CHAPTER 1

INTRODUCTION

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THE SCOPE, NATURE AND CONTENT OF ADMINISTRATIVE LAW

Administrative law is concerned with the delivery of administrative justice according to law. The core elements of administrative justice are lawfulness, fairness and rationality in the exercise of public power. They are not mutually exclusive. They blend into each other. They are central to any just process of official decision-making.

The two main goals of administrative law are:

1 to redress individual complaints; and
2 to improve the quality of decision-making, to the advantage of those who seek redress from government.

For some, administrative law relates to the groups of citizens who have been effected by decisions, and is as much a form of public protest as a means of obtaining redress. To paraphrase Geoffrey Robertson QC from his book *The Justice Game* (1999):

> the most fundamental right of all is the right to challenge the State, under a legal system which allows the possibility of winning.

Public bodies and Ministers must be compelled to observe the law and it is essential that bureaucracy should be kept in its place.

Administrative law is:

- a branch of 'public law'; and
- primarily concerned with the functions, powers and obligations of the executive arm of government, including the administration, and certain non-governmental bodies, known as 'domestic tribunals'.

The main focus is on 'judicial review', that is, the exercise of the inherent supervisory jurisdiction of superior courts in relation to decisions made by inferior courts, statutory tribunals, administrative authorities and domestic tribunals.

However, administrative law is also concerned with:

- extra-judicial 'administrative review' of decisions made by administrators; and
- other mechanisms designed to secure the accountability of decision-makers.

Leading administrative law academics such as Creyke and McMillan give two major accountability perspectives on administrative law:

1 that the purpose of administrative law is to safeguard the rights and interests of individuals and corporations in their dealings with government agencies.
2 to define the values or principles that administrative law is designed to uphold. This is described by Aronson, Dyer and Groves as:

> openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.

See Creyke & McMillan, *Control of Government Action,* 3rd edn, Butterworths, Sydney, 2012; Aronson & Groves, *Judicial Review of Administrative Action*, 5th edn,

Lawbook Co, Thomson Reuters, 2013; and Robinson (ed) *Judicial Review: The Laws of Australia*, Lawbook Co, Thomson Reuters, 2014.

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. The approach is exemplified by the following statement from Peter Cane:

> It is often said that the enforcement of statutory duties and the control of the exercise of statutory powers by the courts is ultimately justifiable in terms of the doctrine of Parliamentary supremacy: even though Parliament has not expressly authorised the courts to supervise governmental activity, it cannot have intended breaches of duty by governmental agencies to go un-remedied (even if no remedy is provided in the statute itself), nor can it have intended to give administrative agencies the freedom to exceed or abuse their powers, or to act unreasonably. It is the task of the courts to interpret and enforce the provisions of statutes which impose duties and confer powers on administrative agencies. In so doing they are giving effect to the will of Parliament [Cane, *Administrative Law* 2004, p. 405].

THE MEANING OF THE WORD 'ADMINISTRATIVE'

The word 'administrative' is incapable of precise definition and capable of bearing a wide range of meanings.

In phrases such as 'administrative law' and 'administrative tribunal', the word 'administrative' refers to a broad range of governmental activity and even, in the case of so-called 'domestic tribunals', non-governmental activity of a non-legislative and non-judicial nature.

For the most part, the courts have considered it inappropriate to seek to expound definitively the meaning and ambit of the expression 'administrative' and have generally taken the approach that what is 'administrative' in nature or character should be determined progressively in each case as particular questions arise.

However, what is 'administrative' will include, for example, the application of a general policy or rule to particular cases: see *Hamblin v Duffy* (1981) 50 FLR 308. Even ministerial acts are often described as 'administrative'.

The view expressed in the Donoughmore Report, *Report of the Committee on Ministers' Powers* (1932) Cmnd 4060, was that an 'administrative' decision-maker:

> may need to consider and weigh submissions and arguments and collate evidence (in addition to acting on the basis of evidence); and does not have an unfettered discretion as to the grounds upon which to act nor the means which the decision-maker takes to inform itself before acting.

Furthermore, even a large number of so-called 'administrative' decisions may and do involve, in greater or less degree, certain of the attributes of a so-called 'judicial'

or 'quasi-judicial' decision. The oft-cited 'duty to act judicially', in the context of administrative decision-making, now refers to a duty to act 'fairly' in the sense of according procedural fairness in the making of any administrative decision that affects a person's rights, interests or legitimate expectations: see *Kioa v West* (1985) 159 CLR 550.

DEVELOPMENT OF ADMINISTRATIVE LAW

The development of a set of principles which we now label 'administrative law' is a relatively recent aspect of the common law.

In 1885, the English constitutional lawyer AV Dicey stated in his *Introduction to the Study of the Law of the Constitution*:

> The words 'administrative law' … are unknown to the English judges and counsel, and are in themselves hardly intelligible without further explanation.

Indeed, Dicey viewed administrative discretion as an arbitrary power which ought to be controlled by the courts. Dicey's rather extreme view of the supremacy of Parliament left administrative law:

- with a great mistrust of executive action; but
- without any theoretical basis for its control; and
- largely neglected until fairly recent times.

In the landmark decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40, Lord Reid said:

> We do not have a developed system of administrative law perhaps because until fairly recently we did not need it.

In recent times, there has been a shift of real power from the legislature to the executive, whose various tasks are increasingly undertaken by government departments and other authorities. This is largely due to the:

- emergence of the 'cabinet system' of government;
- erosion of the doctrine of ministerial responsibility; and
- conferment of broad discretionary powers upon members of the executive and public servants.

The growth of executive power generated a need for an increase in the scope of judicial review of executive and administrative action. To quote Lord Denning MR in *Moorgate Mercantile Co v Twitchings* [1975] 3 All ER 314:

> as Parliament has done nothing, it is time the courts did something.

Indeed, the real tenor of administrative law is the extent to which the courts and other special tribunals are prepared to scrutinise and pass judgment on the actions of administrators.

The so-called 'ebb and flow' of administrative law, that is, periods of judicial activism followed by periods of judicial restraint, is to a large extent explained by the fact that, in Australia, there is no strict separation of powers, with the exception of the separation of judicial and executive powers at the federal level. See *R v Kirby; Ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254.

As a result, there is the ability for one organ of government to control, or at least interfere with, the exercise of the functions of another organ of government and to even exercise those functions.

Although this is at times disturbing, for example, when the legislature exercises judicial power and makes a so-called 'legislative judgment', there is, at best, a healthy and dynamic tension between the three organs of government.

The interplay between the various organs of government is the arena in which administrative law is grounded and has its being. This is well illustrated when one considers the subject of subordinate or delegated legislation:

- the legislature delegates its law-making power to the executive;
- the executive exercises that power and makes statutory rules having the force of law; and
- such rules may be disallowed by the legislature or declared invalid by the courts.

In Australia, the growth of administrative law has been particularly emphasised over the last 35 years. As we will see, the institutions that embody the Commonwealth Government's commitment to administrative law, such as the Ombudsman, the Administrative Appeals Tribunal, the Federal Court and numerous other review bodies, were established by Parliament mostly in the 1970s, at a time of concern about the development of 'big government' in Australia and its impact on the citizen. See *Administrative Appeals Tribunal Act 1975* (Cth); *Federal Court of Australia Act 1976* (Cth); *Ombudsman Act 1976* (Cth); and *Administrative Decisions (Judicial Review) Act 1977* (Cth). Two innovations stood out. First, the antiquated procedures and concepts of the past, with their prerogative writ origins, were largely being submerged; and, second, the dominant focus of administrative law on judicial review was being downplayed, as alternative methods of review by tribunals and Ombudsmen were established.

In the 1980s the parliamentary reform agenda broadened quickly to incorporate an additional premise for government accountability to the citizen, including public disclosure of government documents and the control of government information handling. That broader theme was implemented by the enactment of the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth).

On the other hand, in the 1990s, there was a different reform emphasis but with similar objectives, which was best reflected in the development, by government agencies, of customer service charters and complaint procedures.

These developments have recast the relationship between citizen and government by establishing a comprehensive legal framework in which specific legal rights

are conferred upon people to challenge government decisions and to scrutinise government processes.

JUDICIAL REVIEW

In *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, Justice Brennan described judicial review in the following terms:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

However, as United States Justice Frankfurter pointed out in *Trop v Dulles* 356 US 86 (1958):

> Judicial power … must be on guard against encroaching upon its proper bounds, and not the less so since the only restraint upon it is self-restraint.

In judicial review proceedings, the superior court has a supervisory role to ensure compliance with the law but may not, in the absence of express statutory authority, review the administrative decision 'on its merits'.

As Justice Mason, as he then was, pointed out in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24:

> 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 the discretion, and a decision made within those boundaries cannot be impugned …

A CASE TO REMEMBER

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

A commissioner of inquiry had recommended that certain land be granted to Aboriginal claimants pursuant to certain Commonwealth Aboriginal land rights legislation. The subject land included a uranium deposit over which the respondents had applied for mineral leases. The companies, unhappy with the commissioner's report, made numerous submissions to successive Ministers. The responsible Minister of the day nevertheless decided to adopt the commissioner's recommendation on the basis of a departmental brief which did not refer to the respondents' submissions.

The High Court of Australia held that the Minister was bound, as a matter of law, to consider submissions put to the Minister by parties who may be adversely affected by

the decision and who sought to correct, contradict, elucidate or update material in the commissioner's report.

The Minister was found not to have taken into account a 'relevant consideration' which the Minister was bound, as opposed to entitled, to take into consideration. The court additionally stated that its conclusion and reasoning also conformed to the 'principles of natural justice', even though it had not been argued in the case that the failure to consider the respondents' submissions amounted to a denial of natural justice.

Professor John McMillan, former Commonwealth Ombudsman and Information Commissioner, in '*Developments under the ADJR Act: the grounds of review*' (1991) 20 FLR 50, correctly pointed out that:

> It has long been a feature of administrative law that ambiguous standards and contrasting principles provide the margin between restraint and intervention, validity and invalidity.

Thus, the superior courts, in the exercise of their inherent supervisory jurisdiction over inferior courts, statutory tribunals, domestic tribunals, and administrative decision-makers generally, have developed numerous contrasting distinctions and dichotomies, such as:

merits	lawfulness
justiciable	non-justiciable
administrative	judicial
administrative	legislative
administrative	policy
regulate	prohibit
fair	unfair
mandatory	directory
relevant	irrelevant
proper	improper
reasonable	unreasonable
proportionate	disproportionate
fact	law

(Continued)

jurisdictional	non-jurisdictional
flexible	inflexible
certain	uncertain
consistent	inconsistent

GROUNDS OF JUDICIAL REVIEW

By way of summary, the following is adapted from Lord Diplock's classification in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (*CCSU* case):

1 unfairness
no hearing
bias
no evidence
no reasons/inquiries

2 illegality
ultra vires
- lack of power
- abuse of power
- failure to exercise power

jurisdictional error
- lack of jurisdiction
- excess of jurisdiction
- failure to exercise jurisdiction

3 irrationality
manifest unreasonableness (abuse of power)
no rational basis for decision (no evidence)
arbitrary conduct, perversity

4 lack of proportionality
irrationality (in particular, manifest unreasonableness).

Classification

There are various ways of classifying the grounds of judicial review.

One method of classification makes the doctrine of *ultra vires* the basis of judicial review, whether there has been a breach of the rules of procedural fairness, lack of power, lack or excess of jurisdiction, non-compliance with statutory procedural requirements, or 'manifest unreasonableness': see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The only exception was the

intra vires ground for review known as 'error of law on the face of the record', see *R v Northumberland Compensation Appeal Tribunal ex parte Shaw* [1952] 1 KB 338.

In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock classified the various grounds of review under the following three headings:

1. 'Illegality'—embracing errors traditionally subsumed within the doctrines of *ultra vires* (other than procedural *ultra vires*) and jurisdictional error (including error of law on the face of the record).
2. 'Irrationality'—that is, manifest (*Wednesbury*) unreasonableness.
3. 'Procedural impropriety'—rather than failure to observe the rules of procedural fairness, including procedural *ultra vires*.

In more recent times, some jurists, for example, Justice Kirby in the High Court, and academics have suggested that there is a fourth ground of review, that is, lack of proportionality: see *State of New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, cf *R v Home Secretary, ex parte Brind* [1991] 1 AC 696.

Although Lord Diplock's method of classification has received general acceptance in England, Australian courts, for the most part, continue to classify the grounds of review in fairly traditional terms, that is, procedural fairness (natural justice), *ultra vires*, and jurisdictional error, including error of law on the face of the record.

One reason for this is that most Australian courts, unlike their British counterparts, continue to make a distinction between the two otherwise conceptually indistinguishable doctrines of *ultra vires* and jurisdictional error, with the latter, for historical and jurisprudential reasons, being more commonly invoked in the context of inferior courts and quasi-judicial statutory tribunals.

Justiciability

The cornerstone of judicial review is the concept of 'justiciability'.

A 'justiciable' decision is one fit for judicial review; a 'non-justiciable' decision is not. However, in recent years the threshold of judicial review has moved considerably, such that many matters which were once considered to be 'non-justiciable' are now 'justiciable', or at least potentially so.

In *Ex parte R (ex rel Warringah Shire Council); Re Barnett* (1967) 87 WN (Pt 2) (NSW) 12, the New South Wales (NSW) Court of Appeal held that a decision of the NSW Governor-in-Council to dismiss a local council was not reviewable on the ground of denial of procedural fairness.

However, decisions made by the Crown's representatives have since been held to be reviewable in appropriate cases on the standard grounds of review. See, for example, *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222; *Treasury Gate Pty Ltd v Rice* [1972] VR 148; *R v Toohey (Aboriginal Land Commissioner);*

Ex parte Northern Land Council (1981) 151 CLR 170; and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

In other cases, it has been held, or at least strongly suggested, that the standard grounds of review could be applied to such decisions as the decision of a security intelligence organisation: see *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 and *Alister v R* (1984) 154 CLR 404, cf *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; to an exercise of legislative power: see *Bread Manufacturers of NSW v Evans* (1980) CLR 404; and perhaps even to a decision of Cabinet itself: see the discussion in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218 and *South Australia v O'Shea* (1987) 163 CLR 378.

The fundamental question would now appear to be whether, having regard to its nature and subject matter, the decision *should* be subject to judicial review. Thus, the primary emphasis is now placed on the decision, as opposed to the decision-maker.

These issues were discussed at length in the Federal Court, by Justice Tamberlin in *Hicks v Ruddock* (2007) 156 FCR 574 where the case concerned the fundamental right to have cause shown as to why a citizen was deprived of liberty for more than five years in a place where he had no access to a court and was held without valid charge. It was acknowledged that the meaning of 'justiciable' and the extent to which a court will examine executive action in the area of foreign relations and Acts of State are far from settled.

'RED LIGHT' AND 'GREEN LIGHT' APPROACHES

In judicial review, there are two, so-called 'red light' and 'green light', approaches to administrative law. These two categories were analysed in Harlow and Rawlings' *Law and Administration* (1984).

The 'red light' theorist generally advocates a more interventionist approach by the courts to the review of administrative decisions. This approach advocates a strong role for the courts to review administrative decisions. It considers that the function of law is to control the excesses of state. As Harlow and Rawlings put it:

> Behind the formalist tradition, we can often discern a preference for a minimalist state. It is not surprising, therefore, to find many authors believing that the primary function of administrative law should be to control any excess of state power and subject it to legal, and more especially judicial, control. It is this conception of administrative law that we have called 'red light theory'.

The 'green light' theorist, while also acknowledging the need for and importance of judicial review and the rule of law, tends to place more emphasis on non-judicial

remedies and procedures, for example, political processes, internal and external administrative review and consultative decision-making.

This approach considers that the function of administrative law is to facilitate the operations of the state. It is based on the rationale that bureaucrats will function most efficiently in the absence of intervention. Administration should aim to help simplify the procedures and enhance efficiency. Harlow and Rawlings said:

> Because they see their own function as the resolution of disputes and because they see the administrative function from the outside, lawyers traditionally emphasise external control through adjudication. To the lawyer, law is the policeman; it operates as an external control, often retrospectively. But a main concern of green light writers is to minimise the influence of the courts. Courts, with their legalistic values, were seen as obstacles to progress, and the control which they exercise as unrepresentative and undemocratic. To emphasise this crucial point in green light theory, decision-making by an elite judiciary imbued with a legalistic, rights-based ideology and eccentric vision of the 'public interest' … was never a plausible counter to authoritarianism.

It should be noted, however, that a decision-maker may take a green-light approach in some instances but a red-light in others. In many instances it will be a combination of the two.

CONCLUSION

The Australian administrative law system is a system that is now underpinned by three broad principles:

1. *administrative justice*, which at its core is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded;
2. *executive accountability*, which is the aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and to justify the way in which they have gone about that task; and
3. *good administration*, which is the principle that administrative decision-making should conform to universally accepted standards, such as rationality, fairness, consistency and transparency.

ASSESSMENT PREPARATION

Review questions: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24

1 According to Justice Mason in *Peko-Wallsend*, the factors a decision-maker is bound to take into account are determined by construction of the statute conferring the discretion. What were the factors which the decision-maker was bound to take into account in this case?
2 In this case, the High Court also said that not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. What were some of the considerations that the decision-maker did not have to take into account in this case?
3 The High Court also said that when the decision-maker is a Minister of the Crown, due allowance may have to be made for the taking into account broader policy considerations which may be relevant to the exercise of a ministerial discretion. Is it possible to define the scope of the broader policy considerations?

Review questions: *Hicks v Ruddock* (2007) 156 FCR 574

1 Examine Justice Tamberlin's judgment and see if you agree with his logic and the ultimate decision which is reached.
2 Consider the dangers in allowing courts to resolve disputes which impact on 'non-justiciable' areas such as foreign affairs and national security.
3 Compare this case with the English case of *Abbassi* [2002] EWCA (Civ) 1598. Why were the circumstances in *Abbassi* distinguished from those in *Hicks*?