3017LAW – Administrative Law

Exam Notes
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WEEK 1: THEORIES OF ADMINISTRATIVE LAW & CONTEMPORARY PROBLEMS IN ADMINISTRATIVE JUSTICE

KEY CONCEPTS - SUMMARY

**Administrative Law:** The branch of the law that establishes, empowers and controls the agencies through which the state operates.

**Statutory Power:** Where the source of an executive entity’s power lies within an Act of Parliament.

**Public / Private Divide:** A legal theory concept that categorises social and political institutions and different branches of law as either ‘public’ or ‘private.’ Public institutions are the obvious parts of government (courts, police, parliament, departments). Public law is the law that sets outs the powers and limits of these institutions; namely constitutional law and administrative law. Private institutions are generally seen as everything else (for example, corporations and the family). Private law is therefore defined as all the other areas of law. Some good examples of private law are contract law or property law. The problem with the public/private divide, like all dichotomies, is that it breaks down in hard cases. Is Griffith University public or private? What about Australia Post (a company wholly owned by the Commonwealth government)? What about the National Australia Bank?

**Prerogative Power:** Where the source of an executive entity’s power lies in the common law, and as such is unwritten. The origin of prerogative powers is in the traditional power of the ‘Crown’ as recognised by the common law to undertake the business of government. Most prerogatives have been codified by statute. There are two important ones remaining: the prerogative power of the Crown to enter into contracts and own property, and after the controversial *Tampa* decision, the ‘nationhood’ power to maintain borders. It is important to be able to distinguish between prerogative power, statutory recognition of prerogative power, statutory displacement of prerogative power, and statutory regulation of prerogative power.

**Responsible Government:** The Westminster system of responsible government is an attempt to reconcile a monarchical form of executive government with representative democracy. The system developed in England over several hundred years, during which the Crown retained many of its original formal powers, but in practice became more and more subject to the control of Parliament. The key changes occurred in the nineteenth century with representative democracy’s emergence. While the principles of responsible government were never codified in a written constitution, over time they achieved some kind of higher, ‘conventional’ status. The exact nature of these conventions has never been satisfactorily resolved, but there is sufficient consensus amongst the relevant political and legal actors to state most of them with certainty. Responsible government was introduced into the Australian colonies in the second half of the 19th century, almost simultaneously with its full development in England. The framers of the Australian Constitution clearly intended to adopt the Westminster system at the Commonwealth level, but did not spell out its detail. Several reasons have been suggested for this, including a desire to avoid introducing rigidity into a system that was still developing, and a desire to not look like unsophisticated colonials who needed to spell out what all gentlemen of politics understood. For the purposes of our study of administrative law, the key principle of responsible government is that the Crown is obliged to exercise its formal constitutional and legal powers only on the advice of ministers having the confidence of the lower house of parliament. Through this the executive is made responsible to the parliament, hence the name ‘responsible government.’
**Rule of Law**: refers to the political and legal principle that all of society should be subject to legal rules. Rule of law is considered the opposite to the arbitrary rule of an individual. In administrative law the rule of law manifests itself in the availability of judicial review to take the executive to the courts and have it justify its actions according to legal standards.

**Separation of Powers**: is the political and legal principle that the work of government can be broken into three distinct tasks (making law, administering the law, and deciding controversy according to law) that should be housed in three separate institutions (the legislature, the executive and the courts). Furthermore, the principle of the separation of powers claims that each of these institutions should be independent of each other. The underlying political justification for the separation of powers is that it avoids tyranny by ensuring that the different branches of government check the abuses of the other branches. The extent that the separation of powers is manifest in Australia’s system of government is complex. As discussed in *Introduction to Public Law*, responsible government is a clear breach of a pure conception of the separation of powers doctrine. At the Commonwealth level the High Court has read that the Constitution does provide for a separation of powers, at least in relation to the separation of the judiciary from the other branches of government. In this narrower sense it can be said that the separation of powers is a legal principle which is enforceable in the courts. However, the separation of powers doctrine provided for in the Constitution has only a relatively limited effect on the actions of state governments. Therefore, at the state level, the separation of powers is an ideal aspiration rather than a constitutional requirement.

**Participation / Accountability**: are linked to notions of democracy – simply that in a democracy the citizens should participate in government and that the government should be accountable to the citizens. For many writers in the social sciences, the more a system of government provides for mechanisms of participation and accountability, the more it can be said that the government is a democratic one.

**Efficiency**: refers to the optimal use of resources consumed to do a certain task or achieve a certain end. Given the limited resources available in a society, the business of government requires decisions to be made about how to allocate such resources. Since 1980s the cost of government has been a significant political issue in Australia. Privatising GBE (see below) and contracting out of government services have often been presented as measures which increase the efficiency of government.

**Human Rights**: refers to the political belief that all humans (regardless of their status as citizens) deserve a certain level of respect and treatment. Australia does not have judicially enforceable human rights. In the context of administrative law many consider that significant human rights are, access to information, the right to trial before detention, and due process in decision making. For writers on human rights a government fosters human rights if in its day-to-day operation it respects the basic rights of all persons (citizen or non-citizen). Human rights are often conceived as falling into one of two basic categories: negative and positive rights. Negative rights refer to those entitlements which are absolutely vested in an individual and no entity can interfere with (such as the right to bodily integrity). Positive rights are more social in orientation and reflect political demands for the collective provision of certain services (eg every human has a right to adequate housing, or education).

‘Red Light’ (or Classical Liberal) Theory of Administrative Law: There are two central elements to the traditional theory of administrative law. The first seeks to explain the relationship between the courts, the executive and the parliament. Essentially, the theory holds that the courts act to enforce parliament's
will by ensuring that executive agencies stay within the scope of the statutory powers given to them by parliament. The second element of the traditional theory explains this role of the courts in “red light” terms. That is, the courts have this role in order to protect individuals from unlawful government action. (The flip side to this is that the courts do not have a role in controlling unlawful government action except where it directly impacts on identifiable individuals). The red light theory of administrative law espouses the administrative law principles of the rule of law and human rights (particularly negative rights protecting an individual from government). The emphasis is on “controlling” administrative agencies.

‘Green Light’ (or Statist) Theory of Administrative Law: Implicit in the traditional theory is that it is the role of administrative law to stop government from acting unlawfully (at least where it is directly impacting on identifiable individuals). As such, the emphasis is on the dangers posed by government and the need for restraint. Conversely, ‘green light’ approaches assume that governments have a positive role to play in improving public welfare. As the name suggests, these approaches emphasise administrative law’s role in facilitating (rather than stopping) government action. Green light theories tend to emphasis the administrative law values of separation of powers (the executive should be separate to do its job from the influences of the judiciary or the legislature), efficiency and human rights (where the executive is seen as providing positive rights). The emphasis is more on ‘establishing’ and ‘empowering’ administrative agencies than on controlling them.

Democratic Theories of Administrative Law: Red light theories assume that government is bad and needs to be controlled. Green light theories assume that government is good and should be facilitated. Some alternative approaches start with the assumption that in a democratic society (like Australia), administrative law must been seen as a contribution to the achievement of the democratic values of participation and accountability.

Ministerial Departments and Non-Ministerial Agencies: These are the two general types of institutions that make up the executive in Australia – Ministerial departments and non-ministerial agencies. As administrative law is concerned with the actions (or non-actions) of these entities we need to know about their structures and types of power. Ministerial Departments are headed by a Minister who is a Member of Parliament and is made up of public servants arranged in a hierarchy. Ministerial Departments both develop and implement government policy. An example of a Ministerial Department is the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) that develops and analyses the Government’s welfare and family-related policies. Non-ministerial agencies are more complex and come in all shapes and sizes. The common factor for nonministerial agencies is that they are established by legislation that specifies what the agencies will do, who is in charge and what its powers are. Non-ministerial agencies are often developed to implement policy or make decisions in a non-political environment. For example, Centrelink is the non-ministerial agency responsible for administering the welfare policy developed by (FaHCSIA). Another non-ministerial agency we will be talking about in this course is the Administrative Appeals Tribunal, which can review the merits of decisions made by administrators from other departments and agencies.

GBE (Government Business Enterprises): These are entities owned by the state that provide goods and services that often could be provided by the market. GBEs are often managed as if they are a business with the state conceived as the shareholder to whom the GBE must make a profit. Historically, GBEs were set up for a variety of reasons. Some were established to provide universal services (eg Electricity Commissions and the Commonwealth Bank), others were set up because it was assumed that the Australian economy could not
support a privately owned service or industry (eg State railways and Qantas). Since the 1980s many GBEs have been privatised.

**Contracting Out:** This is where an executive department or agency contracts with a private entity to do the jobs that the agency previously performed. The effect of contracting out is to replace an individual’s administrative law rights with the executive entity with private law rights between the individual as a consumer and the private entity.

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**ISSUES AND PROBLEMS IN AUSTRALIAN ADMINISTRATIVE LAW**

Administrative law has been one of law’s growth areas.

The term “Administrative Law” is something of a misnomer as it is effectively “Public Administrative Law”.

**THE STRUCTURE OF THE EXECUTIVE ARM**

The relationship between these various bodies are regulated by a mixture of law, convention and politics. Bureaucracy is not a monolithic entity. Rather, it is a complex political system whose components can be treated as including both individuals and institutions.

**THE CROWN:**

In Australia the Crown is represented by a Governor-General for the Commonwealth and a Governor for each State. By convention the Crown acts on the advice of the government and thus vesting power in the Crown puts it at the disposal of the government of the day.

To the general principle that the Crown acts on advice of the government there is one contentious exception, the reserve powers – granting a discretion to a Governor or Governor-General to act without or contrary to government advice.

**CABINET:**

Cabinet consists of ministers or an inner group of them. In political terms, cabinet is the government. Major political decisions are made by the cabinet and these will come to fruition in one of two ways:

- Formulation of legislation
- Exercise of executive power.

**EXECUTIVE COUNCILS & MINISTERS:**

Executive councils are the formal versions of cabinet. They are created by s62 of the Commonwealth Constitution. They are endowed with the task of advising the Governor-General or Governor. The link between cabinet and the Executive Council is simple. When cabinet has made its political decisions it reconvenes as the Executive Council and presents those decisions to the Governor-General or Governor.

Ministers come from the ranks of the party or coalition with a majority in the lower house. Ministers perform three basic functions:

- They are members of cabinet and the Executive Council.
- They are usually appointed as political heads of one or more government departments.
They are responsible for administering statutes dealing with the business of their department.

**GOVERNMENT DEPARTMENTS & STATUTORY AUTHORITIES**

Governments organise their business into departments. Each department will have an area of responsibility which will normally involve the administration of a number of Acts or parts of Acts.

Statutory authorities are bodies established by statutes (enabling Acts). Generally the enabling Act will give a statutory body corporate personality and authorise it to own property, enter contracts and to sue and be sued in its corporate name. In practice statutory bodies are normally set up to do specialised tasks which is thought needs to be done free from public service organisation and control, and free from day to day political pressures (e.g. commercial activities, research & cultural activities, radio & broadcasting etc.).

Advantages of statutory corporations over government departments:

- Technical legal advantages of an entity with perpetual succession, capable of suing and being sued by ordinary process of law and of obtaining, owning and giving title to property
- Administration free from the pressures of partisan politics
- Administrative advantage of building up a personnel structure appropriate to the activity, free from rigidities of ordinary public service rules
- Possibility of representation on the governing boards of various functions, interests or outlooks appropriate to the activity.
- Advantages of giving the undertaking some degree of self-contained financing and budgetary control.
- Belief that a statutory corporation develops its own institutional pride – higher standard of efficiency.

Statutory bodies have a very substantial degree of political independence (regardless of the fact that Ministers can veto its actions). This raises a problem because their very freedom from political interference also insulates them from direct political accountability.

**QUASI AUTONOMOUS NON GOVERNMENT ORGANISATIONS (QANGOS)**

QANGO refers to a body which is part public and part private (e.g. RSPCA, NSW Law Society). These bodies raise the question as to what extent, if at all, they should be subject to public regulation by the ordinary Administrative Law remedies. As common law judicial review is currently applied, the position of these bodies varies. As a general practice, a QANGO derives its power from either or both of:

- Agreement among members as to rules and objects
- Statute which may incorporate the QANGO.

**LOCAL GOVERNMENTS**

Elected councils are created as separate legal entities known as bodies corporate. The powers of local governments are quite extensive. They have limited legislative powers. The subject-matter of the by-laws is potentially very wide-ranging (e.g. camping, town planning, public amenities, libraries etc.). Many administrative law matters arise from attempts to control the activities of local councils.

**ADMINISTRATIVE TRIBUNALS:**

Usually statutory authorities which are constituted to fulfil administrative tasks of a quasi-judicial nature. The body may either be the initial body to make a determination on a given problem, or may be established as a review body.
Tribunals continue to enjoy a considerable degree of independence from government and, over the past 30 years, governments appear to have become somewhat more willing to tolerate relatively independent tribunals.

WHY DO ADMINISTRATORS COMPLY WITH THE LAW?

One reason why administrative lawlessness may be limited may lie in the lack of opportunities for worthwhile illegality. A second approach is to focus on constraints – both internal and external:

- Internal constraints: administrator’s self-image as law abiding individuals.
- External constraints: sanctions that may be imposed on offenders, audits.

CONTROLLING PUBLIC ADMINISTRATION

There is no reason to believe bureaucrats are any more saintly than the rest of the population. Even those with considerable respect for bureaucracies and bureaucrats have noted their potential for confusing organisational interests with public interests. In practice, politics may determine the functions and structures of administrative agencies.

The Australian bureaucracies have tended to resist reforms aimed at making them more responsive, and the very fact that such reforms have had to be imposed from outside indicates that the bureaucracies were disinclined to evolve adequate review and accountabilities processes in the absence of external prodding.

Methods in which administrations could be controlled:

- Traditionally minimal controls are supplemented by more formal controls. Senior administrators are made formally answerable to electorally responsible Ministers.
- Ministerial supervision coexists with strong parliamentary supervision. For example, where administrators are summoned to give evidence to Senate enquiries.
- External, non-political supervision by auditors or ombudsman.
- Ad hoc and standing external commissions (e.g. Royal commissions). Whilst their investigative powers may be considerable, their influence is heavily dependent on the degree to which they can persuade others to give effect to such recommendations.
- Judicial control: The Crown is not above the law.

THE LAW AND PRIVATE ADMINISTRATION

Private bureaucracies are subject to the economic discipline of the market and the legal discipline of such “private law” areas as contract and torts law. Moreover to varying degrees, private bureaucracies are subject to regulation by public bureaucracies.

While administrative law is largely concerned with the regulation of public administrators, there are some circumstances in which courts are prepared to treat private bureaucracies as bound by similar criteria to those which regulate public bureaucracies:

- Private bodies which enjoy statutory powers.
- Clubs and societies: bound by rules of procedural fairness.

The Administrative Review Council recommended procedures for the review of decisions by private bodies in relation to their use of publicly provided funds. Amendments to the Commonwealth Ombudsman Act mean that the activities of “Commonwealth Service Providers” fall within the Ombudsman’s jurisdiction.
There is evidence to suggest that private organisations may be moving towards the adoption of some of the traditional institutions and norms of public administration law. There is a further trend, namely the establishment of special bodies to supervise the activities of both private and public service-providers.

Conversely, there is evidence of a trend towards the reorganisation of administrative activity so that formerly public functions are removed from the purview of public administrative law, and to varying degrees, into the ambit of private law. In part this is a product of the privatisation and corporatisation processes.

**NEAT Domestic Trading Pty Ltd v AWB Ltd [2003] HCA 35**

Under the *Wheat Marketing Act 1989* (Cth) s57, no one was to export wheat without the approval of the Wheat Export Authority (WEA) and the WEA was not to give its consent without prior written approval of the AWB.

NEAT sought approval from the WEA on numerous occasions and each time approval had been refused on the grounds that AWB had refused to give the relevant approval. NEAT unsuccessfully sought judicial review of AWB’s refusal to grant approval under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJRA), arguing that AWB had inflexibly applied a policy of refusing approvals without regard for merits.

**Held (Majority):** Appeal dismissed by High Court, as the “decision” was not a “decision under an enactment”.

AWB does not owe its existence to the Act; it is a company limited by shares incorporated under the Corporations Law. The central duty of the board of AWB was to observe its constitution and to pursue the interests of the company as expressed in that document – e.g. maximising returns to those who sold wheat into AWB wheat marketing pools. It was not clear whether AWB’s consent was a necessary but not sufficient, or necessary and sufficient condition for being permitted to export.

Section 47 gives the Authority, not AWB, the power to give the consent to export without which an offence is committed. The Authority derives its functions and powers entirely from that Act. The AWB needed no statutory power to give it capacity to provide approvals, instead relying on companies legislation. Therefore, AWB’s determination to approve the Authority’s giving consent was not a decision under enactment for the purposes of the JRA.

If the Authority had any discretion about giving a consent once AWB had given approval, it is the discretion which is of “public consideration” and that the “merits” which the appellant said had not been considered would be found. The AWB owes its existence to the constituent documents and applicable companies law principles are concerned – reference to any wide “public” considerations would be irrelevant.

**Held (Dissent):** Gleeson CJ and Kirby J both considered that AWB was subject to “public duties” but considered that AWB’s decision was not a “decision under an enactment”.

**AUSTRALIAN MODEL OF ADMINISTRATIVE LAW**

The Australian federal review system reflects the Australian separation of powers doctrine. It precludes the conferral of the Commonwealth’s executive powers on the Federal Court so as to enable juridical review on the merits.

Australian Administrative Law was virtually inseparable from English Administrative law until the 1970s, which saw an extensive program of legislative reform. For example, the office of Ombudsman was created at both State and Commonwealth levels. Furthermore, Administrative Appeals Tribunals with broad powers to review on the merits were established.

The Ombudsman can provide limited reviews on the overall merits of the case, but the Ombudsman’s decision is not binding.
The AAT possess broad powers to review on the merits with the same force as that of a primary decision-maker. Their inquiry is into what is the preferable decision, not into the narrower question of whether the primary decision-maker acted properly.

Judicial review is concerned with the merits of a complaint. On review, a court will normally be concerned with:

- whether the decision-maker had the power to make the decision in question,
- whether the decision-maker followed the correct procedure in making the decision, and
- what should be done if the decision is legally flawed.

Judicial review cases almost always involve the spelling out of the legislation which allegedly conferred the relevant power on the relevant decision-maker. Over time, there has been an evolution of principles which are sufficiently well established to be known to parliamentary drafters. However these general principles of Administrative Law can be overruled by specific provisions to the contrary.

**ADMINISTRATIVE LAW: MERITS & REMEDIES**

The focus on powers and procedures limits the degree to which Administrative Law can provide remedies on the basis of the merits of the case. However, the merits are not altogether irrelevant:

- Australian courts have been prepared to recognise circumstances in which decisions appear to be so unreasonable as to be incapable of lying within a decision-maker’s powers. Judges tend to make their decisions in the context of a achieving a meritorious outcome.
- Precedent is more limited as administrative law cases often involve the interpretation of particular statute – it may be difficult for a subsequent court to know how far a decision is to be seen as a function of the relevant statute vis-à-vis the embodiment of a general principle.

Whilst the merits may prove relevant to who wins, they are often of only limited relevance to the kind of remedy the court can provide:

- Quashing of decisions
- Order that decision-maker go through the process again (correctly).