

ADMINISTRATIVE LAW SUMMARY



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The Framework of Administrative Law

1.1 The scope and objectives of administrative law

- It is a branch of public law.
- A set of rules or a body of law to regulate the exercise of power and the making of decisions by the executive (decision-making) branch of government, the administrative arm of government and non-government bodies.
- 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 – provides a system of checks and balances on the exercise of power by the various arms of government and therefore, ensuring the role of the judiciary to keep the legislative and executive arms of government accountable (see *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73)¹.
 - Rule of law – judicial independence allows the courts to oversee decisions made by the executive and providing access to justice.
- Judicial/administrative review allows individuals to challenge unlawful decisions, thus promoting accountability and fairness.
- Judicial/administrative review encourages better, fairer and more efficient or more consistent decision making.

1.2 Accountability mechanisms

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

¹ Groves M. & Lee H.P., *Australian Administrative Law: Fundamentals, Principles and Doctrines*, 1st ed., Cambridge University Press, Melbourne, Australia, 2007 at 6.

- Accountability to parliament – e.g. parliamentary 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* (Cth).

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 and procedures have been complied with – that is, keeping decisions from being *ultra-vires* (beyond power).
 - Separation of powers dictates that the judiciary cannot encroach on the functions of the executive. Thus, it cannot engage in merits review.
 - This distinction is often said to be vital to the legitimacy of judicial review.

1.3.1 Legalities/Judicial Review

- Undertaken by superior courts as part of their inherent of common law supervisory jurisdiction. It is the enforcement of the rule of law over executive action.
- Judicial/legalities review is concerned not with the substance of the decision, but the decision making process (see Evans). In other words, it is concerned with the lawfulness of a decision and this ordinarily involves issues of fairness and power (or jurisdiction).
- 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 unnecessarily.

Broadly, these fall under the categories of illegality, irrationality and procedural impropriety (*per Lord Diplock in C.C.S.U*).

- 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.
- It is concerned with whether the decision is substantively correct (see *Drake v Minister of Immigration and Ethnic Affairs*). Merits review is generally de novo that is; the decision made by the original decision-maker is considered at new or afresh by the tribunal with reference to the law, and the facts and circumstances, as they exist at the date of the hearing of the appeal. However, legislation can restrict this.
- The review tribunal may affirm, vary or set aside the decision under review but this is subject to any contrary enactment. Here, the review tribunal is exercising 'original appellate' jurisdiction.
- Broadly speaking, the role undertaken by most tribunals can be summarised as:²
 - Provide to each party appearing before them a reasonable opportunity of being heard;
 - 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.

² 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).

- Greater avenues for appeals.
- Ability of decision makers to change or re-make 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 on questions of law. E.g. 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. E.g. the 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.³ E.g. decisions from the Veterans Review Board are appealable to the AAT.
- These tribunals can be further divided into those which are:⁴
 - ‘Policy oriented’ tribunals which formulate and apply government policy. E.g. The Australian Broadcasting Authority and the Australian Broadcasting Securities Commission.
 - ‘Court substitute’ tribunals which primarily resolve disputes between two private citizens (e.g. CTTT in NSW), or between private 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”⁵

³ See Hayley Katzen and Roger Douglas, 1999, *“Butterworths Tutorial Series: Administrative Law”*, Butterworths Publishing.

⁴ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, ARC report No 39 (1995).

- At the Commonwealth level, merits review is undertaken by tribunals and tribunals generally only undertake merits review. This is because Chapter III of the Constitution has been interpreted as meaning that only Chapter III courts can exercise judicial power⁶.
- 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.⁷
 - 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.⁸
 - Government policy – There is much debate as the degree of application of government policy in the making of decisions. However, in Victoria and NSW, there are statutory mechanisms requiring tribunals to decide cases in accordance with government policy.



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⁵ *Re Becker & Minister of Immigration and Ethnic Affairs* (1997) 1 ALD 158 at 161 per Brennan J.

⁶ Known as the *Boilermakers* principle. See *New South Wales v The Commonwealth (The Wheat Case)* (1915) 20 CLR 54 and *R v Kirby; Ex parte Boilermakers Society of Australia (The Boilermakers Case)* (1956) 94 CLR 254.

⁷ 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.

⁸ See Administrative Review Council, 1995, “*Better Decisions: Review of Commonwealth Merits Review Tribunals*”, ARC Report no 39, p 85.