

Administrative Law
LAWS1160

Week 1:

Class 1A - Introduction to Australian Administrative Law

- **Foundational concepts and institutions**

Reading: 'Government Accountability: Australian Administrative Law' - Judith Bannister, Anna Olijnyk, and Stephen McDonald (Third Edition) (TEXTBOOK)

Administrative law is a term which corners exercises of power and the performance of functions by government, separate from the legislative process.

Administrative law is concerned with ensuring that the executive branch acts within the limits of the powers granted to it.

- Administrative law mechanisms must exist at both state and federal levels.
- Administrative law must be sufficiently flexible to provide appropriate redress for affected individuals.

Why do we need administrative law?

It exists to protect individual rights, to promote efficient and effective administration, to promote integrity in governmental decision-making, to increase participation in government, and to promote accountability.

Because of the unique powers of the executive

In administering the laws, the executive has the power to alter the legal rights and duties of individuals.

The executive is also responsible for the protection of the state: it exercises the state's military power.

To keep the executive branch accountable

The courts and the parliament already have a number of accountability mechanisms suited to their institutional characteristics.

In contrast, the executive conducts its functions in private.

Reading: 'Administrative Law in the Australian Environment' - Grover and Boughey - Chapter 1

Administrative Decisions (Judicial Review) Act 1977 (Cth)

- Confers judicial review jurisdiction on the Federal Court of Australia and the Federal Circuit Court of Australia.
- Establishes a single, simple procedure for judicial review.
- Establishes a right to reasons - enables anyone entitled to apply for review under the Act to request reasons from the decision-maker.
- Codifies the grounds of review.

Administrative Appeals Tribunal

Administrative or 'merits' review process - whereby an administrative decision can be appealed to an independent tribunal or board - to the quality of decision-making and to the cost of challenging administrative decisions.

Commonwealth Ombudsman

Empowered to investigate and resolve complaints or steer them towards other appropriate avenues.

The Ombudsman may only investigate the actions of agencies, not Ministers.

Government Information: freedom of information and privacy

Freedom of Information Act 1982 (Cth) (FOI Act)

- The FOI Act was intended to make the federal government more accountable by providing individuals with a legally enforceable right to access government information.

Class Notes

Boilermakers Case: a judicial body cannot exercise non-judicial powers, and vice versa.

ART Act - Administrative Reviews Tribunal

s73(3) of the Constitution is for matters beyond administrative law.

s75(5) of the Constitution establishes judicial review through the High Court.

1971 Kerr Report

Burgeoning government power, especially discretionary power should be balanced by adequate mechanisms that ensure the executive exercises its powers and discretions in a fair, rather than arbitrary manner.

Recommendations

- Confer jurisdiction on proposed new Federal Court to review lawfulness (legality) of administrative decisions.
- Enact legislation to simplify, and in some cases extend, judicial review jurisdiction of the new Federal Court.
- Establish new generalist Administrative Review Tribunal to replace myriad specialist tribunals.

Class 1B - Administrative Justice and Values

- The concept of administrative justice
- Administrative law's values
- The challenges of decision-making

Reading: 'Administrative Justice: Towards Integrity in Government' - Robert Creyke (2007)

'Administrative Justice' in the Literature

- Early Writings - The Kerr Committee Report

That justice to the individual has to be tempered by the needs of public administration.

To ensure the establishment and encouragement of modern administrative institutions are able to reconcile the requirements of efficiency of administration and justice to the citizen.

- Later Developments

'Administrative justice is a philosophy that **in administrative decision-making the rights and interests of individuals should be properly safeguarded.**

The juxtaposition of 'administrative' and 'justice' makes this uncertainty inevitable, since it involves balancing the distributive justice focus of public administration against individual interests. This is the central conundrum in assessing what is 'administrative justice.'

- Professor John McMillan: agencies must balance justice in the individual case with other imperatives, such as government policy, consistency, and the need for efficient operation within budgetary constraints.
- Others take a different view. Since 'justice' focuses on the recipient, it is the recipient's interests that should predominate. It follows that **'administrative justice' should be equated with 'social justice' or 'justice for individuals.'**

Its purpose is **to safeguard the rights and interests of individuals.**

- This is to be achieved by **effecting just administrative outcomes and fairness in administrative law processes.**

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs:

Procedural fairness lies at the heart of administrative justice.

Kirby J:

"It has been said that the attainment of administrative justice is not the object of judicial review. At the same time, this **Court** should not shut its eyes and compound the potential for serious administrative injustice. It **should always take into account the potential impact of the decision upon the life, liberty, and means of the person affected.**"

Administrative Law Institutions in which Administrative Justice applies:

French J listed the following as relevant administrative law institutions and processes:

- Internal and external review;
- The Ombudsman;
- Members of Parliament and Ministers;
- NGOs;

What Matters can Tribunals Adjudicate?

A tribunal is able to adjudicate a matter that falls within its jurisdiction, and which is brought by a competent applicant.

Jurisdiction of Tribunals

Unlike a superior court, a tribunal has no inherent jurisdiction. It only has the specific jurisdiction Parliament has chosen to confer on it.

Section 12 and 13 of the ART Act defines what counts as a 'reviewable decision':

s12 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, an Act or a legislative instrument provides for an application to be made to the Tribunal for review of the 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.

Whether a matter can be reviewed by the ART, it is necessary to answer two questions.

1. Has the government made a **decision** falling within the meaning of that term in the ART Act (s4)?
2. Does **legislation confer jurisdiction** on the ART to review that decision?

Case:	<i>Collector of Customs v Brian Lawlor Automotive Pty Ltd (1978) 1 ALD 167</i>
Facts:	- The Collector of Customs had statutory power to grant a warehouse licence permitting a person to store dutiable goods. - The Statute contained no express power to revoke a license. - The Collector nonetheless decided to cancel the applicant's warehouse licence on the basis that the company was not a 'fit and proper person.'
Issue:	is the AAT's jurisdiction only in relation to decisions made legally under the legislation?
Judgement:	The Collector had no legal power to cancel the licence and No, the AAT's jurisdiction is not only in relation to decisions made legally under the legislation.
Key takeaways:	The phrase: "a decision made in the exercise of powers conferred by that enactment" means: • A decision made in the purported exercise of powers conferred by the enactment. - So, decisions can be reviewed by the AAT even if they are illegally made, because they will have been made in the <i>purported</i> exercise of powers conferred by the legislation. - Interpreted broadly so that as many decisions as possible made under a statute conferring jurisdiction can be the subject of merits review. - It is the purpose of the Act to give an effective right of review to a person who in fact was affected by a decision. - Even if a decision is illegal, it will still affect someone until it is set aside.

Standing

It is necessary for a party to apply for review.

- Only parties with standing are entitled to apply for review of government decisions.

s17 Who can apply (ART Act)

- (1) A person whose interests are affected by a reviewable decision may apply to the Tribunal for review of the decision.
- (2) To avoid doubt, a person may apply even if the person is the Commonwealth or an authority, tribunal, or other body that is established by an Act or an instrument made under an Act.

Tribunal Processes and Procedures

Each tribunal has its own processes and procedures which determine the conduct of proceedings.

ART procedure:

Pre-hearing Procedures

Assuming a person does decide to proceed with a request for review, the usual deadline to do so is 28 days from the date the person is notified about the decision (s18).

The decision-maker is required to provide the Tribunal with a copy of its statement of reasons (s23(a)).

During the pre-hearing stage, the Tribunal may encourage the parties to explore the possibility of resolving the dispute.

Conduct of Hearings

ss49-53 provide that the Tribunal:

- Has discretion to manage its own procedure (s49);
- Must act 'with as little formality and technicality as a proper consideration of the matters before the Tribunal permits' (s50);
- Must conduct its proceeding in a way that is accessible for the parties (s51);
- Is not bound by the legal rules of evidence (s52); and
- Has control over the scope of the review (s53).

To facilitate the review in a manner that is efficient, fair, accessible, and effective, promoting best practice in government decision-making and fostering public trust and confidence in the Tribunal.

Case:	<i>Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611</i>
Key takeaways:	The flexibility available to the Tribunal means that it is able to adopt quite different procedures than those which apply in court proceedings.

Guidance and Appeals Panel

A new feature of the ART is the Guidance and Appeals Panel (GAP), which serves as a higher tier of review within the Tribunal.

Internal appeal: the first function performed by the GAP is to provide a mechanism for appealing first instance decisions made by members of the Tribunal.

- A party who is dissatisfied with the outcome of their case before the Tribunal can request review by the GAP (s123).

Significant matters: the second function performed by the GAP is to provide guidance in significant matters.

- A matter may be recognised as significant after it has already been reviewed by the tribunal member, and a request is made to the President for fresh review by the GAP.

Publication of Reasons

At the conclusion of its review, the Tribunal will make a decision exercising its powers of merits review.

- The Tribunal must give its decision and a statement of reasons to the parties (s111).

The publication of reasons serves important functions in contributing to the transparency of government decision-making.

By ensuring that significant decisions are published, the Tribunal also increases the likelihood that its decisions can contribute to awareness of best practice in government decision-making.

Class Notes

Legality	Merits
- Federal Courts - High Court of Australia - Administrative Tribunals (super/hybrid tribunals) Questions of law - The lawfulness of something	- (Administrative Reviews Tribunal) ART Correct + Preferable decision - Considers policy, public interest, etc... Merits - questions of fact - Inquisitorial approach - New review on fresh facts (de novo review) - Fact-finding jurisdiction

Tribunals with 'CAT' in it - e.g. NCAT

- CAT = Civil Administrative Tribunal
- Civil goes to Legality and Administrative goes to Merits

Class 2B - Merits Review (the nature and outcomes of tribunal review)

- Nature and scope of the merits review function
- New evidence in tribunal proceedings
- The role of government policy in tribunal decision-making
- Remedial powers of tribunals
- The impact of tribunal decision-making

Reading: 'Merits review tribunals' in Boughey, Rock, and Burton Crawford, *Australian Administrative Law: Text, Cases, and Materials* (CUP, forthcoming) - sections [6.4]-[6.5]

The Nature and Scope of Tribunal Review

First tier (preferable): Get into shoes of decision maker - hearing 'De Novo'

- The merits reviewer 'steps into the shoes' of the original decision-maker.
- Make the 'correct and preferable decision'.
- A completely fresh decision-making process.
- The jurisdiction is 'to do over again that which was done by the primary decision-maker' - *Miller v Minister for Immigration*

Second Tier: Re Hearing

- If a merits reviewer has the power to rehear a matter, they will, focusing on reviewing the previous decision, rather than hearing the case fresh.
- They scrutinise the original decision maker to see if they made mistakes.

It is important to know what type of review power is available to a tribunal, because it will be acting unlawfully if it performs its functions in a manner that is inconsistent with its prescribed functions.

Case:	<i>New South Wales Thoroughbred Racing Board v Waterhouse (2003) 56 NSWLR 691</i>
Facts:	- The Tribunal decided to increase the penalty imposed by the Panel by imposing a 9-month disqualification (a more serious penalty than a suspension). - the Tribunal's decision was appealed to the NSW Supreme Court, arguing that it had exceeded its jurisdiction.
Issue/s:	Did the Tribunal have the power to consider the matter afresh, or to consider the correctness of the original decision?
Judgement:	The Tribunal's decision was set aside as it acted beyond jurisdiction. - The tribunal powers in this case sit at the rehearing end of the spectrum rather than a hearing de novo.

Core differences in approach	
Merits Review	Judicial Review
Inquisitorial approach - To inquire more widely - To ascertain based on the facts themselves	Adversarial approach - Not to pursue the truth, but to decide the case between the parties.

Outcome - make a substitute decision	Outcome - invalidate and refer back to the original decision-maker - Requires the executive to make the decision again.
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The correct and preferable decision

A tribunal with de novo review powers will often be tasked with undertaking its review with the goal of determining the 'correct and preferable' decision.

- The ART is intended to perform a de novo merits review function.

ART Act - s54 Tribunal can exercise powers of decision-maker

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.

s105 Tribunal decision on review of reviewable decision

The Tribunal must make a decision:

- (a) affirming the reviewable decision; or
- (b) varying the reviewable decision; or
- (c) setting aside the reviewable decision; and
 - (i) making a decision in substitution for the reviewable decision; or
 - (ii) remitting the matter to the decision-maker for reconsideration in accordance with any order or recommendations of the Tribunal.

s108 Effect of Tribunal decision to vary or substitute a reviewable decision

(1) This section applies if the Tribunal:

- (a) Varies the reviewable decision; or
- (b) Sets aside the reviewable decision and makes a decision in substitution for the reviewable decision.

(2) The reviewable decision as varied, or the decision made in substitution for the reviewable decision, is taken to be a decision of the decision-maker for all purposes other than.....

Correct = the legally correct outcome

Preferable = where there are a number of legal possibilities, it leaves the decision-maker with the discretion to decide the preferred option.

- provided by *Shi v Migration Agents Registration Authority (2008)*

Rationale: the tribunal is not limited to legal error correction, but is also given discretion - 'stepping into the shoes' of the original decision-maker - mirrors their discretion.

Case:	<i>Shi v Migration Agents Registration Authority (2008) 235 CLR 286</i>
Key takeaways:	Kiefel J: 'Preferable' is apt to refer to a decision which involves discretionary considerations. - It is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government.

<u>Remedy</u>	<u>What does it do?</u>	<u>Which court(s) can grant it?</u>	<u>What kind of decision(s)?</u>	<u>What kind of legal error(s)?</u>	<u>Any other considerations?</u>
Certiorari	Quashes decision and legal effect	HCA (con s75v) FCA (JA s395) Supreme Court (<i>Kirk</i>)	Decisions which affect some legal right (<i>Ainsworth</i>)	Jurisdictional Error Non-Jurisdictional Error on the face of the record	Discretionary
Mandamus	'Compel' performance of duty	HCA (con s75v) FCA (JA s395) Supreme Court (<i>Kirk</i>)	Actual or constructive failure to perform duty	Failure to perform jurisdiction or decision vitiated by Jurisdictional error	Discretionary
Prohibition	Prohibits acts that go beyond jurisdiction	HCA (con s75v) FCA (JA s395) Supreme Court (<i>Kirk</i>)	Pending act or decision - decision must affect legal rights (<i>Ainsworth</i>)	Jurisdictional error	Discretionary
Injunction	Prevents acts that breaches law - can also compel act to comply with law	HCA (con s75v) FCA (JA s395) Supreme Court (<i>Kirk</i>)	The act in question likely to cause some detriment in breach of law	Jurisdictional error Non-jurisdictional error	Discretionary Equitable
Declaration	Declare legal rights and obligations of parties	HCA (con s75v) FCA (JA s395) Supreme Court (<i>Kirk</i>)		Jurisdictional error Non-jurisdictional error	Discretionary Parties can't be compelled to act in accordance with
ADJR s16 relief	Orders mimic the nature of relief provided at common law and equity	Federal Courts (FCA, FCFA)	Decision reviewable under ADJR Act	ADJR Legal errors	Discretionary