision-maker to perform a public duty.
  - **Writs of Prohibition**: Preventing unlawful actions by a decision-maker.
  - **Injunctions**: Restraining unlawful behaviour.
- These remedies ensure that Commonwealth officers act within their legal authority and comply with procedural requirements.
- Entrenched provision: The HCA's jurisdiction to remedy Cth public powers affected by jurisdictional error is 'entrenched' and cannot be ousted by legislation (*Plaintiff S157*).

Federal Courts

Judicial review of a federal decision under federal legislation made by a federal officer

Federal Court of Australia

The Federal Court derives its judicial review jurisdiction from:

Administrative Decisions (Judicial Review) Act 1977 (ADJR Act):

- Provides grounds for judicial review, including procedural fairness, irrelevant considerations, and errors of law.
- Allows for statements of reasons to be requested from decision-makers.

Section 39B(1) of the Judiciary Act 1903:

- Mirrors the High Court's jurisdiction under Section 75(v), extending it to the Federal Court.

Federal Circuit and Family Court of Australia

The Federal Circuit Court (formerly Federal Magistrates Court) has concurrent jurisdiction with the Federal Court under the ADJR Act but focuses on simpler matters.

State and Territory Courts

State and territory courts also have jurisdiction to undertake judicial review under equivalent legislation to the ADJR Act, ensuring oversight of decisions made under state laws.

Topic 10: Ethical issues

Key cases and legislation

Legal Profession Uniform Law (LPUL)

Australian Solicitors' Conduct Rules (ASCR)

Barristers' Conduct Rules (BCR)

Main concept

Ethical practice forms the cornerstone of the legal profession, shaping the responsibilities, duties, and conduct of lawyers. Legal ethics ensures that lawyers act with integrity, fairness, and responsibility, not only in their dealings with clients but also in their broader obligations to the court, society, and the rule of law.

Legal ethics is fundamentally about **moral reasoning and professional integrity** and highlights the distinction between strict legal compliance and ethical decision-making.

Key issues include the evolution of self-regulation, the tension between adversarial advocacy and public accountability, and the role of judicial oversight in maintaining ethical standards.

Foundational Principles of Legal Ethics

Legal ethics in Australia is deeply rooted in:

- **Common Law Principles**: Established judicial precedents guide ethical decision-making.
- **Statutory Regulations**: Legal frameworks such as the *Legal Profession Uniform Law (LPUL)* provide formal ethical standards.
- **Professional Rules:** *The Australian Solicitors' Conduct Rules (ASCR) and Barristers' Conduct Rules (BCR)* set specific obligations for legal practitioners.

Core Ethical Duties of Lawyers

The Paramount Duty to the Court and Administration of Justice

- *The Australian Solicitors' Conduct Rules (ASCR)* establish a solicitor's primary duty to the court and the administration of justice, which takes precedence over obligations to clients.
- This principle is rooted in common law and equity, requiring solicitors to act as officers of the court to ensure fairness and integrity in legal proceedings.
- Rule 3 of the ASCR prohibits solicitors from:
  - Misleading the court
  - Concealing relevant documents
  - Engaging in practices that undermine judicial processes
- This duty reflects the profession's historical role as a guardian of the rule of law, where ethical conduct is a moral obligation, not just a regulatory requirement.
- The adversarial system, while central to Australian jurisprudence, often creates ethical dilemmas:

  - Scholars like Christine Parker criticise the traditional "ethic of autonomy," where lawyers prioritize client interests over societal impacts.
  - Example: Aggressive advocacy in corporate litigation may follow procedural rules but neglect environmental or social consequences.
- The ASCR addresses these conflicts by:
  - Emphasizing honesty in dealings with the court
  - Prohibiting dishonest conduct, even if it benefits a client.

Duty to the Court

- Lawyers are officers of the court and must uphold justice over personal or client interests.
- They must not mislead the court, knowingly submit false evidence, or make frivolous arguments.
- **Example:** Misrepresenting case law or facts to the court, such as using AI-generated false case citations, is a serious ethical violation.

Duty to Clients

- Act in the best interests of clients while maintaining independence.
- Provide competent and diligent representation.
- Maintain client confidentiality, except in cases where disclosure is legally required.
  - *Rule 9 of the ASCR* mandates strict confidentiality, prohibiting solicitors from disclosing client information without consent, except to prevent serious harm or comply with law.
  - Client legal privilege (CLP), a cornerstone of trust, shields communications from compulsory disclosure. However, the Law Council cautions against misuse, such as concealing unlawful activities under the guise of privilege.

- Avoid conflicts of interest (e.g., representing multiple clients with opposing interests).
  - Conflicts of interest, particularly between current and former clients, constitute the most frequently cited ethical challenge.
  - *Rule 10 of the ASCR* prohibits acting against a former client's interests in related matters, unless informed consent is obtained.

Duty to Opposing Parties and Colleagues

- Engage in fair and honest dealings with other legal professionals.
  - *Rule 5.1 of the ASCR* bars solicitors from engaging in dishonest or disreputable conduct, both professionally and personally.
- This broad provision addresses offenses ranging from fraudulent billing to off-duty behaviour damaging the profession's reputation.
- Avoid deceptive tactics or abuse of procedural rules.

Duty to Society and Public Interest

- Ensure access to justice and legal aid for the disadvantaged.
- Promote legal reform where laws are unjust or outdated.
- Uphold public confidence in the legal system.

Regulatory Frameworks and Self-Regulation

Development of the Australian Solicitors' Conduct Rules

- The ASCR, first endorsed in 2011, represents a harmonised effort by state and territory law societies to codify ethical standards.

- Adopted progressively across jurisdictions—including Queensland (2012), the ACT (2016), and Tasmania (2020)—the rules derive authority from statutory frameworks like the *Legal Profession Uniform Law*.
- This blend of self-regulation and legislative oversight ensures consistency while allowing jurisdictional adaptations. For instance, South Australia's Law Society Rules incorporate local precedents on conflicts of interest, while maintaining alignment with national principles.
- Self-regulation remains contentious. Critics argue that professional bodies prioritise collegiality over accountability, leading to underenforcement of ethical breaches.
- However, the Law Council of Australia defends the system, noting that solicitors face stringent disciplinary measures, including suspension or cancellation of practicing certificates for misconduct.

Judicial Ethics and Accountability

Ethical Standards for Judges

- Judicial ethics, though distinct from solicitors' rules, intersect in upholding public confidence.
- Key issues include managing courtroom emotions, addressing implicit biases, and avoiding bullying behaviour toward counsel or litigants.
- For instance, judges must navigate victim impact statements in sentencing with empathy while maintaining impartiality.

Oversight and Removal Mechanisms

- Judicial misconduct, though rare, is addressed through commissions of inquiry and parliamentary processes.
- The *Court Procedures Act 2004 (ACT)* exemplifies frameworks for investigating misbehavior, ensuring accountability without compromising judicial independence.
- Recent debates highlight tensions between transparency and protecting judges from frivolous complaints, emphasising the need for nuanced reforms.

The Role of Ethical Leadership in Legal Practice

- **Organisational Culture Matters**: Ethical leadership in law firms, government, and the judiciary sets the tone for professional conduct.
- Unethical practices often trickle down from leadership. The RoboDebt scandal, for example, highlighted how top-down pressure can foster unethical decision-making in government agencies.
- Law firms and legal institutions must promote ethical cultures by:
    - Encouraging **open discussions on ethical dilemmas**.
    - Providing **ethics training**.
    - Establishing **whistleblower protections**.
- Lawyers often **witness questionable conduct** but fear repercussions for speaking up.
- The **"bystander effect"** in legal practice can erode professional integrity if unethical behaviour goes unchallenged

Contemporary Challenges and Critiques

Public Perception vs. Professional Autonomy

- According to the **Governance Institute's Ethics Index**, lawyers score **low on public trust**, ranking below healthcare professionals, firefighters, and even real estate agents.
- The legal profession faces scrutiny over perceived ethical failures, such as defending corporate malfeasance or exploiting procedural delays.
- There may be a "mismatch" between public expectations of responsiveness and lawyers' traditional autonomy.