

**ADMINISTRATIVE LAW
SUMMARY
2010**



LAWSKOOL.COM.AU

LAWSKOOL PTY LTD

CONTENTS

THE FRAME WORK OF ADMINISTRATIVE LAW	6
<i>The scope and objective of administrative law</i>	6
<i>Accountability Mechanisms</i>	6
<i>Legalities/Merit distinction</i>	7
Legalities Review	7
Merit Review and Tribunals	8
Nature and Role of Tribunals	8
Structure of Tribunals	8
Tribunals in a system of government	9
Nature and Scope of Merits Review	10
The Administrative Appeals Tribunal (AAT)	11
Jurisdiction	11
<i>Collector of Customs v Brian Lawlor</i>	12
<i>Drake v MIMEA:</i>	12
Contemporaneous Review:	13
<i>Esber v Commonwealth</i>	13
<i>The Ombudsman</i>	14
Ombudsman schemes	15
<i>Human Rights Agencies</i>	15
The Human Rights and Equal Opportunity Commission (HREOC)	15
<i>Brandy v HREOC (1995)</i>	16
Discrimination	16
<i>Other methods of dispute resolution</i>	17
<i>Other methods of controlling administrative action</i>	17
<i>Rights to information</i>	17

JUDICIAL REVIEW IN AUSTRALIA	18
<i>Australian judicial review schemes and legislation</i>	18
The High Court	18
The Federal Court	19
State Systems	20
Re Wakim: ex parte McNally	21
Tetron v Luchman	21
<i>Remedies Available</i>	22
Certiorari and Prohibition	23
Mandamus	23
Injunction	23
Declaration	24
<i>Justiciability and Jurisdiction</i>	24
Justiciability and the Common Law	24
Different powers and justiciability	24
CCSU (House of Lords UK)	25
Minister for Arts, Heritage and Environment v Peko Wallsend	25
<i>Jurisdiction under the ADJR Act</i>	26
Decision or conduct under the ADJR Act	27
Director-General of Social Services v Chaney	27
Lamb v Moss	28
Australian Broadcasting Commission v Bond	28
Right to Life Association v Secretary	28
Kelson v Forward	29
Edlesten v Health Insurance Commission	29
Peverill v Meir	29

A decision of an Administrative Character	30
<i>Central Queensland Land Aboriginal Council Corporation</i>	30
<i>Federal Airports Corporation v Aerolineas Argentinas (1997)</i>	30
Decision under an enactment	31
<i>Chittick v Auckland (1984)</i>	31
<i>Australian National University v Burns</i>	31
<i>General Newspapers v Telstra</i>	32
<i>Judicial Review and the Criteria for Lawful Decision Making</i>	32
Legality/Merits Distinction Revisited	32
Jurisdictional (Objective) Fact Doctrine	33
<i>Timbarra Protection Coalition Inc v Ross Mining NL</i>	33
<i>Attorney-General (NT) v Hand</i>	34
<i>Minister for IEA v Naumovska</i>	34
<i>Enfield v Development Assessment Commission</i>	35
Findings under particular grounds of review:	35
State of Mind Phraseology	35
<i>Liversidge v Anderson</i>	36
<i>Judicial Deference</i>	37
<i>Chevron, USA, Inc v Natural Resources Defence Council:</i>	37
<i>Baker v Canada (Canada)</i>	38
<i>Corporation of the City of Enfield v Development Assessment Commission</i>	38
<i>Jia v White</i>	
<i>Minister for Immigration and Ethnic Affairs v Wu Shan Liang</i>	38
CRITERIA FOR LAWFUL DECISION MAKING	39
<i>Unauthorised Decision Making</i>	39
<i>Government legal authority – statutory, executive and prerogative powers</i>	39

<i>A and Others v Hayden (no 2)</i>	40
<i>Congreve v Home Office</i>	40
<i>Victorian Council for Liberties Incorporated v Minister for Immigration and Multicultural Affairs</i>	41
<i>Ruddock v Vardalis</i>	41
<i>Statutory Unauthorised Decision Making</i>	41
<i>Church of Scientology Case:</i>	42
<i>Subordinate Legislation (Regulations) and Unauthorised Decision Making</i>	42
<i>McEldowney v Forde:</i>	43
<i>Shannahan v Scott</i>	43
<i>Swan Hill v Bradbury</i>	44
<i>Foley v Padley:</i>	45
<i>State of SA v Tanner</i>	45
<i>Decisions not made by authorised persons</i>	46
<i>Distinction between delegates and agents:</i>	47
<i>O'reilly v Commissioner of the State Bank of Victoria</i>	48
<i>DDS v Alvaro</i>	49
<i>Fazil Din v Minister for Immigration and Multicultural Affairs</i>	49
<i>Words or express importing a discretion or imposing a obligation</i>	50
<i>Uncertainty – As an implied statutory requirement</i>	51
LEGISLATIVE SCOPE AND PURPOSE	52
<i>Acting for unauthorised/improper purposes:</i>	52
<i>Municipal Council of Sydney v Campbell</i>	52
<i>R v Toohey: Ex parte Northern Land Council</i>	53
<i>Multiple Purposes</i>	53
<i>Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board:</i>	54
<i>Schlieske v MIEA:</i>	54

<i>Kent v Johnston – Telstra Tower Case:</i>	54
<i>Considering Irrelevant Considerations</i>	55
<i>Water Conversation v Browning</i>	56
<i>Roberts v Hopwood</i>	57
<i>Padfield v Minister for Agriculture, Fisheries and Food</i>	57
<i>Not Considering Relevant Considerations:</i>	58
<i>Sean Investments Pty v McKellar:</i>	59
<i>Peko-Wall send</i>	60
<i>Tickner v Chapman (Hindmarsh Island Bridge Case)</i>	60
<i>Hindi v MIEA</i>	60
NATURAL JUSTICE	61
<i>When will natural justice apply?</i>	61
Legislative implication theory	62
The Universal Implication Theory	62
The multi-factorial approach to determining whether natural justice applies	62
The nature of the interest affected	62
The nature and role of legitimate expectations	64
<i>Haoucher v MIEA</i>	64
<i>FAI Insurance v Winneke</i>	65
<i>MIEA v Teoh</i>	65
<i>R v MIMA: Ex parte Lam</i>	66
Nature of the power being exercised	67
Legislative and Factual Decisional Criteria	68
Nature of the decision maker	68
The effect or impact on the individual	68
The legislative framework in which the decision is made	68
<i>Marine Hull & Liability Insurance Co Ltd v Hurford</i>	70

<i>Twist v Council of Municipality of Randwick</i>	71
Circumstances implying that natural justice is not required	71
<i>General principles concerning the hearing rule</i>	72
<i>The Bias Rule</i>	72
<i>MIMA v Jia White</i>	73
<i>Johnson v Johnson</i>	74
<i>Vatuka v Kelly</i>	74
<i>R v Commonwealth Conciliation and Arbitration Commission</i>	74
Exception to the bias rule	75
<i>The probative evidence rule and the duty to enquire</i>	75
EXECUTIVE POLICIES, DIRECTIONS AND REPRESENTATIONS	76
<i>The legal status of executive policies</i>	76
<i>Ignoring or breaching a policy</i>	78
<i>Nikac v MILGEA</i>	78
<i>Ministerial Directions</i>	79
<i>R v Anderson: Ex parte Ipec Air</i>	79
<i>Ansett Transport Industries v Commonwealth</i>	79
<i>Bread Manufacturers of NSW v Evans</i>	80
<i>Statutory Directions</i>	80
<i>Riddell v Secretary of the Department of Social Security</i>	81
<i>Smoker v Pharmacy Restructuring Authority</i>	81
<i>Administrative Tribunals and Government Policy</i>	81
<i>Drake v MIEA (No. 1)</i>	82
<i>Re Drake (No. 2)</i>	82
THE ERROR OF FACT/ERROR OF LAW DISTINCTION	83
<i>The Distinction in the interpretation and application of error/fact of law</i>	84

<i>Applying legislation to the facts</i>	84
Fact Finding	84
Rule Stating	85
Rule Application	85
<i>Appozardi v Tasman UEB Industries Ltd</i>	86
<i>Collector of Customs v Agfa-Gavaert</i>	86
<i>Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic</i>	86
<i>Hope v Bathurst</i>	87
<i>Error of Law/Fact Distinction under ADJR</i>	87
<i>Distinction at Common Law</i>	88
<i>The No Evidence Rule</i>	89
UNREASONABLENESS	90
<i>Making a decision devoid of plausible justification</i>	91
<i>Traveli v MIEA</i>	91
<i>Chan v MIEA</i>	91
<i>Giving excessive or inadequate weight to a relevant consideration</i>	92
<i>Making an erroneous factual finding on a point of some importance</i>	92
<i>GTE (Australia) Pty Ltd Brown</i>	92
<i>Failure to Seek Information Readily Available and Centrally Important</i>	92
<i>Prasard v MIEA</i>	92
<i>Videto v MIEA</i>	93
<i>Failure to have proper regard to a departmental policy or representation</i>	93
<i>Making a decision with unnecessarily harsh effect</i>	93
<i>Wheeler v Leicester City Council (House of Lords)</i>	93
<i>Eddleston v Wilcox</i>	93
<i>Inconsistent and discriminatory decisions</i>	94

Parramatta City Council v Pestell	94
CONSEQUENCES OF UNLAWFUL DECISION MAKING	95
<i>The legality principle</i>	95
<i>Wattmaster Alco Pty Ltd v Button</i>	96
<i>The separation of powers principle</i>	96
<i>Hoffman-La Roche v Secretary of State for trade and industry</i>	97
Re Kretchmer AAT	97
Minister for Immigration and Multicultural Affairs v Bhardwaj	97
Project Blue Sky v ABA	98
PRIVATIVE CLAUSES	100
<i>Types of privative clauses</i>	100
<i>The Court's approach to privative clauses</i>	102
Anisminic's Case (1969) House of Lords	102
R v Hickman	102
Plaintiff 's 157 v Commonwealth (2003)	103
STANDING	104
ACF v Commonwealth	104
Omus v Alcoa	104
North Coast Environmental Council v Minister for Resources	105
Bateman's Bay Local Aboriginal Land Council 1998 HC	105
<i>Standing under ADJR</i>	106
Ogle v Strickland	106
<i>Standing before the AAT and other Tribunals</i>	106

1. The Framework of Administrative Law

1.1 The scope and objectives of administrative law

- A set of rules to keep accountable the executive (decision making) branch of government.
- Administrative review is premised on separation of powers, responsible government, and parliamentary sovereignty.
- The main objectives of Administrative Law are:
 - To keep within limits the “public powers” of the government through:
 - Ultra vires doctrine – keeping powers within a certain ambit.
 - The Separation of Powers – ensuring the role of the judiciary to keep the legislative and executive arms accountable.
 - Rule of law – courts overseeing decisions made by the executive and providing access to justice.
- Administrative review allows individuals to challenge unlawful decisions, thus promoting accountability.
- Administrative review encourages better, fairer and more efficient decision making.

1.2 Accountability mechanisms

Several layers of accountability mechanisms exist, comprising of internal and external aspects. The main pillars of accountability are:

- Accountability to parliament – eg. question time, tabled reports, parliamentary committees.
- Self review – internal review of departments undertaken by independent tribunals and the ombudsman.
- Judicial/Legalities Review – undertaken by the courts through their inherent jurisdictions.
- Information access – through the *Freedom of Information Act 1982 (Cth)* and also through rights of reason under the *Administrative Decisions (Judicial Review) Act 1977*.

1.3 Legalities/merits distinction

- The role of the executive is to determine decisions on its *merits* by way of:
 - Finding the facts

- Determining the applicable policy
- Making discretionary judgements
- Applying the law to the facts.
- The role of the judiciary is to ensure that decisions made by the executive are lawful by:
 - Ensuring that the relevant legal criteria have been complied with – that is, keeping decisions from being *ultra-vires* (out of power).
 - Separation of powers dictates that the judiciary cannot encroach on functions of the executive. Thus, it cannot engage in merits review.
 - This distinction is often said to be vital to the legitimacy of administrative review.

1.3.1 Legalities Review

- Undertaken by superior courts as part of their inherent of common law supervisory jurisdiction.
- Legalities review is concerned not with the substance of the decision, but the decision making process. (see Evans).
- Courts are faced with limited criteria for review – this is to ensure that categories are not so wide as to allow persons to bring actions unnecessary. Broadly, these fall under the categories of illegality, irrationality and procedural impropriety. (per Lord Diplock in *CCSU*).
- The burden is on the applicant to prove a legal error. If the applicant is successful, the remedy usually provides that the decision be re-made. Courts do not grant damages for judicial review.

1.3.2 Merit Review and Tribunals

Nature and Role of Tribunals

- Merit review arises out of statute, and is usually undertaken by Tribunals. However, some states in Australia give merit review powers to their courts.
- Broadly speaking, the role of undertaken by most tribunals can be summarised as:¹
 - Provide to each party appearing before them a reasonable opportunity of being heard;

¹ Lawrence W Maher, 'The Australian Experiment in Merits Review Tribunals' in O Mendelsohn & L W Maher (eds), *Courts, Tribunals and New Approaches to Justice* (La Trobe University Press, 1994).

- Carefully weigh up the evidence put before them
- Interpret and apply the law
- Expose the reasoning processes to the parties
- They avoid actual bias or appearance of bias
- Tribunals are well structured to merits review because:
 - Use of expert, non legal members
 - Flexible rules concerning jurisdiction, mode of operation, membership and procedure.
 - Considered as less confrontational, cheaper, and more efficient than courts.
 - Greater avenues for appeals.
 - Ability of decision makers to change decisions.

Structure of Tribunals

- Broadly speaking, 3 types of Tribunals exist in Australia.
 1. Single tier review by specialist tribunal – This model allows persons to seek review in a Tribunal confined with a particular area of government or dispute. Appeals to the court from these tribunals are only for questions of law. Eg. The Refugee Review Tribunal.
 2. Single tier review by generalist tribunals - The tribunal is given general jurisdiction and can hear all matters within that jurisdiction. Eg. Commonwealth AAT.
 3. Two -Tier Review tribunals - Under this model, the first tier focuses on speed, efficiency and informality whereas the second tier deals with 'harder cases' and focuses on the quality of the decision. Appeals to the second tier can often extend beyond legal questions to merit reviews.² Eg. Veterans Review board appealable to the AAT.
- These tribunals can be further divided into those which are:³
 - 'Policy oriented' tribunals which formulate apply government policy. Eg. The Australian Broadcasting Authority and the Australian Broadcasting Securities Commission.

² See Hayley Katzen and Roger Douglas, 1999. "Butterworths Tutorial Series: Administrative Law", Butterworths Publishing.

³ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, ARC report No 39 (1995).

- 'Court substitute' tribunals, which primarily resolve disputes between two citizens, or between citizens and the government.

Tribunals in a system of government

- Constitutionally, tribunals belong to the executive arm of government. This is however, more blurred in practice:
 - “ *The legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon a judicial model, separate from, and independent of, the executive*”⁴
- At the Commonwealth level, merits review is undertaken by tribunals and tribunals generally only undertake merit review. This is because Chapter III of the Constitution has been interpreted as meaning that only Chapter III courts can only exercise judicial power, and Chapter III courts can only exercise judicial power.⁵
- Of particular importance, is maintaining independence of the tribunals from the government. Three major themes arise in this analysis:
 - Membership – In some Australian tribunals, members are offered security of tenure on par with judicial officers. More commonly, members are appointed for a fixed term. This ensures that members are not influenced in any way by the government.⁶
 - Management – Tribunals should be housed separately from the agencies whose decisions they are reviewing. It is suggested by the ARC in its Better Decisions Report that it is not appropriate to set targets for performance of individual members. It is suggested that decisions should remain an unpredictable product of achieving the 'best' decision in each individual case.⁷
 - Government policy – There is much debate as the degree of application of government policy in the making of decisions. However, in Vic and NSW, there are statutory mechanisms requiring tribunals to decide cases in accordance with government policy.

⁴ Re Becker & MIEA (1997), 1 ALD 158 at 161 per Brennan J.

⁵ Known as the Boilmakers principle. See New South Wales v Cth (the Wheat Case) (1915) 20 CLR 54 and R v Kirby; Ex parte Boilmaker's Society of Australia (The Boilmaker's Case) (1956) 94 CLR 254.

⁶ See Report of the Joint Committee on Tenure of Appointees to Commonwealth Tribunals, 1989, "Tenure of Appointees to Commonwealth Tribunals". Here it was recommended that the nature of tenure in tribunals should a) Offer an adequate term in office; b) Removal before expiration of term should only be for a cause specified in the relevant legislation; c) Adequate procedures for removal should be ensured.

⁷ See Administrative Review Council, 1995, "Better Decisions: Review of Commonwealth Merits Review Tribunals", ARC Report no 39, p 85.

Nature and Scope of Merits Review

- Ultimately, powers of merit reviews is dependent on statute, but the following aspects are usually presumed:
 1. *De novo review*: Tribunals 'stands in the shoes of the original decision maker' having the same powers and discretion, and performing the same function.
 2. Decisions made by Tribunals are binding, unless they are challenged in the courts.
 3. Tribunals determine the 'correct and preferable' decision rather than reviewing the reasonableness of the previous decision. (*Drake v MIEA*)
 4. Generally, the burden to prove that original decision maker had made wrong decision or made an unlawful decision is non-existent. Thus, tribunals can affirm, vary, quash or substitute decisions as they see fit. (*Re Greenham and Minister for Capital*)
 5. Thus, the grounds for merits review is simply that the original decision was wrong for which the remedy is a new decision.
 6. A tribunal undertaking merits review has a duty to address all issues on which its jurisdiction or the proper exercise of the decision making power depends. (*Kuswardana v Minister for Immigration and Ethnic Affairs*)



**If you have any queries regarding the administrative law summary
please email - info@lawskool.com.au**