

# Administrative Law Final Notes

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## The Constitutional and Legal Framework

### Parliamentary rule or responsible government

- origins in the struggles between the English monarch, heading a federal aristocracy and the parliament, representing the emerging mercantile and capitalist class.
- the Crown and the Privy Council through the Star Chamber exercised central power
- judicial control = prerogative writs such as certiorari, mandamus, prohibition and habeas corpus- form the heart of the old administrative law
- tribunals, FOI legislation and Ombudsmen, infringes the notion of ministerial responsibility
- responsible govt: bureaucracy has a watch dog
  - o involves the idea that governments and ministers are – and should be – answerable to parliament
  - o pg 29 - Thynne and Goldring (1987): executive is becoming less responsible to Parliament due to the power of the political parties and the complexity of modern bureaucracies

### Sovereignty of parliament

- English revolution = parliament became the legal sovereign, determining what is law by legislation subject to the separation of powers with the judiciary and the executive.
- events in the early years of the 21<sup>st</sup> century underscored the limits of parliamentary power e.g. the wide use of executive power and tighter restrictions on public and parliamentary scrutiny.
- parliaments do not have unfettered power but must share it according to the various heads set out in the Constitution

### The rule of law

- The rule of law is simply assumed, Dixon J, *Australian Communist Party v Commonwealth (1951)*
- Fundamental: all equally subject to the same body of stable/certain law, not subjected to arbitrary rule.
- Not binding rule = no guarantee of the protection of legal and democratic rights. Involves judicial power to protect the rights of citizens
- Dicey saw admin law as a manifestation of – rather than a means of restricting – bureaucratic power
- urged the apolitical and objective nature of the law to emerge

- Legal equality by no means assures social equality – latter mocks former when poorer or more vulnerable applicants lack access to the resources to adequately pursue their claims.
- Dicey identified three concepts:
  1. No one was punishable by the state unless they committed a breach of the law and this breach was established before an ordinary court of law
    - a. Been eroded especially through measures upheld by the High Court to automatically detain asylum seekers without trial.
    - b. May also be virtually impossible to compel a minister to testify and be cross-examined about the making of a decision, *Haneef v Minister for Immigration and Citizenship [2007]*, where the minister declined to testify. Court refused to draw any adverse inference from that failure to testify from *Minister for Immigration v Multicultural Affairs v Jia (2001)*
  2. All citizens irrespective of status were subject to the law as administered by law courts, including every official, from the Prime Minister down to the police constable
  3. In contrast to the American system, personal liberties and freedoms are derived from common law principle, and not written guarantees of freedom.

### The separation of powers

- the three “arms” of government are legislative, judicial and executive (latter equivalent to administrative) to provide checks and balances against each = 3 institutions designed to give independence to each branch of government = limit on power of each branch
- clash with responsible government – doctrine requires executive to be answerable and that true separation is answerable – roles of the court and administrative decision makers are similar
- Mistrust of government implicit in the ‘separation’ of powers doctrine doesn’t sit well with the assumption that each branch will respect the right of the other
- Separation of powers exists by convention at State level, entrenched protection for judicial independence and for judges but not the jurisdiction
- High Court drawn a sharp distinction between courts and tribunals.
- Judicial and executive powers constitutionally cannot be conferred on the same body.
- Tribunals cannot make final and enforceable decisions on questions of law
- Higher courts can exercise quasi-legislative power; their decisions establish broad legal rules or principles. In *Mabo v Qld (1992)* the HC created a legal entity known as native title.
- The courts defend separation of the judicial power. In *Boilermakers*, the HC upheld a strict distinction between the powers, denying bodies other than courts exercising judicial power of the Commonwealth.
- Commonwealth courts cannot be given general executive powers, e.g. to review the merits of decisions
- The principle of not mixing two powers (executive (administrative) and judicial) has not been applied with the same strictness to the delegation of legislative power to the executive

- *Victorian Stevedoring and General Contracting Co Pty Ltd*, where the court rules the delegation did not infringe on the principle of the separation of powers and there was no invalid delegation of power. **Principle:** in absence of any provisions to the contrary, legislatures established by British Imperial legislation possess the power to delegate their legislative powers.
- *Meakes v Dignan*, parliament can delegate powers to the executive

### Merits review vs. legal review

- Merits review is generally confined to tribunals
- **Tribunals** have the power to reconsider a decision - same power as the original decision maker
- **Courts** can only determine whether a decision was made lawfully (legality of it) - set aside to be re-made NOT the merits of the decision
  - Separation of powers prevents the courts from having power to review and remake a decision based on the merits
- unlawful decision can be reconsidered without any change to the outcome - *Green v Daniels* (1997)
- Litigation may serve to highlight issues and be part of the battle to determine rights on a wider scale.
- Mason J in *Peko-Wallsend*:
  - The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind.
  - It is not the function of the Court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion...”  
- pg 434

## Delegated Legislation

- It is commonplace to delegate rule-making power to members of the executive, statutory authorities, tribunals and courts
- delegated legislation is legislative in form and executive in source - must be within power of the maker of the relevant decision
- 2 reasons why the delegation of rule making power has been seen as problematic:
  1. maxim of delegates non potest delgare - the delegate may not delegate
  2. the separation of powers doctrine
  
- If you are challenging a decision made under a regulation, bylaw or other delegated legislation, 2 step investigation is needed:
  - 1) Is the delegated legislation within the power of the parent Act?
  - 2) Is the decision authorised by the delegated legislation?

### The Legislative Instrument Act 2003 (Cth)

- **LIA requires:**
  - public consultation in making delegated legislation,
    - s 19 states “the fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument”
  - publication in a Legislative Instruments Register,
  - tabling in Parliament within 6 sitting days, and
    - s 45, the Act specifies that if a legislative instrument is not laid before both houses of parliament within 6 sitting days, or disallowed by parliament, it ceases to have effect “**as if it has been repealed**” from that time
  - a 10-year sunset clause
- **Definition:**
  - **S 5(1) LIA, A legislative instrument** is an instrument in writing that is of legislative character and was made in the exercise of a power delegated by the parliament
  - **S 5(2) LIA, legislative character**, means the instrument determines the law or alters the content of the law, or directly or indirectly affects privilege or interest, imposes an obligation, creates a right or varies or removes an obligation of a right
- LIA should apply to every delegated instrument that is legislative in character, that is, every Cth “rule”, unless expressly excluded by its enabling provision.

### Constitutional limit to delegated legislation

#### *Meakes v Dignan*

- The HC upheld the validity of the regulations, ruling that they did not infringe the notion of the separation of powers, effectively approving delegation of the executive
- There were three objections – the maxim that the delegate may not delegate; the separations of powers doctrine; and the abdication of parliament’s legislative power under the constitution.
- All but the last were rejected as possible challenges to the delegated legislative power, on the grounds that otherwise effective govt would be impossible = would only apply where the parliament purported to transfer the entire power

- **Dixon:** ‘the well known maxim ‘delegatus non potest delegare’, applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of the federal and state constitutions that it has in private law
- the constitution draws a clear distinction between the legislative, executive and judicial functions
- “because of the distribution of the functions of govt and of the manner in which the constitution describes the tribunals to be vested with the judicial power of the Cth, and defines the judicial power to be invested in them, the parliament is restrained both from reposing any other than that judicial power in such tribunals” – separation of powers – pg 306
- **Evatt:** legislative power connoted the power to deposit or delegate legislative power because this was implied in the idea of parliamentary sovereignty itself. It was always understood that the power of the delegate could be withdrawn by the parliament that had created it
- it is no longer disputed that if parliament passes a law within its powers it may as part of its legislation, endow a subordinate body with power to make regulations for the carrying out of the scheme described in the legislation – basis for transferring power – pg 308
- “The following matters are material in examine the question of the validity of an act of parliament which purports to give power to the executive or some other agency to make regulations and by laws:
  1. a grant of power made to the executive assists the validity of the legislation
  2. scope and extent of the power of regulation making conferred is important: the greater the extent, the less likely it is with respect to a head of power
  3. restrictions placed by parliament upon the exercise of power by the subordinate law making authority is important
  4. the circumstances existing at the time when the law conferring power is passed or is intended to operate is important to the question of validity
  5. conferring powers to make regulations for the purpose of carrying out a scheme contained in the statute will not prevent it from being a law with respect to legislative power
  6. Cth enactment is valid if it is a law with respect to a granted subject matter
  7. if the statute conferring power to regulate is valid and the regulation is not inconsistent with such statute” – pg 309

#### Judicial Review of delegated legislation

- Control over delegated legislation lies in the requirement that it be published and also tabled in both houses of parliament, where it can be scrutinised by committees.
- Cases concern breaches of this procedural requirement:  
**Minister for Primary Industries and Energies v Austral Fisheries Pty Ltd** – test of validity
- general rule that for subordinate legislation to be valid it must be shown to be within the powers conferred by the statute
- “the test of validity of delegated legislation is whether there is a ‘real connection’ between the delegated legislation and the purpose for which the regulation making

power was granted by parliament. The test of invalidity is on the ground that no reasonable mind could justify it as 'only a way of stating the conclusion that no real connection with the purposes of the power can be seen'"

- "delegated legislation may be declared invalid on the ground of unreasonableness if this leads to manifest arbitrariness, injustice or partiality; but the underlying rationale is that legislation of this offending kind cannot be within the scope of what parliament intended when authorising the subordinate legislative authority to enact laws"

### Process of Making Subordinate Legislation

#### **(a) a matter of terminology**

- empowering legislation confers the power to make rules which might be called regulations, statutory rules etc
- courts possess rule making power; local govts possess limited legislative powers

#### **(b) Public consultation requirements**

- govts need to consult those who might be affected by regulations; it can take time
- LIA in some states further provisions require some form of public consultation before an instrument is made
- S 17 LIA provides a weak requirement
- S 19, failure to consult does not affect the validity or enforceability of a legislative instrument

#### **(c) 'professional vetting'**

- in several jurisdictions, subordinate legislation may not be submitted to the Governor unless it has been submitted to external scrutiny

#### **(d) Publication rules**

- publicity must be given to the making of subordinate legislation
- Usually the commencement date for a legislative instrument is the date of publication
- Cth regulations must be published in the Gazette and details must be provided of where it can be obtained
- **Golden-Brown v Hunt:** the notice must clearly and definitely describe the place where the copies can be purchased. It must give an adequate address. The Ordinance in question was not notified in accordance with the provision of the Act. It was therefore not operative at the time the police purported to act under it or at the time of the hearing
- **Watson v Lee:**
- Barwick CJ Notification procedure set out in **s48(1) of the Acts Interpretation Act**- where acts confer power to make regulations, then, unless the contrary intention appears, all regulations made accordingly:
  - a. shall be published in the Gazette
  - b. shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulation from the date specified and
  - c. shall be laid before each House of the Parliament within 15 days of that House after the making of the regulation

- alternative method of notification- **s5(3) of the Rules Publication Act**- copies of the regulation which has been made are available for purchase = sufficient compliance with statutory rules required by an Act
- question of proof of the availability of the copies of the regulation - onus of establishing that they were not is upon the person raising the question
- Gibbs J: I consider that although copies of that amending regulation were not available for purchase until about ten days after the notice was published in the Gazette, least copies became available after substantial compliance the requirements
- **Note**: Failure to comply with publication requirements means that the relevant subordinate legislation is void. In NSW failure to publish is not fatal to the validity of the rule, but the rule takes effect only from the date of its gazettal

## Judicial Review: Jurisdiction, Justiciability and Standing

- Judicial review will normally be a strategy of last resort –more costly than other forms of review and concerned with relatively narrow issues – with the legality of the decision, rather than whether the decision makers findings of facts were correct, or with whether the decision maker should have exercised a discretion differently.
- wherever the cases concern cutting edge issues or where the government has curtailed merits review rights, there has been a growing recourse to the courts e.g. immigration and refugee cases
- the HC has remitted many Migration Act matters to the Federal Court, which has itself transferred cases to the Federal Magistrates Court.

### 1. Jurisdiction

- Two questions arise:
  1. Was the decision made under Commonwealth or State law?
  2. Which court has jurisdiction?
- Federal decisions must go to the Federal courts and State (and local government) decisions to the State Supreme Courts, *Evans v New South Wales [2008]*
- Superior courts of general jurisdiction are traditionally regarded as having inherent jurisdiction to review administrative actions and to grant the traditional common law remedies of writs, declarations and injunctions.
- Federal Magistrates Court now has jurisdiction to hear a range of applications under the ADJR Act and certain appeals from the AAT (AAT Act (Cth) s44AA)
- **s75** of the Constitution it provides that the HC shall have original jurisdiction in all matters: “(iii) In which the Cth or a person suing or being sued on behalf of the Cth, is a party”, and “(v) In which a writ of Mandamus or prohibition or a injunction is sought against an officer of the Cth”
- s 75(v) has been confined to cases of “jurisdictional error” ie where an administrative error is deemed to be so serious that it is said to have been made outside the jurisdiction of the decision maker.

### Restrictions embodied in s75:

- Curtails the ability of the federal government and parliament to legislate to limit the jurisdiction of the courts. The Federal Court is a statutory creation, the HC has allowed its jurisdiction to be curtailed by legislation (*Abebe v Cth*)
- substantially prevents the HC’s original jurisdiction being ousted by a privative clause that purports to prevent any judicial review of an administrative action – referendum needed to amend constitution
- create a constitutional guarantee of access to the HC to challenge actions taken by the Cth government or in its name- it assures the “rule of law”
- In *Re Refugee Review Tribunal; Ex parte Aala* (2000), the court ruled that it has the power to grant all forms of prerogative relief, including certiorari

- The court further held that denial of procedural fairness will result in a decision made in excess of jurisdiction, allowing prohibition to lie under s75(v) of the Constitution
- *Plaintiff S157/2002* = the HC reinforced this view and applied it to prevent the court's jurisdiction being blocked by the "super privative clause" inserted in the Migration Act in late 2001

### **Timing of Applications**

- Applications for judicial review should be made within a short period of the making of the decision.
- ***Hunter Valley Developments v Cohen (1983) 3 FCR 344***: Whether extensions of time will be granted: Wilcox J: the section does not in terms, place any onus of proof upon an applicant for extension. Court will not grant the application unless positively satisfied that it is proper to do so. The prescribed period of 28 days is not to be ignored.