1. Introduction

In Chapter 1, you will learn:

- the nature of administrative law
- the two general forms of review in administrative law (judicial review and merits review)
- the importance of the doctrine of separation of powers in administrative law
- the weaknesses of administrative law

Administrative law defines how people or organisations can challenge government decisions. These may range from the 'high end' decisions of Cabinet (eg whether an area of land can be declared a national park) or the important decisions of government departments (eg whether someone may be granted refugee status) to the everyday decisions made by a local council (eg whether someone can build an extension on their house). The focus of administrative law, therefore, is on the variety of institutions that make up the Executive branch.

SEPARATION OF POWERS

The relationship between the Executive, Legislature and Judiciary is a focal point of administrative law. The Executive branch (Federal, State and Territory governments) has its powers defined and limited by statute passed by the Legislature (Federal, State and Territory Parliaments). An exception to this is *prerogative powers*. These are fundamental powers the Executive branch can exercise, such as the power to declare war or appoint ambassadors, regardless of whether legislation permits it. Most prerogative powers, however, have been codified into statute.

The Judiciary has the responsibility of ensuring the Executive branch does not misuse the powers given to it by the Legislature (or those that exist as prerogative powers). This means that the courts may examine government activity and determine whether government officers have acted within their

legal limits. Simply put, the Judiciary is the 'watchdog' of the Executive branch and this important role is constitutionally safeguarded *(Plaintiff S157/2002 v Commonwealth* (2003)*; Kirk v Industrial Relations Commission (NSW)* (2010)). The Judiciary, however, must tread carefully to ensure only orders based on the legality of administrative action are made. A judge must not interfere with a government decision based on how he or she perceive its merits because this would mean the Judiciary is 'doing' the job of government. Such politically charged decision-making in the Judiciary would be a violation of the separation of powers.

JUDICIAL REVIEW AND MERITS REVIEW

There are two general forms of review in administrative law:

- **Judicial review:** This is a review of a government decision based on the legality of the decision.
- **Merits review:** This is where there is nothing necessarily unlawful about the decision in question – the challenger simply wants a review based on the facts or 'merits' of the case.

Judicial review is carried out by the courts, though questions of legality can come up in front of other (merits) review bodies. Merits review is conducted within the Executive branch by review bodies such as the Administrative Appeals Tribunal (the 'AAT') or Ombudsman's Office. Government bodies may even have internal merits review mechanisms available. As seen above, courts must not conduct merits review as this would infringe on the separation of powers.

In order to be successful in a **judicial review** action, four key elements need to be satisfied:

- the decision must be a reviewable one (see Chapter 2);
- the applicant must have standing to bring the action (see Chapter 2);
- there must be a ground of review (see Chapter 3); and
- the court must opt to exercise its discretion to grant a remedy (see Chapter 5).

Further information on **merits review** is contained in Chapters 8 and 9. Two key bodies are explored – the AAT and the Commonwealth Ombudsman.

THE WEAKNESSES OF ADMINISTRATIVE LAW

From the 1970s onward a raft of improvements were made in the field of administrative law to expand the range of review bodies and other avenues available to challenge government decisions. Examples include the introduction of the AAT, the Ombudsman, Freedom of Information ('FOI') legislation and judicial review legislation such as the Administrative Decisions (Judicial Review) Act 1977 (Cth). This reform agenda demonstrated that administrative law was now taken seriously in Australia. It served in part to monitor and remedy corrupt and dysfunctional government activity and also to recognise the need to provide an alternative avenue to costly litigation.

These measures were helpful, but there are several areas of administrative law that remain problematic. Firstly, these improvements were not all great successes. For example, the FOI process has not allowed the easy access to government documents that was envisioned. Hopefully this will improve with recent changes to FOI law.

Secondly, some of the law surrounding judicial review is overly convoluted and antiquated. For example, administrative law relief was traditionally only available if one was granted a prerogative writ (an order from the Crown handed out by judges through the courts). A lot of (arguably) unnecessary technicalities were involved in obtaining these writs (for example, each writ carried with it a different level of standing) and some of these technicalities still persist as relevant law today.

Thirdly, the branches of the Executive and Legislature in Australia are closely connected. That is, the Ministers running government are members of Parliament. This means that it is relatively easy for government to restrict scrutiny and review of their decisions by the legislation they pass. This may be done, for example, by the passing of privative clauses or by not allowing review by tribunals such as the AAT.

Finally, there is noticeable hesitancy by the courts to get too involved in government affairs. Despite their role as 'watchdog' of the Executive and 'protector of the people', Australian courts appear more reserved than their UK counterparts in interfering with government decisions out of reverence to the separation of powers discussed above (for example, the no evidence rule is far more lenient in the UK than it is here – see Chapter 3). Bluntly put, this means that the courts have, at times, refused to assist people in the face of quite obvious injustices due to an (over)sensitivity that this might compromise their constitutional role.

These issues should be kept in mind when examining the different aspects of administrative law outlined in this book.