

# **Week 3: Introduction to Judicial Review**

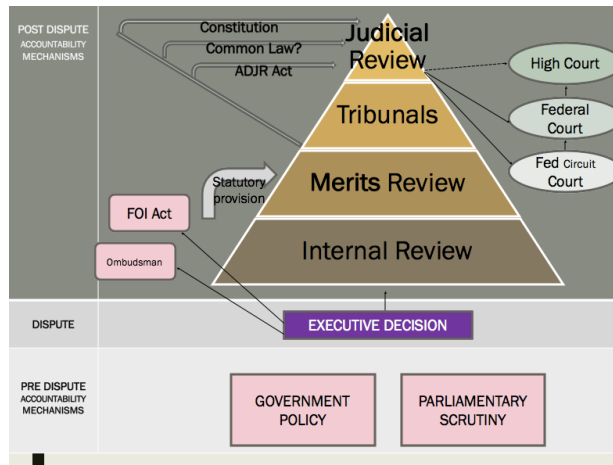
## **Introduction**

- Law - legally binding
- Policy - not legally binding
  - The decision maker must always maintain discretion
  - The policy may lead them into an incorrect decision

## **Introduction to judicial review**

### **Historical background**

- Major influences on contemporary system today:
  - 1) British system- settlers imported British law with them, English law was still in force and local laws could be struck down for repugnancy- English law was supreme.
    - Relevant features: responsible government, parliamentary supremacy, rule of law, development of prerogative writs (certiorari, prohibition, mandamus- these common law remedies were very rigid and formulaic), equity (additional remedies i.e. injunction, declaration that could be more flexible in terms of their application).
  - 2) American system- adoption of the separation of powers concept
  - 3) Colonial system- elements of British system remained, however in a slightly limited/altered state
  - 4) Federation- 1901-1970- federation transformed legal arrangement, constitution introduced limitations on state parliamentary powers thus reducing parliamentary supremacy, powers of the court entrenched by the operation of 75(v) CC. Prerogative writs became constitutional writs.
  - 5) New administrative law- 1970-present- responsible government becomes part of the underpinning rationale behind the establishment of a number of accountability processes and institutions. Prompted by the *Kerr Committee Report- 1971*- which made a number of administrative law recommendations including the passage of the AD(JR) Act, establishment of the AAT, etc. 1975- AAT established.



## Merits review v Judicial review

### Levels of review:

1. Judicial review
2. Merits review
3. Second tier external review (AAT)
4. First tier external review (Social Security Appeals Tribunal)
5. Internal review (undertaken within relevant govt. department)
6. Primary decision maker (the original person within a government who makes a decision under review)

### Merits review

Function of reviewer is to reconsider the decision- review the decision and in doing so can exercise the same powers that the original decision maker had (i.e. vary, set aside, make substitute decisions)

### Judicial review

- Concerned with law
- State level- state supreme courts
- Federal level- FFC, FC and HCA
- Function of the review is to police limits of decision making power

### Legality/merits distinction

- Fundamental principle in Australian administrative law
- There is a constitutional basis for this division- separation of powers at Federal level, the judiciary is clearly separated which has an impact on legality and merits and who can undertake which function.
- Federal courts are not able to engage in merits review as a result of the constitution because this would involve the exercise of non-judicial power which would be in breach of *Boilermakers*
- The grounds of review available under judicial review are based on legal errors- not merits based errors. The remedies available for judicial review are narrow and confined to ensuring that the executive act in accordance with law.

## R v HICKMAN

RELEVANT TO: Privative clauses

KEY FACTS: Coal Industry Union - issues with application to board

PRINCIPLES:

- Privative clause will be effective where:

- bona-fide attempt to exercise power
- decision related to subject matter of legislation
- decision was reasonable with reference to legislation

AND - breached restriction was not 'essential, imperative, indispensable or inviolable'

⚡ NOTE: Overruled in Plaintiff S157 - no longer good law!

## PLAINTIFF S157

RELEVANT TO: Privative clauses; statutory interpretation; jurisdictional error; rule of law

KEY FACTS: S474 Migration Act - privative clause

PRINCIPLES:

- Court outlined how to interpret privative clause
- ① Determine what the clause purports to prevent
- A decision that is infected with jurisdictional error is not a decision at all
- The privative clause referred to 'a decision' and therefore does not cover decisions infected by jurisdictional error
- S75(v) Constitution protects judicial review in cases of jurisdictional error > legislation cannot remove power of court entrenched in constitution
- EFFECT: operation of privative clauses is limited.

## DRAKE (NO 1)

**RELEVANT TO:**

- Judicial review v merits review
- AAT
- Separation of Powers

**KEY FACTS:** - Drake was a US citizen convicted of drug offences in Australia. Threatened with deportation.

### PRINCIPLES:

- The objective of a merits review body (the AAT) is to identify the correct or preferable decision on the material before the tribunal
- Appointment of a Federal Judge to the AAT (which falls within the exec arm of govt) does not constitute a breach of the separation of powers → constitutionally permissible
- Distinguished between the appointment of a judge to perform an administrative function, and investing a ch III court with administrative functions / power

## DRAKE (NO 2)

**RELEVANT TO:**

- Policy
- AAT
- Merits review v Judicial review

**FACTS:** - Drake was a US citizen convicted of drug offences in Australia, threatened with deportation

### PRINCIPLES:

- A merits review tribunal may apply govt. policy unless that policy is unlawful
- A party must give  cogent reasons if arguing against the application of policy
- The tribunal must apply policy taking into account the facts and merits of the case, and must not be applied inflexibly



## THE 'NEW' ADMINISTRATIVE LAW: KERR REPORT

Kerr Committee Report 1971 prompted:

- AD(JR) Act
- AAT
- Merits review as a form of accountability
- Ombudsmen
- etc...

ISSUE:

- There was insufficient scope for review of admin action
- s75(v) was inadequate

TERMS OF REFERENCE:

- Consider procedures for obtaining review
- Consider grounds of review
- Consider introducing a tribunal
- Consider the jurisdiction of federal courts to exercise judicial review

## STATUTORY INTERP. IN JUDICIAL REVIEW

KEY CASES: Wei; Haneef; Project Blue Sky

RELEVANT INFO:

- Starting point for judicial review will always be statutory interpretation
- Stat interp is the cornerstone of admin law
- Used to determine (eg) extent of power, availability of discretion, what are relevant considerations, etc.

FOCUS ON:

- Language of the Statute (Shi)
- Context of legislation, subject matter & objectives
- Principle of legality - courts assume parliament did not intend to override fundamental rights and freedoms (Green v Daniels)
- Courts will usually imply procedural fairness (plaintiff v W)
- Consequences for parties