

WEEK 3: Reviewing Administrative Action: The Nature & Framework of Merits Review

What is administrative decision-making?

- Administrative decisions are decisions that are usually made under legislation (but can be based on executive and prerogative power as well) and are directed towards a particular person (or organization).
- They are different from contractual and commercial decisions and policy and political decisions.
- Examples of administrative decisions include:
 - Issuing a license to a taxi driver;
 - Granting or refusing access to documents under freedom of information laws;
 - Refusing to register a migration agent; and
 - Placing conditions on a planning permit.

Merits Review: What is it?

- **Merits Review**
 - A reconsideration of the substance - or merits - of an administrative decision.
 - Merits review is a creature of statute, not the common law.
 - A new administrative decision-maker asks, 'Is this the best decision on the merits?' Then he or she substitutes his or her own decision for that of the original decision-maker.
 - The concept of merits review came to fruition with the establishment of the AAT. However, the AAT Act nowhere mentioned merits review – those matters were left to the AAT Act and the courts
 - A tribunal carries out merits review by standing in the shoes of the original decision maker and reaching the correct or preferable decision on the basis of the material before it
 - There is no common law right to merits review by a tribunal, it is a creature of statute
- **Rehearing**
 - The decision-maker (usually) only takes into consideration material that was before the original decision-maker.
 - Reviews matters based on errors in the original decision.
 - Example: Racing Appeals Tribunal
- **De Novo Review**
 - The decision is made 'anew', based on the material before the review body (*Re Greenham*)
 - The reviewer '**stands in the shoes of the original decision-maker**'
 - It is the decision itself which falls for review in light of the reasons advanced by the decision maker and the applicant, together with any other facts, circumstances or considerations which are relevant to the decision under review and which emerge during the tribunal's consideration of that decision: see *Re Greenham*
 - The tribunal does not acquire all the powers of the original decision, only those necessary to review the decision made by it: see *Shi v Migration Agents Registration Authority* (2008)
 - Aims to come to the '**correct or preferable decision**'
 - The phrase 'correct or preferable' was coined by the Federal Court: see *Drake v Minister for Immigration and Ethnic Affairs*
 - The justification for 'or' rather than 'and' is that cases before a tribunal can fall into either of two categories. In some instances, only one decision is

open on the facts or law, in such a case the tribunal decides if the correct decision was made. In other instances, there is a discretion as to which decision is made, in such a case it is for the tribunal to decide which is the preferable decision

- Correct = a decision that is rightly made in the proper sense. In considering what the right decision is the tribunal must identify the same question as the original decision maker was required to address: see *Shi v Migration Agents Registration Authority* (2008)
- Preferable = the phrase is relevant where there is a discretion to exercise. The test to determine what is the preferable decision cannot be subjective. It must be based on community standards or values, which are informed by relevant legislation, ministerial statements and the decision-makers experience and knowledge of the world: see *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship*

- **Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409**
 - **Issue:** Can the Tribunal apply a policy without making an independent assessment of its propriety?
 - **Principle:** The question for the determination of the Tribunal is whether the decision was the correct or preferable one based on the material before it. I.e. Was the decision objectively the right one made?
 - American national with Australian visa - grew marijuana convicted for 12 months - visa would be revoked and deported
- **Shi v Migration Agents Registration Authority (2008) 248 ALR 390**
 - **Issue:** Did the Tribunal exceed its authority by basing its decision on the circumstances prevailing at the date of the Tribunal's own decision?
 - **Principles:** It is up to the Tribunal to reach its own decision with regard to the best and most current information available. 'Preferable' involves discretion where 'correct' means 'rightly made'. The Tribunal must address the same question as the original decision maker.

- **Contemporaneous review**

- Change in 'administrative outlook'
 - A decision once appealed to a merits review tribunal becomes the responsibility of the tribunal, and the agency does not have the independent authority to tamper with the decision at that stage: see *Re Bloomfield and Sub-Collector of Customs*
 - Legislation may override the general rule and confer power upon an agency to alter a decision
- Change in the facts
 - The tribunal can look at fresh evidence and submissions at the date of its decision that were not before the original tribunal: see *Shi v Migration Agents Registration Authority* (2008)
 - Whether there is a temporal element in the decision to be reviewed, evidence cannot be led of matters occurring after the original decision was made. Whether that is so will depend:
 - The general provisions of the tribunal legislation; and

- The provisions of the legislation under which the decision was made
- Change in the law
 - An intervening change in the law can arise when the legislation to be applied by a merits review tribunal is amended while a matter is before the tribunal. Commonly the amending law will contain a transitional provision that states whether the new provisions apply to proceedings that are underway. If not, the tribunal will decide the case by reference to the law as they stand at the date of the tribunals decisions: see *Kavvadias v Commonwealth Ombudsman*
 - Accrued rights are not diminished by a change in law due to the protection that is offered by interpretation legislation: see *Esber v Commonwealth* (1992)
- Can extend to reviewing whether the decision was lawfully made in the first place.
 - An administrative tribunal is not confined to issues of fact and policy but can examine whether a decision under review is lawful: see *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*
- Purported exercise of powers conferred by an enactment
 - Purported: An exercise of power, regardless of whether or not the decision-maker correctly interpreted those powers.
- The ability of the tribunal to undertake contemporaneous review is central to its capacity to make the 'correct or preferable decision'
 - **Esber v Commonwealth (1992) 174 CLR 430**
 - **Issue:** Did the redemption of Mr. Esber's option of a lump sum payment under the 1971 Act affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act? (s8, Acts Interpretation Act)
 - **Principle:** Yes, he had a right to have his claim to redemption determined in his favor if the delegate wrongly refused his claim.
 - **Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338**
 - **Issue:** Did the Tribunal have the power to review a decision (to revoke a warehouse licence) that was deemed invalid (i.e. a nullity)?
 - **Principle:** Yes, for the Tribunal to have the power to review a decision, that decision must be made in purported exercise of powers conferred by an enactment
 - *Purported: An exercise of power, regardless of whether or not the decision-maker correctly interpreted those powers.*
- **Jurisdiction**
 - There is legislation that specifies the specific categories of decision that can be reviewed by a tribunal: see AAT Act s 25; CAT Act ss 28-22
 - The ARC provided that decisions that are suitable for merits review are those that affect the interests of the individual
 - The ARC provided that the decisions that are not suitable for merits review include:
 - Decisions of a legislative character
 - Decisions that automatically flow from a set of circumstances
 - Policy decisions

- Preliminary or procedural decisions
- Decisions to institute proceedings
- Decisions allocating resources between applicants
- Decisions relating to parliamentary or judicial records
- Decisions of a law enforcement nature
- Financial decisions with a significant public interest element
- Decisions to delegate a power or to appoint a person to undertake a specified function
- Recommendations to ultimate decision makers
- Decisions where there is no appropriate remedy
- Decisions involving extensive inquiry processes
- Decisions that have such limited impact that the cost of review cannot be justified

How is the Review Carried Out?

- **Internal Review**

- A review of the decision is made internally, within the department.
- The review is generally undertaken by a more senior staff member.
- Fast, accessible and cheap.
- E.g.: Social Security Original decision -> Authorized Review Officer (ARO) -> external review
- Internal review = a process of review on the merits of an agency's primary decision. It is undertaken by another officer within the same agency, usually a more senior officer
- Only available if a legislative provision provides for it – check the legislation under which the decision was made
- Procedure = depends on the legislation
- Advantages:
 - Quick
 - Inexpensive
 - Informal
 - Can create personal contact between citizen and the agency
 - Ensures that proper consideration is given to an issue within an agency at a senior level before the decision is reviewed by an external agency
 - Can alert agency to deficiencies or discrepancies in decision making practices = improved future decision-making
 - Prevents the need for external review
- Disadvantages:
 - Lack of independence and impartiality on the part of the review officers
 - Adds another lawyer to the review process = complexity
 - Adds to the cost of administrative review