

Introduction

Administrative law is the body of law of most direct relevance to the administrative state for the reason that its central (although not exclusive) focus is on the legal reputation of the executive branch of government (the administration).

Merits v legality = what people review

Merits → considerations bearing upon why a given administrative action is considered to be a preferable one in legal and factual circumstances

- Requirement that executive determine merits is closely associated with fact that many statutory powers vested in administrative decision-makers will be in form of discretion.
 - **Discretion** → 'rule making' and 'decision making'
 - **Rule making** - making of secondary or delegated legislation
 - **Decision making** - administrative decision making.

Legality → when conducting judicial review, court may decide legality of administrative action by reference to **four kinds of legal material**:

- Constitution
- Statute that executive is charged with administering.
- Principles of statutory interpretation
- Norms of administrative law (known as grounds of judicial review)

Distinction between both is based in the Constitution.

Australian system of administrative justice

The central focus of administrative law is on the legal regulation of the executive branch of government, gesturing to the separation of powers principle.

- Protects the rights and interest of individuals and corporations when they deal with government agencies.
- Provide a mechanism for accountability and external check on executive decision-making and action.

Breadth of administrative law

Who is in the executive branch of govt & exercising the power?

- Political Executive i.e. the PM, ministers, Governor General
- Bureaucrats i.e. traditional departments of state, public servants.
 - Also called 'integrity' branch, for ensuring that the executive acts with integrity & is accountable.

Core institutions

The Courts

- High Court, Federal Court → engages in judicial review under the Constitution s75(v)
- Judicial review → courts can review and repeal decisions and invalidate them. They do not decide for the Executive (separations of powers)

Merit Appeal Tribunal → Engage in merits review

- Administrative Appeals Tribunal (AAT): This job couldn't be performed by a Ch III court.
 - Looks at the substantive desirability of a decision as opposed to whether or not it complies with legal requirements.

Ombudsmen

- A complaint body → It is a non-adjudicative accountability mechanism that doesn't depend on a judge / tribunal to decide a dispute. It takes complaints against governments.
- Other examples: ICAC, Human Rights Commissions, Royal Commissions.

Delegated legislation

- The central focus of administrative law is on the legal regulation of the executive branch of government, gesturing to the separation of powers principle.

The Minister for Immigration and Multicultural and Indigenous Affairs suspended Clark from office as a Commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC) because of a conviction for obstructing police. ATSIC Act s 40 said the Minister could suspend a Commissioner from office for 'misbehaviour'. S4A said the Minister may make written determination that specified behaviour is taken to be 'misbehaviour'. Exercising s 4 A, the Minister made ATSIC (Misbehaviour) Determination 2002 specifying in clause 5(1)(k) that misbehaviour included conviction for a criminal offence which is punishable by imprisonment. The Minister said Clark's conviction amounted to "misbehaviour" by virtue of the Determination and was also within the "general concept of misbehaviour" in s40(1) of the ATSIC Act.

Held → Black CJ and Weinberg J decided Cl 5(1)(k) was invalid because it lacked reasonable proportionality.

- Black CJ said Cl 5(1)(k) did not "specify" misbehaviour as required by the ATSIC Act.
- Weinberg differed on that point, but nevertheless considered that Determination was invalid because it was not "proportionate" as the law required.
- Both members agreed that the **general concept of "misbehaviour" within the meaning of the ATSIC Act must relate to fitness for office** and that the Minister's reasons did not show that she had considered the question according to the correct view of what misbehaviour was in that context.
- In other words, the judges also considered this issue as one of simple ultra vires, rather than one of taking into account irrelevant consideration.

Evans v New South Wales (2008) 168 FCR 576

Full Court of the Federal Court had to determine whether a regulation was validly made within the regulation-making power conferred by the primary legislation. Issue considered → **application of the principle of statutory interpretation known as the 'principle of legality'**.

- Principle of legality → if Parliament intends to interfere with fundamental rights or principles, or to depart from general system of law, then it must express that intention b clear and unambiguous language.

The applicants argued that certain provisions in the WYD Act and the Regulation were constitutionally invalid on the basis that they impermissibly burdened the implied freedom of communication on matters of government or politics under the Constitution. They also claimed that certain provisions in the Regulation were 'ultra vires' the WYD Act.

Ultra vires issue → French, Branson and Stone JJ

- In determining whether CL 7 is within regulation making power conferred by WYD Act → first consider proper construction of section conferring that power in light of the scope and objects of that Act.
- Clause 7 then examined to determine whether, on its proper construction, it falls within the statutory authority.
- These two processes are interdependent.

On what grounds can delegated legislation be declared invalid?

Full range of judicial review grounds are not available. The three main types are:

- Inconsistent with/repugnant to empowering Act
- Exercised for an impermissible purpose
- Unreasonableness/disproportionality - "so unreasonable that it cannot be regarded as falling within the contemplation of the legislature in enacting the empowering Act"

JUDICIAL REVIEW OVERVIEW

1. Jurisdictions (provision and scope) of Review

- Constitution s 75
- Judiciary Act 1903 (Cth) s 39B
- Administration Decisions Judicial Review Act 1975 (Cth) [ADJR Act]
- Supreme Court Act 1970 (NSW)

2. Legal Standing

- Who can apply for review under this avenue?

3. Grounds for Review

- What must such a person establish in order to succeed?
 - a) Procedural fairness
 - Hearing rule, bias rule
 - b) Decisional grounds
 - Error of law, no evidence, jurisdictional facts, Wednesbury unreasonableness, uncertainty
 - c) Reasoning process grounds (Broad ultra vires?)
 - Account of irrelevant consideration
 - Omission of relevant consideration
 - Improper purpose
 - Inflexible policy
 - Behest of others
 - unreasonableness

4. Remedies

- What can a court order if the applicant is successful?
 - a) Prerogative remedies
 - Certiorari
 - Prohibition, mandamus
 - Habeas corpus
 - b) Equitable remedies
 - Injunction & declaration
 - c) Statutory remedies
 - ADJR Act
 - Statutory reforms in the Supreme Court Act 1970
 - d) Constitution s 75

Procedural Aspect → Refers to the remedies such as **certiorari, Prohibition and injunction, mandamus** that courts may grant in their exercise of judicial review.

Substantive Aspect → Relates to the criteria that the courts use to determine whether a government action or decision is lawful or unlawful. The criteria may include procedural fairness, irrelevant considerations, & inflexible application of policy.

Availability of judicial review → what applicants needs to show before a judge will issue remedy

1. **Jurisdiction of the court to deal with the application (legal source of authority) to judicially review the impugned act or decision.**
2. **Justiciability of the dispute** → issues apt for judicial resolution
3. **Standing of the applicant** → must be an appropriate person (have standing) to bring application.

4. A ground for review on the basis of legal error or unlawfulness of the decision → breach of administrative law norm that engages the court's review authority

5. Remedy sought must be made → even if court accepts ground of review is available, it must have power to grant appropriate remedy and there must be no discretionary reasons to refuse relief.

Judicial Review – key concepts

Defining judicial review – used in broad sense to mean civil proceeding in which a superior court determines the legality of a purported exercise of public power by another person or body.

Contrast between appeal and review, and between judicial (or legality) review and merits review.

Courts only look at legality and not merits because merits is about the merits of a policy decision that could have many different outcomes.

- Separation of powers → executive is accountable to Parliament. Judiciary is separate and not elected so to make a judgement on the merits of a decision doesn't accurately reflect the representative population.
- Courts cannot be invested with non-judicial power.

Appeal and review → idea that on judicial review, a court does not exercise decision making power of original decision maker.

An appellate court assumes decision making power that was exercised in the judgement below.

- Judicial appeal has limited range of remedies. Courts (through judicial review) cannot change decisions because it would be exercising executive power. They can only invalidate decisions and make that decision be taken again.

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

Following concerns about fitness for office, Mr Quin and four other magistrates were not appointed to a new magistrate's court system established under the *Local Courts Act 1982* (NSW). In *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268 the magistrates succeeded before the NSW Court of Appeal in arguing that they had been denied procedural fairness in the processes leading up to their nonappointment under the new scheme. Soon after that decision, the Attorney-General announced a policy of appointing magistrates by merit selection, as contrasted with an earlier policy that existing magistrates be reappointed unless considered unfit for judicial office. Mr Quin was not reappointed under the new policy, and successfully sought a declaration from the NSW Court of Appeal that his reappointment be determined in accordance with the earlier policy. The Attorney-General appealed to the High Court, who by majority found allowed the appeal and set aside the declaration.

Brennan J → Judicial review must focus on the statute & not on the merits of the case. This is for a functional reason, as judges are experts on the law and nothing else.

- The courts— above all other institutions of government— have a duty to uphold and apply the law which [38] recognizes the autonomy of the three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.
- “The repository of individual power needs to balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice...”
- If judges were to make these decisions, the legitimacy of their role in our political system would be sacked as they are not electorally accountable to make these decisions regarding the public interest more generally.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

McHugh, Gummow, Kirby and Hayne JJ: question is whether a program standard made by the ABT is invalid. Appellants contend it is invalid as it gives preference to Australian television programs contrary to Australia obligations under an international trade agreement with NZ. ABA established by *Broadcasting Services Act*, functions outlined in s158:

Develop program standards relating to broadcasting in Australia::

- Monitor compliance with those standards
- Object of the act is to ensure Australian control over standards and promote role of broadcasting services in developing Australian identity/character/cultural diversity.
- Importantly, s160(d) states that must perform functions in line with Australia's international obligations.
- Parliament has authority to review and alter a standard, not AAT.

ABA determined Australian Content Standard:

- Set minimum levels of Australian programming/first release Australian programs etc.
- Primary purpose of act is to ensure Australian tv is controlled by Australian for the benefit of Australians.
- S160(d) = potential conflict with Trade Agreement

Federal Court held Standard was invalid to the extent that it was inconsistent with the Trade Protocol.

Full Court held the Act should prevail over the protocol.

High Court held s160 is the leading provision, directing how the function conferred by s122 should be carried out. Power conferred by s122 must be exercised in framework imposed by s160.

- However, an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect.
- Depends on if there was a legislative purpose to invalidate any act that fails to comply with obligation.
- If breach is of a necessary precondition or essential preliminary to exercise of power, that will be invalid.
- Relied on three other factors to conclude that a breach of s160(d) didn't not render a decision invalid:
 - whether the statutory requirement regulated the exercise of functions already conferred or was an 'essential preliminary' to the exercise of a function.
 - Nature of stator requirement → s160 did not have a 'rule-like quality' that could be identified and applied.
 - Public inconvenience that would result if non-compliance meant that a decision was legally ineffective.

Main authority → was it a purpose of the legislation that an act done in breach of the provision should be invalid?

In this case, the making of an Australian content standard in breach of s160 was not outside powers granted to ABA.

- Hence, not invalid.
- S160 regulates the exercise of functions already conferred on ABA, rather than imposing essential preliminaries and this strongly indicates, not a purpose of the Act that a breach of s160 was intended to invalidate any act done in breach of that section.
- Also noted public inconvenience of invalidity

Principle of this case was a breach of a statutory requirement will invalidate a decision where it can discern that it was a legislative purpose, from the language, scope and object of the statute, that such a breach will amount to invalidity.

Key questions as to whether breach of statutory requirement results in 'invalidating error' stemming from Project Blue Sky:

1. What is the purpose of the provision and was it the legislature's intent that breach would result in invalidity (the key question)?

2. Did the section regulate or impose essential preliminaries?

3. Does the section use mandatory language such as 'must' or 'shall be'?

4. Did the section impose 'general obligations' or 'rule like' obligations?

5. What would the consequences be if every act done in breach of condition were held invalid?