ADMINISTRATIVE LAW NOTES

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MERITS REVIEW

- In its most basic, the merits of a decision can be reviewed by a tribunal, but the legality of a decision must be reviewed by a court
- Merits refers to the considerations bearing upon ***why*** a given administrative action is considered to be the preferable one in the legal and factual circumstances
    - Merits of a given instance of administrative action is for the executive to determine
    - This idea is closely related to the fact that many statutory powers vested in admin decision makers will be a discretion
    - Discretion gives administrators a degree of freedom of choice – both in rule making and in decision making, but also comes with risks of exploitation, arbitrariness and uncertainty
- Merits and discretion bring challenges to the courts task of checking the legality of that exercise.
    - The idea that it is the executive's job to attend to the merits of administrative action and the judiciary's job to supervise legality highlights the constitutional story about separation of powers and who is to perform which role and why
- In performing its role, the judiciary must ensure that it does not encroach on the role that has been assigned to the executive, namely its responsibility for deciding the merits
- Brennan J in *Quin* said that 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
    - **The court has no jurisdiction simply to cure administrative injustice or error**
- When conducting judicial review, the court must determine the legality of administrative decisions in reference to:
    - The Constitution
    - Legislation that the executive has been charged with administering, and the set legal boundaries within that statute
    - Principles of statutory interpretation
    - The norms or 'grounds' of administrative law
- The norms or grounds of admin law emerged over time from applications to the courts known as 'prerogative writs' or orders addressed to an official requiring an action or refrain from an action – aka similar to modern remedies
    - Writs would only succeed if the applicant could specify a ground for the issue of the writ, such as error of law or procedural unfairness
    - The ground then established a norm which the decision maker had to comply to insulate any decision from judicial review
- Currently registered grounds include
    - Procedural fairness
    - Relevant and irrelevant considerations
    - Improper purpose
    - Inflexible application of policy
    - Rules against delegation and dictation
    - Error of law
    - Jurisdictional fact
    - No evidence
    - Irrationality/illogicality in factual findings
    - Unreasonableness
- One exception to the judicial review of the merits is *Wednesbury unreasonableness* – the court can hold invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action

- To deal with the merits/legality distinction, the Kerr Committee introduced the raft of legislation that brought about modern admin law, and established the **Administrative Appeals Tribunal**
    - Although the Administrative Appeals Tribunal (AAT) was technically not a court, the way it was designed was to mirror a court and operate in a similar way
    - The President of the AAT must be a judge of the Federal Court
- A tribunal resolves disputes, primarily by adjudications, involving the finding of facts, the ascertainment of law, and the application of the law as ascertained to the facts found; it decides on merits and law.
- Key differences between tribunals and courts
    - The qualifications for membership
        - To become a judge of a court, the typical qualification is expertise as a lawyer
        - For a tribunal member, their expertise may lie in the subject matter of the tribunal's jurisdiction e.g. taxation, rather than taxation law, or immigration, rather than immigration law
        - Expertise is the greatest advantage in the finding of facts and the application of law to facts; where the question is mostly a matter of law, it is often referred to a court
    - The nature of its jurisdiction
        - Courts are generalist, whereas tribunals are specialist
        - However, in Australia, the AAT has jurisdiction under 450 statutes covering a wide range of government activities
    - The speed, cost and informality of tribunals is usually seen as distinctive
        - Costs for both the government and citizens of tribunals is lower
    - Independence
        - While judicial independence is entrenched in the Constitution and in statute, there are questions over the independence of tribunals
        - Tribunals have issues with security of tenure, qualifications of appointees, procedures for appointment, reappointment and dismissal, mechanisms for funding and relations between tribunals and the department whose work they review
- The line between tribunals and courts is a function of the strict version of separation of powers that the High Court has held to be embodied in Chapters I, II and III of the Constitution
- Within the States, the separation of powers is not so clear cut, and the distinction between courts and tribunals can be blurred
    - This allows state legislatures to confer **both judicial and non-judicial powers** on both tribunals and courts, like the NSW Land and Environment Court
    - However the states are limited under s71 of the Constitution, which imposes a limit on the power of state legislatures to confer on courts functions incompatible with the exercise of federal judicial power (*Kable v Director of Public Prosecutions*)
- Under federal law, there are certain non-judicial adjudicatory functions that only tribunals can perform, most notably merits review of administrative decision and the power to give an advisory opinion
- Tribunals and courts together form a federal system of (independent) adjudication made possible by the combination of parliament's power under s 71 of the Constitution to create courts, and its incidental power, under the heads of s 51, to create tribunals to deal with disputes about matters falling within its legislative competence
- Ultimately the High Court has appellate jurisdiction over all state and federal laws; because most tribunals can appeal to the state Supreme Courts, which can then appeal to the High Court

Attorney-General (NSW) v Quin (1990) 170 CLR 1

Facts:

- Mr Quin was a magistrate in the old petty sessions courts that were abolished in favour of local courts.
- The AG said he would appoint the magistrates from the old court to the new court; but there were 5 or 6 that he wouldn't reappoint because of rumours, innuendo etc. He didn't tell the magistrates why he would not appoint them.
- There was a lack of procedural fairness, meaning Quin was not able to rebut the accusations against him because he did not know about the accusations.
- In 1985 the NSW magistracy was reorganised, and six people who were once magistrates, were not re-appointed under the new Act. The AG in making this decision, decided to depart from the course previously adopted for recommending magistrates for appointment in the Local Courts from those who were not unfit to an entirely merits-based method requiring an assessment of competing applicants.
- In 1988, the NSWCA required the AG to consider Quin's application for appointment on its own merits and not in competition with applications from others.

Held (Mason CJ, Brennan and Dawson JJ) (Deane and Toohey JJ dissenting):

- The legitimate expectation was that the AG in considering whether or not to appoint a judge, would accord procedural fairness – the opportunity to answer material which was adverse
- Once it was accepted that the decision by the AG to consider applications in competitions with others was acceptable under the relevant Act, a representation made by the Executive cannot preclude the Executive from adopting a new policy and acting in accordance with it
- There's no justification for granting relief in a form which would compel the Executive to adhere to an approach which it had discarded in favour of a different approach which in the opinion of the Executive was better calculated to serve the administration of justice and make it more effective
- Brennan J: The duty and jurisdiction of the court to review administrative action does not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of 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.
    - There was nothing in the Act that prevented the AG from appointing a magistrate that was the most suitable person available for appointment at the time the power was exercised – the order of the NSWCA impermissibly intruded into the merits of the advice to be tendered to the Governor
- **AG's and the Executive must have the power to change policies when they believe it to be necessary**

Omar v Minister for Home Affairs [2019] FCAFC 188

Facts:

A 33 year old man came to Australia from Somalia as a teenager. He had mental health problems and a severe intellectual disability, in part due to a very traumatic early life in Somalia.
After being a child soldier at eight, he was rescued by family members, and fled to Kenya, where he lived in a refugee camp for 6 years. From there, he came to Australia as an accepted refugee to