# Table of contents

- Public law 3
- Statutory interpretation 5
- Commonwealth judicial review 8
- Overview 9
- Justiciability 10
- Jurisdiction 12
- Standing 16
- Grounds of judicial review 17
- Procedural fairness 18
- Acting without power 22
- Acting for an improper purpose 24
- Mandatory relevant considerations 26
- Irrelevant considerations 28
- Unauthorised decisions 29
- Unlawful and inflexible policies 33
- Unreasonableness 35
- Mistake as to jurisdictional fact 37
- Error of law 40
- Consequences of breach 44
- Remedies 46
- Privative clauses 51
- Victorian judicial review 53
- Human rights protections 57
- Merits review 59
- Reasons 63
Public law

Introduction
Administrative law focuses on the executive branch of government and how best to regulate its activities.

It is driven by the principled assumption that those who exercise power should be subject to some form of external check on that power; that exercises of government power should not be unfettered.

A major part of administrative law deals with the exercise of discretion. The executive branch must exercise discretion as it applies law passed by the legislature, but how should this discretion be exercised within the confines of the law itself?

The need for administrative law
Louglin argues that the administrative state has expanded and that this has warranted the need for the development of administrative law.

Law has become more complex, and the decisions that administrative decision makers make are more complicated. Consequently, there needs to be something to regulate administrative powers and executive discretion.

Judicial review is the most used form of administrative oversight. Courts’ workloads have dramatically increased.

‘Systems’ of administrative law
Australia’s landscape of administrative law can be divided into two ‘systems’: one old and one new.

The ‘old’ system revolves around traditional common law prerogative writs. These writs still play an important role in administrative law where ‘new system’ administrative law has been expressly excluded from operation. These writs include:

1. writs of mandamus, which compel a public agent to exercise its discretion in accordance with the law;
2. writs of certiorari, which allow courts to quash the decisions of the executive; and
3. writs of prohibition, which forbid public agencies from acting beyond their power.

However, the ‘old’ system has disadvantages. The writs above can only be brought in higher courts, they are costly legal cases to bring, and standing issues prevent some applicants from bringing proceedings.
The ‘new’ system is encapsulated in the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (‘ADJR Act’). This is the produce of Commonwealth efforts to simplify, modernise and codify Australia’s administrative law, and it constitutes Australia’s ‘new system’ of administrative law.

Aronson argues that the new system is affecting the development of the ‘old’ system of common law writs. He also criticises the Act for it’s limited coverage.

Another criticism is that the ADJR Act does not address the changing nature of government in Australia. The increasing privatisation of government services. This means that many “government” decisions, are not made by the government at all, and do not constitute ‘decisions made under an enactment’.

**Administrative decision makers**

French CJ characterises those who hold the position of an administrative decision maker as holding the office ‘on trust’ for the public. Decision makers must exercise their power within the confines of the law and in the best interests of the public.

French CJ appears to applaud efforts to codify Australia’s system of administrative law (in the ADJR Act), but identifies Australia’s constitutional framework as also establishing a ‘minimum criteria by which… decisions and the process by which [decisions] are made, can be regarded as just and in accordance with the purpose for which they were conferred?’. French CJ sets out four standards:

- **Lawfulness** – decisions made by those empowered by law must be made lawfully, that is, within the confines that the law prescribes.
- **Rationally** – decisions must be logically open on the information before the decision maker.
- **Fairly** – procedural fairness is required in all administrative decision making (‘it is not an optional moral extra in decision-making’).
- **Intelligibility** – all decisions made should be accompanied with a statement of reasons sop that the person affected by the decision can know why it has been made.
Statutory interpretation

Overview
There are two general approaches to the interpretation of legislation and legislative instruments: the literal approach and the purposive approach.

Literal approach
The literal approach has been largely disregarded.

It looks to the ordinary meaning of the word to determine the meaning that the legislature is taken to have intended to give them (Project Blue Sky). The literal approach is defective, however, because it assumes that words only have one meaning.

Purposive approach
The purposive approach is the dominant approach used today. It interprets statutes and gives them a meaning based on the ‘mischief’ that the provision is intended to combat.

The purposive approach has been somewhat codified in Australia through s 15AA of the Acts Interpretation Act 1901 (and its state equivalents).

Section 15AA
In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

The provision instructs the court to choose an interpretation that achieves the Act’s purpose over an interpretation that fails to — even in the absence of ambiguity at first glance.

The purpose of an Act does not need to be an express statement (for example, in the ‘object’s section of the Act). A purpose of an Act may be inferred from a reading of the Act as a whole.

In Mills v Meeking, Dawson J commented on the impact of s 15AA and its equivalents:

“The purposes [of an Act] are to be taken into account in construing the provisions of [it], not only where those provisions one their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose of object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose... The approach of [s 15AA] requires no ambiguity".
Extrinsic material
Section 15AB of the Acts Interpretation Act 1901 sets out when extrinsic materials may be resorted to.

Section 15AB
(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

Subsection (2) of 15AB lists some of the extrinsic materials that may be used: reports of Law Reform Commission; report of Parliamentary committees; treaties or international agreements; explanatory memorandum; second reading speech; material from Senate or House debates.

Principle of legality
It is a presumption that the Parliament does not intend to interfere with fundamental human rights or common law rights; legislation will be interpreted to avoid such a reading (Evans v State of New South Wales [68]).

“We have applied a principle of interpretation in favour of that freedom which has been accepted by the Courts of this country since federation” (Evans at [7])

If Parliament does intend to legislate to reduce the freedoms and liberties of individuals it must do so in clear an unambiguous language.

Common law principles
There are a range of various common law principles used to interpret statutes.

• Words must be given their ordinary meaning (primary and natural significance) when not defined explicitly in the Act.

• All words must be considered in a provision: the court cannot assume that some are superfluous and disregard them accordingly.

• In a list of requirements in a legislative provision, the word ‘and’ is used conjunctively (all requirements must be present for the provision to take effect), and the word ‘or’ is used disjunctively (any one of the requirements may be present to enliven the provision).
• Words may be implied into statute where the ‘clear necessity’ test is satisfied: can only be done if the court knows the mischief the Act is trying to remedy, and the court must be satisfied that ‘by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved’, and ‘the court must be able to state with certainty what words Parliament would have used to overcome the omission’. (McHugh JA in *Kingston v Keprose*)

• The court will avoid statutory interpretations that permit a person to take advantage of their own wrong.

• The court will interpret statutes with a view to ensure their constitutional validity (*Evans* at [40]).

*Evans v State of New South Wales* — Evans argued that World Youth Day regulations were not authorised by the Act; cl 4 provided that various items could be sold without the approval of the government authority; cl 7 provided that persons who engaged in conduct that caused ‘annoyance’ to WYD participants could be asked to leave designated areas.

Court held that the Act did not impermissibly burden the implied freedom of political communication. Clause 4 was valid, but clause 7 was ultra vires.

• On the validity of clause 4, court looked to the stated purpose of the Act and the scope of the regulation-making power in the Act. NSW sought to argue that ‘distribute’ should be read in light of the purpose of the section. The court rejected this approach on the ground that ‘sale’ was juxtaposed with ‘distribute’ in the same sentence, suggesting that ‘distribute’ had a broader meaning than sale.

• On the validity of clause 7, it was invalid in respect of ‘annoyance’ because conduct that causes annoyance cannot be determined by the Act: it cannot be objectively determined.
Commonwealth judicial review
Overview

What is judicial review?

Judicial review is the legal mechanism for the review of executive action by the courts. It reviews the legality of administrative decisions made by the executive. If a decision is beyond the powers conferred on the administrative decision maker, it is legally invalid.

Checklist

- Is the matter justiciable? Must be a matter involving a real controversy relating to ‘some immediate right, duty or liability’ (McBain); a court’s decision must have a direct consequent for the rights and interest of the affected parties (Quin).
- Does the court have jurisdiction to review the decision?
  - Under what avenue is judicial review sought?
    - Constitution: s 75(iii)/(v) or common law
    - Statute: ADJR Act (Cth) or ALA (Vic)
- Does the applicant have standing?
- On what ground is judicial review sought?
  - Procedural fairness (natural justice)
    - Hearing rule
    - Bias rule
  - Power
  - Improper purpose
  - Relevant or irrelevant considerations
  - Identity of the decision maker
  - Unreasonableness
  - Jurisdictional facts
Justiciability

Judicial review
Judicial review is not a remedy for correcting all government error: justiciability is the ‘suitability for, or amenability to, judicial review of a particular administrative law decision or a class of decisions’ (Finn).

For an issue to be ‘justiciable’:

1. It must be a ‘matter’ which involves the existence of a controversy relating to ‘some immediate right, duty or liability’ which may be ‘quelled’ by the Court (McBain, Hayne J).

2. A judicial ruling must be capable of having a direct and immediate consequence for the legal rights and interests of a party (Attorney-General (NSW) v Quin, Brennan J).

3. There must be some ‘wrong’ which the court is capable of remedying.

An issue is non-justiciable where the plaintiff essentially seeks to extend the functions of the court into considering political issues or hypothetical matters (McBain, Hayne J).

Statute
This notion of justiciability is recognised in the ADJR Act.

<table>
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<th>Section 3</th>
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<td>“decision to which this Act applies” means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition) … under an enactment …</td>
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Common law
At common law, courts are left to determine what is and is not justiciable. Courts will consider: the nature of the issue; the plaintiff’s standing; the ground of legal error asserted; the nature of the relief claimed; or the time proceedings are commenced (McBain).

In terms of determining what is, and is not, justiciable at common law, Quin and McBain are instructive.

AG (NSW) v Quin — Quin was a magistrate; the government introduced a new court structure; most magistrates were in some way reappointed, but Quin was not; Quin sought to challenge the grounds upon which the AG refused to reappoint him.

Brennan J held that the role of the court is to pronounce the validity of executive action, citing Marbury v Madison (US): ‘it is emphatically the province and duty of the judicial department to say what the law is’. However, courts cannot make decisions on behalf of