

Administrative Law

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Week 1

Topic 1: Introduction

Scope of our subject

Administrative law

- Non-constitutional rules and principles applied in court and tribunal proceedings for review of administrative action
 - Court proceedings = judicial review
 - Tribunal proceedings = merits review

'Administrative action'

- Executive branch action (usually); concerned w/ application of general rules to individual cases (usually)
 - Some exceptions and caveats – **Topic 3**
- Examples of administrative action:
 - Immigration decisions
 - e.g. whether to grant or deny a visa, deport someone, registering migration agents etc.
 - Social security payments
 - i.e. whether or not someone is eligible for welfare payments under statute
 - Taxation
 - Competition tribunal decision-making (regulatory decision-making)
 - Licensing and registration; planning permits

Introduction to the substance of administrative law

The core of administrative action subject to administrative law

- (i) Diversity of decision-makers w/in Exec Branch
 - Ministers, Depts, Statutory Agencies, Tribunals, Corporations
 - Note: delegates, external merits review tribunals, private corporations sub-contracted by govt?
- (ii) Range of sources of decision-making powers: predominantly primary legislation, but also subordinate legislation, prerogative/inherent exec power
 - Typically excluded: govt executing powers under contract

The 'law' in administrative law

- Non-constitutional rules and principles applied in court and tribunal proceedings, AS WELL AS general principles and rules developed to constrain the exercise of decision-making powers, promote certain values in 'public sector' decision-making
- Sources – decisional law of courts and tribunals; applying:
 1. Express statutory requirements
 2. Implied statutory requirements
 3. Common law requirements (presumed to apply unless excluded)
 4. 'Principles of good administration' (merits review only)
- Note re: the substantive law of the area of administration
- Note re: statutory obligations of administrators that have a distinct regulatory focus (other than validity of the administrative actions)
 - E.g. Migration Act - not the focus of this course

Law applied in review proceedings

- Review/appeal distinction
 - Review proceedings = exercise of inherent jurisdiction of courts to review exec action (see Kirk). ADJR Act – another avenue of review.
 - ⇒ Remedies limited to declaration that decision was wrong
 - Appeal = scope always defined by statute
 - ⇒ Decisions can be overturned/substituted
- Collateral challenges
 - Idea that if you are an individual adversely affected by govt action, you can go straight to civil/private law remedy (i.e. compensation for wrongful imprisonment)
 - ⇒ Validity of statutory action will be one of the elements that the court must consider in the case
 - ⇒ Administrative law principles will thus be considered

Introduction to grounds of review

Aspect	Terminology	Focus of:
Courts' authority to engage in JR re: administrative action	'scope of review'	Topics 3, 10
Grounds of JR – i.e. the principles of legality enforced in JR	'substantive principles of review'	Topics 5, 6, 7, 8

- **Cane & McDonald's 'general categories':**
 - Procedural grounds
 - Concerns the steps that the decision-maker takes (i.e. informing themselves of the facts, giving people a chance to respond etc.)
 - CL procedural fairness requirements supplemented by statutory procedures
 - Reasoning process
 - Quality of deliberation of the decision-maker
 - Did the decision-maker act according to the right purpose? Did he/she take the right things into account? Did he/she demonstrate the requisite level of independence? – will depend on statutory context
 - Also includes questions about delegation
 - NB: no CL duty to provide reasons for decision; obligation derives from statute
 - Decisional grounds
 - Courts: looking at decision objectively (outcome, substantive effect), it is 'wrong' in law
 - i.e. there was a precondition that should have been met that clearly wasn't present
 - **Wednesbury case:**
 - ⇒ Court articulates a framework for decisional review
 - ⇒ Four corners of discretion - if a decision-maker goes outside of that, court can intervene.
 - ⇒ By looking at the decision, it can be ascertained that no reasonable person would have made it.
- **Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5:**
 - Statutory statement that describes the scope of review at CL
 - (1)(a) to (j) list kind of errors that MAY be grounds for review
 - Also catch-all provision – 'was otherwise contrary to law'

Constitutional fundamentals: The rule of law, parliamentary supremacy and the separation of powers

Dual role of constitutional fundamentals

Role of constitutional fundamentals	Terminology	Links to topics in this course
Justifying the courts' authority to engage in JR	'scope of review'	Topics 3, 10

Justifying the courts' development of the grounds of JR – i.e. the principles of legality enforced in JR	'substantive principles of review'	Topics 5, 6, 7, 8
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Rule of law

- Historically significant, remains foundation
- Core principle:
 - Legal equality of government and citizens – i.e. law applies to everyone, including public officials
 - Public officers and private individuals should be subject to the same law (Dicey)
 - However, there is a distinctive body of public law that applies only to public officers
- RoL a statement of aspiration as to an idea of legality
- RoL shares a core meaning with admin law – its aim of controlling the exercise of power by the executive government, since the government is subject to the law.
- RoL requires that courts apply the law (are the appropriate institution to do this because they are independent/impartial)
 - s 75 of the Constitution provides for a measure of judicial control of officers of the Cth which the legislature cannot remove; establishes RoL as the conceptual foundation of judicial review
 - But RoL a constraint on exercise of executive power AND judicial power (i.e. courts must enforce the law, not judge government policy)

Separation of powers

- Three major organs of the governmental system:
 1. Legislature - enacts laws.
 2. Executive - applies those laws in individual cases.
 3. Judiciary - resolves disputes on the meaning or application of a law
- Separation of powers explains why courts assert jurisdiction to conclusively determine questions of law
- Administrative law principles: division of powers – each arm of govt provides a check and balance on the other
 - However, the executive controls the legislative arm through the party system
- Ch III jurisprudence on limits of 'judicial power' – in some cases, this will generate harm on judicial development of principles of legality
 - Under Ch III, courts have authority to exercise judicial power. If they go beyond this, they offend the strict separation of powers. This becomes relevant to determining the content

of grounds of review – as involving the exercise of judicial power only (and not making assertions that are non-judicial).

- Separation of powers, particularly between judicial and executive power, embodies the legality/merits distinction.
 - It is an exclusively judicial function to state, conclusively, what the law is

Parliamentary supremacy

- Australian modification: parliamentary law-making power subject to the Constitution, but essentially parliament can make the law as it likes, and it overrides CL to the extent of any inconsistency
- Parliament as supreme source of law tells exec how to authorise powers, and courts are required to hold the exec to this. It supports JR where it is enforcing the requirements of statute.
- Can it provide an overarching justification for JR or its grounds?
 - (Prerogatives are reviewable; enabling statutes rarely prescribe requirements in detail; there are grounds developed by common law that are applied on a judicial assumption that parliament intends they apply unless excluded...)

Responsible government

- Slightly less relevant to JR
- In essence, it is the idea of the accountability of the govt to the people and to parliament (by being Members of Parliament)
 - Collective responsibility and individual responsibility
- Provides justification for recognising the autonomy of exercise of executive power – i.e. that it is subject to this constitutionally entrenched political accountability mechanism.
 - Courts will refer to responsible govt to explain why they are *not* reviewing something, by stating that the issue at hand is more suitable to a political mechanism of accountability

Introduction to judicial review and the law/merits distinction

- **Judicial review** = way for courts to oversee exercise of administrative (exec) power by determining whether a decision is valid and within power.
 - Judicial review jurisdiction exercised by federal courts:
 - s 75 of the Constitution expressly gives the High Court original jurisdiction with respect to the prerogative writs of mandamus and prohibition and the power to grant injunctions against an officer of the Commonwealth

- HCA has appellate jurisdiction to engage in judicial review of other federal courts and in relation to common law and statutory judicial review jurisdiction of state courts
- FCA has jurisdiction under **ADJR** and **Judiciary Act**
- State courts have inherent/supervisory judicial review jurisdiction derived from and protected by the federal Constitution (**Kirk**)

Judicial review vs merits review

- Judicial review = legality, not the correctness, of decisions
- Merits review = whether decision was the correct/preferable one

Attorney-General (NSW) v Quin

- **Facts:**
 - The NSW magistracy was reorganised (Court of Petty Sessions abolished and jurisdiction transferred to newly established Local Courts). The Governor on advice of A-G may appoint any suitably qualified person as a magistrate of LC.
 - The Attorney General departed from the previous method of recommending former magistrate. New method was to recommend magistrates for appointment unless they are unfit for judicial office.
 - 5 magistrates challenged this; succeeded in JR of A-G's decision (on basis of denial of a fair hearing).
 - On remittal, A-G announced new policy – to consider the appointment of the 5 former magistrates 'on merit' – i.e. had to show they were the best candidates.
- **Issue(s):**
 - Scope of judicial review of administrative action
 - The distinction b/w legal requirements and the merits of a decision
 - New ground of 'substantive unfairness'?
- **Held:**
 - Courts were not able to overrule government policy as the appointment of magistrates is a role of the executive.
 - "Even if a reviewing court were of the view that the A-G's decision to change policy was substantively unfair, it would not be proper for the court to intervene to set aside the decision on review"
 - "The court has no power to protect a person's rights against adverse decision other than enforceable rights" (i.e. no power to protect them from being adversely affected by policy)
 - Legality/merits distinction can be difficult to determine – but there is a boundary and the reasons are institutional and functional

- The duty of the courts extends to judicial review of administrative action alleged to go beyond power conferred by statute or by the prerogative or alleged to be otherwise in disconformity w/ the law
- "...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"
- 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

- NB: if merits review comes up in an exam context, it will be at a federal level (AAT)

Merits review in overview

- All merits review a creature of statute; no CL merits review jurisdiction, and no body in Australia that has inherent MR jurisdiction
- Aus parliaments' commitment to provide for 'merits review' – 1970s onwards
- Shared understanding – 'full' / 'de novo' merits review:
 - Reviewer is external and independent of decision-maker
 - Reviewer asks – is the decision under review 'correct and preferable', on the materials available to the reviewer, and in the circumstances at the time of the review, and
 - if reviewer considers decision made not the correct and preferable one – reviewer may exercise all the powers of the decision-maker to vary or substitute decision
- Full/de novo MR can be contrasted w/ JR:
 - Wider substantive criteria ('correct and preferable' c.f. 'lawful')
 - Wider remedial powers (including to exercise the administrative power to make substitute decision).
- By reason of its breadth and depth, it can be argued that merits review is a more significant mechanism than judicial review for holding govt accountable.
- NB: at state level, external merits review can be provided by courts (e.g. Land and Environment Court)

Types of tribunals

Tribunals

- **Cane & McDonald**: statutory bodies that resolve disputes by adjudication, but are not courts
 - Dispute resolution by adjudication (similar to courts)
 - Adjudication – neutral third party resolution of disputes b/w 2 parties – can be conducted w/ relative informality, and ADR may also be available (even preferred)
 - DR can be civil or administrative; may result in ‘original’ decisions or review decisions
 - Not courts
 - Decisions can’t be conclusive as to law
 - Freedom of appointment of members; no tenure; not necessarily legally trained
 - ⇒ **NB**: President of AAT must be a federal court judge
 - Functional distinction b/w tribunals and courts
 - Federal parliament – cannot invest judicial power in tribunals; cannot invest non-judicial federal powers in courts – **Constitution s 71** and **s 77(iii)**, **Boilermakers case**
 - ⇒ Granted that certain adjudicative dispute resolution functions are essentially non-judicial, federal parliament must establish tribunals to perform these functions – e.g. arbitration of industrial disputes (**Boilermakers**); also giving ‘advisory opinions’ to the executive; ‘merits review’ of executive decision
 - State parliament – no strict separation of powers but cannot vest in courts non-judicial powers that are incompatible with exercise of federal judicial power

NB:

- AAT is a suitable case-study for merits review in Australia
- BUT:
 - Merits review of administrative decisions under federal statutes may be conferred on other tribunals
 - Specialist tribunals = Social Security Appeals Tribunal and the Veterans’ Review Board (both of which maintain a right of appeal to the AAT), Refugee Review Tribunal, Migration Review Tribunal
 - Parliaments of each State and Territory have made various provisions for merits review in relation to decisions under laws of the State or Territory, e.g. ADR Act 1997 (NSW).

Independent merits review tribunals

Commonwealth: Administrative Appeals Tribunal

- Conducts merits review of administrative decisions under Cth laws
- First general merits review tribunal established in Australia – established by **AAT Act 1975** (Cth)

- The AAT is at the apex of the merits review system. It has a split nature – at one and the same time part of the administrative process, and an external reviewer of the executive.
 - The AAT is a reviewer of decisions made by others, and it may exercise the powers of the original decision-maker only ‘for the purpose of reviewing a decision’
 - The basic question for the AAT is whether the decision under review was the correct or preferable one. The purpose of the AAT’s remedial powers is to bring about that the correct or preferable decision is made.
 - Although the AAT is not bound by its own previous decisions, it should aim to be consistent in its decision-making.
- **Scale of operation:**
 - Jurisdiction conferred by 400+ statutes
 - The **AAT Act** supplies essential legal underpinning for the AAT’s powers to vary a decision and to make a substitute decision
 - Diversity of jurisdiction
 - Major areas of AAT review include social security, veterans’ affairs, taxation, Commonwealth employees’ compensation and freedom of information
- **Key provisions re Tribunal practice:**
 - **s 2A**: tribunal’s objectives
 - **s 27**: applicants (also **s 30**)
 - **s 33**: procedure (also **s 39**)
 - **s 43(1)**: remedial powers (also **s 43(6)**)
 - **s 43(2)**: duty to give reasons
 - **s 44**: appeals to FCA (also **s 45**; and note AAT subject to JR)
 - Because federal merits review tribunals are not courts, they cannot be given power to enforce their decisions (this being a judicial function).
 - The AAT Act establishes no mechanism for the enforcement of decisions of the AAT. Thus decisions of the AAT cannot be enforced unless they are actually reviewed by a court.

Administrative Appeals Tribunal Act 1975 (Cth)

Section 2A - Tribunal’s objective

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

- (a) is accessible; and
- (b) is fair, just, economical, informal and quick; and
- (c) is proportionate to the importance and complexity of the matter; and
- (d) promotes public trust and confidence in the decision-making of the Tribunal

Section 25 - Tribunal may review certain decisions

- (1) An enactment may provide that applications may be made to the Tribunal:
 - (a) for review of decisions made in the exercise of powers conferred by that enactment; or
 - (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment

Section 27 – Persons who may apply to Tribunal

- (1) Where this Act or any other enactment (other than the *Australian Security Intelligence Organisation Act 1979*) provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth or Norfolk Island or an authority of Norfolk Island) whose interests are affected by the decision.
- (2) An organization or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association.
- (3) Subsection (2) does not apply in relation to a decision given before the organization or association was formed or before the objects or purposes of the organization or association included the matter concerned

Section 28 – Persons affected by decision may obtain reasons for decision

- (1) Subject to subsection (1AAA), if a person makes a decision in respect of which an application may be made to the Tribunal for a review, any person (in this section referred to as the **applicant**) who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision, request that person to give to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and give to the applicant, such a statement.

Section 30 – Parties to proceedings before Tribunal

- (1) Subject to paragraph 42A(2)(b), the parties to a proceeding before the Tribunal for a review of a decision are:
 - (a) any person who, being entitled to do so, has duly applied to the Tribunal for a review of the decision;
 - (b) the person who made the decision;
 - (c) if the Attorney-General intervenes in the proceeding under section 30A—the Attorney-General; and
 - (d) any other person who has been made a party to the proceeding by the Tribunal on application by the person in accordance with subsection (1A)

- (1A) Where an application has been made by a person to the Tribunal for a review of a decision, any other person whose interests are affected by the decision may apply, in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order, make that person a party to the proceeding

Section 33 – Procedure of Tribunal

- (1) In a proceeding before the Tribunal:
- (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
 - (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate
- (1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding
- (1AB) A party to a proceeding before the Tribunal, and any person representing such a party, must use his or her best endeavours to assist the Tribunal to fulfil the objective in section 2A

Section 35 – Public hearings and orders for private hearings, non-publication and non-disclosure

- (1) Subject to this section, the hearing of a proceeding before the Tribunal must be in public.
- (2) The Tribunal may, by order:
- (a) direct that a hearing or part of a hearing is to take place in private; and
 - (b) give directions in relation to the persons who may be present

Section 37 – Lodging of material documents w/ Tribunal

- (1) Subject to this section, a person who has made a decision that is the subject of an application for review (other than second review) by the Tribunal must, within 28 days after receiving notice of the application (or within such further period as the Tribunal allows), lodge with the Tribunal a copy of:
- (a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and
 - (b) subject to any directions given under section 18B, every other document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal.