

MLL 324

ADMINISTRATIVE LAW

OVERVIEW AND INTRODUCTION

Administration

Unit team

- Unit Chair – Martin Hardie
- Geelong & Off campus lecturer – Martin Hardie
- Burwood lecturer – Jane O’Callaghan
- Contact details in Unit Guide & on CD

My contact details

- Jane O’Callaghan
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Who to contact, when and how

- Extensions / special consid – Unit Chair by email
- Content / assignment queries – CloudDeakin forum / consultation time
- Other personal (e.g. anyone with concerns re passing, reference) – your lecturer via email / consultation time

Schedule

- Contact hours: 4 x 1 hour classes per week
- Type Day Start/End Campus Location
- Seminar Wed 08:00-08:50 Burwood LT12 (X2.05)
- Class Wed 11:00-11:50 Burwood LT 1A (I2.07)
- Class Thu 11:00-11:50 Burwood LT 1A (I2.07)
- Class Thu 12:00-12:50 Burwood LT 1A (I2.07)
- Consultation times: Wednesday 9am – 11am (between classes)

Subject Resources

- Study Guide 2013
- Prescribed texts
 - Cane & McDonald, Principles of Administrative Law, Oxford 2012 [PAL]
 - Cane & McDonald, Cases and Materials for Principles of Administrative Law, Oxford, 2012 [C&M]
- Cloud Deakin
 - Set up of site
 - Unit Guide

- Course Navigator
- Assessment Resources
- Echo recordings

Assessment

1. Assignment 1 50%

- Available via the 'Assessment resources' folder
- Due date: 11.59pm 16 May 2014

2. Final exam 50%

- Closed book
- Comprises short essay question
- Focus on the conceptual framework and issues of administrative rather than black letter law

Expectations

Expectations of me / unit team

- Provision of subject materials
 - Class notes (and copies of any other materials used, video etc) after class
 - Assignment instructions, rubric & sample HD assignments
 - Past exams & sample HD exams
- Teaching is clear and cater to different learning styles
 - More than just a summary of course
 - Answer questions
 - Content of administrative law AND skills required to complete assessment
- Reply to emails / CD posts within 48 hours, may be longer during peak assessment times

My expectations of students

- Come to classes/seminars
- Reading / questions ahead of class/seminar
- Interactive /discussion
- Respect for all other students at all times
- Check CloudDeakin 'news' and discussions on a daily basis

Tips

- Conceptually very difficult subject
- Will take time to understand
- Plan for the assessment

Topic 1 Part (a) Getting Our Bearings

1. What is Administrative Law

+ What do you think Admin Law is about?

+ Examples;

- ***X v University of Western Sydney [2014] NSWSC 82***
 - ADMINISTRATIVE LAW - Judicial review - Procedural fairness - Allegation of serious misconduct - Plaintiff was suspended under a university policy - Express obligation to afford procedural fairness - Decision-maker's interview of complainant prior to the decision to suspend the plaintiff - Statements made in interview not disclosed to the plaintiff before the decision to suspend was made - Whether decision was made in breach of the obligation to afford procedural fairness to the plaintiff - Whether interview material was required to be disclosed for the plaintiff to have an opportunity to respond on the issue of any risk to health and safety of the complainant and on the issue of measures to minimise any risk alternative to outright suspension - Whether there existed apprehended bias in the decision-maker having made an earlier decision in favour of suspension - Whether decision affected by error as to jurisdictional facts or jurisdictional error or improper purpose or Wednesbury unreasonableness - Form of relief - Declaration - Leave to parties in respect of injunctive relief claimed.
 - Full judgment:
<http://www.austlii.edu.au/au/cases/nsw/NSWSC/2014/82.html>
- ***Australian Football League v Carlton Football Club:***
 - The Court of Appeal in Victoria effectively refused to overturn an Australian Football League tribunal's finding that the Carlton player, Greg Williams, had unduly interfered with an umpire, Judge of Appeal Tadgell said:
 - 'Examples are legion in which the courts have consistently refused to review on the merits decisions made by private or domestic tribunals. ... For one thing, where the parties have agreed to have their disputes decided by domestic tribunals designated for the purpose, the courts have been in the habit of respecting the agreement ... For another thing, the courts have been prepared to recognise that there are some kinds of dispute that are much better decided by non-lawyers or people who have a special knowledge of or expertise in the matters giving rise to the dispute.'

<http://www.mondaq.com/australia/x/20555/Sport/Sports+Discipline+Porsche+Driver+Cashes+At+Court+As+Golfers+Play+Through>

- **Asylum Seeker – Manus Island case**
 - <http://www.abc.net.au/7.30/content/2013/s3830082.htm>
 - http://www.hcourt.gov.au/cases/case_s156-2013

General Overview of Administrative Law

- ✚ Focuses on the executive branch of government and its relationship with the people that it governs, ie the relationship between the ‘governors’ and the ‘governed.’
- ✚ *Concerned with keeping the executive legally accountable*
- ✚ ‘Administrative’ - Links in to separation of powers and theory that underlies it
 - **Should not allow too much power to be concentrated in hands of individual/institution** (that’s why we have 3 branches: the legislature, the executive and the judiciary)
 - **those who exercise power should be subject to some form of external check**
- ✚ Admin law provides an external check on exercise of power by executive branch of government.
- ✚ **As a branch of Public Law**
 - All public law is concerned with the rship between the governors and the governed, e.g. international human rights law, constitutional law etc
 - CF private law, concerned with relations between citizens, e.g. tort law
 - Public law consists of special laws for those who govern
 - Contrast to Dicey’s view that the best way to control govt was to ensure they were subject to the same laws as everybody else: equality before the law.
 - While Diceys views did not represent the way things were at the time, they influenced the way judges & scholars thought about the law

2. What is the Executive?

- ✚ Executive may refer to:
- ✚ **Executive (government), branch of government that has sole authority and responsibility for the daily administration of the state bureaucracy**
 - Asylum seeker case – Scott Morrison
 - University of Western Sydney case?
 - Carlton case?

+ **Standard Definition** = govt dept headed by minister and staffed by appointed public servants

- This model was appropriate when the 'welfare state' was the norm, i.e. when the State was responsible for provision of public goods like education etc
- **BUT This model has evolved:**

+ Budget deficits, mounting public debt, perceived govt inefficiency and loss of faith in govts prompted move to privatization (neoliberalism)

+ **Describes ways that govts have changed balance between private and public activity in the economy à preference for private sector over public sector**

- Privatization of public assets, ie economic infrastructure and business, e.g. **Telstra, Commonwealth Bank of Australia**
- Contracting out /outsourcing - performance of public functions to private contractors at public expense, e.g. train systems; links to processes of competitive tendering e.g. Vic govt has a Legal Services Panel
- Use of statutory corporations to perform public functions, e.g. Australia Post
- Deregulation, ie removal of govt regulations over private business/individuals in the marketplace; market seen as the natural order of things
- Public-private partnerships – e.g. for provision of new infrastructure
- Streamlining of govt administration – downsizing public sector, public sector reform

+ **How do we now define the 'executive' for the purposes of Administrative Law?**

- Admin lawyers advocate different tacks, e.g. Dicey's view that the best way to control govt was to ensure they were subject to the same laws as everybody else: equality before the law.
- CF higher public law duties because of monopoly over coercive power

+ (a) **Institutional approach**

- Admin law generally understood 'institutionally'
- Admin law norms apply to decisions made by those people who are part of the formal institutions of exec govt
- Remains the Australian approach, BUT no consensus reached re whether *Datafin* represents CL of Australia

+ (b) **Functional approach**

- In England, law has adapted

- Admin law understood primarily in ‘functional’ terms à concerned with the legal control of the exercise of *public functions*, whether by govt or non-govt entities
- Admin law is about control of governance (certain activities or functions) rather than about the control of government (certain institution)
- Adhering to the ‘institutional’ approach means that the reach of admin law will probably diminish as privatization etc increases

Datafin 1987 UK

Facts:

- ❖ Panel on Take-overs and Mergers was an unincorporated association without legal personality.
- ❖ ***Was a central self-regulatory body responsible for regulating takeovers***
- ❖ Made of up 12 members representing many committees and companies.
- ❖ No statutory, prerogative or common law powers and no contractual relationship with the financial market or people that deal in the financial market
- ❖ Promulgated the ‘City Code on Take-overs and Mergers’ which lacked ‘force of law’, but which had to be adhered to in order to participate in the financial market
- ❖ Self-regulating in sense of being a group, acting together, to use their collective power to force themselves and others to comply with a code of conduct of their own devising. Involved devising, promulgating, amending, interpreting the City Code on Takeovers and Mergers, waiving or modifying application of the Code, investigating and reporting upon alleged breaches fo the Code and application or threat of sanctions
- ❖ Panel supported/sustained by periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient/non-existent
- ❖ Operated wholly in public domain

Issue:

- ❖ Whether decisions of non-government bodies that exercise public law powers are susceptible to judicial review

Arguments:

- ❖ ***Against:*** jurisdiction only extends to bodies whose power is derived from legislation or the exercise of the prerogative
- ❖ ***For:*** regard has to be had not only to the source of the body’s power, but also to whether it operates as an integral part of a system which h as a public law character, is supported by public law in that public law sanctions are applied if its edicts are ignored and performs what might be described as public law functions

- ❖ **Held:**
 - Jurisdiction extends to bodies that have a public element
 - Panel had a public element, therefore Court had jurisdiction over it:
 - Performing a public duty
 - Rights of citizens were affected by its decisions
 - Has a duty to act judicially
 - Reason for being to do equity
 - Source of power from statute

❖ **Demonstrates willingness of English courts to take 'functional' approach**

- ❖ NB: discussion re judicial review vs appeal to be dealt with subsequently when considering 'judicial review' part of course

Plaintiff M61

- ❖ *Demonstrates lack of consensus/decision re whether Datafin is to be followed in Aus*
- ❖ Should administrative law apply to particular functions/activities regardless of whether they are performed by govt or non-govt entities?
- ❖ *le Who should the executive be for the purposes of Administrative Law*

3. How could we characterize Australian administrative law?

- ❖ Inherited from UK, BUT 1970s 'the new administrative law':
 - **Kerr Committee Report 1971**
 - Codification of grounds of judicial review of administrative action in ADJR Act 1977
 - Establishment of Administrative Appeals Tribunal
 - Establishment of Cth Ombudsman
 - Enactment of FOI Act 1982
 - Emergence of Fed Ct as leading admin law forum in Aus
- ❖ **But not as clear division between public and private law as, e.g. UK. Australian administrative law has not taken as sharp a functional turn as English law.**
 - e.g. No distinction between public law courts and private courts in Australia.
- ❖ Administrative law is about control of **governance** (certain activities or functions) rather than about the control of **government** (certain institutions).

4. To what extent is administrative law "law"

- ✚ We are concerned with the use of "law" to control the exercise of power by governors over the governed.
- ✚ **Statutes (e.g. ADJR Act) and case law**, BUT also include other rules.

- (a) **Legal view**
 - Focus on law and legal institutions
 - ***Presents admin law as being primarily concerned with providing complainants with redress for past breaches of admin law, and society with a means by which decision-makers can be held accountable for such breaches***
 - Also representative of particular societal values, such as **legality, rationality, procedural fairness.**
 - Regulation one of possible purposes or aims, but *subsidiary* to other aims and the law's expressive and accountability-related purposes.
 - Rooted in concept of the rule of law.

- (b) **Regulatory View**
 - Regulation involves the deliberate attempt to influence human behaviour. Regulation is one of the major functions of government.
 - Focus on the future - on influencing human behaviour and its outcomes.
 - Law constitutes one regulatory 'tool' among others
 - 3 components: ***standards for how people should behave, mechanism for monitoring compliance, and mechanism for promoting future compliance.***
 - *Primary regulatory role is to promote "process values" such as fair procedure and compliance by decision makers with legal limitations on their powers.*
 - **Purpose of admin law from regulatory point of view is to influence the way decision-makers exercise their powers.** Accountability is not the prime purpose of administrative law.
 - Rooted in the concept of separation of powers.

Topic 1 Part (b): Historical and Constitutional Context

- ✚ Objective: Contextual background to present day Australian administration law.

✚ Major influences:

1. British system
2. American system
3. Colonial system
4. Federation
5. New administrative law

1. **British system**

- ❖ Australian administrative law has no Indigenous heritage – in legal terms, the British who colonised Australia in the decades following 1788 treated the Indigenous population effectively as fauna, and the land as their for their taking.
- ❖ **Australia was settled – settlers imported British law with them – there was no local law to accept or reject since it was a “peaceful settlement of an empty land.. rather than conquest or cession.”**
- ❖ **Local laws could be struck down as invalid if ‘repugnant’ to English statutes applicable to Aus, until 1986 with passage of Australia Acts.**
- ❖ Courts supposed to follow English precedent, though **appeal to Privy Council abolished from 1986.**
- ❖ Australian law re British heritage a mixture of **‘imitation, adaptation, reaction and innovation.’**
- ❖ **Features:**
 - **Responsible government:** People elect the parliaments, who effectively ‘elect’ the executive. Executive is responsible to parliament (and people) for its continued power.
 - **“Collective ministerial responsibility”** – individual members of government – the ministers of state – would stand or fall as a group depending on whether they retained or lost the confidence of the Lower House. Nowadays, this means ministers must be loyal members of the government to its policies and mandates confidentiality of cabinet decisions.
 - Also currently in Australia it’s **“Individual Ministerial Responsibility (IMR)”** – members of govt must provide information to legislature for their conduct and take remedial steps when things go wrong, or resign. *Legislative can exercise control over the Executive without threatening its existence.*
 - **IMR is a mechanism of political accountability and a significant feature of the environment in which judicial review is conducted.** *Debateable since there’s a view that party discipline trumps IMR as being an effective accountability mechanism.. merits review, ombudsman might be more effective.*
 - **Supremacy of parliament:** Aspect borrowed from English law and modified for Australian purposes.
 - In case of conflict between statute law and CL, statute law prevails.
 - Parliament was free to enact whatever law it chose.

- No Act of Parliament could be challenged in the courts on grounds of invalidity or unconstitutionality
- No parliament could bind its successors. (Every statute could in theory be repealed).
- **Rule of law**: Government constrained by law and subject to same laws as ordinary citizens.
 - Exercise of power by government over citizens is constrained by clear rules of law
 - Those laws were applied and enforced by “ordinary” courts rather than by “special tribunals”
 - Rules that constrained exercise of power by government were the same rules as regulated by conduct of citizens
 - The rights of citizens are protected by the ordinary law rather than by a “higher law” (or “constitutional”) bill of rights.

(Dicey)

❖ ***The prerogative writs: The tools for the exercise of royal control (by the King's/Queen's courts) over the machinery of Government. The prime vehicle of judicial review of administrative action in 17th century.***

- **Old system** – writ of certiorari, prohibition and mandamus.
 - ***Certiorari***: Ordered the addressee to deliver to the court the official record of some decision made by the addressee so that the decision could be ‘quashed’ – deprived of legal effect.
 - ***Prohibition***: Ordered addressee not to make some (unlawful) decision or perform some (unlawful) action.
 - ***Mandamus***: Ordered addressee to make some decision or perform some action required by law.
 - ***Formulaic in nature, meritorious claims might fail where they didn't meet the necessary conditions, even if those conditions were unrelated to the “merits” of the claim.*** Tempered by development of equitable remedies of injunction and declaration.
- **New system** – prerogative orders replaced with quashing orders, prohibitive orders and mandatory orders.
 - Claimant pleads a breach of public law and requests a suitable remedy – shifts focus from remedies to focus on whether there is a good cause of action for which a remedy should be provided.
- ***We have both systems in Australia!***

2. **American system**

- ❖ Similar to US federal system and adopted ‘separation of powers’ from US constitution into Aus constitution.