I WHAT IS ADMINISTRATIVE LAW?

A Introduction

What makes up the content of the subject known as Administrative Law is not immediately obvious. This topic of law is a mess and boundaries are not clearly defined.

Primary focus is on the legal accountability of the executive branch of government (legal rules that regulate the conduct of the executive branch of government). The exercise of all public power must be justified by reference to some legal rule: normally a statute, but also the common law.

As you will discover on reading through the materials in this topic, administrative law only emerged as a discrete subject in Australia in the early 1950s. Administrative law’s status as a discrete body of law was historically contested, particularly by the hugely influential English academic Albert Venn Dicey (1835–1922). Dicey, for one, regarded the development of administrative law as a discrete body of law as politically undesirable and a threat to the rule of law. Many would argue that Dicey’s views retarded the development of a rational and effective system of administrative law in the Anglo–Australian legal world. Although, contra Dicey, administrative law is now well and truly established as an important and discrete body of law, the debate about the precise ambit of administrative law has continued up to this day.

AI is characterised by abstract concepts and general principles because it is concerned with a very large and diverse set of activities and functions. AI deals with large issues of institutional and constitutional design—two important abstract ideas are the supremacy of parliament and rule of law (see below).

B The scope of administrative law

An area of law that focuses on the executive branch of government

Primary Focus

- Medieval English origins of the prerogative writs ➔ Craig (re: jurisdictional error); Kirk (State privative clauses)
- The origins were about the capacity of the superior courts to supervise the decisions made by inferior courts. It was the judiciary supervising the judiciary
- AI is much older than the separation of powers; this was an 18th century concept that came into Australia with federation and the writing of the constitution.
- Even though the primary focus is on accountability, it’s not the exclusive focus. We can still use remedies to bring magistrates and inferior court judges to account in superior courts.

The word ‘administrative’ refers to the separation of powers ➔ based on two propositions

1. Not allow too much power to be concentrated in the hands of one individual/institution
2. That those that exercise power should be subject to some form of external check.
Administrative law is concerned with providing an external check on the exercise of power by the executive branch of government

Executive:

Separation of powers (e.g. Boilermakers’)

Public law = the government. We can divide this into three arms
- Legislature
- Executive
- Judiciary

What is the Executive?

- The executive administers the laws. Defining who is in the executive isn’t easy to do
- ‘Executive’ includes not only the government department headed by a minister but also the statutory corporations that perform the functions of the state and the private non-governmental bodies who run the previous public assets/services → take a broad approach to administrative law extending it’s principles and values to all entities concerned with ‘public functions’

Institutional approach (traditional approach – Australian approach): to think of the executive as an institution. Basically one big pyramid...
- Cwth hierarchy
- Gov Gen, who’s the formal head
- Gov in counsel – the Gov Gen and the ministry
- Ministers appointed by the Gov Gen to run the government (cabinet)
- The various heads of government departments (secretaries or heads of departments) who are responsible to the ministers
- The vast array of public servants

- merging of the two concepts (in Aus) AL norms applied only to decisions made by those that were part of the formal institutions of executive government – this means that the reach of the admin law diminishes as the state increasingly relies on private entities

Functional approach (big in UK, but not so much in Australia). This looks at whether they’re performing a public function, rather than the actual government as an institution

- Clear distinction between public/private with separate institutions (Eng) – focus is on whether or not the decision maker exercises a public power or function.

Datafin case (see below) symbolises the functional turn in English law – no consensus whether this defines the law in Aust (see Neat)

No one system is a pure form of either.

Datafin can be contrasted with the ADJR Act, which was supposed to simplify and improve the law of judicial review in Australia

ADJR Act:

1. Gives a sense of the main sorts of general questions that arise in applications to have admin decisions reviewed
2. Provides an interesting contrast to the general approach taken in Datafin
3. Where judicial review has a statutory/constitutional basis the courts’ ability to conceive of judicial review in functional terms is limited by these terms eg: HC’s original jurisdiction under s 75(v) to engage in review is limited to matters in which particular remedies are sought, also the language also limits the extent to which judicial review can be conceived in functional terms

About ‘governance’ (certain activities and functions) rather than about control of government (certain institutions)
→ about controlling activities
→ ensuring that public functions and activities are performed and conducted in the interests of the public at large rather than the partisan interests of a particular group
→ exercising public power in the public interest (contrast private power for personal interests)

‘Legal’ accountability

Legal accountability isn’t the only form of accountability. AL is a way in which the executive arm of Gov may be held legally to account. There is also political accountability – ministers are responsible for the actions of their department. Another form is economic accountability, which is very relevant when it comes to privatisation – this is the idea that we don’t need legal accountability because now the public sector competes with the private sector. The other aspect is bureaucratic accountability – if you think about the public service, you would expect a person who stuffs up to be held accountable within the bureaucracy (mechanisms in place to hold people accountable and rectify problems).

We’re focused on legal accountability; however there is an interaction between the different accountabilities. Sometimes more emphasis is placed on one more so than others.

Generic subject embraces host of specialist areas e.g. migration (visas), Youth Allowance, planning & environmental decisions, tendering for public sector contracts → challenging ‘public’ decision making

Primary concern is with the role of the law in constraining and controlling the conduct of governors in their dealings with the governed

Shift in the function of the state → Privatisation

Idea away from the state being responsible for the care of its citizens ‘from cradle to grave’ and a move towards privatisation

Said to be a response to budget deficits and mounting public debt, inefficiencies of government and loss of faith that governments could meet the expectations of citizens

‘Privatisation’ manifold processes and techniques by which governments have readjusted the balance between private and public activity in the economy
- UK/Australia understood narrowly as a change from public to private ownership. UK public utilities were initially privately owned, then nationalised then reprivatised → shows 1. what is a government function is socially constructed/society specific 2. economic theories grounded in large open economies may not work in smaller closed economies
3. has been lots of private sector involvement in the provision of public services for a long time

- US little history of federal ownership has a broader meaning encompassing the performance of public functions by private contractors

→ Previous government businesses are then free from the ‘shackles’ of public law accountability/mechanisms

On corporatisation one or more of the following threads of ‘publicness’ are diminished/eliminated – judicial review/bill of rights/FOI legislation, centralised financing audit and executive/parliamentary oversight etc

→ Deregulation

Regulation = direct government intervention in the market place
Deregulation = lessening/removal of some/all regulation

Arises from the concept of a free market economy where willing buyers/sellers trade goods/services/money and the role of the state is simply to enforce agreements → the free market reflects the natural order → regulation can only be justified if the market fail → deregulation leads to competitive benefits

→ Contracting out

Oldest form is the ‘procurement contract’, newest is ‘contracting out’ functions of the public service with the state taking responsibility for performance

1. Funding can be split from service delivery with disadvantage – splits the decision about what to fund from the responsibility of delivering it
2. Private sector provision is more efficient/cost effective
3. Gives rise to a triangular relationship between government (purchaser), private sector provider (provider) and recipient (customer) → how do you ensure accountably/control?

Problem: How do you best categorise government contracting? Through private contract law or through contract but modifying the remedies in respect to the difference between state/individuals? Or apply the administrative law doctrine and remedies to prevent unfairness and abuse of power.

Problem with this shift raises issues of control accountability in the exercise of those powers

Distinction between ‘private’ and ‘public’ law
What did Dicey think of the distinction?

Sharper distinction between public and private law (in Eng)

- Private law: relations between citizens
- Public law: relations between governors and the governed

Dicey believed that the best way to control government power was to subject public officials to ordinary private law (esp tort and contract) → denied any justification for the distinction between the two
reacting against the French system which went the other way and established a court to hear only complaints about the government

Dicey thought that ‘special’ law dealing only with the government were a form of special privilege and lawlessness

reliance on private law remedies, based on the fear that if the state is treated differently it will eventually be treated more favourably

Opposing view:

firm distinction between the public and private

public law values will disappear in a rush to the market

public law duties should be more burdensome on the state and its agents because of the state’s monopoly on coercive power

Although Dicey’s beliefs did not accurately reflect what was actually occurring in England at the time

Crown was immune from tort action and tribunals arose to deal with disputes between citizens and the state BUT his views profoundly influenced that legal thinking of the time

It was only in the 1960’s that the administrative law ‘took off’ in England with some leading cases, where the House of Lords showed a new willingness to exercise control over executive decision making

In Australia the birth of administrative law was really with the 1971 Kerr Committee Report → influenced by the English case developments of the 60’s and leading to...

- codification of the grounds of judicial review of administrative action in the Administrative Decisions (Judicial Review Act 1977 (Cth) (ADJR)
- establishment of the Administrative Appeals Tribunal (AAT)
- office of the Commonwealth Ombudsman
- enactment of the Freedom of Information Act 1982 (Cth)
- emergence of the Federal Court as the leading administrative law forum

Distinction between public/private law less distinctly drawn in Aus → there is no distinction between public law courts and private law court → both state and federal courts will adjudicate disputes between citizen/citizen and citizen/state

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R v Panel on Take-overs and Mergers, Ex Parte Datafin PLC [1987] CofA (UK)

Pls note:

The judicial review jurisdiction of the courts was first developed by the common law. This source of review jurisdiction is often referred to as ‘supervisory’ or ‘inherent’ jurisdiction

The courts’ supervisory judicial review jurisdiction developed through the provision of certain remedies which were called ‘prerogative writs’, one of which was called ‘certiorari’ The legal effect of certiorari is to ‘quash’ (that is nullify) a decision.

The UK decision in Datafin determined justiciability through the governmental nature of power exercised, rather than the source of the power (i.e. statutory authority).

Facts: The Panel on Take-overs and Mergers was an unincorporated association, whose members were appointed by various non-government organisations that participated in the financial and
The securities industry. The City Code devised by the panel provided that a material breach, as found by
the panel, could result in a private remand or public censure. Datafin complained that other
companies had acted in breach of the code. The panel investigated but rejected the complaint,
whereupon Datafin made an application for leave to apply for judicial review of the panel’s decision.

**Held:** The Court of Appeal held that the courts had jurisdiction to undertake judicial review, but
dismissed the proceedings on the ground that no legal error had been committed by the panel.

→ The panel lacks legal authority but exercises immense power de facto by applying the City Code
on Taker-overs and Mergers and the sanctions they apply are no less effective because they are
applied indirectly and lack a legally enforceable base.

→ The source of power should not be the sole test of whether a body is subject to judicial review.
The *nature* of the power is also significant. If the body in question is exercising public law functions,
or if the exercise of its functions have public law consequences, then this may be sufficient to bring
the body within the reach of judicial review.

→ The panel operates wholly in the public domain and performs an important public duty and
therefore should be subject to administrative law and judicial review.

In practice, even if the decisions of the panel were subject to judicial review, why would aggrieved
person find it difficult to get a remedy?

1. Would require a speedy decision that could be relied upon in the market but the decisions of
the panel would remain in force until/if allowed leave to review
2. Decisions can still be refused application to set aside if in the public interest not to
3. The panel’s function can be seen as both legislator, judicial interpreter, consultant, court
investigator and imposer of penalties. It sets down the general principles – little scope for
the complainant to assert that the rules made are ultra vires. It interprets its own rules with
great latitude as well

The decision in *NEAT* is the closest the High Court has come to addressing the issues illustrated in
*Datafin*.

**NEAT Domestic Trading Pty Ltd v AWB Ltd**

**Issue:** Whether a decision by a private company that had statutory effect was a decision that was
reviewable under the *ADJR Act*.

**Held:** The Court found that the jurisdiction under s 39B was not available because the company was
not “an officer of the Commonwealth” however some members of the Court alluded to the broader
issues, by discussing both the availability of public law remedies against a private company and the
application of the grounds for judicial review to an exercise of private power.

→ “When a statute confers a discretionary power which is capable of affecting rights or interests,
the identity and nature of the repository of the power may be a factor to be taken into account
when deciding what are intended to be matters that must necessarily, or might properly, be
considered decision-making or whether it is intended that the power is at large.”

→ Whilst the company is not a statutory authority, to describe it as representing purely private
interests is inaccurate because it holds a virtual statutory monopoly on the export of wheat, which is
also in the national interests.

→ Their Honours found that the company was under no duty imposed by the Act to consider
“public” considerations when making decisions to grant or refuse export approval. Kirby J dissented,
finding that the company’s refusal to grant consent was a decision of administrative character and
therefore was made pursuant to governmental or statutory authority.
When we refer to administrative law, what do we mean by the word ‘law’?

‘Law’ to control the exercise of power by governors over the governed

Statutes and decisions of appellate courts (esp Fed and HC) are the two main sources of relevant rules and principles

BUT do not interpret too narrowly because the exercise of government power is framed, influenced, structured and guided by a plethora of rules/principles that are not ‘legal’ in the strict sense → policy, administrative rules, informal rules, codes of practice, guidelines and so on → many times these are indistinguishable in form and content from rules that have the full status of laws

‘Legal’ and ‘regulatory’ approaches to administrative law

- Regulation: the deliberate attempt to influence human behaviour
  → one of the major functions of government
  → see admin law as a form of regulation
  → focus is on the influencing future behaviour and consequences / unconcerned with past action
  → think in terms of a system with three components
    1. Set of standards that announce how people ought to behave
    2. A mechanism to monitor compliance with those standards
    3. Mechanism for promoting future compliance
  → main purpose of admin law is to influence the way decision makers exercise their powers
  → effectiveness judged primarily by its effect on bureaucratic behaviour
  → typically have limited ‘social’ goals (protect the environment, improve education etc)
  → understands that the law is only one tool for influencing behaviour (eg education)
  → compares and contrasts accountability techniques to measure effectiveness, think in terms of ‘institutional design’ and the horizontal relationships between various institutions and accountability measures

- Legal: focus is on the law and legal institutions
  → regulation of behaviour is only a subsidiary goal of this approach
  → primary concerned with providing complainants with redress for past breaches and on holding decision makers accountable for breaches
  → ‘expressive’ role of embodying and thereby promoting certain values like legality, rationality, procedural fairness etc
  → not to say it cannot promote future improving of standards
  → effectiveness judged in terms of the acceptability of the values it embodies and expresses and its ability to provide redress
  → promote ‘process’ values (fair procedure and governmental compliance)
  → focus is more on accountability in term of the vertical relationship between the governor and the governed, rooted in the concept of the rule of law

Lawyers typically see admin law negatively in terms of constraints and limitations imposed on the achievement of regulatory and other social goals, rather than positively in terms of promotion of such goals

Components of Australian administrative law
There are around four different components

(i) ‘Judicial review’; the mechanism by which a court or a judge holds the executive to account. This is where most of the law is, so raises the most complicated legal questions

(ii) ‘Merits review’ & ‘internal review’; There are roughly 500 applications for judicial reviews each year in the federal courts. There are about 20,000 merits review applications (AAT) each year. The clear distinction between judicial review and merits review is made in Australia, although it may be thought of as blurred.

Differences between (i) and (ii): ‘correct or preferable’ decision;
- When a judge judicially reviews a decision, they are looking for an error of law. When it comes to merits/internal review of a decision, the reviewer is concerned about whether the decision being made was correct or preferable

- Separation of Powers: In Australia, at least federally, only judges can judicially review an administrative decision. Also, judges can’t engage in merits review in Australia – this separates the powers (not constitutional). Internal/merits review is usually done within government parties or tribunals (eg – Youth Allowance, if rejected, you ask for an internal review)
- Relevance of ‘soft law’ (e.g. policy; guidelines; codes of practice; Ministerial directives) to merits & internal review.

(iii) ‘Integrity branch of government’ e.g. ombudsman; Freedom of Information legislation; ‘whistleblowers’; Independent Commissions Against Corruption

(iv) Private law; This looks to pursue public law objectives

II HISTORICAL AND CONSTITUTIONAL CONTEXTS

A Introduction

In AL, history is still alive. History informs and influences the content of our main statutory system of judicial review of administrative action (‘the ADJR Act’) and its various ‘clones’ in some of the States, and history helps us to understand and determine the meaning and operation of key provisions in the Constitution, such as s 73(ii) and s 75.

Moreover, the historical ‘common law’ (or perhaps more accurately the ‘general law’) AL remedies are by no means dead and buried. All in all, AL in Australia is an extremely complex maze of common law, equity, statute law and constitutional law. As Cane and McDonald state at the end of Chapter 2 in PAL, ‘[i]t is no exaggeration to call the law of judicial review in Australia a mess and a quagmire’.

Australian ‘hybrid’ system. We were assumed to be terra nullius, so we received the English system of law in 1888. Up until 30-40 years ago, Australian and British law were very similar.

British Inheritance

Colonisation by the British saw an adoption of all the existing laws of England. The lack of formal institutions and the unique situation that the original settlers found themselves in were not conducive to a straightforward adoption and implementation of a highly developed set of laws.

The Australia Act 1986 saw any remaining right of appeal to the Privy Council abolished and Aus
courts were not obligated to follow UK decisions. As the amount and sophistication of Aus common law increased, deference to Eng decisions has become less common/necessary.

Mixture of imitation, adaptation, reaction and innovation.

**Responsible Government**

The idea that in the ‘Westminster’ system the executive is politically accountable to the members of parliament. The executive here is appointed from people who are members of parliament. This is in contrast to the US system where the president is elected by members of parliament.

- **Collective ministerial responsibility (CMR)** = collective responsibility is constitutional convention in governments using the Westminster System that members of the Cabinet must publicly support all governmental decisions made in Cabinet, even if they do not privately agree with them. This support includes voting for the government in the legislature.

- **Individual ministerial responsibility (IMR)** = in governments using the Westminster System that a cabinet minister bears the ultimate responsibility for the actions of their ministry or department. Individual ministerial responsibility is not the same as cabinet collective responsibility, which states members of the cabinet must approve publicly of its collective decisions or resign. Where there is ministerial responsibility, the accountable minister is expected to take the blame and ultimately resign, but the majority or coalition within parliament of which the minister is part, is not held to be answerable for that minister's failure.

IMR allows the legislature to exercise a measure of control over the executive without threatening its existence.

In terms of AL, IMR is more significant than CMR because:
- A theme underlying AL theory is a distinction between legal and political accountability, meaning that the role of legal institutions is to enforce accountability in the name of the law, not polity.

This has probably had an adverse impact on the development of AL (the idea is that because we have political accountability built into the ministerial system, and because the parliament is politically accountable, we don’t need to worry so much about legal accountability). This is one reason why AL in the Anglo-Australian world is much less developed historically than it has been in other legal systems, such as in continental Europe.

Collective ministerial responsibility hasn’t had much impact in its own right upon AL, except perhaps in one aspect. We have a system of government where ministers as a group meet as a cabinet and deliberate, making various decisions. The cabinet deliberates in secret, you have to play by the rules and become a team player. If you can’t support the decisions, you have to resign as a minister. When it comes to judicially reviewing administrative decisions, courts are reluctant to review administrative decisions that were made at the very peak of the hierarchy. This is the notion of non-judiciability. This tradition is stronger in England than Australia.

Individual ministerial responsibility is far more important because the notion that ministers are individually responsible for the conduct of their departments has retarded the development of AL.

**Supremacy of parliament**

Implications: (Dicey’s view)
- In a conflict between statute and common law, statute prevails
- Parliament is free to enact whatever law it chooses
- No Act of Parliament can be challenged in the court based on invalidity/unconstitutionality
- No Parliament can bind its successors

**Diceyan conception of Rule of Law**
Albert Venn Dicey (1835-1922) was a Vinerian Professor of English Law at Oxford; he wrote a very influential book about English Common Law - *Introduction to the Study of the Law of the Constitution* (1885) influential when our Constitution was being created.

He said a number of things about the rule of law that have had an enduring effect upon our system of Constitutional law. Dicey praised the British constitution on four grounds:

1. Excise of power by government over citizens was constrained by clear rules of law
2. Those laws were applied/enforced by ‘ordinary’ courts rather than ‘special tribunals’ – meaning that they are protected from external influence and the principle of judicial independence (unlike tribunals)
3. The rules that constrained exercise of power by government were the same rules as regulated the conduct of citizens
4. Rights of citizens were protected by the ordinary law rather than a ‘higher law’ (or bill of rights’)

One thing he didn’t like was the idea that the executive or the government could exercise power arbitrarily or in an unfettered fashion. That idea has had a strong influence on judicial review, judges also don’t like the idea of ministers having an unfettered or arbitrary discretion.

When you look through cases, and read the statute, which confers the power on the administrative decision maker, you’ll see it’s couched in very broad terms (...in his/her discretion grant a licence...). Judges will say that that power cannot be exercised arbitrarily or in an unfettered fashion. Exercise in good faith, natural justice, not so unreasonable etc. This is consistent with the Dicey system.

Some people would say the following had a negative affect on the Australia system of law. This is the point that there should be Equality before the law i.e. same law for governors and governed, administered and enforced by independent judiciary contra public law/private law divide; but the next stage for Dicey was that we should have the same law applying to everyone. He felt there was no need for special laws to deal with government. He didn’t like what was happening in France, they had developed an administrative law that just applied to public officials - *droit administratif* and *Conseil D’Etat* (French). His response was to use private law eg: to sue the person in trespass.

This hampered the development of Administrative Law in Australia. Up until 1950 no-one talked about AL or public law. It wasn’t until Wolfgang Friedmann, Melb Uni, wrote the first book about AL - *Principles of Australia Administrative Law* (1950) that we had the first textbook and university course.
AL is now a huge area and recognised as part of the curriculum.

Dicey dislike the idea of specialist courts and tribunals, taking aim at the French. He wanted to make sure there were courts of general jurisdiction. He also didn’t like the establishment of tribunals as he felt they compromised judicial independence. He felt if you set up a specialised court it would be captured in some way and seek to make decisions which justify its decisions (see e.g. Heydon J’s dissents as to the orders in *Kirk*).

Heydon talks about the industrial court in NSW and is very critical because he believes it’s been
captured by the agencies who prosecute OHS offences in NSW and isn’t exercising justice impartially.

*Australian Constitution* – note that there are no specialist courts in the Constitution. We had to wait until 1976 for the Federal Court (1976), which isn’t really a specialist court but is the closest thing, and then until 1975 for a specialist Administrative Appeals Tribunal (‘AAT’) (1975).

Dicey was very hostile towards the notion of Bills of Rights or top-down human rights instruments. He thought the best way to protect rights was to allow ordinary citizens to go to general courts to enforce the law. This was a bottom up remedy. This has had a huge impact on our system of law; it means that you can’t go to a federal court and ask for judicial review because it breaches your personal rights. Virtually everywhere else in the world, UK, NZ, Canada, you can do that. We can’t do it because we don’t have a broad Human Rights instrument. This instrument radically changes the way AL works.

Victoria does have a charter, but we don’t focus on this.

Dicey’s influence in the drafting of *Constitution* is evident with the lack of recognition of administrative law except for s 75(v), there is no reference to tribunals, administrative courts, and the Constitution contains limited rights

**Prerogative Writs & Equitable Remedies**

One of the most important things we inherited from the English was the system of prerogative writs. This is historically relevant as it forms the background to AL, but is also relevant now as the writs still exist. These writs began in the medieval period, as a *tool of governance*.

They were a document containing orders/instructions sent by one government official to another. Writs were commonly used by central government (both executive and courts) to communicate with local functionaries.

There were many types of writ, with names that referred to the order or instruction. Eg: Habeas corpus, instructed a jailor to release a prisoner who was being unlawfully detained.

In the middle ages these writs began to be used for admin purposes and in the 17th century the Court of the Kings/Queen’s Bench began to use them as a technique for controlling the unlawful conduct of officials – they gradually replaced actions for damages in tort as the principle technique by which the common law courts provided remedies for government lawlessness.

In the 19th century these ‘local official’s’ functions came under the control of the central government to which the prerogative writs then applied. In the 1960’s it was finally settled that they could be used to challenge decisions made personally by minister of state. UK became unhappy with the system and in 1977 streamlined public law matters essentially excluding ‘public law matters’ from this system. The older and newer models sit side by side in Aus creating an extremely complex picture.

- Relevance today:
  - Commonwealth jurisdiction and orders ‘in the nature of…’ (e.g. Victoria);
  - Established the position of a superior court which had judicial scrutiny re error of law;
  - ‘Manifest’ legal error or error of law ‘on the face of the record’. The record doesn’t include the transcript of the decision, so no record of what was said, what evidence was led, or the reasons the magistrate came to etc. This meant it was a limited scrutiny of lower courts
Eg: you’re convicted of theft, the magistrate won’t hear from you because you have red hair, if you were unhappy with the decision, the problem you have is the record only discloses the fact that a charge of theft was brought against you, and you were convicted. The record doesn’t include the miscarriage of justice

Eg: if someone accidentally files your charge as murder, and you’re convicted and seek a writ of certiorari – you would expect the record would show you were charged for murder, and lower courts aren’t allowed to hear murder charges

Certiorari
➢ Ordered its 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 its addressee not to make some (unlawful) decision or perform some (unlawful) action

Eg: local magistrate prohibited from hearing cases of murder which was filed in a local magistrate’s court
➢ The charge cannot have been heard already

Mandamus
➢ Ordered its addressee to make some decision or perform some action required by law
➢ Comes from the Latin word mandatory – to order

More complications

‘Jurisdictional’ error of law: when it comes to prohibition and mandamus, an error of law isn’t enough. In order to obtain prohibition or mandamus, you need to be able to establish a jurisdictional error of law. One of the problems is that no-one knows what a jurisdictional error of law is, as opposed to a mere error of law.

In England, they’ve abandoned the system (see above). Kirby’s view was that it should be interred immediately, without tears. An error of law can encompass a minor error, a jurisdictional error of law is a serious mistake.

Eg – you go to Centrelink and apply for unemployment benefits after you’ve graduated. When you complete the form, it turns out you fill in the wrong form. You’re assessed as eligible, as you meet all the criteria. Although this might be a legal error of law, it’s not a jurisdictional error of law
Compare this to a magistrate who’s not allowed to hear murder charges, yet still does. This is a jurisdictional error of law

This developed into these writs being used against JP’s, and civil servants. This then commenced the development of Cabinet Government & centralised civil service in 19th cent. → which followed with the application of writs to public servants and public corporations, which is a recognisable system of AL.

‘Formulary system’ of pleading, it was very technical and had numerous rules e.g. requirement of ‘judicial function’- re certiorari; mandamus & the requirement of public duty. The reform the of 1870’s (Judicature Acts 1875-77), was never done in Australia.
Prerogative writ procedure is OLD: decree or order ‘nisi’ obtained ‘ex parte’ → hearing where respondent must ‘show cause’ → order is then made ‘absolute’ (win) or ‘discharged’ (lose); prosecutor/applicant; respondent e.g.

**R v Kirby; Ex parte Boilermakers Society of Australia.**

This was a prerogative writ case. The BSA was seeking a writ of prohibition in the HC. The ex Parte bit – people seeking the writ (prosecutor of applicant). You apply to issue a writ against Kirby/Queen and others.

Orders: BSA won.

The deployment of equitable remedies (e.g. declarations and injunctions) in public law developed to avoid technicalities of prerogative writs.

**US Heritage**

The federated commonwealth is based on the US system. The Aus constitution is based on the Us model – including the separation of powers in three distinction chapters at the start. Despite the US influence, the idea that there is a separation of powers to protect the individual from abuses of government power and to uphold the rule of law (Dicey’s view) permeates Aus AL law at both the state and federal level.

**Colonial Heritage**

In 1823 NSW established the Legislative Council. Before a law was laid before the Council the Chief Jusitce had to verify that it was consistent with English law so far as the circumstances of the colony permitted – a form of judicial review. With the establishment of the Colonial Laws Validity Act 1865 (Imp) (and the establishment of responsible government) the consistency requirement was removed and judicial review was replaced by royal assent.

Colonial legislatures were given wide powers to legislate over their territory but could not pass laws that operated outside their territory or conflicted with UK statutes that operated in the colonies. The colonial legislatures enjoyed the sort of freedom Dicey celebrated – except for the ACT and Vic no colonies/states had enacted a bill of rights and in no jurisdiction does any court have the power to strike down legislation for incompatibility with a protected right. This lack in Aus of a formal protection of human rights arguably reflects a view that the role of judges and courts in controlling the other branches of government should be limited.

Contrast with US position – where citizens may apply to the courts for breaches of their human rights in the Constitution.

**Prerogative Writs**

➢ We don’t really know much about the use of them in judicial review of executive action but we know that the colonial legislatures created statutory remedies that were similar. Certainly they were used in Vic a lot to control the activities of judicial officers (jp’s and magistrates) but also ministers of state and admin and regulatory boards/agencies. It seems that local judges pretty much stuck by Eng authority when granting/refusing applications for public law remedies.
Colonial courts made no attempt to alter fundamentally the formal nature of the writs and the Judicature Acts of the 1870’s left them untouched.

**Responsible Government**

- NSW granted in 1855 – bicameral legislature, critical section s 37 drew a distinction between two categories of public officials: ones liable to retire from public office on political grounds and others that were not – determining how they were appointed and essentially establishing responsible government. A central plank being the principle that the non-political head (GG or G) acts on the advice of the government (not written down but convention).

- In colonial times the CMR was more important than the IMR because political parties as we understand them today had not developed.

**Prerogative writs system in England: A problem develops**

- Prerogative writs were closely aligned with royal control of the government machinery. As royal power waned many governmental functions were transferred to the executive and there was a clear distinction being drawn between the Crown (ministers of state and government departments) and the monarch.

- In the 19th century as many of the functions of local officials were transferred to a central government the use of prerogative writs was unproblematic BUT their use against the Crown was ridiculous because the situation was that the Crown was attempting to control the Crown by apply for a royal writ from one of the monarch’s judges.

- This wasn’t a problem is Aus so much because a. by colonization royal power had waned significantly b. distance meant a lot of practical freedom and independence c. it was a large country with a small economy/population and the government perform more functions d. G-I-C did a lot and e. local government was slow to develop.

- In terms of judicial review it seems they were quite willing to subject the G-I-C and colonial minister to judicial review.

- Recently the HC has held that the remedies of mandamus and prohibition are available under s 75(v) of the Constitution and are ‘constitutional’ rather than ‘prerogative’ writes because they act to enforce the rule of law (not the power of the monarch) and are available for use against all officers of the commonwealth, including ministers.

- Superior court judges in England are not amenable to judicial review BUT Aus judges of superior courts **ARE R v Commonwealth Court of Conciliation and Arbitration: Ex parte Whybrow & Co (1910)** – except for those of the **HC Federated Engine Drivers’ and Firemen’s Association of Australasia v The Colonial Sugar Refining Company (1916)**

**Post Federation**

**1901-1970**

- Federation essentially created a new constitutional arrangement by establishing a one legal system and a complex set of relationships between it and the six existing colonial legal systems. There were now two layers the federal (federal law) and the state (state law) both having AL law. The layers were connected in three ways:
  1. Fed law could be conferred in state courts
  2. HC could hear appeals from state courts on matters of state and federal law
  3. Privy Council could still hear appeals from fed/state on both fed/state law and bind all Aus courts

- HC and Privy Council could therefore lay down rules of common law that applied to all states. There was an overlap of jurisdiction in the constitution where inconsistencies went in favour of the fed law s 109
Federalism means legalism in the sense that there was a predominance of the judiciary in the constitution— the prevalence of a spirit of the legality among the people (Dicey). Federalism necessarily ‘legalises’ issues about the allocation of power, that in a unitary system, either do not arise or can be resolved politically, without recourse to law.

s 75(v) of the Constitution: confers on the HC original jurisdiction ‘in all matters...in which a writ of mandamus or prohibition or an injunction is sought against an officer of the commonwealth.'

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 75 ‘Original jurisdiction of High Court’
In all matters: (i) arising under any treaty; (ii) affecting consuls or other representatives of other countries; (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; (iv) between States, or between residents of different States, or between a State and a resident of another State; (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.

s 75(iii); confers in the HC ‘original jurisdiction’ in all matters...in which the commonwealth, or a person suing or being sued on behalf of the commonwealth, is a party.

- View that s 75(iii) is broader in scope than s 75(v), and that s 75(v) was only inserted merely to remove any risk that the more general provision might be interpreted as not conferring jurisdiction to award the remedies enumerated in the narrower provision
- The effect of s 75(v) – which provides the prima facie basis for judicial review – is to provide for a measure of judicial control of officers of the commonwealth which the legislature cannot remove

SECT 73 ‘Appellate jurisdiction of High Court’
The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences: (i) of any Justice or Justices exercising the original jurisdiction of the High Court; (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council; (iii) of the Inter- State Commission, but as to questions of law only; and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

SECT 77 ‘Power to define jurisdiction’
With respect to any of the matters mentioned in the last two sections the Parliament may make laws: (i) defining the jurisdiction of any federal court other than the High Court; (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;