

# Administrative Law

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# Topic 1: Introduction to Administrative Law

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## Constitutional Fundamentals

The focus is on legal challenges to administrative decisions, where those decisions are usually made in the exercise of discretion

- “Decisions”
  - Departmental and agency officials – decisions of these officials can be challenged
  - Tribunals – decisions of tribunals, who have authority to overturn initial decisions, can be challenged
  - Rules – delegated legislation made by the Executive, a power conferred by Parliament, can be challenged
- “Discretion”
  - choice between reasonable/legitimate alternatives

The core values of Administrative law are openness, participation, rationality and fairness.

## Separation of Powers

- Parliament has no power to invest judicial power in any hands other than those of Ch III courts (*Boilermakers Case*)
  - Exceptions: military tribunals, public service disciplinary tribunals, parliament to punish contempt of parliament
  - Judicial power: imposing prison sentence, administrative detention of non-citizens (*Chu Kheng Lim; Al Kateb v Godwin*), Imposing a fine, Imposing a coercive order such as an injunction (*Brandy*), making a binding and conclusive declaration of the law
- Non-judicial functions cannot be exercised by Ch III courts unless it is incidental to judicial function
  - Merits review is an Executive function, and thus cannot be exercised by the Courts
- *Kable* extends the doctrine of separation of powers to the states

## Rule of Law and Constitutionalism

- Conceptual foundation of judicial review, which provides a measure of control of the Cth
- Role of the court is to enforce the law, not to judge the wisdom or propriety of government policy
- S75(v) Constitution creates an entrenched minimum of judicial review that the federal parliament cannot remove
- An analogous limitation is imposed on the power of state parliaments: *Kirk v Industrial Court of NSW*
  - There should be legal norms which are prospective, open and clear. It should not be impossible to comply with the norms. The making of norms should be guided by open, clear and fairly stable general norms. They should be applied and enforced correctly and consistently.



## Introduction to Judicial Review

- Judicial review is concerned with when the court will intervene to quash or otherwise remedy errors in administrative action

### Elements

1. Does the court have jurisdiction?
2. Is the application justiciable?
3. Does the applicant have standing (appropriate person)?
4. Is a breach on one or more of the grounds of review established?
  - a. Procedural grounds
    - i. Hearing rule: person affected by decisions is given opportunity to be heard
    - ii. Bias
  - b. Reasoning process grounds
    - i. Decision-maker must consider relevant factors and disregard irrelevant factors
  - c. Decisional grounds
    - i. Decision-maker must have jurisdiction
    - ii. Wednesbury unreasonableness
5. Is a remedy available?

### Review/Appeal Distinction

Review	Appeal
<ul style="list-style-type: none"> <li>• Usually refers to judicial review by courts                             <ul style="list-style-type: none"> <li>○ Review is part of courts supervisory jurisdiction</li> <li>○ Judicial review should not allow courts to impose ideas of 'good administration' on the executive</li> <li>○ However, while it is clear that judicial review seeks to keep administrators within the legal boundaries of their power, the boundaries can be unclear because: the meaning of statute is unclear, grounds of review are sufficiently abstract to be capable of different interpretations and applications</li> </ul> </li> <li>• Inherent or statutory jurisdiction of the courts                             <ul style="list-style-type: none"> <li>○ Federal: HCA (Constitution), FCA (Constitution; <i>ADJR Act</i>; <i>Judiciary Act</i>)</li> </ul> </li> <li>• Focus on the grounds of judicial review</li> <li>• Court may not substitute a decision (Phrryic victory) – only empowered to identify errors</li> <li>• Court will quash decision and remit the</li> </ul>	<ul style="list-style-type: none"> <li>• Granted by statute for specified decisions</li> <li>• Scope of courts authority depends on the statute</li> <li>• Remedy depends on the statute – make include substituting a decision (i.e a merits appeal)</li> </ul> <p>Examples:</p> <ul style="list-style-type: none"> <li>• Appeal from a planning decision of a council to the Land and Environment Court (<i>Environmental Planning and Assessment Act s97</i>)</li> <li>• Appeal from commissioner of LEC to a judge of the LEC (<i>Land and Environment Court Act s56A</i>)</li> <li>• Appeal from judge of LEC to the Supreme Court (<i>Land and Environment Court Act s57</i>)</li> </ul>

decision to the original decision maker	
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### Law/Merits distinction

- Legality: is the decision valid? Did the law permit the decision to be made in the first place? (Validity)
- Merits: is the decision correct? Did the decision maker make the correct decision? (Correctness)
- Judicial review is concerned with legality and not with the merits

#### *Attorney General (NSW) v Quin (1990) 170 CLR 1*

**Facts:** NSW gov reorganized the magistracy. Q was a magistrate but was not recommended for reappointment. The A-G departed from the previous method of recommending magistrates and adopted a new policy. Q challenged the decision on the basis he had a real expectation to be reappointed.

**Issue:** Was the A-G entitled to challenge the policy of reappointment

**Finding:** Yes

**Judgment:** per Brennan J

- The duty and jurisdiction of the court to review administrative action goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of the repository's power
- If, in so doing, the court avoids administrative injustice or error, so be it – however, the court has no jurisdiction simply to cure administrative injustice or error
- The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power alone
  - 'To the extent that they can...' indicates that, in reality, the line between legality and merits may be less clear
  - Thus, it was open for the government to change its policy and it is not for the court to overrule such a change
    - However, while Q was not entitled to hold the government to a particular policy, it may be argued that he should have had the right to be heard on the change of policy

# Topic 2: Merits Review

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## Purpose of Merits Review

- De novo review of administrative power
- Purpose:
  - Correct or preferable decision
  - Improve the quality and consistency of government decision making
  - Provide a mechanism of review that is cheap, informal and quick
  - Openness and accountability of government
- Wider remedial powers (powers to make a substitute decision: *s43(1)(c)(i) AAT Act*)
- Creature of statute (no inherent or common law merits review)

## Types of Tribunals

A tribunal is the institution that provides merits review in Australia. They are statutory bodies that provide dispute resolution, primarily through adjudication.

Types:

- Civil/Appeals
  - Civil: disputes between individuals
  - Appeal/merits review: review of decision made by a government official
- Generalist/Specialist
  - Generalist: may determine appeals in many different areas of law
  - Specialist: tribunal hears appeals in a particular area (e.g RRT)
- Adversarial/Inquisitorial
  - Adversarial: parties determine issues, collect and present evidence
  - Inquisitorial: tribunal determines issues and collects evidence

Difference between a decision of a tribunal and a curial decision: *Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1980)*

- Policy
  - Tribunal can take into account the possible application of administrative policy
  - Court applies the relevant law to the facts
- Public objective
  - Tribunal may have to balance achieving an objective of public significance, as articulated in a policy, and the interests of the individual
- Right
  - Tribunal creates a right in or imposes a liability on an individual
  - Court declares and enforces a right or liability antecedently created

## Independent Merits Review Tribunals

Defining characteristics of Administrative law in the 21<sup>st</sup> Century has been super tribunals, reviewing under large amounts of legislation.

### Administrative Appeals Tribunal (AAT)

#### *Administrative Appeals Tribunal Act 1975 (Cth)*

Key sections:

- **2A Objective:** accessible, fair, just, economical, informal, quick, proportionate to importance and complexity of matter, promotes public trust and confidence in decision-making of AAT
- **25 Tribunal may review certain decisions:** by enactment
- **27 Persons who may apply to Tribunal:** whose interests are affected
- **28 Persons affected by decision may obtain reasons for decision**
- **30 Parties to proceeding before Tribunal:** duly applied, person who made decision, AG
- **33 Procedure:** informal, accessible, quick, not bound by evidence law
- **35 Public hearings and orders for private hearings, non-publication and non-disclosure**
- **37 Lodging of material docs with Tribunal:** statement of findings
- **39 Submissions**
- **43 Tribunal's decision on review:** "step into shoes" of decision maker to affirm, vary, set-aside, substitute, remit
- **44 Appeals to FCA**

Review:

- The AAT has jurisdiction to entertain an appeal from a decision in fact made, which *purported* to be made in exercise of powers under an enactment: *Collector of Customs v Brian Lawlor Automotive*; s25
- Tribunal cannot rule on the constitutional validity of legislation: *Re Adams*

<i>Collector of Customs (NSW) v Brian Lawlor Automotive (1979) 41 FLR 338</i>
<b>Facts:</b> CC revoked warehouse license of BL which had previously been granted under <i>Customs Act</i> . BL argued that the Collector exceeded powers under license. AAT ordered cancellation to be set aside. Collector appealed to the FCA arguing that either 1) the collector did have power to revoke the license, or 2) if the collector did not have power to revoke the license, then the AAT had no jurisdiction to determine BL's application
<b>Issue:</b> Did the AAT have power to review the decision under s25(1) AAT Act
<b>Finding:</b> Yes
<b>Reasoning:</b> Bowen CJ <ul style="list-style-type: none"><li>• A 'decision' refers to a decision in fact made, regardless of whether or not it is a legally effective decision</li><li>• 'Made in the exercise of powers conferred by that enactment' means made in purposed exercise of powers conferred by the enactment<ul style="list-style-type: none"><li>○ 'Purported exercise' includes the notion that the official may be making his decision on the basis that he is exercising powers conferred by the enactment, whether or not such powers are conferred as a matter of law</li><li>○ Does not mean:</li></ul></li></ul>

- In pursuance of a legally effective exercise of powers conferred by the enactment – this would leave a gap in accountability
- In the honest belief that it was in the exercise of powers conferred by the enactment – introduces an inappropriate subjective element
- Here, there was a decision to revoke the license and this decision was purportedly made in the exercise of powers conferred by the Customs Act
  - Rejected the Collector's argument that if he did not have the power to revoke the license, there was no decision and thus BLA cannot appeal it
  - Even if the Court concludes that there was no power to make the decision and that the decision is a nullity, there is the ability to appeal the decision

*Drake v Minister for Immigration and Ethnic Affairs (1979)*

**Facts:** Decision for deportation of D pursuant to Migration Act under which Minister may upon expiration of a term of imprisonment, order deportation. D had been convicted of a drug offence. Under the statute there was no criteria for making the assessment (unstructured discretion). The Minister applied a policy statement, which asked 'in all the circumstances, is it in the best interests of Australia that the person be deported?' and listed matters. D appealed a decision of the AAT affirming the Ministers decision.

**Issue:** did the AAT attach such importance to the policy statement as to result in a failure to exercise independent judgment

**Found:** Yes

**Judgment:** Bowen CJ and Deane J

- Nature and function AAT
  - Tribunal must decide whether the decision is the correct and preferable one
  - The question is not whether the decision was the correct or preferable one on the material before the person who made it, but whether it was so on the material before the tribunal
    - Decision made on the facts at the time of the review, not at the time the decision was originally made
- Government policy
  - Ordinarily, an administrative officer will be entitled, in the absence of specifically defined criteria or considerations, to take into account government policy
    - Especially where there are no specified statutory criteria and where the power is entrusted to a Minister responsible to Parliament
  - Where it was permissible to take relevant government policy into account, but where the tribunal is not under a statutory duty to regard itself as bound by that policy, the tribunal is entitled to treat such government policy as a relevant factor in reviewing the decision
    - The Tribunal should make clear that it has considered the propriety of the policy and indicate the consideration that have led to its application
  - However, the tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be
    - An uncritical application of policy which represents an abdication is not permitted
  - Not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the tribunal
    - That is a matter for the tribunal itself to determine in the context of the particular case and in the light of the need for compromise, in the interests of

good government, between the desirability of consistency in the treatment of citizens under the law and the ideal of justice in the individual case
<b>Principle:</b> The Tribunal's function when it undertakes a review of the Ministers decision is to form its own judgment of what is the correct or preferable decision in the circumstances of the particular case as revealed in the material before the Tribunal

<i>Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1980) 2 ALD 634</i>
<b>Facts:</b> Decision of the AAT on remittal to the AAT following appeal. At this point government had produced public policy stating reasons why government did not support violent types.
<b>Found:</b> per Brennan J <ul style="list-style-type: none"> <li>• Policy can cure inconsistency, facilitates decision-making, improves integrity of decision-making and diminishes the impact of individual predilections</li> <li>• Policy is subject to Parliamentary scrutiny and are amenable to alternation or revocation</li> <li>• <b>A lawful policy</b> 1) must be consistent with statute, 2) allow the minister to take into account relevant circumstances, 3) must not require them to take into account irrelevant circumstances and 4) must not serve a purpose foreign to the purpose for which the discretionary power was created (<i>Drake; Murphyores Inc v Cth</i>)</li> <li>• A ministers discretion must not be so truncated by a policy as to preclude consideration of the merits. Policy must not allow minister to 'shut its ears to an application' – applicants must be able to show why policy should be changed, or why it does not apply to them</li> <li>• The Tribunal is as free as the Minister to apply or not apply the policy.</li> <li>• When T is reviewing the exercise of a discretionary power reposed in a minister, and the minister had adopted a general policy to guide them in the exercise of the power, the T will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case.</li> <li>• The tribunal must only cautiously depart from policy and cogent reasons must be shown.</li> <li>• Policy does not fetter discretion, it merely identifies relevant factors to be considered and conduct which may gravely affect Australia's interests</li> </ul>

<i>Shi v Migration Agents Registration Authority (2008) 235 CLR 286</i>
<b>Facts:</b> MARA cancelled Shi's registration. Shi applied to the AAT, who stayed the cancellation decision and allowed Shi to continue working subject to conditions. Later AAT set aside MARA's decision and substituted a decision to caution Shi, however the AAT considered facts at the time of its decision (not only prior to MARA's decision)
<b>Issue:</b> Could the AAT take into account facts occurring after MARA's decision?
<b>Found:</b> yes
<b>Judgment:</b> Kirby J <ul style="list-style-type: none"> <li>• Tribunal must base decisions on the state of evidence as it stood at the time of the decision, but on the circumstances prevailing at the date of the Tribunal's own decision <ul style="list-style-type: none"> <li>○ Administrators are obliged to have regard to the most current information</li> <li>○ This approach is supported by nature &amp; function of Tribunal; s43 purpose</li> </ul> </li> <li>• Circumstances may be adverse to an applicant before Tribunal e.g bankruptcy or criminal conviction for an offence of dishonesty</li> <li>• Regard must be had to the enabling legislation in resolving whether the Tribunal has exceeded jurisdiction</li> </ul> <p>Hayne and Heydon JJ:</p> <ul style="list-style-type: none"> <li>• Generally, the Tribunal may have regard to information about conduct and events that occurred after the decision under review</li> <li>• However if there is a statutory limitation that the decision be restricted to the material before the original decision-maker, it must be found in the legislation which empowered the primary</li> </ul>

## Topic 2: Merits Review

<p>decision-maker to act (as there is nothing in the AAT Act that provides such a limitation)</p> <ul style="list-style-type: none"> <li>Here, the Migration Act did not fix a particular time as the point at which the agent's fitness to provide immigration assistance was to be assessed</li> </ul> <p>Kiefel J</p> <ul style="list-style-type: none"> <li>The Tribunal is not limited to a supervisory role – it is authorised and required to review the actual decision</li> <li>It is open to the Tribunal to have regard to evidence of conduct subsequent to the original decision</li> </ul>
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<i>MZZW v Minister for Immigration and Border Protection</i> [2015] FCAFC 133
<b>Facts:</b> Asylum seeker refused protection visa. RRT affirmed original decision. Decision was set aside in judicial review proceedings. When the case was remitted back to the RRT, it again affirmed original decision. MZZW challenged decision on basis that the RRT failed its function as reasons were copied from the first decision.
<b>Issue:</b> Did the second RRT fail to perform its merits review function?
<b>Found:</b> Yes
<p><b>Judgment:</b> Full Court</p> <ul style="list-style-type: none"> <li>The Tribunal must decide the issue afresh and bring its own mind to bear on the issues. The Tribunal must be free from prejudgment, bias and the constraints on thought from the adoption of the conclusion of others and the way those conclusions have been formulated and framed in language</li> <li>Here the RRT did not consider the claim afresh, there was <b>substantial and substantive</b> adoption of the previous decisions reasons. The member had transposed the previous findings and language into her findings and language, but so as to appear as if she had formulated the finding</li> </ul> <p><b>Principles:</b></p> <p>"Within the limits of the applicable law, a new decision-maker brings her or his own perspectives, approach and reasoning to the claims made by an applicant for review"</p> <p>"The Member will bring her own mind to bear on the issues arising in the review, freed not only from infections such as prejudgment or other bias but from the inevitable constraints on thought, consideration, and reflection which flow from the adoption of not only the conclusions of others, but the way those conclusions have been formulated and framed in language"</p>

<i>Zhao v Minister for Immigration</i> (2015)
<b>Facts:</b> Zhao comes to Australia from China aged 17. Bought permanent visa to come and go from Australia for \$20K. Put in back of passport. The Passport control found false visa.
<b>Found:</b> Charged with breaching passport act – 10 years imprisonment/fines. However, not deported on grounds of character witnesses, evidence of steady employment – discretion applied.

