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INTRODUCTION TO ADMINISTRATIVE LAW

Constitutional fundamentals: the rule of law, parliamentary supremacy and the separation of powers

- HC's original jurisdiction
 - S 75(iii) of Constitution confers on HC 'original jurisdiction' 'in all matters... in which the Cth, or a person being sued on behalf of the Commonwealth, is a party'.
 - S 75(v) confers on the court original jurisdiction 'in all matters... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Cth'
 - NB: There is a view that s 75(iii) is broader in scope than s 75(v), and that s 75(v) was inserted merely to remove any risk that the more general provision might be interpreted as not conferring jurisdiction to award the remedies enumerated in the narrower provision
 - Fact that jurisdiction is 'original' means that applicant for a s 75(v) remedy may apply in first instance to HC and need not initially go to any other court. In practice, most applications for these remedies are made in first instance to Federal Magistrates Court or Federal Court of Australia, on which the *Judiciary Act 1903* (Cth) confers jurisdiction equivalent to that of the HC under s 75(v).
 - NB: HC also has appellate jurisdiction re judicial review jurisdiction of other federal courts, both constitutional and statutory, and also that exercised by state courts.
- Federal Court
 - By statute, FC shares HC's 'constitutional' jurisdiction, but also has further sources of jurisdiction under the *ADJR Act* (Cth) and (separately) *Judiciary Act 1903* (Cth).
- State Courts' inherent/supervisory jurisdiction
 - Until recently, legal source of this jurisdiction was thought to be common law. However, HC has controversially held, in *Kirk's case* (2010), that aspects of this jurisdiction are, like the HC's 'original' jurisdiction, derived from and protected by Constitution.
 - *Supreme Court Act 1970* (NSW), s 69: "the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari..."

Introduction to judicial review and the law/merits distinction

- Overview of judicial review
 - Does the court have jurisdiction?
 - Is the application justiciable?
 - Does the applicant have standing?
 - Is a breach of one or more of the grounds of review established?
 - Procedural grounds
 - Reasoning process grounds
 - Decisional grounds
 - Is a remedy available?
- Grounds of review
 - Procedural grounds
 - Hearing rule: person affected by decision is given opportunity to be heard
 - Bias
 - Reasoning process grounds
 - Decision-maker must consider relevant factors
 - Disregard irrelevant factors
 - Decisional grounds
 - Decision-maker must have jurisdiction
 - Wednesbury unreasonableness – decisions that are so unreasonable that no reasonable decision-maker could make
 - Grounds of review are principles/standards – they are not clear-cut rules
- Review/appeal distinction
 - Review
 - Usually refers to judicial review by courts
 - Inherent or statutory jurisdiction of the Court
 - Review focuses on the grounds of judicial review
 - Court cannot substitute a decision
 - Appeal

- Granted by statute for specified decisions – a “creature of statute”
 - Scope of court’s authority depends on the statute
 - Remedy depends on the statute – may include substituting a decision (i.e. a merits appeal)
- Law/merits distinction
 - *A-G (NSW) v Quin* (1990) 170 CLR 1 per Brennan J
 - “The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power.
 - If, in so doing, the court avoids administrative injustice or error, so be it; but 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 and, subject to political control, for the repository alone.”
 - Boundary b/w law and merits is determined by the courts

MERITS REVIEW

Types of Tribunals

- Civil/Appeal tribunals
 - Civil: disputes b/w individuals (e.g. NCAT civil jurisdiction)
 - Appeal: review of decision made by a govt official
- Generalist/specialist tribunals
 - Generalist: may determine appeals in many different areas of law (e.g. AAT)
 - Specialist: tribunal hears appeals in a particular area (e.g. RRT – now merged into AAT)
- Adversarial/inquisitorial tribunals
 - Adversarial: parties determine issues, collect and present evidence
 - Inquisitorial: tribunal determines issues and collects evidence
- NB: State bodies are not precluded from exercising both judicial and non-judicial functions. State courts can exercise merits review e.g. NSW Land and Environmental Court.

Independent merits review tribunals

- Purposes of merits review
 - Correct or preferable decision
 - Improve quality and consistency of govt decision-making (normative effect)
 - Provide a mechanism of review that is cheap, informal and quick
 - Openness and accountability of govt
- AAT
 - Developed as part of Cth “administrative law package”
 - Recommended by Kerr Committee (1971)
 - Most common decisions: social security, veteran’s affairs, taxation, workers’ compensation for Cth employees, FOI, migration
 - Membership and organisation:
 - President: judge of FC
 - Presidential members: judges of FC
 - Deputy presidents: legal practitioners enrolled for at least 5 years
 - Senior members and other members:
 - Legal practitioners (enrolled for at least 5 years), or
 - Persons who have special knowledge or skills
- AAT Jurisdiction – reviewable decisions
 - *AAT Act 1975* (Cth)
 - S 25: An enactment may provide that applications may be made to the Tribunal... for review of decisions made in the exercise of powers conferred by that enactment
 - S 3(3): “Decision” means making, suspending, revoking or refusing to make an order or determination

- See also *Administrative Decisions Review Act 1997* (NSW), ss 6-9
- *Collection of Customs v Brian Lawlor*
 - **Facts:** Lawlor's warehouse licence cancelled by Collector of Customs. Lawlor successfully appealed to AAT – Collector of Customs had no power to cancel licence. In FC, Collector argued: (1) Collector did have power to revoke licence, and (2) if Collector did not have power to revoke, then AAT had no jurisdiction to determine application. Q: If a decision is not in law a decision within the power conferred by the Customs Act, is it a decision for the purpose of AAT Act s 25(1)?
 - Did "decision" in s 25 of the AAT Act mean:
 - (a) in pursuance of a legally effective exercise of powers conferred by the enactment [here the Customs Act]; or
 - (b) in the honest belief there was an effective exercise of powers under the enactment; or
 - (c) in purported exercise of the powers conferred by the enactment?
 - **Held:** Collector didn't have power to revoke licence – in statute, breach not stated to lead to revocation (rather lead to penalty). Adopted (c). AAT has jurisdiction to entertain an appeal from a decision in fact made, which purported to be made in the exercise of powers under an enactment whether or not as a matter of law it was validly made.
- AAT – Who may apply
 - *AAT Act 1975:*
 - S 27(1): The application may be made by or on behalf of any person whose interests are affected by the decision
 - S 27(2): An organisation or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association
 - S 30(1A): The Tribunal may, in its discretion, make any other person whose interests are affected by the decision a party to the proceedings – on application by the person
 - See also *Administrative Decisions Review Act 1997* (NSW), s 55
- AAT – Administrator's reasons for decision
 - *AAT Act s 28:*
 - Request for reasons:
 - By person entitled to apply to Tribunal for review of the decision
 - Request is made in writing to the decision-maker
 - Reasons are to set out:
 - Findings on material questions of fact
 - Referring to the evidence or other material on which those findings were based, and
 - Giving the reasons for the decision
 - S 37(1): The administrator must lodge with the AAT:
 - A statement of reasons for decision; and
 - Every other document that is relevant to review of the decision by the Tribunal
 - S 38: AAT may order the administrator to lodge with the Tribunal an additional statement
 - See also *Administrative Decisions Review Act 1997* (NSW) ss 49-52
- AAT – AAT's reasons for decision
 - S 43: AAT's decision on review
 - Tribunal shall give reasons either orally or in writing for its decision
 - If oral reasons are given a party may request Tribunal to give them a statement in writing of the reasons of the Tribunal for its decision
- Hearings before the AAT
 - Informality and efficiency
 - Fair, just, economical, informal and quick (*AAT Act*, s 2A)
 - Conduct proceedings with little formality and technicality (s 33(1)(b))
 - AAT is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate (s 33(1)(c))
 - See also *Civil and Administrative Tribunal Act 2013* (NSW), ss 3, 36, 38
 - Representation is permitted (s 32)

- Hearing shall be in public except in special circs (s 35)
- Opportunities for parties to present case:
 - Tribunal shall ensure that every party to a proceeding is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard and to make submissions in relation to those documents (s 39)
- See also *Civil And Administrative Tribunal Act 2013* (NSW), s 38, 45
- Powers of the AAT
 - *AAT Act* s 43(1)
 - AAT may exercise all the powers and functions that are conferred by an Act on the person who made the initial decision and shall make a decision:
 - (a) affirming the decision under review, or
 - (b) varying the decision under review, or
 - (c) setting aside the decision under review, and
 - (i) making a decision in substitution for the decision so set aside; or
 - (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal
 - See also *Administrative Decisions Review Act 1997* (NSW) s 63
 - "... the function of the AAT is primarily driven by the objects, purposes and proper construction of the statute which in each case conferred the power to make the original decision.": *Allars* (Fed LR, 2013)
- Drake cases
 - *Migration Act 1958* s 12: where an alien has been convicted of a crime for an offence for which he has been sentenced to be imprisoned for one year or longer the Minister may order his deportation
 - Minister's deportation policy: matters to be taken into account include:
 - The nature and circs of the offence
 - The prospects of recidivism, etc
 - Particular concern where trafficking in or distribution of drugs is involved
 - Facts: Statutory authority to deport at issue – an unrestricted discretion, Minister 'may', no criteria indicated in the express terms of the statute.
 - *Drake v Minister for Immigration* (FedFC)
 - Held: AAT failed to make independent assessment and perform its function.
 - "The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal" (per Bowen CJ and Deane J)
 - When Tribunal applies policy, desirable that it "makes clear that it has considered the propriety of the particular policy and expressly indicates the considerations which have led it to that conclusion"
 - NB:
 - AAT is being held to general administrative principles, centring on the reasoning process – relevant considerations, duty not to fetter discretion, act under dictation, etc.
 - In theory, AAT's task re Qs of law is to identify 'correct' answer. But in cases where reasonable minds could differ about which interpretation is correct, the 'correct' answer may be equivalent to the 'preferable' answer.
 - *Drake v Minister for Immigration* (AAT), per Brennan J:
 - AAT will ordinarily apply a governmental policy when it is reviewing a decision
 - AAT should not apply a policy when the policy is unlawful or when it tends to produce an unjust decision in the circs of the particular case
 - Injustice, in context of ss 12 and 13, means a disproportion b/w detriment suffered by those affected by execution of deportation order and benefit which might reasonably be expected to result to community at large or to particular individuals in community if order were affirmed
 - An argument against applying a policy will be considered by the AAT but cogent reasons will have to be shown against its application

- See also *Administrative Decisions Review Act 1997* (NSW) s 64
- *Shi v Migration Agents Registration Authority (MARA)*
 - Facts: MARA cancelled Shi's registration. Shi applied to AAT. (1) AAT stayed the cancellation decision – Shi continued working but subject to conditions (supervision for 3 years; not to provide immigration assistance to protection visa applicants during this period). (2) AAT set aside MARA's decision and substituted a decision to caution Shi – AAT considered facts at time of its decision. Q: Could AAT take into accounts facts occurring after MARA's decision?
 - Held: AAT can look at any information up until the time that the AAT makes its decision. Thus AAT could hear evidence about Shi's practice when he was under supervision.
 - Nothing in provisions of *Migration Act* fixed a particular time as point at which a migration agent's fitness to provide immigration assistance was to be assessed
 - Language in s 303 clearly contemplates possibility that circs may change b/w an initial decision of the Authority and a subsequent decision of the Tribunal
- *MZZZW v Minister for Immigration*
 - Facts: Applicant was an asylum seeker who was refused a protection visa by the departmental delegate and the RRT. Applicant sought judicial review in FC and succeeded – case remitted to RRT. RRT with different member reconsidered claim to refugee status, and rejected claim. RRT's reasons very similar to initial RRT member's reasons. Q: Did second RRT fail to perform its merits review function?
 - Held: FC set aside 2nd Tribunal's decision. (1) Court looked at Act. Act says that RRT's decision-making function is allocated to a particular member of RRT. Once that Tribunal member has that function, they can't delegate it to anyone else. (2) Court looked at general merits review principles. Claims must be fresh, indicating that Tribunal is supposed to act on an independent basis.
 - "we are not satisfied that Member Boddison brought an independent mind to the consideration of the appellant's claims. She failed to discharge the statutory task imposed on the Tribunal to consider an applicant's claims on review for itself, afresh (as we have explained that term) and to make the decision which the Tribunal, as constituted, considers the correct and preferable one. The Tribunal's task includes exposing the reasoning of that Tribunal, as constituted, for making material findings of fact and setting out the material on which those findings are based, not the reasons for some other decision-maker."
- Review of AAT decisions by FC
 - Appeal on a Q of law (s 44):
 - "A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding."
- Procedural fairness
 - Basic question for AAT is whether the decision was correct or preferable one. Although procedural defects may result in a decision that is not the correct or preferable one, AAT's prime task is not to identify such defects and require decision-maker to repair them, but rather to reach correct or preferable decision, and to repair ('cure') procedural defects if this is necessary to enable it to do that. In this sense, procedural error lacks the independent significance in merits review law that it has in judicial review law.
- Reasoning process
 - Prime function re reasoning defects is to cure them by reconsidering the decision under review in accordance with norms of sound reasoning
 - Although AAT is not 'bound' by its own previous decisions, it should aim to be consistent in its decision-making, and consistency may often be most effectively realised by the formulation of general norms (in the nature of policies) to structure not only the AAT's own decision-making, but also that of decision-makers subject to its jurisdiction
- Fact
 - If AAT concludes that a relevant question of fact admits of only one acceptable answer, which is different from that given by the decision-maker, it can intervene on the basis that the decision wasn't 'correct'
 - If AAT concludes that Q of fact admits of more than one acceptable answer, and that the answer given by the decision-maker was not the best of the available options, it can intervene on the basis that the decision was not the 'preferable' one