PART IX –ADMINISTRATIVE LAW

I *Introduction*

A *The 'New' Administrative Law*

Components of the 'new' administrative law include:

- *Freedom of Information Act 1982* (Cth)
  Allows the public to access information held by government

- *Ombudsman Act 1976* (Cth)
  Establishes a statutory body for receiving and handling complaints about defective administration

- *Administrative Appeals Tribunal Act 1975* (Cth)
  Sets out rights to appeal the merits of a decision

- *Administrative Decisions (Judicial Review) Act 1977* (Cth)
  Creates a statutory mechanism to challenge the legality of government action in the courts

B *Purposes of Administrative Law*

Administrative law subjects the executive branch of government to internal and external regulatory mechanisms. These processes serve several important functions; namely, they:

- **Hold the executive accountable**
  A form of external control of executive action:
  - Ministerial supervision;
  - Parliamentary oversight;
    - Eg, Senate enquiries (eg, into immigration detention, etc)
  - Non-administrative law external control
    - Eg, auditor-general (ensuring government departments spend money legitimately)

- **Minimise bureaucratic pathologies**
  There is a tendency for governments to exploit their power in order to maintain it or further illegitimate interests
  - Identify systemic cultural elements that influence decision-making

- **Ensure democratic control**
  Bureaucrats might think they have a monopoly over the public interest and usurp democratic control by presuming they know better than elected representatives

- **Improve the quality of administration**
  Administrative law serves the bureaucratic self-interest — disclosure is often good for government departments, and can promote change
  - Leads to more efficient operation

  - Improvement, performance metric

- **Inform the public**
  Demonstrating the executive's exercise of power to the public (so they can make an informed vote)

- **Legitimise administrative action**
  To imbue their conduct with the appearance of legitimacy by reason of the potential for external invalidation or review

- **Protect and promote human rights**
  Administrative law embodies procedures and doctrines which naturally recognise and protect human rights and liberties of citizens
  - Requires 'due process' to be given
  - The ability to seek review might in itself be seen as a human right in itself
  - Administrative decision-making is influenced by administrative law (and hence) human rights principles
  - Freedom of speech, freedom of information, privacy

Reasons for the 'new' administrative law

- Decline of parliament?
- A rights-culture?
- Perceived inadequacies of the common law:
  - Costly procedures
  - No right to decisions
  - Limited to legality not merits of decision
  - Complex procedures and remedies

C *Administrative Law and the Rule of Law*

The rule of law according to A V Dicey:

1 **Power is not exercised arbitrarily but according to law**
Constraint is to be contrasted with 'the exercise by persons in authority of wide, arbitrary, or discretionary powers'

2 **All citizens are equally subject to the law**
This entails that 'no man is above the law' and that all are subject to the same, 'ordinary law'; this is legal equality; and

3 **Judicial remedies are critical to rights**
Remedies should be granted by courts to specific individuals; this is more effective than implying liberties or security from the *Constitution*.

Perhaps the greatest is irony is that the system Dicey once denounced as a manifestation of unrestricted executive power is now the primary means by which the executive is held to account.

Dicey's conception of the rule of law has significantly shaped the development of administrative law. For example:

- Tribunals are 'inferior' bodies and subject to review for lawful decision-making;

- Tribunals must act 'judicially';
- Tribunals must act *intra vires*, only within the power accorded to them by and in accordance with law;
- Tribunals may not always look to privative clauses to oust review (often disregarded, reinterpreted or presumed not to apply).

Administrative bodies perform many and varied functions. This makes them substantially different to courts in many respects (eg, formulating advice or recommendations on matters of public policy, something that a court would never do). Similarly, standing is more relaxed than in law, parties and tribunals often share responsibilities for adducing evidence and presenting arguments, evidentiary rules are significantly altered, formality is reduced, the range of remedies wider, and administrative judgements entail both technical, legal and logical components as well as educative, political and social aspects.

It might thus be argued that, owing to these differences, administrative bodies should not be evaluated against the same criteria as courts for compliance with the rule of law.

In many ways, administrative bodies are inherently subject to the rule of law: they only have power to adjudicate in accordance with their functions; to go beyond makes their decision liable to be quashed by a court. With the exception of some privative clauses (which are still valid laws that warrant compliance) decisions are reviewable for correctness and propriety. Tribunals must apply rules uniformly, like a court. An even wider arsenal of remedies are available than those contemplated by Dicey.

Where it might be doubted that administrative tribunals comply with the rule of law is in the exercise of discretion and the application of undisclosed (and unchallengeable) policies:

- *NEAT*: law used to afford a competitive advantage on AWBI and discretion to grant permission to others; discretion not disinterested; not reviewable; dangerous combination;

- AAT review: 'correct or preferable decision'; abundance of rules, but not always applied consistently or equally; highly circumstantial; often a great deal of discretion involved
    - Cf Hayek: need fixed rules visible to the public
    - But Davis: discretionary power both necessary and inevitable:
        - Confine discretion
            - Set criteria and limiting concepts
            - Dependent on proper drafting by parliament
            - Lack of respect for precedent in administrative law?
        - Structure discretion
            - Statutory frameworks provide rigid logical structure and boundaries
        - Check discretion
            - Appeal to Federal Court or Supreme Court

However, discretionary may be desirable in some cases. Douglas provides the example of the *Migration Act* reforms which prevented decision-makers from taking certain factors into account. This increased consistency and reduced discretion, but came at the case of rendering non-justiciable (and on an arbitrary basis) facts and circumstances that were potentially relevant to an applicant's case.

To a large extent, all law is arbitrary — discretion inevitably so. Administrative law increases oversight and provides for additional review processes, so it can only serve to enhance compliance with the content of those laws. As to their substantive merit, that is a matter best left to parliamentary consideration.

D *Administrative Law and Responsible Government*

Federal government in Australia is a peculiar blend of the Westminster system and United States federal system of government. As such, it exhibits tension between controlling government by reference to principles of responsible government and by controlling it by separating government power.

The state level more closely resembles the Westminster system of government. The local level has considerable power to affect individuals' lives but is subject to higher levels of government and administrative regulation. Douglas notes that each institution 'is informed by its own set of values, rules and regulations which have been derived from the chance combination of history and ideology' (at 26).

Thynne and Goldring note that responsibility is an 'elusive concept open to a range of meanings'. They identify five distinct usages insofar as it is applied to the executive:

- **Tasks:** the executive is *responsible for* performing certain tasks or acts
    - Acts conferring statutory power make administrative bodies responsible for the performance of certain functions

- **Appropriate:** the executive must perform its tasks *responsibly*; that is, in a responsible or appropriate manner
    - the executive must be responsive to community values and so *responsible to* and for the people; it must *take responsibility for* reforms

- **Accountability:** the executive must be accountable for the performance of their tasks and are therefore *responsible to* an institution, person or electorate capable of enforcing the discharge of their *responsibilities*

- **Blame:** in a normative sense, the executive or its members may be *responsible for* some problem or deficiency

- **Cause:** in a descriptive sense, the executive may be *responsible for* causing a certain state of affairs to come into existence

Many argue that the executive is become less responsible to Parliament. To reasons are commonly offered:

1 Party system

Party discipline means that Ministers are no longer individually accountable to parliamentary scrutiny but can rather count on the votes of their party; and

- It would be against parties' best interests to 'mindlessly defend incompetence'
- Even if party government weakens the responsibility of Ministers to Parliament, it coincides with increased responsiveness (through polling) to the needs of citizens, and may thus contribute to *electorally* responsible government

2 General complexity

Ministers cannot reasonably be expected to maintain control over and supervise

the activities of all public servants, so they are decreasingly seen as responsible for the conduct of their Department.

- Ministerial responsibility is insufficient to eliminate bureaucratic error, though it may provide a disincentive against deliberately introducing such errors
- Administrative review processes are necessary to enhance correctness
- Rather than shielding departments behind a Minister, administrative law enhances individual responsibility in government by subjecting each decision to review procedures, and consequently each decision-maker to public (and judicial) scrutiny

E *Administrative Law and the Separation of Powers*

According to the separation of powers, institutional arrangements are made designed produce independence of each branch of government. The objective is to reduce the power exercisable by any single branch, preventing the domination of other bodies. In this way, each branch imposes checks and balances on the others.

- Separation is powers is impossible to reconcile with responsible government (overlap in personnel between executive and Parliament for Ministerial accountability);

- Assumptions about the divisibility of power are questionable (many similarities between administrative and judicial adjudication, and between administrative and legislative formulations; the values and logical modes of reasoning are also much the same);

- The mistrust of government power implicit in the separation of powers is ad odds with the assumption that each branch will respect the rights of the others (though perhaps this enhances to checks and balances their separation provides).

Implications for administrative law:

- Tribunals cannot exercise judicial power at the Commonwealth level;
- Tribunal members, if judges, must have administrative power conferred upon them in a personal capacity;
- Tribunals cannot make final and determinative decisions about particular points of law;
- Except in the case of administrative tribunals, who have the power of the original decision-maker, their orders are nor enforceable (*Grollo*);
- Tribunals must defer matters of policy to the executive (*Drake* per Brennan J);
- Tribunals must defer legislative amendment of the law to the Parliament (as must courts);
- Courts defer fact finding to tribunals;
- Tribunals must independently assess government policy (*Drake*);
- A state government could probably not confer a general merits review jurisdiction on a state court exercising federal jurisdiction (*Kable v DPP*);

II *Delegated Legislation*

A *Introduction*

The executive branch has power to implement and administer laws. It also has legislative power in some circumstances.

- What is delegated/subordinate legislation?
  - Legislation made in reliance on power delegated by Parliament to the executive. Delegated instruments are subordinate, meaning that they are dependent for their validity on the legislative grant of power
  - Made by the Executive pursuant to a power delegated by the legislature
- 115 different categories of subordinate legislation (a Senate report found)
- Examples:
  - Regulations;
  - By-laws;
    - Subordinate or *Local Government Act*s
    - Council acting as delegate of the legislature
  - Proclamations

B *Constitutional Issues*

Issue: does the *Constitution* allow the Commonwealth Parliament to delegate legislative power to the executive?

Boilermakers states that only Ch III courts can exercise judicial power; this is implied from the text and structure of the *Constitution*. Reasoning by analogy, it might be argued that only the legislature can exercise executive power. However, the High Court in *Dignan* held that delegated legislation is a valid grant of legislative power.

***Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) HCA:**

Facts

- Section 3 of the *Transport Workers Act* delegates broad legislative power to the executive to control the employment of waterside workers
- The government intended to give preference to workers licensed under the Act, thereby subverting the maritime workers' union
- Following enactment of the provision, a subsequent Labour government uses the grant in s 3 to
  - These regulations are said to prevail over any inconsistent statutory provision
  - Regulations are enacted and tabled on the last sitting day of parliamentary sitting, so that there won't be time for Parliament to disallow the regulations
- The validity of the grant of power is subsequently challenged

Issue

- Is the conferral of 'extensive powers to make regulations' — power that is 'essentially legislative' — on the Governor–General, by s 3 of the *Transport Workers Act*,

constitutional?
    - The government argues that it is executive power, and hence not in contravention of the separation of powers
    - Dignan argues that the grant is invalid because
        - Parliament (to whom power has been delegate by the people) cannot further delegate its powers to another party
        - *Delegatus non potete delegare*

Reasoning

- Dixon J:
    - The power is legislative in nature
        - Law-making power: 'essentially legislative'
    - Parliament can delegate power
        - United States jurisprudence inapplicable to Australia
        - Principle of non-delegation 'has no application to the *Australian Constitution*'
        - *Commonwealth Constitution* is a statute of the United Kingdom Parliament
        - This is what confers upon the *Constitution* its legal force
        - Therefore, the grant of power is not so much democratic as statutory
            - [Applicable to today's political context? *Sue v Hill*: UK a 'foreign power']
    - 'the time had passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the Parliament so as to restraint from reposing in the Executive an authority of essentially legislative character'
        - [This argument is based on practicality: no true separation of powers between legislature and executive — same ministers; also note Evatt J]
- Evatt J: with strict separation of legislative and executive powers: 'effective government would be impossible'
    - To have effective government, need to confer law-making power upon the executive
        - Cf judicial branch - but *Brandy* (redundancy of judicial orders)?
- Dixon and Evatt JJ (continued):
    - Importance of 'history and usages of British legislation and the theories of English law', eg:
        - Parliamentary sovereignty: the sovereign Parliament can make any law; delegating power is a law; therefore, the sovereign Parliament can delegate power
        - Parliamentary sovereignty 'trumps' separation of powers between legislative and executive branches
    - Parliament cannot confer any power to the executive
        - *Constitutional* constraint: law conferring regulation-making power must still be 'with respect to' a head of power in s 51
            - Grant must be characterised as falling within the scope of a power
            - Relatively weak constraint — powers are broad
- Here, grant of power, while broad, still 'with respect to' s 51(i) ('interstate trade and commerce')

Decision

- The grant of power is therefore valid
- It is constitutionally permissible to confer broad legislative power on the executive, subject only to the availability of a head of power

Why should the executive be able to pass delegated instruments?

- Parliament sets broad standards and guidelines
  - Principles of general application
- Executive adapts to specific circumstances, maintains day-to-day affairs
  - Lawmakers can't anticipate all circumstances; might delegate a power to create laws with respect to unforeseeable circumstances
  - Fill in details
  - What are details? Delegated legislation invariably involves general rules
- Sinister reasons
  - Sometimes makes it easier for a government with a senate majority to pass regulations
  - Gives the government of the day more policymaking power
- Are there matters inappropriate for executive determination?
  - Administrative Review Council report:
    - 'Significant matters of policy' cf minor details or implementations
    - 'Rules matters going to the essence of a legislative scheme'
    - 'Amendments to primary legislation'
    - Because: many members of the executive (public service?) aren't elected; appointed by their department's responsible Minister

C *Supervision of Delegated Instruments*

- Why is it important to supervise the exercise of delegated power?
  - Accountability and responsible government: need to maintain parliamentary oversight
  - Democratic control: delegated legislation should reflect democratic composition of Parliament

1 *Supervisory Processes*

- How is delegated legislation supervised by Parliament?
  - Regulations, once made, must be tabled with (present to) each House of Parliament within a certain period
    - *Acts Interpretation Act 1901* (Cth) s 48: within 15 sitting days of being made
    - Embodies ideal of responsible government
  - If the regulation is not tabled, it ceases to have effect
  - Once tabled, the regulation may be disallowed within another 15 sitting days
  - Regulations can be disallowed by any Member in either house by moving the relevant motion within that time period
  - Re the effect of not tabling: *Thorpe* highlights that effect of not tabling depends on interaction between Acts Interpretation Act 1901 (Cth) and statute under which regulations made

***Thorpe's Case*:**

Facts
- A statute permits ATSIC elections to be held at certain intervals
- The rules governing these elections are to be those that are in force when the Minister fixes the date of an election
- August: the Minister fixes the date of an election; the regulations were made before that time and tabled with the House of Representatives
    - However, they were not tabled with the Senate
- Intervening time: the tabled regulations cease to have effect because they aren't tabled with the Senate (failure to comply with tabling requirements)
- November: the election occurs

Reasoning
- Need to examine the statute itself to determine the effect of regulations which lapse
- Here, the statute provides that regulations which were in force at the time the election was fixed, but which subsequently ceased to have effect, will still apply to the election

Decision
- The regulations still apply to the November election

2 *Review Committees*

- Regulation review committees: e.g. Senate Regulation and Ordinances Committee
- Criteria for review (Pearce)
    - 'Principle of legality'
        - Exercise of the conferral of power to make regulations must be within the power granted by the statute (rule of law argument)
    - Regulations must be clearly expressed
        - Public needs to be able to discern the regulations and organise their affairs accordingly (rule of law argument)
        - Necessary for proper rational and proper usage by the executive
        - Clarifies legal boundaries: aids legal challenges to unlawful conduct
    - Must not 'unduly trespass' upon rights and freedoms
        - Eg, police powers; where power is conferred on the executive without any effective mechanism for review
- Reviewers examine both legal and non-legal factor

3 *Sunset Clauses*

- Sunset clauses: a fixed term after which legislation will expire and lose effect
    - Means that parliamentary debate needs to reoccur
    - Eg, in Victoria, legislative enactments expire ten years after their enactment, unless renewed

4 *Non-Parliamentary Mechanisms*

- What are the non-parliamentary mechanisms for review?
- Departmental arrangements: internal controls and public consultation
- Note distinction between internal controls and external controls

- Internal processes — consultation, drafting, advice, public comment and submissions
    - Setup by the department or the executive branch
    - Control within the executive (eg, sunset clauses)
    - Useful because preventative
- External processes
    - Control from outside the executive (review committees, judicial review and other administrative measures, Ombudsman)
    - Administrative law mechanisms
    - Ombudsman
- Note limitations of other admin law remedies in relation to subordinate/delegated legislation
    - Confined to the *legality* (lawfulness) of the decision under the regulation
    - Terms of review thus tightly confined
    - Not considering substantive merits of the decision
    - Judicial review: consider scope of review through *Austral Fisheries*: 'Delegated legislation may be declared to be invalid on the ground of unreasonableness if it leads to manifest arbitrariness, injustice or partiality'
        - Fisherman trying to challenge the decision of the board
    - Only considers manifest arbitrariness, or partiality

III *Freedom of Information*

A *Purposes*

*Freedom of Information Act*s ('FOI') grant individuals access to certain documents held by government agencies.

- Cf freedom of political communication
    - Electors shall be chosen 'directly by the people'
    - Voters need information about governmental action to make an informed decision in elections
    - Need freedom of political communication to discuss and be informed about governmental action

- A similar rationale justifies FOI: to make informed decision, voters need access to information about the government actions which form the subject of their decision

- Open government: consistent with democratic accountability

- To ensure government acts in a responsible manner
    - Although some degree of democratic and parliamentary oversight is inherent in the democratic system, this is insufficient to ensure full accountability

- Property argument: government operates under the mandate given to it by the people through democratic election — in doing so, it creates and holds information
    - Therefore, taxpayers (who indirectly fund the research/documentation) should be entitled to access that information
- Rule of law argument: to comply with the law, the people need access to all rules and regulations which they will be expected to obey

- Privacy argument: individuals should have a right to access personal information on the basis of which government agencies will make decisions affecting them; individuals can thus ensure this information is accurate and truthful

- Arguments against disclosure of government action
    - Efficiency
    - Security
    - Integrity of processes
    - Need free and frank discussion within government departments

- Arguments for disclosure
    - *ACTV*: can't discuss government action without knowing about it
    - Need public knowledge to prevent deterioration of executive processes and broader democratic freedoms

B *Components*

FOI legislation consists of various components:

- Government manuals
    - Enables individuals to understand the basis on which decisions will be made
- Amendment of personal records

  - Minister or department may amend or correct the document
- Right to access documents
  - See below
- Review mechanisms
  - Original decision-maker
  - Internal review (s 54(1)): decisions re-examined by another
  - VCAT: can review the merits of the decision
  - Ombudsman: can complain about unreasonable delay, eg

Section 11 — Right of access:

(1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
  (a) a document of an agency, other than an exempt document; or
  (b) an official document of a Minister, other than an exempt document.

Statutory interpretation is important understand this: s 4 (interpretation), which contains definitions of keywords.

C *Right to Access Documents*

- Classifying the information
  - Document?
    - Electronic, visual?
  - Cabinet document?
    - Authorised by Secretary?
  - Minister (official) document?
- Information not covered by the Act
  - Official records of cabinet (doesn't fall within definition of 'document' and is exempt under s 34)
  - Exempt documents
  - Official documents of a Minister
    - Relates to the affairs of their Department?
- Prescribed authorities
  - Private companies? excluded from limb (a)
  - Limb (b), (c), (d)? Need to be expressly specified as such by regulation

D *Exempt Documents*

- Official document of a Minister that contains some matter that does not relate to the affairs of an agency or Department (s 7(1)(c))
  - Could be exploited to prevent access (primarily about affairs, but for a minor passage)
  - Definition of 'official document of a Minister' does not require that *all* its content relates to official affairs
  - This section deals with *hybrid documents* — documents which contain both official and unofficial matters

    - Such documents are exempt and are not able to be requested under s 11
- Exemptions contained in Schedule 2 (exempted by means of s 7(1)(e))
    - Eg, certain government departments, commercial activities of some corporations, etc
- How should these categories of exempt documents be interpreted?
    - Narrowly construed?

Section 3:

(1) A The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth

Exceptions therefore should be narrowly interpreted, consistently with the objects of the Act, but:

Section 3:

(b) ...limited **only** by exceptions and exemptions **necessary** for the protection of **essential** public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities

If the central purpose is to confer a right of access *subject* to exceptions, then courts need to interpret the exemptions on their terms. This is because the exemptions are part of the Act's purpose; s 3(b) clearly acknowledges the role of the exemptions in fulfilling the purposes of the Act. In general: interpret exemptions according to their terms, *unless* ambiguous (in which case interpret narrowly).

- **Part IV — categories of exempt documents**
    - Whether the document is exempt under s 33 depends on the *effect* of its disclosure (consequentialist test)
    - Affecting national security
        - Minister can sign a certificate declaring that disclosure would undermine national security objectives
        - AAT can only ask whether there are reasonable grounds for making the certificate
        - Section 58(4)
    - Cabinet and Executive Council documents (unless purely factual)
    - Documents affecting relations with a state
    - Unreasonable disclosure of personal information

***Colakovski*:**

Facts

- Applicant wanted personal information of nuisance caller disclosed to her
- The nuisance caller was committing an offence under s 86 of the *Telecommunications Act 1975* (Cth)

- It is thus in the public interest to prosecute the individual responsible

Issue
- Can an application under s 41(1) of the *FOI Act* be granted?

Reasoning
- Arguments against disclosure
    - Privacy of caller
    - Would this result in unreasonable disclosure of personal information?
    - Arguments are highly contextual – depends upon the precise circumstances

Decision
- Appeal dismissed; access to information not granted

- Law enforcement: s 37
- Business activities: s 43
    - Information relating to trade secrets? OR
    - Where disclosure would make it lose its commercial value?
        - Contains information relating to the normal commercial activities of a person; and
        - Disclosure would unreasonably affect such activities
    - Note that this test is purposive - the specified consequence (unreasonable effect upon commercial activities, losing commercial value) must occur for the document to be exempt
        - Arguing against these criteria: must be more than merely 'commercial in confidence'
        - Disclosure must be such as to unreasonably affect commercial activities of the confident, or to lose the information's commercial value
- Section 36:
    - Government must establish that the document relates to the deliberative processes of an agency or department
    - It must *also* establish that disclosure would be contrary to the public interest
    - Note certificate availability
- Internal working documents must:
    - Pertain to the deliberative working processes of the agency or department; and
    - Be such that their disclosure would be 'contrary to the public interest'

Public interest

- Not defined by the *FOI Act*
- Note the '*Howard* factors' (see D&J 104)
    1. Level of officers and sensitivity of communication (higher more likely to be against)
    2. Whether made in the course of developing policy (if so, against)
    3. Whether disclosure would inhibit frankness and candour in future discussions or deliberations (if so, against)
    4. Where it would just result in needless debate about possibilities that had been considered (if so, against)
    5. Where it would prejudice the integrity of the decision making process or be unfair to the decision-maker (if so, against)
- However, these factors are not conclusive and are merely a guide to determining whether disclosure would be in the public interest (similar to cabinet secrecy)

***Harris v ABC*:**

Facts
- Harris is the head of ABC's legal department
- The ABC is required to produce a report for the NSW Law Society
- In preparing the report, the ABC did not consult Mrs Harris
- Mrs Harris is attempting to deny public access to the report under the *FOI Act*

Issue
- Is access to the document possible?

Reasoning
- Document? Yes
- Agency? Yes, because the NSW Law Society is a prescribed authority (a private body established for a public purpose under the enactment)
- Exempt document?
    - s 36: relates to deliberative processes of ABC? Yes, outlines their position and intended restructure of the legal department
    - So, is disclosure contrary to the public interest?
        - Harris argues that because the report was completed without the consultation of the head of the department concerned, it would be misleading to release the report
        - This argument is accepted

Decision
- It would be contrary to the public interest to release the report, because it would be mislead the public about the reasoning processes of the ABC
- Access to the document is therefore denied

***Re James v ANU*:**

Facts
- James and some other graduates wanted to obtain access to academic information about them
- ANU resists their requests

Issue
- Do the applicants have a right to disclosure under s 11 of the *FOI Act*?

Reasoning
- Document?
    - Yes
- Agency?
    - Yes, ANU is a statutory body established for a public purpose (like all universities)
- Exempt?
    - Relates to deliberative processes? Yes

    - Contrary to public interest?
        - Universities ought to be transparent about their marking processes, which should be based upon merit
        - People affected by a decision ought to have access to the reasons for their mark
        - But if students knew who had marked their essays, it might make them more inclined to select professors known to be soft markers
        - Also, if students had access to marking information, it would place pressure on academics to justify their comments; it would thus inhibit their candour and make them less forthright in their appraisal of the work (ie, secrecy required for candid and frank discussion, like cabinet
- Tribunal rejects this argument; whilst some professors may be less candid, students interests are best served by disclosure — the whole point of assessment is to provide feedback to students; universities should be committed to open enquiry; and professors should be prepared to stand by their marks

Decision
- Disclosure is ordered

***Re Kamminga v ANU*:**

Facts
- K applies for a job at ANU; she is unsuccessful, and suspects this is due to a comment made by a referee
- She requests access to the documents supplied by the referee

Issue
- Is disclosure contrary to the public interest?

Reasoning
- Relates to deliberative processes (leading up to a decision about employment)
- In the public interest to disclose?
    - Kamminga argues that access may be granted in order to ensure a transparent and meritorious recruitment policy
- ANU argues that disclosure would inhibit the candour of referees if they knew that their comments would be read by the person whom they are refereeing

Decision
- ANU's argument rejected: secrecy not required for candid referee reports
- However, ANU wins and is able to prevent disclosure on the basis of s 45
- Document is exempt because disclosure would give rise to an action for breach of confidence

IV *Reasons*

A *Reasons for Decisions*

Reasons for a decision explain the basis for a conclusion or determination by an administrative decision-maker. While not normally as detailed as a judgment which might be delivered by a court, they serve to explain the basic process leading to the decision, any intermediate findings of fact as well as the authorities or other assumptions made in making the final determination.

Broadly, there are four reasons why the provision of reasons is valuable for the decision-maker, the aggrieved and the executive:

- **Error-correction role**
  Aids discovery of problems or deficiencies with decision-making;

- **Better decision-making**
  Given the possibility of having to defend a decision (and its reasons) publicly, government decisions must be better substantiated and defensible;

- **Confidence in decision-making**
  The process is seen as rational and justified and subject to scrutiny; and
  - Process not seen as arbitrary
  - In the interests of the department to promote a perception of reasonableness
  - Alleviates individual sense of grievance on the part of those affected by decisions

- **Assessment of review options**
  Seeing reasons enables a potential appellant to assess their likely prospects of success; this reduces the number of unsuccessful appeals from administrative decisions.

B *At Common Law*

In *Osmond*, the High Court of Australia held that there is no general common law right to obtain reasons for decisions. Although, in doing so, the judgment of the Court of Appeal of the Supreme Court of New South Wales was overturned, it is useful to reproduce the reasoning of that Court to illustrate a point of contrast:

***Osmond v Public Service Board of New South Wales* (1986) NSW CA:**

Facts
- Osmond applies for a promotion; in order to do so, he needs approval from the head of his department
- He does not receive this approval, and receives only a comment to that effect by the public service board
- He seeks a reason why he was not appointed
- No statutory provision entitled him to access this information, so he brought the matter at common law

Issue
- Is Osmond entitled to reasons?

Reasoning

- The common law generally requires that reasons be given for a decision
    - Does the common law generally require tribunals to give reasons for their decisions? Yes
- Due process can only be satisfied by providing reasons and allowing time to respond to any allegation
    - Do the requirements of procedural fairness/natural justice require the provision of reasons? Yes
- Two reasons in support of these conclusions
    - 'The overriding duty of public officials who are donees of statutory power is to act justly, fairly and in accordance with their statute'
    - More generally, government officials are generally subject to a review mechanism (eg, judicial review, or internal review processes)
    - For this mechanism to operate effectively, there must be reasons for the decision
        - A person cannot challenge a decision without knowing the basis on which it was originally made
    - 'The basis of the right … is two-fold'
- Rejection of duty not required by precedent

Decision

- Osmond is successful; there is a general entitlement to reasons

The High Court subsequently confined this entitlement. At common law, reasons are not available as of right, but only be in 'special circumstances' where natural justice requires it.

***Public Service Board of New South Wales v Osmond* (1986) HCA:**

Reasoning

- Does the common law generally require tribunals to give reasons for their decisions? No
- Do the requirements of procedural fairness or natural justice require the provision of reasons?
    - Gibbs CJ: yes, but only in 'special circumstances'
        - Such circumstances do not apply to the present case
    - Because procedural fairness requires statutory decision-makers to afford due process to an individual before a decision is made, it cannot be affected by conduct which takes place *after* the decision is made
- There are strong policy considerations supporting both views; arguments against providing reasons:
    - Administrative burden for decision-makers (adds cost and delay)
    - May lead to lack of candour by decision-makers (similar to *Re James* and *Kamminga*)
    - Statutory developments are the result of extensive study and consultation — carefully formulated exceptions, etc; but at common law, the mechanism would be too blunt and broad (not as nuanced as a statutory right)
    - Therefore, this is not an occasion for 'judicial innovation'
- Re natural justice: 'difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made'

Decision

- Appeal allowed; there is no general common law right to access reasons for decisions

C *Under Enactments*

There are several statutory sources of a right to access reasons for decisions:

- *Administrative Appeals Tribunal Act* (Cth) s 28
- *Victorian Civil and Administrative Tribunal Act* (Vic) ss 45–6

The above provisions create a general entitlement to reasons if an individual has standing to review a decision on its merits and the decision is reviewable for purposes of the Acts.

- *Administrative Decisions (Judicial Review) Act* (Cth) s 13
- *Administrative Law Act* (Vic) s 8:

The above provisions also create a general entitlement to reasons if an individual has standing to seek judicial review of a decision and that decision is judicially reviewable.

- *Freedom of Information Act* 1982 (Cth) s 11 (and state equivalents): a right to access to documents
- *Ombudsman Act* (Cth) ss 15(1)(c)(ii), 23(1)(e) (where reasons are given but inadequate or inadequately explained, there is an entitlement to further reasons)

V *The Ombudsman*

A *Primary Functions*

- To investigate complaints of defective administration
- To improve quality of administration
- In statutory terms, to investigate 'a matter of administration' taken by 'a Department or prescribed authority' upon complaint or own motion
    - s 5 Cth Act (see also *Ombudsman Act* (Vic) s 13):
    - Note 'Department' and 'prescribed authority' defined by *Ombudsman Act* s 3
    - But 'matter of administration' not defined by Act: consider Vic decisions *Glenister* and *Booth* and see *Ombudsman Act* (Vic) s 2
- Powers confined by *Ombudsman Act* ss 5(2)-(7) and *Ombudsman Act* (Vic) ss 13(3)–(5)
    - Note trichotomy of judicial, legislative and executive power
    - 'Mater of administration' must pertain to executive action
    - *Booth*: distinguishes between 'matters of administration' (a particular decision affecting specific individuals) and 'matters of policy' (rules or statements which have general application) — both are exercises of executive power, but policy will not be encompassed
    - The distinction is not absolute; policy quickly blurs into administration depending on the number of individuals concerned
    - Thus, not all executive acts will fall within the scope of the Ombudsman's investigatory powers

B *Investigating Complaints*

- Is there a duty on the Ombudsman to investigate complaints etc?
    - The Ombudsman 'shall investigate action, being action that relates to a matter of administration … in respect of which a complaint has been made …': *Ombudsman Act* s 5(1)(a)
    - It might be presumed that 'shall' implies compulsion; ie, that the Ombudsman is obliged to investigate all complaints
    - However, the duty is circumscribed by an express, broad discretion not to pursue a complaint: *Ombudsman Act* s 6
        - Discretion not to investigate certain complaints: *Ombudsman Act* s 6:
            - Vexatious or frivolous complaints;
            - Delay;
            - Insufficient interest;
            - Alternative avenues of review (see also *Ombudsman Act* (Vic) ss 14(3), 15)

- Powers of investigation and inquiry?
    - Preliminary inquiries: *Ombudsman Act* s 7A (quasi-informal)
    - Can also launch a formal investigation
        - Investigative powers: 'inquisitorial method' (McMillan)
            - Inquisitorial cf adversarial: investigator takes more active role in calling witnesses and soliciting evidence rather than passively listening to parties putting their own cases
            - power to make enquiries and obtain information: s 8(3);
            - coercive powers to obtain information and documents and to compulsorily question: s 9;

- Process of investigation: e.g. generally
  - in private: *Ombudsman Act* s 8(2)
  - no need to afford complainant opportunity to appear: s 8(4)

See also *Ombudsman Act* (Vic) ss 17, 21.

C *Purposes of Investigations*

- To identify and remedy defective administration
  - An administrative act is necessarily defective if illegal
  - An unlawful governmental act must be defective
  - Thus, the ombudsman's investigations aim to determine whether the government action is lawful

- Upholding rule of law: McMillan:
  - Was the action 'contrary to law'?
  - action wholly or partly based on mistake of law;
  - Has the decision-maker taken into account irrelevant considerations, failed to take into account relevant considerations, or use their power for an improper purpose: s 15(1) Cth Act
    - Section 15 uses grounds for judicial review: concern legality
    - Legality thus clearly falls within the scope of the ombudsman's capacity for investigation

- Has there been unreasonable delay in making the decision? (*Ombudsman Act* s 10: may afford a basis for bringing a complaint)
  - Failure to provide reasons when required: *Ombudsman Act* s 15(1)(c)
  - Have there not been reasons provided? This may provide another basis
  - Action or rule which action made 'unreasonable etc' or action 'in all circumstances, wrong': *Ombudsman Act* s 15(1): human rights protection? McMillan
  - This would also be possible even where the decision was legal

See also *Ombudsman Act* (Vic) s 23(1).

D *Outcomes of Investigations*

Report-making powers triggered upon certain opinions: *Ombudsman Act* s 15(1). Report to Department or prescribed authority on various matters including copy to Minister: *Ombudsman Act* ss 15(2), 15(6)

Where Ombudsman forms view that adequate action not taken re report, can report to Prime Minister and Parliament: *Ombudsman Act* ss 16, 17 (also note annual and additional reports to Parliament)

- Powers of recommendation and public shaming
- But does not have a power to rectify the original decision (no determinative powers)
- Most recommendations are adopted (so the ombudsman is still arguably effective)
- No determinative powers: a 'toothless tiger': see McMillan.

See also *Ombudsman Act* (Vic) ss 23(2)–(7), s 25).