

# **ADMINISTRATIVE LAW SUMMARY**



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Sample

## 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* – Latin for ‘beyond power’. This means that a public body cannot act beyond the ambit of their authority or exercise powers they don’t have.
    - The Separation of Powers – provides a system of checks and balances on the exercise of power by the various arms of government. In particular, it ensures the role of the judiciary in keeping the legislative and executive arms of government accountable (see *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73)<sup>1</sup>.
    - Rule of law – this is the idea that all bodies, including the bodies that make and execute the law, are also subject to it. 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.

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

## 1.2 Accountability mechanisms

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

- 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).
  - Observing the separation of powers, which 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 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 Merits Review and Tribunals

#### Nature and Role of Tribunals

- Merits review arises out of statute, and is usually undertaken by Tribunals. However, some states in Australia give merits 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 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.
- Basically, the person or body charged with conducting merits review re-makes the original decision, exercising the same powers as the original decision maker.
  - For example, where the parliament (exercising legislative powers) remakes a decision with regards to a law they wish to implement (re-exercising legislative powers), this is merits review.
  - On the other hand, judicial review would occur where the courts (exercising judicial powers) scrutinise whether parliament had power to implement a certain law.
- 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:<sup>2</sup>
  - Providing to each party appearing before them a reasonable opportunity of being heard;
  - Carefully weighing up the evidence put before them;
  - Interpreting and applying the law;
  - Exposing the reasoning processes to the parties;
  - Avoiding actual bias or appearance of bias.
- Tribunals are well structured to merits review due to:
  - Use of expert, non-legal members;
  - Flexible rules concerning jurisdiction, mode of operation, membership and procedure;
  - Being considered as less confrontational, cheaper, and more efficient than courts;
  - Greater avenues for appeals;
  - The ability of decision makers to change or re-make decisions.



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<sup>2</sup> 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).