

General – Executive Accountability

- Accountability is a core objective of Administrative Law.
- Accountability → the need for the executive government and administrative bodies to comply with the law and, in particular, observe relevant limitations on the exercise of those powers (Gaudron J in *Enfield*)
- Decisions taken by government which affect citizens and the information held about citizens, should be transparent.
- There are 3 primary ways to request information and potentially trigger to an agency that its original decision was flawed.
 - Internal Review:
 - FOIA
 - Merits Review
 - External Review:
 - Merits – AAT/VCAT; Ombudsman
 - Judicial Review
- Aims/values of administrative law
 - Purpose: Rol? Regulating executive power?
 - **Accountability** – responsible government
 - **Transparency** – foia
 - **Openness**
 - **Good governance** – grounds seen as norms for good governance as enforced in the courts
 - Tension: between correct/lawful/legal and those that are serving other purposes such as finality and efficiency
 - **Individual justice** (?)
 - Don't have entrenched bill of rights, admin law has been the main area of law which human rights and individual justice has been upheld. Obviously has limits as compared against a HR charter, as admin law has other concerns whereas charter is principally concerned with indiv justice

Merits Review

- MR is conducted by an administrative or executive body, such as AAT, VCAT, MRT, rather than a Court
 - It is not an exercise of judicial power.
- Broader concept of review than review for legality.
- Role of merits review tribunal is to 'step into the shoes' of the original decision maker and to **reconsider** the decision under review **to determine whether it was the correct or preferable decision on its 'merits'**, regardless of whether or not it was vitiated by legal error.
- Primarily concerned with issues of fact
- Essentially MR is a reconsideration of an administrative decision within the executive arm of government.

Key differences:

- There is a right to MR **only** where it is provided **specifically** by legislation dealing with the decision in question (cf. cl right to JR)
- Govt policy
- Evidence
- The decision can be changed by the tribunal
- Available remedies are broader
- JR – concerned with issues of law; MR concerned with issues of fact

Judicial Review – Commonwealth

Definition:

- JR = *supervisory function of the judiciary over the decisions of inferior courts and the executive arm of government.*
- Courts review *executive* action to determine the **lawfulness** of that action (NOT an appeal against the outcome)
- Grounds of JR seen as operative frames and concepts limiting the exercise of executive power

1. Jurisdiction

- A court must have jurisdictional authority to hear and determine a judicial review application
- At the Commonwealth level, there are several jurisdictional avenues:

Source?	Court?
ADJR Act	Federal Court/Federal Circuit Court
Constitution	High Court (CL jurisdiction)
Judiciary Act	Federal Court/ Federal Circuit Court (CL jurisdiction)

ADJR Act:

s 5 'Decision' → s 3(1) 'decision to which this Act applies'

- Schedule 1?: s 3(1)(d)
- Governor-general?: s 3(1)(c)
 - Yes: as the decision was made [by the Governor-General], it is not a 'decision' to which the ADJR applies. X cannot seek judicial review per s 5.
 - No: The decision was not made by the Governor-General.

1. A decision?

- Per Bond, a decision must be:

(i) 'final or operative',

(ii) 'determinative of the issue of fact falling for consideration'

- *Not merely a step taken in the course of reasoning on the way to the making of the ultimate decision.*

- *Finality → an outcome reflecting something in the nature of a determination of an application, inquiry or dispute*

(iii) 'substantive' (Bond, Mason J).

→ *otherwise if decision were to embrace procedural determinations, there would be little scope of review of 'conduct', a concept that appears essentially procedural in nature.*

OR: Alternatively, a decision can be

(i) 'intermediate'

(ii) but 'expressly provided for under the statute'

(iii) **substantive** in character (cf 'procedural') (Bond, Mason J).

- ***antecedent conclusions or findings can also be considered, as 'review of an ultimate or operative decision on permissible grounds will expose for consideration the reasons which are given for the making of the decision and the processes by which it is made.*

- **Exception: Bond also allowed for decisions which are not final and operative, provided they are decisions of substance for which the relevant Act has made a separate provision**

Ss 3(2) and (3) ADJR provide illustrations of decisions: including a failure to make a decision; or making reports/recommendations precedent to another decision.

2. Of an administrative character?

- Not defined in the Act
- *Kerr Report* treated 'administrative decision' as those which usually do not include policy elements, but includes decisions made by Ministers
- Administrative decisions = those which are neither judicial nor legislative
- Decisions to make delegated legislation not administrative character

3. Made under an enactment?

- S 3(1) → an Act or Legislative instrument
- Gummow, Callinan and Heydon JJ in *Tang*:

- **Decision-maker has no express or implied legal authority to make a decision.**

X may challenge Y on the ground that he had no express or implied legal authority to make [the decision]. This ground is available under the common law and under s 5(1)(d) and arguably also s 5(1)(b) of the ADJR. ((6(1)(b), (d) for conduct)

- (1) What is the scope of the DM's legal/relevant powers under the Act?
Determining the scope of the power is a matter of statutory construction, having regard to matters such as parliament's intention & the statutory context of the relevant provision.
- (2) Whether the decision under challenge was made within them? (*ABC Learning*)

- For a decision to be lawful, the decision-maker must have legal authority to make that decision.
- Principle of legality → requires government officials to show a source of legal authority for their actions.

** Where a statutory power is conferred, there must also be implied powers to do things that are incidental or consequential to that expressly authorised by Parliament.

Look for factual circumstances:

- *Where there's a clear 'scope' of the power under the Act (i.e **temporal** scope, **geographic** scope) and you can show the decision was outside that scope; OR*
- *Where the DM has failed to comply with the **procedural requirement** surrounding the decision under legislation*

ABC Developmental Learning Centre Pty Ltd v Secretary, The Department of Human Services (2007) 15 VR 489

Hollingworth J

- Read in the context of **Act as a whole**
- *The Court has to try to glean Parliament's intention from the words of the statute and any permissible extrinsic materials.*
- Parliament's intention?
 - Read provisions together, to come to the conclusion that all of the powers granted are restricted to the premises.
 - Extrinsic materials for Parliament's intention? Considered the explanatory memorandum, second reading debate
- *If Parliament wishes to give DHS officers **broad powers to interrogate any person, no matter who they are or where they are located**, orally or in writing, with the **threat of prosecution** under s 46 if they fail to respond, it **must do so in clear and unambiguous language**.*