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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
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 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;
o Carefully weigh up the evidence put before them
o Interpret and apply the law
o Expose the reasoning processes to the parties
o They avoid actual bias or appearance of bias

• Tribunals are well structured to merits review because:
  o Use of expert, non legal members
  o Flexible rules concerning jurisdiction, mode of operation, membership and procedure.
  o Considered as less confrontational, cheaper, and more efficient than courts.
  o Greater avenues for appeals.
  o 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
  o ‘Policy oriented’ tribunals which formulate apply government policy. Eg. The Australian Broadcasting Authority and the Australian Broadcasting Securities Commission.

‘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.

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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.
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