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Administrative Law Notes Week 2: Merits Review

Lecture

- Merits review only exists if the relevant statute provides for it.
    - The exact nature of the merits review jurisdiction is determined by the conferring statute:
        - Who may seek merits review of a decision (standing)
        - Imposing pre-conditions
        - Imposing time limits upon seeking review
        - Varying the normal procedure of the merits review body
        - Varying the normal powers of the merits review body – ie, altering the orders it can make.
- Appeal de novo – a full merits review:
    - The matter is heard afresh and a decision is given on the evidence presented at that hearing
        - The review body steps into the shoes of the original decision maker.
    - A complete fresh start – where the merits review body re-decides for itself all relevant questions of law and fact – and makes little or no reference to the original decision…the appellate body is required to exercise its powers whether or not there was error at first instance – steps into the shoes of the original decision makers.
        - Can look at all the evidence, information and government policy documents considered first time around and anything else it or the parties want to adduce and then make a fresh decision
        - The process followed by the original decision maker and any errors it might have made in that process are irrelevant to the decision it now must make on the de novo review.
- Merits review and judicial review compared:
    - Merits review looks at the <u>substance</u> of the matter – do the facts fit the statutory requirements?
        - Merits review takes the facts and law as they are <u>at the time of review</u> – incorporating any changes since the original decision.
        - **Consider** what the statute says to confirm.
        - The outcome of a successful merits review is a <u>substitution of a fresh decision</u> –which legally takes the place of the original decision
    - Judicial Review looks at the <u>process</u> by which the original decision was made – was it lawfully made?
        - Judicial Review takes the facts and law as they were <u>at the time of the original decision</u>
        - The outcome of a successful JR application is that the original decision is legally 'quashed' and the matter is <u>remitted (sent back) to the original decision maker</u> who then has to make a fresh decision
            - It may be sent back with instructions from the review body that the decision maker act in a particular way.
    - A Merits Review body is constitutionally part of the Executive branch – it can exercise executive power and can make administrative decisions.
        - A Court CANNOT exercise executive power – hence it cannot substitute its own decision – and must remit the matter to the executive branch for reconsideration if it finds a legal error in the original decision
    - Merits review takes the facts and law as they stand at the time of its fresh decision:
        - If the law has changed – new law will generally be applied.
            - Unless it has a very clear temporal element.
        - If the facts have changed – the matter will be determined on the new (current) state of the facts.
        - Applicants may bring fresh evidence of those facts to the merits review body
        - *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286

        - AAT took into account evidence of conduct after MARA decision up until AAT decision
        - Shi had been allowed to practice (with conditions) until AAT appeal was heard
    - Commonwealth merits review system:
        - Often there will be internal merits review within the government agency first.
            - If decision remains the same, then external merits review may be available.
    - Administrative Appeals Tribunal (AAT) more generalist tribunal now (incorporates other specialist tribunals as a result of Abbott's cost cutting measures.
        - Jurisdiction:
            - Must say so in relevant legislation – does not have a general power to review.
            - **Only commonwealth statutes.**
        - 'Decisions':
            - While a decision is legally flawed or invalid it is still considered a decision and subject to a right of review: *Collector of Customs (NSW) v Brian Lawlor Automotive*.
            - 'decisions' includes 'decisions made in purported exercise of powers conferred by an enactment'
            - Decisions which are legally flawed and hence invalid may still be reviewed by the tribunal.
- Seeking merits review:
    - What statutory power was used to make the decision?
    - Read the relevant statute – to see if merits review is actually available
    - Look carefully for any limits upon that review.
        - Standing, time, specific factors to the individual decisions.
    - Must read statute carefully so as to be aware.
- Advantages of merits review:
    - All relevant issues of fact and law can be re-examined
    - Much more powerful remedy – a <u>fresh decision</u> is substituted.
    - Less formal procedure – not bound by rules of evidence, and proceedings shall be conducted expeditiously and with as little formality and technicality as possible
    - Cheaper – More user friendly – Tribunals often set up to hear unrepresented parties and to facilitate their presentation of their case.
        - Must be some grounds of review – not just that you're unhappy. Must be able to show there are some grounds. Reviewer found that I didn't satisfy the criteria, here is evidence supporting why I do.
- Administrative Appeals Tribunal Act 1975 (Cth) reasons and documents:
    - S28 – original decision maker must furnish a statement of reasons – upon request (from a person entitled to seek review of the decision)
    - S37 – all documents relevant to the original decision must be made available to the Tribunal
    - See also s 43(2) – AAT must give reasons for its decisions – in writing.
- Correct or preferable decision:
    - "The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him (ie the decision maker). The question for the determination of the Tribunal is whether that decision was the correct or preferable one <u>on the material before the Tribunal</u>." (p 419)
        - Not the original material, but the current material.
    - 'Tribunal entitled to treat .. Government policy as a relevant factor for the Tribunal to take into account in reviewing the decision … But the tribunal is <u>not … entitled to abdicate (renounce) its function</u> of determining whether the decision made was … 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."(p 420)
    - Can't give too much importance on government policy and failed to make an independent assessment. Therefore abdicating their function.
  - *Drake v Minister for Immigration and Ethnic Affairs*.
  - How is the preferable decision to be arrived at? *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship*:
    - "cannot be subjective. It cannot admit of idiosyncratic ideas. Evaluation in accordance with the decision-maker's own personal standards or philosophy must not guide the determination."
    - Proper basis of evaluation of reaching the preferable decision is reference to - community standards or community values
      - Not transient ideas, vocal minorities or the media
      - Found in more permanent values
      - Informed by legislation and decision-maker's experience
      - Reflect a broad consensus of opinion
      - Evidence will rarely be of assistance
- Merits review in SA:
  - Recently the passage of *South Australian Civil and Administrative Tribunal Act 2013* created an AAT equivalent.
  - Jurisdiction conferred by the Act or any other state Act s31
    - <u>Section 32-Three kinds of Jurisdiction:</u>
      - Original jurisdiction-s33
        - Jurisdiction - applies where the matter given to tribunal by a statute does not involve a reviewable decision. Tribunal acts as original decision maker in the matter, can resolve a dispute between parties and adopt other courses of action that it considers appropriate to deal with the matter- example of the Tribunal's civil jurisdiction
          - AAT doesn't have this original jurisdiction – can only have matters referred to it from other statutes.
          - SATAC doesn't need to have a reviewable decision.
      - Internal Review jurisdiction s.70
        - Sets out a procedure for the Tribunal *to review its own decisions* where the Tribunal was exercising its original jurisdiction. Sets out rules for how it takes place. Obviously it will not be a review by the Tribunal member who made the original tribunal decision.
        - If tribunal exercising original jurisdiction, it can be reviewed by another member of the tribunal.
      - Review Jurisdiction-s.34
        - Review of matter before Tribunal governed by following matters:
          - It must examine the decision of the decision maker by way of rehearing s34(3)(so not strictly a de novo hearing)
          - It must 'reach the correct or preferable decision but in doing so must have regard to, and give appropriate weight to, the decision of the original decision maker' s34(4)
          - It must consider the evidence and material before the original decision maker, but with discretion to admit new material s34(5)
            - Normally generous in accepting new material.

        - It must also have regard to any relevant factors referred to in the legislation under which the decision was made s34(6)
        - Relevant Act may modify operation of the Act in relation to a matter that comes before the Tribunal's review jurisdiction.
- Tribunals power on a review – s 37(1)
    - Affirm the decision being reviewed, or
    - Vary the decision being reviewed, or
    - Set aside the decision being reviewed and
        - Substitute its own decision, or
        - Send the matter back to the decision maker for reconsideration in accordance with any directions or recommendations that the Tribunal considers appropriate
    - AND, in any case, may *make any order* the Tribunal considers appropriate (including any interim order pending the reconsideration & determination of the matter by the decision maker, or any ancillary or consequential order, that the Tribunal considers appropriate).
    - The Tribunal decision takes effect (substitutes) as a decision of the decision maker. S37(3)
- Principles governing tribunal hearings – s 39:
    - On the hearing of any proceedings, but subject to the provisions of a relevant Act—
        - (a) the procedure of the Tribunal will, subject to this Act, be conducted with the minimum of formality; and
        - (b) the Tribunal is not bound by the rules of evidence, may adopt, as in its discretion it considers appropriate, any findings, decision or judgment of a court or other tribunal (insofar as may be relevant to the proceedings before the Tribunal), and may otherwise inform itself as it thinks fit; and
        - (c) the Tribunal must act according to equity, good conscience and the substantial merits of the case and without regard to legal technicalities and forms.
    - (2) Nothing in this Act affects any rule or principle of law relating to—
        - (a) legal professional privilege; or
        - (b) "without prejudice" privilege; or
        - (c) public interest immunity.

Readings (Weeks 2 – 3):

Chapter 8: Review on the Merits:

- Merits review is more simplistic than judicial review, a creature of statute (it is necessary to look to the statute to ascertain precisely what form merits review will take).
    - What merits review involves in any given situation depends entirely on the relevant legislation: it is necessary to look to the statute to determine whether merits review is available, and, if so, which body determine the review.
    - The test for standing, the procedure to be adopted, the standard of review, and the powers of the review body all depend on the statute.
    - Exception:
        - It is always open to a person affected by a decision to make an informal request that the decision-maker reconsider their decision. This process requires no statutory basis.

Nature of review: re-hearings and hearings de novo

- De novo review is the most comprehensive form of merits review.
    - The merits review body 'stands in the shoes' of the original decision-maker (*Pochi*, *Shi*): the decision making process must be gone through afresh, having regard to the applicable law, any relevant government policy, and the material the parties put forward.
        - New material may be presented. There is no need for the person seeking review to establish grounds of review; he or she has to convince the merits review body that the decision he or she seeks is the right one.
            - A fresh decision is not made.
    - The aim is to reach the 'correct and preferable' decision: *Drake*.
        - Correct means lawful.
            - If there is only one decision that can be made, then there is only one 'correct' decision.
        - If there are a range of possible decisions which would be equally legally correct, the 'preferable' decision is the one that the decision-maker judges the best of the available options: *Re De Brett Investments Pty Ltd and Australian Fisheries Management Authority*.
            - EG. In reviewing a decision to impose conditions on a license, a merits review body might conclude that it is preferable to impose different conditions from those imposed by the original decision maker or not to impose any conditions at all.
- Re-hearing:
    - More restricted in two ways:
        - Conducted on the basis of the material before the original decision maker, although the merits review body may have discretion to admit fresh evidence.
        - Involves a search for errors in the original decision rather than a completely fresh decision-making process.
        - *Allesch v Maunz*:
            - Re-hearing: the powers of the appellate court are exercisable only where the appellant can demonstrate that having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal factual or discretionary error.
            - De novo: those powers may be exercised regardless of error.
        - *Coal and Allied Operations v Australian Industrial Relations Commission*:
            - Re-hearing: if an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance.

        - (Although further evidence may be admitted) Usually conducted by reference to the evidence given at first instance and is to be contrasted with an appeal by way of hearing de novo where the matter is heard afresh and a decision is given on the evidence presented at that hearing.
    - If there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of re-hearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker.
        - Unless there is something to indicate otherwise, the power is to be exercised for the correction of error.
        - However, a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance.
- Involves the review body searching for errors in the original decision.
    - Need not be a legal error as in the case for the purposes of judicial review – it can be a factual or discretionary error: *Mio Art v Brisbane City Council* (unsuccessful attempt to argue of a discretionary error).
        - EG. Placing undue weight on a particular factor.
    - If there is no error, the review body cannot alter the original decision even if the review body believes a better decision could have been made.
        - De novo: whatever decision it thinks best, regardless of error in the original decision.

Merits review

- Simple procedure compared to judicial review.
    - Informal – not bound to the rules of evidence and procedure that apply to courts.
    - Lawyer generally not needed to be successful – simply need to be able to explain why a particular outcome is correct or preferable.
- Lower cost compared to courts and likely to take less time than judicial review.
- Usually has the power to set aside the original decision and substitute a new decision.
    - Courts at most can quash the original decision and remit it back to the original decision-maker for reconsideration. It is not the role of courts to decide what the correct and preferable decision is; that would be an exercise of executive, rather than judicial, power: *Boilermakers*.
    - The remedies available in merits review offer a person affected by an administrative decision the opportunity to get the outcome they want immediately.
- Why do parliaments provide merits review?:
    - Ensures that all administrative decisions of government are correct and preferable.
        - Improves the quality and consistency of decision making in government agencies.
    - Important accountability mechanism, incudes the provision of reasons.
- Decisions suitable for merits review:
    - A matter for parliament.
    - Administrative Review Council has published detailed guidelines for government on the principles used to determine whether a decision should be subject to merits review.
        - Not binding.
        - Consider the public expense: the time of the review decision maker, the physical infrastructure (hearing room) and the administration and organisation of reviews.
        - Starting point: an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review.

- Categories unsuitable for merits review:
    - Legislation-like decisions:
        - Decisions that are not directed towards the circumstances of particular persons, but which apply generally to the community.
    - Automatic or mandatory decisions:
        - Arise where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances.
            - There is nothing on which merits review can operate.
    - Extensive inquiry processes:
        - Decisions that would create a situation in which the costs of merits review (financial or efficiency, or both) outweigh the benefits.
    - No appropriate remedy:
        - The effect of the decisions has been spent, the decision is irrevocable, or where the decision has such limited impact that the costs of review cannot be justified (only a small financial cost).
    - Allocation of finite resources between competing applicants; highest consequence to government; financial decisions with a significant public interest element; access to parliamentary and judicial records; law enforcement.

Internal and external merits review

- Ways merits review is carried out: internal review, external review by specialist and generalist bodies, and merits review by courts.
- Individuals can also simply approach the original decisions-maker, or their supervisor, and ask them to reconsider the decision.
- Internal review:
    - A review within the department or agency that made the original decision, often by a more senior officer than the original decision-maker (or simply another person).
        - If the statute provides for a minister to be a *primary* decision maker, there will rarely be any provision for internal review as the Minister is the highest-ranking official within any department.
    - Advantages:
        - Faster, cheaper, more accessible than external review, and able to address grievances more efficiently.
        - For agencies, it is an effective way of improving the quality of their decision making.
            - Identify areas in which staff may need training
    - Disadvantages:
        - Lack of independence from original decision maker.
        - If the statute makes internal review a prerequisite to seeking external merits review, an effectual internal review process simply becomes an additional hurdle to clear before seeking review externally.
            - Potential to succumb to ‘appeal fatigue’.
        - Internal review alone does not meet the objectives of an effective system of merits review because of its inherent lack of independence.
- External review:
    - Achieve the independence internal reviewers cannot.
        - Power determined by statute.
    - Review bodies can be specialist bodies dealing with a particular class of matter (Social Security Appeals Tribunal) or generalist bodies with jurisdiction to review a wide range of administrative decisions (AAT).

- Courts with merits review jurisdiction:
    - Specialist courts combine judicial power with merits review functions in relation to particular subject matter.
    - Possible but unusual to confer generalist merits review functions on a state court.
    - Subject to constitutional limits:
        - Federal courts may only exercise the judicial power of the Commonwealth: *Boilermakers*
        - In de novo merits review, the review body stands in the shoes of the original decision maker, applies policy as well as law, and exercises administrative discretion in order to arrive at the correct and preferable decision.
            - Exercise of executive power opposed to judicial power.
            - Some more limited merits review functions fall within the category of 'chameleon' powers: *AG v Alinta*
                - That is, their character depends on the body by which they are exercised.
        - There is no rigid separation of powers in the states and so it is permissible to confer non-judicial functions on state courts.
            - Must not be incompatible with the institutional integrity of the court.

Judicial review of, and appeal from, merits review decisions

- Decisions made on internal or external merits review are subject to judicial review for errors of law.
    - Once an applicant has taken a decision through merits review and the review body has substituted its own decision for that of the original decision maker, it is the merits review body's decision that is subject to judicial review and any judicially reviewable errors of law will be those of the review body – not those of the original decision maker.

Chapter 9: Administrative review tribunals:

- A tribunal is an external merits review body that is not a court, although it may have some court-like characteristics.
    - Generally external to other government agencies (structurally and functionally, despite being established by statute, funded by government, and form part of the executive).

Constitutional issues for tribunals

- Commonwealth tribunals:
    - *Brandy*:
        - The Commission's power to determine complaints by ascertaining the relevant facts and applying the law to those facts was not necessarily judicial. But the procedure by which the Commission's determinations became enforceable as orders of the Federal Court shifted the Commission's power into the realm of judicial power.
        - The effect of the legislation was that the Commission's determinations became binding and authoritative: a defining characteristic of judicial power.
            - Infringed the *Boilermakers* principle.
    - Whether judges of federal courts can be appointed to tribunals: *Drake*
        - The appointment of a federal judge to the AAT did not infringe the *Boilermakers* principle.
            - There is a difference between, on the one hand, 'the appointment of a person, who has the qualification of being a judge…, to perform an administrative function' and, on the other, 'the purported investing of a court created under Ch III of the Constitution with functions which are properly administrative in their nature.

        - It is constitutionally permissible for serving federal judges to sit on merits review tribunals.
- State tribunals:
    - States have greater freedom in conferring powers on their tribunals.
        - Can be given judicial power in addition to merits review functions.
    - Limits:
        - Cannot be invested with federal judicial power because they are not courts (s 77(iii)) Constitution.
        - Conferral of non-judicial functions on a state judge acting *persona designate* can breach the *Kable* principle.

Status of tribunal decisions

- *Brandy*:
    - Commonwealth administrative tribunals cannot be given the power to enforce their decisions unlike courts.
        - Contempt of court, seizure of property.
- Tribunal decisions generally have the same legal force as the original decision which is under review and, while tribunal lack the formal machinery to enforce their decisions, in practice their decisions are generally followed.
    - Matter can be taken to court to engage the court's coercive mechanisms.
- Issue of precedence: highly desirable but not obligatory.
    - Precedence should apply as many administrative review tribunals make a large number of decisions involving similar facts and legislation and it is desirable that the tribunal take a consistent approach to similar cases.
    - Publishing reasons makes it relatively easy to apply previous decisions of a tribunal.
    - Where agencies disagree with tribunal decisions, they should make a public statement explaining their reasons for adopting an approach inconsistent with that of the tribunal.

Issues of tribunal design

- Specialist, generalist, and super tribunals:
    - Specialist: review decisions concerning a specific subject matter.
    - Generalist: exercise review jurisdiction over a diverse range of decisions (AAT).
    - Super: a form of generalist tribunal, vested with civil jurisdiction, typically in high volume but low dollar value areas.
        - Primary decision maker (rather than review)
- Jurisdiction:
    - No inherent jurisdiction – parliament must specify which decisions a tribunal can review.
    - Enabling acts: an arrangement is for the Act establishing the tribunal to allow other Acts to confer jurisdiction on the tribunal.
        - In order to find out what jurisdiction the tribunal has, we have to search through other legislation in the relevant jurisdiction.
    - An enabling Act may also modify the way in which the tribunal conducts the review of decisions under that Act.

Procedure

- Common for legislation to provide that a tribunal is not bound by the formal rules of evidence that operate in courts and that the procedures to be adopted are at the discretion of the tribunal: *Eshetu*
    - Tribunals must usually comply with the rules of procedural fairness.

Nature of review

- Phrases which have been used to confer de novo merits review functions:
    - A fresh hearing on the merits

- The power to exercise any function given to the original decision maker.
- All the powers and discretions of the original decision maker, together with the power to affirm, vary, set aside or substitute the original decision.

The role of government policy

- *Drake*:
  - When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal 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. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny.
  - However, tribunals must not apply policy without regard to the circumstances of the individual case and must not apply a policy that is inconsistent with the statute.
  - Cogent reasons:
    - Application of the policy would be unjust or the policy is unlawful in the sense of being inconsistent with the relevant statute.

Administrative Appeals Tribunal

- *Collector of Customs (NSW) v Brian Lawlor Automotive*:
  - Having regard to the reasons for the creation of the AAT – to provide an alternative to the unduly technical system of judicial review – the Court held that the AAT had jurisdiction to review decisions made 'in purported exercise of the powers conferred by the enactment', regardless of whether the decision was lawful.
    - To have held otherwise would have severely restricted the scope of the AAT's review function.
- *Drake*:
  - The phrase 'correct or preferable' indicates that the AAT is to undertake a de novo review; it is not limited to correcting error on the part of the original decision maker.
- *Shi*:
  - The AAT's decision is to be based on the material before the AAT, rather than the material before the original decision maker. The AAT is to consider the facts as they are at the time of the AAT decision, rather than the facts as they were at the time of the original decision, unless the statute provides otherwise.
  - The AAT has the purpose of stepping into the shoes of the original decision maker and making a decision on the merits.
    - It has the power to substitute its own decision for the original decision.
- Standing:
  - Basic standing test: 'person whose interests are affected'.
    - Suggested that the test is broader than the common law tests: *Re Control Investments and Australian Broadcasting Tribunal (No 1)*.
  - Public interest groups:
    - Standing conferred on any organisation or association in relation to a decision which relates to a matter included in the objects or purposes of the organisation or association.
      - *Re Control Investments and Australian Broadcasting Tribunal (No 1)*.
    - Easier to establish standing.
    - A group cannot be formed simply in order to gain standing nor can a group confer standing on itself by amending its objects or purposes after the decision has been made.

- As long as the person has standing, and the decision concerned is one that the AAT has power to review, there is a right to reasons.

State and territory administrative review tribunals

- They exercise generalist merits review powers conferred by enabling Acts.
- SACAT does not have de novo merits review powers, but conduct reviews by way of re-hearing: *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 34.

Cases

Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409, particularly p 419

- The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material *before the Tribunal*.
- The Tribunal is obliged to act with judicial fairness and detachment.
    - In its review of an administrative decision, it is subject to the general constraints to which the administrative officer whose decision is under review was subject, namely, that the relevant power must not be exercised for a purpose other than that for which it exists, that regard must be had to the relevant considerations, and that matters absolutely apart from the matters which by law ought to be taken into consideration must be ignored.
- An administrative officer charged with the exercise of discretionary power will be entitled, in the absence of specifically defined criteria or considerations, to take into account government policy.
    - Where not inconsistent with the provisions or the objects of an Act.

Shi v Migration Agents Registration Authority (2008) 235 CLR 286, particularly 296-299 (Kirby J) 324-328 (Kiefel J)

- The nature of the review conducted by the Tribunal depends upon the terms of the statute conferring the right, rather than upon the identification of it as an administrative authority entrusted with a particular type of function.
    - Stands in the shoes of the original decision maker.
- The object of the review undertaken by the Tribunal has been said to be to determine what is the “correct or preferable decision” (154). “Preferable” is apt to refer to a decision which involves discretionary considerations (155). A “correct” decision, in the context of review, might be taken to be one rightly made, in the proper sense (156).
- Where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the Tribunal in the process of informing itself. Cases which state that the Tribunal is not limited to the evidence before the original decision-maker, or available to that person, are to be understood in this light (162). It is otherwise where the review to be conducted by the Tribunal is limited to deciding the question by reference to a particular point in time.

Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338, particularly p 342 (Bowen CJ)

- It is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration.
- It appears to me that the word simply refers to a decision in fact made, regard· less of whether or not it is a legally effective decision. The difficulty lies in interpreting the words "made in the exercise of powers conferred by that enactment". This may mean that it must be shown there was a decision made:
    - (a) in pursuance of a legally effective exercise of powers conferred by the enactment; or

        - Rejected.
    - (b) in the honest belief that it was in the exercise of powers conferred by the enactment; or
        - Rejected.
    - (c) in purported exercise of powers conferred by the enactment.
        - The adoption of this COLLECTOR view would mean that the Administrative Appeals Tribunal would have jurisdiction to entertain an appeal from a decision WALES in fact made, which purported to be made in the exercise of powers under an enactment. It could then proceed to determine whether the decision was properly made in fact and in law. There is nothing unusual in holding that an administrative decision which is legally ineffective or void is susceptible of appeal.
- A decision made in the intended exercise of powers will generally constitute a purported exercise of those powers

Daycorp P/L v Parnell [2011] SADC 191

- The third limb of the test is that disclosure "would, on balance, be contrary to the public interest". The test is not whether disclosure would be in the public interest but whether it would be contrary to the public interest.[14] In considering whether disclosure would have that result it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies against the public interest in the proper working of government and its agencies.[15] Any specific adverse effect that disclosure could reasonably be expected to cause is a relevant consideration. As Paterson observed:[16]
    - There is a general public interest in favour of disclosure inherent in the objectives of the legislation which may be augmented by factors specific to an individual document or request. That interest must be balanced against any potential harm to an interest which is protected by the exemption provision.
- When faced with multiple claims for exemptions an external review authority is obliged to consider each claim and to determine whether it satisfies the test(s) of exemption relied upon by the agency or a third party. A failure to conduct the review in accordance with these principles constitutes jurisdictional error, as illustrated by the decision of the Federal Court in *Htun v Minister for Immigration and Multicultural Affairs*
- The success of the consortium's argument [that it is contrary to public interest] would require the public to reach a 'wrong' conclusion, and I am not satisfied either that the public would do this or, in a subjective sense, and where opinions may differ, could do this. For these reasons I am not satisfied that the disclosure of this information could reasonably be expected to have an adverse effect on the business affairs of the consortium (or its constituent members). I am not satisfied that disclosure of this information would, on balance, be contrary to the public interest.
- Decisions of this nature tend to impact a wide variety of people, significantly the people living in surrounding areas, and not just those involved in the negotiations. Disclosure of relevant information assists openness and accountability. Any countervailing public interest factors tending against disclosure will have to be weighed against this.
    - More particularly, and in the light of the importance of these decisions made under theDevelopment Act, it is my view that there is significant public interest in the actual issue surrounding the particular information, and a corresponding public interest in knowing that the government is appropriately handling such issues. Accordingly, to the extent that this disclosure of this information could be expected to have an adverse effect on the business affairs of the consortium, I am not satisfied that this outweighs the overriding public interest in the release of the information.
- I do not consider something becomes confidential merely because it constitutes criticism of another party. Moreover, where there is, in a general sense, a strong public interest in a decision likely to affect many people, I do not consider there to be a comparatively strong public interest in not disclosing a criticism made by one party about another. Rather, the party being criticised may have something to add to the matter and good decision making will be enhanced.
- The failure to give sufficient reasons constitutes error of law

- I reject the consortium's submission that its business relationship with the government would be damaged by disclosure. The information sought by Mr Parnell has not been, and will not be, released by the government. Indeed, his application under the FOIA for access to the documents was refused by the government's agency (DPLG) and granted only after he applied to the Ombudsman for a review of that determination. Furthermore, approval of the DPA has been granted.
- Nor do I accept that disclosure would compromise future dealings between the government and the consortium and other private developers. For the reasons already expressed there is no substance in the consortium's claim that its business affairs will be adversely affected by disclosure. I do not believe that the consortium or other private developers are likely to be deterred from entering into substantial and lucrative ventures with the government due to the release of such information under the FOIA. The submission is commercially unrealistic. Moreover, as Paterson has observed, the significance of access to business information in ensuring the objective transparency inherent in freedom of information legislation has increased commensurately with the extent of commercialisation of government activities.
- I turn to the fourth factor that "disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest". I do not believe that at the time of the external review disclosure of the information in the documents would necessarily have resulted in confusion or ill informed debate about the proposed rezoning. As I earlier remarked the risk of public misunderstanding can be countered by the release of further appropriate information. Furthermore, whatever may have been the position at the time of the external review, there is now no risk of ill informed debate because the DPA has been approved

Seminar

Commonwealth Merits Review

Questions:

Answer the following questions

1. In relation to the current wording of the legislation; and

2. As the law would apply if amended by the Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth).

Note: Question two is only answered if applicable (that is, if it differs from the response given in question 1)

- **Does the CEO have a right to internal review, and does she have to apply for internal review before seeking any other form of merits review?**
    - The CEO has a right to an internal review as s 52 provides for internal review of decisions by agencies, other than decisions made personally by the principal officer of an agency or the responsible Minister, where there has been an access refusal decision (ss 53A(a) or (b), (b), s 54(2)). Agencies are required to complete internal reviews within 30 days (s 54B(1)(a)). However, this period may be extended.
        - Does **not** have to seek internal review before other forms of review: s 54L(2)(a) – application may be made for an access refusal decision, or of an internal review of such a decision (see Note 1, which states this).

- **Who makes the decision if internal review is sought?**
    - Section 54C(2): The agency must, as soon as practicable, arrange for a person (other than the person who made the original decision) to review the decision.
        - 54C(3) The person must make a fresh decision on behalf of the agency within 30 days after the day on which the application was received by, or on behalf of, the agency

- **What powers does this new decision maker have on internal review?**
    - 54C(3): The person must make a fresh decision on behalf of the agency within 30 days after the day on which the application was received by, or on behalf of, the agency. **New decision is substituted.**

- **If dissatisfied with the decision made on internal review, where can the CEO then seek merits review?**
    - Information Commissioner and **then** the Administrative Appeals Tribunal (AAT).
        - IC: The CEO can apply for s 54L(2)(b) IC reviewable decision – where a decision is made by an agency on internal review of an access refusal decision.
        - AAT: 57A Tribunal reviewable decisions
            - (1) An application may be made to the Tribunal for review of the following decisions:
                - (a) a decision of the Information Commissioner under section 55K on an IC review.
    - AAT: 57A(d): a decision under section 54C made by an agency on internal review of an access refusal decision or access grant decision.
        - IC: the right to external merit review of FOI decisions will lie directly with the AAT, and unresolved applications will be transferred to the AAT for completion.

- **What decision making powers does this new decision maker have?**
    - Information Commissioner and then the Administrative Appeals Tribunal (AAT).
        - IC – The Information Commissioner may make preliminary inquiries before deciding whether or not to conduct a review. In certain circumstances, the Information Commissioner may decide not to review a decision (or a part of a decision) (see Division 5).

- Div 7, s 55K(1) After undertaking an IC review, the Information Commissioner must make a decision in writing:
    - (a) affirming the IC reviewable decision; or
    - (b) varying the IC reviewable decision; or
    - (c) setting aside the IC reviewable decision and making a decision in substitution for that decision.
- (2) For the purposes of implementing a decision on an IC review, the Information Commissioner may perform the functions, and exercise the powers, of the person who made the IC reviewable decision.
- (3) A decision of the Information Commissioner on an IC review has the same effect as a decision of the agency or Minister who made the IC reviewable decision.

- 55L Decision on IC review—no power to give access to exempt documents
    - (1) This section applies if it is established in proceedings on an IC review that a document is an exempt document.
    - (2) The Information Commissioner does not have power to decide that access to the document is to be given, so far as it contains exempt matter

- Section 55(1) The Information Commissioner may, for the purposes of an IC review, review an IC reviewable decision by considering the documents or other material lodged with or provided to the Information Commissioner, and without holding a hearing, if:
    - (a) it appears to the Information Commissioner that the issues for determination on the IC review can be adequately determined in the absence of the review parties; and
    - (b) the Information Commissioner is satisfied that there are no unusual circumstances that would warrant the Information Commissioner holding a hearing; and
    - (c) none of the review parties have applied for a hearing under section 55B
- Section 55(2) (2) The Information Commissioner may otherwise:
    - (a) conduct an IC review in whatever way he or she considers appropriate; and
    - (b) use any technique that the Information Commissioner considers appropriate to facilitate an agreed resolution of matters at issue in the IC review (for example by using techniques that are used in alternative dispute resolution processes); and
    - (c) allow a person to participate in an IC review by any means of communication; and (d) obtain any information from any person, and make any inquiries, that he or she considers appropriate; and
    - (e) give written directions as to the procedure to be followed in relation to: (i) IC reviews generally; or (ii) a particular IC review.

- AAT – section 58 powers of AAT:
    - (1) … The Tribunal has power, in addition to any other power, to *review any decision* that has been made by an agency or Minister in respect of the request and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister

- (2) Where, in proceedings under this Act, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted

- **Freedom of Information Act 1982 (Cth) s 55H and s56 refer to the Federal Court; could the Federal Court review this decision on the merits?**
  - 56 Appeals—appeals to Federal Court of Australia on questions of law
    - (5) The Federal Court of Australia:
      - (a) must hear and determine the appeal; and
      - (b) may make any order or orders that it thinks appropriate by reason of its decision.
    - (6) Without limiting subsection (5), the orders that the Federal Court of Australia may make include the following:
      - (a) an order affirming the decision of the Information Commissioner;
      - (b) an order setting aside the decision of the Information Commissioner and making a decision in substitution for the decision;
      - (c) an order remitting the case to be considered and decided again by the Information Commissioner in accordance with the directions of the Court:
        - (i) with or without the holding of a hearing; and
        - (ii) with or without the hearing of further evidence.

Notes:

Question	Current Legislation	If Amended	Notes
Right to internal review?	Yes, under s 54. • Decision not made under principal officer or Minister of an access refusal decision (53A)		
Need for IR before other reviews?	Don't need internal review from IC first (54L(2)(a)) • Must have an IC review before an AAT review (57A)	New s 57A(d): Can go from access refusal review to AAT. • Internal review compulsory. • Exception: a decision by a minister or Principal Officer. • Then to AAT.	Current: 4 steps Amended: 3 steps
Who?	Another person within the agency: s 54C(2) • Usually someone senior		
Powers?	A fresh decision is made: 54C3		
If dissatisfied?	Go to Information Commissioner for review: 54L(2)(e)	Go to AAT for review: 57A(d)	Current: Internal Review > IC > AAT Amended: Internal Review > AAT
Powers?	IC - Section 55K(1) • (a) Affirm • (b) Vary	Power: s 58(1) but not s 58(2)	

	• (c) Set Aside IC - Section 55K(2) Can exercise same powers as original decision maker • Except to grant access to exempt documents: 55L AAT – Section 58(1) Tribunal can substitute its decision for the original decision maker • 58(2) can't give access to an exempt document.		
Apply to AAT?	Yes, if an IC review has first been made: 57A(1)(a) • Must have standing: s 27 of AAT act. That is, interests are affected by the decision.	Section repealed. • Look to AAT Act s 44	
Can the Fed Ct review on the merits?	No: *Biolermakers* – a judicial body cannot exercise Executive power.		

Merits Review Generally:

- Executive power, not Judicial.
- Substance – facts and law.
- Generally a fresh decision – appeal de novo.
    - Decision maker stands in the shoes of the original decision maker
- Can consider new evidence that exists after the original decision.
    - New evidence is admissible: *Shi*.
- Cheaper, less formal, representation not needed, faster resolutions
- Not a right – it's a creature of statute: an Act must provide for it.
    - There must be standing and substance to the appeal.
    - If the enabling legislation is silent once it has granted a right to review, then the AAT provisions come into play – otherwise, the enabling legislation dictates.
- Must be the 'correct and preferable' decision: *Drake*.
    - Preferable: with the discretionary power. With all options available, which is most preferable considering the facts and law.

- Page 92 of the course materials (seminar questions) is a checklist to answering questions.
    - 'Where can you seek review'? > Insert merits review beneath.
    - Process:
        - Access refusal decision:
            - FOI Officer > Internal Review officer (another, different) > Information Commissioner > AAT (per the FOI Act (Cth))
            - Is there standing?
                - CEO's application, which was refused. Therefore directly affected.

    - Standing only an issue when it comes to third parties, generally.
- Grounds/merits of your appeal?
    - Argue on the merits and what is the correct or preferable decision
    - What orders will you seek and what is permissible under the act?