<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONTENTS</td>
<td></td>
</tr>
<tr>
<td>The Framework of Administrative Law</td>
<td>12</td>
</tr>
<tr>
<td>1.1 The scope and objectives of administrative law</td>
<td>12</td>
</tr>
<tr>
<td>1.2 Accountability mechanisms</td>
<td>12</td>
</tr>
<tr>
<td>1.3 Legalities/merits distinction</td>
<td>13</td>
</tr>
<tr>
<td>1.3.1 Legalities/Judicial Review</td>
<td>13</td>
</tr>
<tr>
<td>1.3.2 Merit Review and Tribunals</td>
<td>14</td>
</tr>
<tr>
<td>Nature and Role of Tribunals</td>
<td>14</td>
</tr>
<tr>
<td>Structure of Tribunals</td>
<td>15</td>
</tr>
<tr>
<td>Tribunals in a system of government</td>
<td>15</td>
</tr>
<tr>
<td>Nature and Scope of Merits Review</td>
<td>16</td>
</tr>
<tr>
<td>1.3.3 The Administrative Appeals Tribunal (AAT)</td>
<td>18</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>18</td>
</tr>
<tr>
<td>Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd.:</td>
<td>19</td>
</tr>
<tr>
<td>Drake v Minister for Immigration and Ethnic Affairs:</td>
<td>20</td>
</tr>
<tr>
<td>Contemporaneous Review:</td>
<td>20</td>
</tr>
<tr>
<td>Commonwealth v Esber:</td>
<td>20</td>
</tr>
<tr>
<td>1.3.4 The Ombudsman</td>
<td>21</td>
</tr>
<tr>
<td>Ombudsman schemes:</td>
<td>21</td>
</tr>
<tr>
<td>1.3.4 Human Rights Agencies</td>
<td>23</td>
</tr>
<tr>
<td>The Australian Human Rights Commission</td>
<td>23</td>
</tr>
<tr>
<td>The Australian Human Rights Commission is the main human rights agency</td>
<td>23</td>
</tr>
<tr>
<td>in Australia. Its jurisdiction covers discrimination on the basis of:</td>
<td>23</td>
</tr>
<tr>
<td>Discrimination</td>
<td>24</td>
</tr>
<tr>
<td>1.3.5 Other methods of dispute resolution</td>
<td>25</td>
</tr>
<tr>
<td>1.3.6 Other methods of controlling administrative action</td>
<td>25</td>
</tr>
<tr>
<td>1.3.7 Rights to information</td>
<td>26</td>
</tr>
<tr>
<td>2. Judicial Review in Australia</td>
<td>27</td>
</tr>
<tr>
<td>2.1 Australian judicial review schemes and legislation</td>
<td>27</td>
</tr>
<tr>
<td>The High Court</td>
<td>27</td>
</tr>
<tr>
<td>The Federal Court</td>
<td>28</td>
</tr>
<tr>
<td>The Federal Magistrates Court</td>
<td>29</td>
</tr>
<tr>
<td>State Systems</td>
<td>30</td>
</tr>
<tr>
<td>Re Wakim; Ex parte McNally</td>
<td>30</td>
</tr>
<tr>
<td>Tetron International Pty. Ltd. v Luckman</td>
<td>31</td>
</tr>
<tr>
<td>2.2 Remedies Available</td>
<td>31</td>
</tr>
<tr>
<td>Certiorari and Prohibition</td>
<td>32</td>
</tr>
<tr>
<td>Mandamus</td>
<td>33</td>
</tr>
<tr>
<td>Injunction</td>
<td>34</td>
</tr>
<tr>
<td>Declaration</td>
<td>34</td>
</tr>
<tr>
<td>2.3 Justiciability and Jurisdiction</td>
<td>35</td>
</tr>
<tr>
<td>2.3.1 Justiciability and the Common Law</td>
<td>35</td>
</tr>
<tr>
<td>Different powers and justiciability:</td>
<td>35</td>
</tr>
<tr>
<td>C.C.S.U (House of Lords, UK)</td>
<td>37</td>
</tr>
<tr>
<td>Minister for Arts, Heritage and Environment v Peko Wallsend Ltd.;</td>
<td>38</td>
</tr>
<tr>
<td>2.3.2 Jurisdiction under the ADJR Act</td>
<td>38</td>
</tr>
<tr>
<td>Decision or conduct under the ADJR Act</td>
<td>38</td>
</tr>
<tr>
<td>Director-General of Social Services v Chaney:</td>
<td>40</td>
</tr>
<tr>
<td>Lamb v Moss</td>
<td>40</td>
</tr>
<tr>
<td>Australian Broadcasting Tribunal v Bond:</td>
<td>40</td>
</tr>
<tr>
<td>Right to Life Association (NSW) v Secretary, Department of Human</td>
<td>41</td>
</tr>
<tr>
<td>Services and Health</td>
<td>41</td>
</tr>
<tr>
<td>Kelson v Forward</td>
<td>41</td>
</tr>
<tr>
<td>Edelsten v Health Insurance Commission:</td>
<td>42</td>
</tr>
<tr>
<td>Peverill v Meir</td>
<td>42</td>
</tr>
<tr>
<td>A decision of an Administrative Character s3(1) ADJR Act</td>
<td>43</td>
</tr>
<tr>
<td>Central Queensland Land Council Aboriginal Corporation v Attorney-</td>
<td>43</td>
</tr>
<tr>
<td>General (Ct)</td>
<td>43</td>
</tr>
<tr>
<td>Federal Airports Corporation v Aerolineas Argentinus (1997)</td>
<td>43</td>
</tr>
<tr>
<td>Decision under an enactment</td>
<td>44</td>
</tr>
</tbody>
</table>
2.4 Judicial Review and the Criteria for Lawful Decision Making

2.4.1 Legality/Merits Distinction Revisited ................................................................. 46
2.4.2 Jurisdictional (Objective) Fact Doctrine ................................................................. 47

2.5 Judicial Defence....................................................................................................... 51

3. Criteria for lawful decision making ........................................................................... 54

3.1 Narrow Ultra Vires; Unauthorised Decision Making .................................................. 54
3.2 Government legal authority – statutory, executive and prerogative powers. .................. 54

3.3 Statutory Unauthorised Decision Making ................................................................. 57
3.4 Subordinate Legislation (Regulations) and Unauthorised Decision Making ................. 59
3.5 Decisions not made by authorised persons: .............................................................. 64

3.6 Words or expression importing a discretion or imposing an obligation ....................... 69
3.7 Uncertainty – As an implied statutory requirement ..................................................... 71

4. Legislative Scope and Purpose .................................................................................... 72

4.1 Acting for unauthorised/improper purposes: ............................................................. 72

4.2 Considering Irrelevant Considerations ..................................................................... 75

4.3 Not Considering Relevant Considerations ............................................................... 79

5. Natural Justice ............................................................................................................. 83

5.1 When will natural justice apply? .............................................................................. 84
5.1.1 Legislative implication theory ............................................................. 84
5.1.2 The Universal Implication Theory ........................................................ 84
5.1.3 The multi-factorial approach to determining whether natural justice applies ......................................................... 85
5.1.3.1 The nature of the interest affected .............................................. 86
5.1.3.2 The nature and role of legitimate expectations ............................... 86
5.1.3.3 Nature of the power being exercised ............................................ 89
5.1.3.4 Legislative and Factual Decisional Criteria ................................. 90
5.1.3.5 Nature of the decision maker ..................................................... 91
5.1.3.6 The effect or impact on the individual ......................................... 91
5.1.3.7 The legislative framework in which the decision is made ............... 91

Minister for Immigration and Ethnic Affairs v Teoh ........................................... 88
Re. Minister for Immigration and Multicultural Affairs; Ex parte Lam ......................... 89

5.1.4 Exceptional cases of legitimate expectations ................................. 89

Drake v Minister for Immigration and Ethnic Affairs ........................................ 107

5.2 General principles concerning the hearing rule ....................................... 95
5.2.1 Exceptions to the bias rule .................................................................... 100
5.3 The probative evidence rule and the duty to inquire ................................. 100

5.3 The probative evidence rule and the duty to inquire ................................. 100

6. Executive policies, directions and representations ........................................ 102
6.1 The legal status of executive policies ....................................................... 102
6.2 Ignoring or breaching a policy .................................................................. 103

Nikac v Minister for Immigration, Local Government and Ethnic Affairs .................. 104

6.3 Ministerial Directions .............................................................................. 104

R v Anderson, Ex parte Ipec Air ..................................................................... 105
Ansett Transport Industries v Commonwealth .................................................... 105
Bread Manufacturers of NSW v Evans .............................................................. 106

6.4 Statutory Directions ................................................................................. 106

Riddell v Secretary of the Department of Social Security ................................. 106
Smoker v Pharmacy Restructuring Authority .................................................... 107

6.5 Administrative Tribunals and Government Policy ....................................... 107

Drake v Minister for Immigration and Ethnic Affairs (No. 1) ......................... 107
Re. Drake and Minister for Immigration and Ethnic Affairs (No. 2) .................. 107

7. The Error of Fact/Error of Law Distinction ................................................. 109
7.1 The Distinction in the interpretation and application of error fact/error of law ......................................................... 109
7.2 Applying legislation to the facts ............................................................... 110

Fact Finding .............................................................................................. 110
Rule Stating: .......................................................................................... 111
Rule Application ....................................................................................... 111

Azzopardi v Tasman UEB Industries Ltd ......................................................... 112
Collector of Customs v Agfa-Gevaert ........................................................... 112
Collector of Customs v Pressure Tankers Pty Ltd. and Pozzolanic Enterprises Pty Ltd ........................................................................ 113
Hope v Bathurst City Council ...................................................................... 113

7.3 Error of Law/Fact Distinction under the ADJR Act ................................ 115
7.4 Distinction at Common Law .................................................................... 116
7.5 The No Evidence Rule .......................................................................... 116

8. Unreasonableness .................................................................................... 117
8.1 Making a decision devoid of plausible justification .................................. 118

Taveli v Minister for Immigration, Local Government and Ethnic Affairs ................ 118
Chan v Minister for Immigration and Ethnic Affairs ....................................... 118

8.2 Giving excessive or inadequate weight to a relevant consideration ............ 118
8.3 Making an erroneous factual finding on a point of some importance ............ 119

GTE (Australia) Pty Ltd. v Brown ................................................................ 119
8.4 Failure to Seek Information Readily Available and Centrally Important ............................................. 119
   Prasad v Minister for Immigration and Ethnic Affairs ................................................................. 119
   Videto v Minister for Immigration and Ethnic Affairs ............................................................... 119

8.5 Failure to have proper regard to a departmental policy or representation ........................................ 120
8.6 Making a decision with unnecessarily harsh effect ............................................................................. 120
   Wheeler v Leicester City Council (House of Lords) ............................................................... 120
   Edelsten v Wilcox ......................................................................................................................... 120

8.7 Inconsistent and discriminatory decisions ......................................................................................... 121
   Parramatta City Council v Fesiell .............................................................................................. 121

9. Consequences of Unlawful Decision Making ................................................................................. 122
9.1 The legality principle ....................................................................................................................... 122
   Wattmaster Alco Pty Ltd v Button .......................................................................................... 123
9.2 The separation of powers principle ................................................................................................. 123
   Hoffmann-La Roche v Secretary of State for Trade and Industry ............................................. 124
   Re. Kretchmer and Repatriation Commission (AAT) .................................................................. 124
   Minister for Immigration and Multicultural Affairs v Bhardwaj ............................................... 125
   Project Blue Sky Inc v Australian Broadcasting Authority ......................................................... 125

10. Privative Clauses ............................................................................................................................. 127
10.1 Types of privative clauses ............................................................................................................... 128
10.2 The Court’s approach to privative clauses ...................................................................................... 129
   Anisminic’s Case (1969): ......................................................................................................... 129
   R v Hickman; Ex parte Fox and Clinton .................................................................................. 130

11. Standing ............................................................................................................................................. 132
   Australian Conservation Foundation v Commonwealth (1980) .................................................. 132
   Onus v Alcoa .............................................................................................................................. 132
   North Coast Environmental Council v Minister for Resources ................................................. 133
   Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund P/L (1998) HC .......................................................... 133
11.1 Standing under ADJR ..................................................................................................................... 134
   Ogle v Strickland ....................................................................................................................... 134
11.2 Standing before the AAT and other Tribunals ................................................................................ 134
Cases

R v Hickman; Ex parte Fox and Clinton .................................................................131
A v Hayden (No. 2) (ASIS Case) (1984) 156 CLR 532 ....................................59, 126
Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs (1999) 162 ALR 1 .........................................................122
ACF v Forestry Commission 1988 FC ..............................................................80
AG v Great Eastern Railway .............................................................................63
Andrews v Mitchell .........................................................................................100
Anisminic Ltd. v Foreign Compensation Commission [1969] 2 AC 1471 117, 133
Annetts v McCann (1990) 170 CLR 596 ..........................................................38, 89
Ansett Transport Industries v Commonwealth (1977) 139 CLR 54, 40, 90, 109
ARM Constructions Pty Ltd. v Deputy Commissioner of Taxation (1986) 65
ALR 343 .........................................................84
Attorney-General (NT) v Hand, Minister for Aboriginal Affairs (1989) 25 FCR 345 ....................................................................................136
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 ..............45, 121
Australian Conservation Foundation v Commonwealth (1988) 146 CLR 493
Australian Conservation Foundation Inc. v Forestry Commission of Tasmania (1988) 81 ALR 166 .................................................................81
Australian National University v Burns (1982) 43 ALR 1569 ....................49
Azzopardi v Tasman UEB Industries (1988) 4 NSWLR 139 ..............31, 114-116
Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817
Banks v Transport Regulation Board (Vic) (1968) 119 CLR 222 ..........38, 95
Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund P/L (1998) 194 CLR 247 .........................................................137
Blackwood Hodge (Australia) Pty Ltd. v Collector of Customs (NSW) (1980) 47 FLR 131 ....................................................................................115
Botany Bay City Council v Minister of State for Transport and Regional Development (1996) 137 ALR 281 .................................................................81
British Oxygen Co. Ltd. v Minister of Technology [1971] AC 610; 3 All ER 165
Brownells Ltd. v Ironmongers’ Wages Board & the Drapers’ Wages Board (1950) 81 CLR 108 .................................................................160, 107
Burmah Oil Co Ltd v Lord Advocate [1965] AC 75 ........................................59
C.C.S.U v Minister for the Civil Service [1985] AC 374 ..............................50
Cairns v Jenkins ..............................................................................................101
Calvin v Carr [1980] AC 574 ............................................................................99
Carltona Ltd. v Commissioners of Works [1943] 2 All ER 560 ........................69
Chairperson, Australian Torres Strait Islander Commission v Commonwealth Ombudsman (1995) 134 ALR 238 .................................................................28
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 ........................................122
Chittick v Ackland (1984) 53 ALR 143 ................................................................................49
Church of Scientology Case (Church of Scientology Inc. v Woodward) (1982) 154 CLR 25 .................................................................61
Clenae Pty Ltd. v ANZ Banking Group (2000) 176 ALR 644 ..............................................104
Coal Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194 ...........................................................................23
Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338 .....................................................25
Collector of Customs v Agfa-Gevaert Ltd. (1996) 186 CLR 389 ........................................115, 116
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 .................................................................55, 115, 117
Commissioner for ACT Revenue v Alphalone ........................................................................100
Commonwealth v Esber (1991) 101 ALR 35 ........................................................................26
Commonwealth v Mewett (1997) 191 CLR 471 .........................................................................33
Community and Public Sector Union v Woodward (1997) 76 FCR 551 ...................................49
Cooper v Wandsworth Board of Works (1863) 143 ER 414 ..................................................87, 126
Courtney v Peters (1990) 98 ALR 645 ....................................................................................96
Craig v State of South Australia (1995) 131 ALR 595 ................................................................118, 119
Department of Social Security v Alvaro (1994) 50 FCR 213 .....................................................69
Director-General of Social Services v Chaney (1980) 31 ALR 571 ..........................................45
Drake v Minister of Immigration and Ethnic Affairs (1979) 24 ALR 577 ..................................20, 23, 25, 111
Duryappah v Fernando [1967] 2 AC 337; 2 All ER 152 ........................................................................89
Ebner v The Official Trustee in Bankruptcy (2000) 176 ALR 644 ........................................102, 104
Edelsten v Health Insurance Commission (1990) 96 ALR 673 ........................................................................47
Edelsten v Wilcox (1988) 15 ALD 546 ..................................................................................124
Errington v Minister for Health [1935] 1 KB 249 ...........................................................................96
FAI Insurance v Winneke (1982) 151 CLR 342 ........................................................................97, 98, 100, 102, 108
Fazal Din v Minister for Immigration and Multicultural Affairs [1998] 961 FCA .................................................................69, 70
Federal Airports Corporation v Aerolíneas Argentinas (1997) 147 ALR 649 ........................ 48
Fletcher’s Application [1970] 2 All ER 527 ................................................................................27
Foley v Padley (1984) 154 CLR 349 ......................................................................................55, 64, 66, 76
Forbes v NSW Trotting Club (1979) 143 CLR 242 ..................................................................126
Forster v Jododex Australia Pty Ltd; Bass v Permanent Trustee (1972) 127
CLR 421 .................................................................................................................................40
Furnell v Whangarei High Schools Board 1973] 2 NZLR 705 ..................................................97
Gaisford v Hunt (1996) 71 FCR 187 ......................................................................................101
General Newspapers Pty Ltd. v Telstra Corporation (1993) 117 ALR 629 ................................ 50
Gerah Imports Pty Ltd. v Minister for Industry, Technology and Commerce (1987) 17 FCR 1 .................................................................107
Green v Daniels (1977) 51 ALJR 463 ............................................... 51, 53, 91, 106
GTE (Australia) Pty Ltd v Brown (1986) 14 FCR 309 .................... 121, 123
Hamblin v Duffy (1981) 34 ALR 333 .................................................. 48
Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648 .............................................................. 88, 89, 90, 91, 96
Hindi v Minister for Immigration and Ethnic Affairs (1988) 20 FCR 1 ...... 84, 86
Hockey v Yelland (1985) 157 CLR 124 ......................................... 132
Hoffmann-La Roche & Co. v Secretary of State for Trade and Industry [1975] AC 295 ........................................................................ 127, 128
Hope v Bathurst City Council (1980) 144 CLR 1 .............................. 116, 117
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149 ..................... 38-39
Howells v Nagrad Nominees (1982) 43 ALR 283 .......................... 107
Hurt v Rossall ................................................................. 101
Independent EM. Radio Pty Ltd v Australian Broadcasting Tribunal (1989) 17 ALD 529 .......................................................... 81, 121
Inglis v Commonwealth Trading Bank of Australia (1969) 119 CLR 334 ..... 33
Johnson v Johnson (2000) 201 CLR 488 ...................................... 101, 102, 103
King Gee Clothing v Cth (1945) 71 CLR 184 ................................ 74
Kioh v West (1985) 159 CLR 550 .................................................. 39, 55, 88, 89, 95, 99, 100, 127
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531 129
Koppen v Commissioner for Community Relations (1986) EOC 92-173 ..... 96, 101
Lamb v Moss (1983) 49 ALR 533 .................................................. 45
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 .............. 102
Livesey v NSW Bar Association [1983] 47 ALR 45 .......................... 102
Lombardo v Federal Commissioner of Taxation (1979) 10 ATR 310 ........ 114
London and Clydesdale Estates Ltd v Aberdeen District Council [1980] 1 WLR 182 .............................................................. 73
Lonrho v Secretary of State for Trade and Industry [1989] 2 All ER 609 ...... 81
Macksville & District Hospital v Mayze (1987) 10 NSWLR 708 ........... 126
McEldowney v Forde [1971] AC 637 .................................................. 63
McInnes v Onslow-Fane [1978] 1 WLR 1520 ................................... 92
McRae v Attorney-General (NSW) [1978] 1 WLR 1520 .................... 91
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24 42, 43, 72, 85
Minister for Immigration and Ethnic Affairs v Eshetu (1999) 197 CLR 611 .122
Minister for Immigration and Ethnic Affairs v Naumovska (1983) 88 ALR 589 .......................................................... 52
Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41.104, 121
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 .... 92
Minister for Immigration and Ethnic Affairs v Wu Shan Liang .............. 55, 57
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 .......................................................... 129
Minister for Immigration and Multicultural Affairs v Jia and White (2001) 205 Morton v Union Steamship Co. of New Zealand (1951) 83 CLR 402 .......... 65
Municipal Council of Sydney v Campbell [1925] AC 338 ..................... 76
New South Wales v The Commonwealth (The Wheat Case) (1915) 20 CLR 54

Nikac v Minister for Immigration, Local Government and Ethnic Affairs (1998) 92 ALR 167 ...............................................................................................................22
North Coast Environmental Council v Minister for Resources (1994) 127 ALR 617 ..........................................................................................................................107
Northern Territory of Australia v Mengel (1995) 129 ALR 1 ..................................................31
Norvill v Chapman........................................................................................................84
O'Reilly v Commissioner of the State Bank of Victoria (1983) 153 CLR 169, 72
O'Sullivan v Farrar (1989) 168 CLR 210 ........................................................................81
Ogle v Strickland (1987) 71 ALR 41 ....................................................................................138
Onus v Alcoa (1981) 149 CLR 27 .....................................................................................136
Padfield v Minister for Agriculture, Fisheries & Food [1968] AC 997.39, 76, 80, 82

Parramatta City Council v Pestell (1972) 128 CLR 305 ................................................125
Patrick Stevedores v Maritime Union of Australia (1998) 195 CLR 1 ..................35
Peninsula Anglican Boys School v Ryan (1985) 8 ALD 419; 7 FCR 415 .........................107
Peverill v Meir (1990) 95 ALR 401 ..................................................................................47
Post Office Agents Association v Australian Postal Commission (1988) 84
ALR 563 .............................................................................................................................49
Prasad v Minister for Immigration and Ethnic Affairs (1985) 65 ALR 549 ........121, 123
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 72, 73, 79, 80, 129
Public Service Board v Osmond (1986) 159 CLR 657 .........................................................131
R v Anderson; Ex parte Ipec-Air (1965) 113 CLR 177 ....................................................108
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13 .........83
R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty Ltd (1953) 88 CLR 100 .............................................................38, 120
R v BBC; Ex parte Lavelle [1983] 1 All ER 241 ...............................................................38
R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546 .................................................................103
R v Connell; Ex parte Hetton Bellbird Colleries Ltd (1969) 122 CLR 546 ...................54
R v Cook; Ex Parte Twigg (1980) 147 CLR 15 .................................................................34
R v Criminal Injuries Compensation Board; Ex parte Lain [1967] 2 QB 864 ..........38
R v Deputy Industrial Injuries Commissioner; Ex parte Moore [1965] 1 QB 456 .104
R v Electricity Commissioner; Ex parte London Electricity Joint Committee Co Ltd 1924) 1 KB 171 .................................................................39
R v Federal Court of Australia; Ex parte Western Australia National Football League (1979) 143 CLR 190 .................................................................33
R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 59 .............................................133
R v Kirby; Ex parte Boilmaker's Society of Australia (The Boilmaker's Case) (1956) 94 CLR 254 ...............................................................22
R v Ludeke; Ex parte Queensland Electricity Commission (1985) 159 CLR 636 ........55
R v Optical Board of Registration; Ex parte Qurban [1933] SASR 1 ..................101
R v Port of London Authority; Ex Parte Kynich Ltd. [1919] 1 KB 176 ..........107
R v Secretary of State for The Home Department; Ex parte Khan [1985] 1 All ER 40 ..............................................................................................................124
R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256, All ER 233 ......101
R v The Brecknock and Abergavenny Canal Company (1835) 111 ER 395 ..39
R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 .42, 53, 77, 78
R v Trebilco; Ex parte F. S. Falkiner & Sons Ltd (1930) 56 CLR 20 ......79, 80
R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228 ..............................................................................................................39
R v Coldham; Ex parte The Australian Workers’ Union .......................133
R. v Dixon; Ex parte Prince and Oliver [1979] WAR 116 ..................27
Randall v Northcote Corporation (1910) 11 CLR 100 ..........................40
Re. Becker & Minister of Immigration and Ethnic Affairs (1997) 1 ALD 158 .22
Re. Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 ..........89
Re Wakim; Ex parte McNally (1999) 198 CLR 511 ...............................36
Re. Bloomfield and Sub Collector of Customs (1981) 4 ALD 204 ..........26
Re. Clarkson; Ex parte Australian Telegram and Phonogram Officers’ Association (1982) 39 ALR 1 .................................................................107
Re. Drake and Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2 ALD 634 ..................................................................................111
Re. Goodson and Secretary, Department of Social Security (1996) 23 AAR 209 ..........................................................112
Re Greenham and Minister for Capital Territory (1979) 2 ALD 137 ......23, 26
Re. McBain; Ex parte Australian Catholic Bishops Conference (2002) 209 CLR 372 .................................................................38
Re. Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502 ..................................................93
Re. Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57 ............................................131
Re. Ombudsman of Ontario and Health Disciplines Board of Ontario (1979) 104 DLR (3d) 597 ..................28
Re. Reference under s 11 of the Ombudsman Act 1976; ex parte Director General of Social Services (1979) 2 ALD 86 ..................................68
Re. Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 ..........39
Rice Growers Co-operative Mills Ltd. v Bannerman (1981) 38 ALR 535 ......45
Riddell v Secretary of the Department of Social Security (1993) 114 ALR 340 .........................................................110
Right to Life Association (NSW) v Secretary, Department of Human Services and Health (1995) 128 ALR 238 ..................................................46
Roberts v Hopwood [1925] AC 578 ...........................................38, 80, 82
Ruangrong v Minister for Immigration and Ethnic Affairs ..................51
Ruddock v Vardalis (1988) 14 ALD 773 ..............................................60
Salemi v Mckellar [No. 2] (1977) 137 CLR 326 ...............................89, 90
Samrein Pty Ltd. v Metropolitan Water Sewerage and Drainage Board (1982) 56 ALJR 678 ..........................................................79
Sanders v Snell (1998) 196 CLR 329 ...........................................................31
Sean Investments Pty Ltd. v MacKellar (1981) 38 ALR 363 ..........................85
Secretary, Department of Social Security v Alvaro ........................................71
Smoker v Pharmacy Restructuring Authority (1994) 53 FCR 287 ..............110
State of South Australia v O’Shea (1987) 163 CLR 378 ................................. passim
State of South Australia v Tanner (1989) 166 CLR 161 .........................55, 66
Surinakova v Minister for Immigration, Local Government and Ethnic Affairs 81
Swan Hill v Bradbury (1937) 56 CLR 746 ........................................65
Taveli v Minister for Immigration, Local Government and Ethnic Affairs (1989)
86 ALR 435 ..........................................................................................121, 122
Television Capricornia v Australian Broadcasting Tribunal (1986) 13 FCR 511........121
Television Corporation v Cth (1963) 109 CLR 59 ........................................74
Telstra v Kendall [1994] 55 FCR 221 .........................................................106
Tetron International Pty Ltd. v Luckman (1985) 8 ALD 243 ......................35, 37
Tickner v Chapman (Hindmarsh Island Bridge Case) .....................................85
Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55 ..51
Tobacco Institute of Australia Ltd. v Australian Federation of Consumer
Organisations Inc. (1992) 38 FCR 1 .........................................................84
Twist v Council of Municipality of Randwick (1976) 136 CLR 106 ..............90, 98
Victorian Council for Civil Liberties Incorporated v Vardalis v Minister for
Immigration and Multicultural Affairs [2001] FCA 1297 ..............................60
Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46
CLR 73 .................................................................................................18
Videto v Minister for Immigration and Ethnic Affairs (1985) 69 ALR 342 ...123
Vietnam Veterans Association of Australia (NSW Branch Inc.) v Cohen (1996)
70 FCR 419 .........................................................................................35
Water Conversation and Irrigation Commission (NSW) v Browning (1947) 74
CLR 492 ...............................................................................................82
Waterford v Commonwealth (1987) 163 CLR 54 .....................................114
Wattmaster Alco Pty Ltd. v Button (1987) 70 ALR 330 ...........................127
Webb v R (1994) 181 CLR 41 ..............................................................101, 102
Wednesbury case ...................................................................................... 121
Wheeler v Leicester City Council [1985] UKHL 6; AC 1054 ....................124
White v RMC .......................................................................................100
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:

• 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:
  o Finding the facts
  o Determining the applicable policy
  o Making discretionary judgements
  o Applying the law to the facts.

• The role of the judiciary is to ensure that decisions made by the executive are lawful by:
  o Ensuring that the relevant legal criteria and procedures have been complied with – that is, keeping decisions from being ultra-vires (beyond power).
  o Separation of powers dictates that the judiciary cannot encroach on the functions of the executive. Thus, it cannot engage in merits review.
  o 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:
  - 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.

---

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. E.g. decisions from the Veterans Review Board are appealable to the AAT.
- These tribunals can be further divided into those which are:
  - 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"

---

• 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:
  o 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
  o 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
  o 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.

To order the complete version of the lawskool Administrative Law Summary please visit www.lawskool.com.au

---

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 Boilmaker’s Society of Australia (The Boilmaker’s 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.