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## Topic 1: Constitutional Introduction to judicial review and the laws/merits distinction

An executive decision-maker makes a decision. If you're unhappy with that decision, how do you challenge it?

- **Merits Review:** Did they make the preferable or correct decision?
- **Judicial Review:** Were they legally authorised to make the decision that they did?

### Judicial Review vs Merits Review

- Judicial review is the process by which a Court investigates the legality of a decision made by an administrative decision-maker as to whether they've followed the correct legal procedure/process. Thereby as a judicial review involves resolving a question of law only, merits review involves placing the reviewer into the shoes of the decision-maker and making a fresh decision on the facts.
- While every individual has a constitutional right to challenge a law through judicial review (**Kirk v Industrial Relations Commission**), a merits review can only be undertaken if the empowering statute provides an avenue of merits review.
- Essentially, the administrative decision-maker decides the merits, the Court's decide the law. The judiciary's job in judicial review of administrative action is to attend to the legality, as distinct from the merits, of the action.
- Judicial review is concerned with whether there was an error of law, not whether the decision was a good decision on the facts of the case. Courts avoid involvement in the merits of a case to retain separation of powers.

### Attorney-General (NSW) v Quin (1990)

- It is the executive's job to attend to the 'merits' of administrative action, while it is the judiciary's job to supervise its legality
- 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 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." [36].
- 'Judicial review has undoubtedly been invoked, and invoked beneficially, to set aside administrative acts and decisions which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful.' [35].
- 'If judicial review were to trespass on the merits of the exercise of administrative power it would put its own legitimacy at risk'

## Topic 2: Merits Review Institution and Other Tribunals

Whilst a judicial review involves a judicial determination as to whether the legality of an administrative decision is valid (i.e., within the powers of the decision-maker), a merits review involves an independent tribunal re-considering the initial decision made by the decision-maker; focusing on the merits of the decision. This includes a scrutiny of the original decision by 'stepping into the shoes,' in taking into account all the factors that the original decision-maker had before them (even material that has since

become available, in some circumstances) to determine if the decision was correct (legally) or preferable (normatively).

### **Types of Tribunals**

- Independent Merits Review Tribunals (Cth ART – abolished AAT in 2024; NSW ADT)
- Independent Investigative Tribunals (Ombudsman; ICAC)
- ‘A tribunal’ is a generic term for institutions/bodies that determine/resolve disputes by adjudication, but not acting as a court (can be called e.g., board, council, commission, authority...)
  - Tribunals are a creature of statute; merits review is always established by legislation.

### **Independent Merits Review Tribunals**

Independent Merits Review used to be conducted by AAT (Administrative Appeal Tribunal), but was replaced by Administrative Reviews Tribunals. ART’s most common decisions are:

- Social Security; Taxation; Veteran’s affairs; worker’s compensation for Commonwealth Employees; Freedom of Information; Migration; NDIS.

### **ART’s organisation and membership:**

- Consists of President, the Deputy President, the senior members and ordinary members.
- President: judge of the Federal Court.
- Senior members: legal practitioners enrolled for at least 5 years.
- Ordinary members: people with special skills or knowledge.

### **Administrative Review Act 2024 (Cth)**

#### **Section 9 Objective**

The Tribunal must pursue the objective of providing an independent mechanism of review that:

- a. Is fair and just.
- b. ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; and
- c. is accessible and responsive to the diverse needs of parties to proceedings; and
- d. improves the transparency and quality of government decision-making; and
- e. promotes public trust and confidence in the Tribunal.

#### **Section 12 Reviewable Decisions**

1. A decision is a reviewable decision if an Act or a legislative instrument provides for an application to be made to the Tribunal for review of the decision.
2. In addition, if an Act or a legislative instrument provides for an application to be made to the Tribunal for review of a decision of a person under a power, a decision under the power is a reviewable decision, whether or not it is made by the person.

#### **Section 17 Who can Apply**

1. A person whose interests are affected by a reviewable decision may apply to the Tribunal for review of the decision.

#### **Section 22 Parties to Proceedings for Review**

1. Each of the following parties to a proceeding for review by the Tribunal of a decision:
  - a. The applicant for review;

- b. The decision-maker;
- c. Any other person, if:
  - i. The person applies to the Tribunal to become a party to the proceeding; and
  - ii. The Tribunal is satisfied that the person's interests are affected by the decision; and
  - iii. The Tribunal considers it appropriate that the person becomes a party to the proceeding.

**Section 27 Decision-makers must give copies of reasons and documents to other parties – general rule**

1. If a decision-maker for a decision is required to give the Tribunal a statement or copy of a document under this Subdivision within a period, the decision-maker must give a copy of the statement or document to each other party to the proceeding for review of the decision within the same period.
2. Subsection (1) does not apply if there is a certificate under section 91 (disclosure of information—public interest certificate) that relates to the disclosure of the statement or document in the proceeding.

**Section 50 Tribunal is to act informally etc**

1. In a proceeding, the Tribunal must act with as little formality and technicality as a proper consideration of the matters before the Tribunal permits.
2. Subsection (1) is subject to this Act and the rules.

**Section 52 Tribunal is not bound by rules of evidence**

The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it considers appropriate.

**Section 54 Tribunals can exercise powers of a decision-maker**

For the purposes of reviewing a reviewable decision, the Tribunal may exercise all the powers and discretions that are conferred on the decision-maker by an Act or an instrument made under an Act.

**Section 55 Right to present case**

*General Rule*

1. The Tribunal must ensure that each party to a proceeding in the Tribunal is given a reasonable opportunity to:
  - a. Present the party's case.
  - b. Access any information or documents to which the Tribunal proposes to have regard in reaching a decision in the proceedings; and
  - c. Make submissions and adduce the evidence.
  - d. (The rest of the section is about exceptions to the rule)

**Section 69 Hearings to be in public unless practice directions or Tribunal order requires otherwise**

*General Rule*

1. The hearing of a proceeding of a tribunal must be in public.
2. (The rest of this section is about exceptions to the rule)

## **Section 123 Application may be made to refer certain Tribunal decisions to guidance and appeals panel**

### *General Rule*

1. Application may be made to the President to refer a decision of the Tribunal under section 105 (Tribunal decision on review of reviewable decision) to the guidance and appeals panel

*Parliamentary Counsel Note: If the President refers a Tribunal decision to the guidance and appeals panel, the Tribunal will be constituted by the guidance and appeals panel for the purposes of the proceeding (see sections 41 and 42).*

2. An application may be made under subsection (1) by a person who was at any time a party to the proceeding in which the decision of the Tribunal is made.
3. To avoid doubt, the decision of the Tribunal is not a reviewable decision.

*Parliamentary Counsel Note: If the President refers a Tribunal decision to the guidance and appeals panel, the review relates to the decision affirmed, varied or set aside by the Tribunal decision (see subsection 130(2)).*

(The rest of this sections is about exceptions to the rule)

## **Section 172 Party may appeal**

1. A party to a proceeding in the Tribunal may appeal to the Federal Court, on a question of law, from the decision of the Tribunal in the proceeding.

## **Section 176 Federal Court has jurisdiction**

1. If an appeal is made under Subdivision A, the Federal Court:
  - a. Has jurisdiction to hear and determine the appeal; and
  - b. Must hear and determine the appeal; and
  - c. May make any orders it considers appropriate because of its decisions.
2. Without limiting the orders it may make, the Federal Court may:
  - a. Affirm or set aside a decision of the Tribunal; or
  - b. remit a matter to be decided again by the Tribunal, either with or without the taking of further evidence, in accordance with the directions of the Court.

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

- The tribunal determines what is the correct or preferable decision based on the material before them with judicial fairness and detachment.
- Drake (US citizen, permanent residency in Aus. – convicted of possession of drugs – year or longer) argued that the tribunal attached such an importance on the policy that it meant that the AAT failed to exercise its own independent judgement when deporting him. Appeal allowed. **AAT failed to make an independent assessment and independent determination – therefore failing to exercise its review function.** Drake
- Any AAT decision to apply to a particular policy **must be the result of an independent determination of the propriety of the policy** (i.e., appropriateness of the policy) and that the **correct or preferable decision is the decision that results from applying the policy.**
- **Correct** applies where there is a binary – only one lawful result/conclusion. **Preferable** applies where there is more than one possible correct decision ('preferable ways of exercising discretion')

### **Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1980)**

- The AAT will ordinarily apply a governmental policy when it is reviewing a decision and **should not depart from the policy unless there are ‘cogent reasons’ against its application** i.e., when the policy is unlawful or when it tends to produce an unjust decision in the circumstances of the particular case.
- **The AAT may depart sparingly from the minister’s policy.**
- Drake (No 1) remitted the case for re-hearing; Brennan J gave a practice direction concerning the AAT departures from Government policy (above).
- The two key requirements of policy (at 640) are that it must be consistent with the statute and that it cannot fetter the range of discretion in the statute (can guide but can’t control- can’t serve a purpose for which the power was not created i.e., taking into account irrelevant considerations)

#### **Shi v Migration Agents Registration Authority (2008)**

- **Unless the legislation enabling the primary decision requires otherwise, the AAT will ordinarily make the correct or preferable decision assessing evidence in the circumstances at the time of the AAT decision, not looking-back at the time of the original decision.**
- Mr Shi provided new evidence to the AAT to show that as at the date of the hearing, he was a fit and proper person. Held that the AAT is not confined/restricted to circumstances at the time of the original decision but **can consider new material**.
- Function of the AAT: **s 43 requires a Tribunal to consider a decision on its merits – the Tribunal has to consider “relevant material including any new, fresh, additional or different material that had been received by the Tribunal as relevant to its decision”**
- Purpose of s 43 of the AAT Act: it is a feature of good public administration that a decision - maker have regard to the best and most current information available ([39]-[41])

#### **MZZZW v Minister for Immigration and Border Protection (2015)**

- There is a non-delegable duty to review with requirements of a **‘fresh and independent consideration’ in the review process**, emphasising the inquisitorial nature of the review process. **An independent mind must be brought to the review task which ‘resolves afresh the claims made’ with ‘fresh eyes.’ The AAT must consider a decision for itself; ‘afresh.’**
- Asylum seeker refused protection visa. Member Boddison (2nd review) had not considered the decision “afresh” because she had not brought an independent mind to the consideration of the appellant’s claims (passages of her decision were copied and pasted from initial review).

#### **Ombudsman Act 1976 (Cth)**

##### **Section 5 Functions of Ombudsman**

1. Subject to this Act, the Ombudsman:
  - a. shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and **in respect of which a complaint has been made to the Ombudsman**; and
  - b. may, **of his or her own motion**, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority; and
  - c. with the consent of the Minister, may enter into an arrangement under which the Ombudsman will perform functions of an ombudsman under an ombudsman scheme established in accordance with the conditions of licences or authorities granted under an enactment.