

Administrative Law Exam Notes

Ordinary answer skeleton

To weave in authority (case and legislation):

- ___ is authority for the proposition that ___. In these circumstances therefore _____.
- _____ is authority that there is justification for a _____.
- - 'the application of s__ will result in _____'

When using case law, consider:

- Does the case apply? Are the facts sufficiently similar or can it be distinguished?
- What is the ratio of the case? Is it binding precedent or just persuasive?
- Why is the current scenario similar to justify applying the case?

If missing facts, ensure to state that! State what facts would be required for a more robust analysis.

1. **ISSUE SPOT:**
 - a. What is/are the decision(s) being challenged?
 - i. NOTE: if a decision/series of decisions are 'intimately connected', consider them together: *Bond*.
 - b. Who was/were the decision maker(s)?
 - c. What was the source of power relied on to make the decision(s)?
2. Is merits review provided for in the legislation (required under s 25(1) *AAT Act* and s 31 *SACAT Act*)? If so:
 - a. Is it Commonwealth or SA jurisdiction?
 - b. Is internal review available? AND/OR review by an external specialist body?
 - i. Consider standing (under the legislation)
 - ii. What are the powers of the reviewer? (under the legislation)
 1. Is it *de novo* or a re-hearing? – *see below*
 - iii. What arguments will be made in the review? – *apply to facts*
 1. The decision maker will reach the 'correct or preferable' decision (*Drake*).
 - c. IF COMMONWEALTH: Review by the AAT:
 - i. Does [plaintiff] have standing?
 1. Does anything in the [Act] modify the standing test for the AAT under s 27(1) *AAT Act*? If not, then are the [plaintiff's] interests affected by the original decision? – *Apply to facts*.
 - ii. *STATE*: If [plaintiff] was not provided with reasons [he/she] could request a statement of the [original decision maker's] reasons under s 28 *AAT Act*.
 - iii. Is the decision reviewable?
 1. 'Decision' includes any decision made in purported exercise of powers conferred by the enactment: *Brian Lawlor Automotive*. Thus, can still be reviewed if flawed.
 2. *See below*.

- iv. What are the powers of the AAT?
 - 1. Check to see if the referring Act has modified the power of the AAT.
 - 2. If not, the AAT will 'stand in the shoes' of the original decision-maker, per *Shi*. Hence, in conducting the review, the AAT may exercise all of the powers of the original decision-maker, per s 43(1) AAT Act. The AAT will be exercising *de novo* merits review power, and will be able to make a fresh decision, per *Drake*.
- v. What arguments will be made?
 - 1. What is the 'correct or preferable' decision, per *Drake*? – apply to facts
- vi. Remedies of the AAT under s 43 (unless modified in the [Act] – state this):
 - 1. (a) affirm the decision, (b) vary the decision, (c) set aside the decision and: (i) make a substitute decision or; (ii) remit it back to the Regulator for reconsideration
- d. IF STATE: Review by SACAT:
 - i. Which jurisdiction will [plaintiff] apply under (s 32)?
 - 1. Original jurisdiction under s 33
 - 2. Review Jurisdiction under s 34
 - 3. Internal Review jurisdiction under s 70
 - ii. Apply the standing test in the referring legislation!
 - iii. What are the powers of SACAT? Outlined in s 34, it is not a strict *de novo* hearing:
 - 1. See below.
 - iv. What arguments will be made under the review?
 - 1. What is the correct or preferable decision, per *Drake*? – apply to facts
 - v. What is the likely outcome/remedy?
- 3. If no merits review (SAY: no conferral of jurisdiction to AAT/SACAT), consider judicial review: - consider jurisdiction
 - a. IF COMMONWEALTH:
 - i. STATE: As the decision was made under a Commonwealth Statute, [plaintiff] has three potential avenues for judicial review: in the High Court's original jurisdiction under s 75(v) Constitution, or in the Federal Court under s 39B Judiciary Act or, under the AD(JR) Act to the Federal Court.
 - ii. AD(JR): STATE: [Plaintiff] will prefer applying to the Federal Court under the AD(JR) Act as it is more straightforward, and less technical, and gives access to simplified remedies under s 16.
 - 1. ASK: Is it a decision to which the AD(JR) Act applies?
 - a. Select relevant grounds under s 5(1) – see below.
 - b. Is it a decision on the facts? – apply s 3(2)/(3) definition
 - c. Is it 'final or operative and determinative' and not a 'step along the way', per *Bond*?
 - d. Is the decision excluded under sch 1, or made by the G-G, per s 3?

- e. Is it of 'administrative [and not legislative] character' under s 3? *Apply Roach analogy/distinction*
- f. Was made 'under an enactment', and not from a general law or contractual power, per s 3(1)?
- 2. ASK: is [plaintiff] 'aggrieved', per s 5(1)?
 - a. *Apply s 3(4) definition*
 - i. *Note: Read the question carefully – the person with standing may not be the one who actually wants to challenge the decision*
 - b. If [plaintiff] is an intervener, apply s 12(1) and *US Tobacco Co*
- 3. ASK: If it is not a decision, is it 'conduct' to which the *AD(JR) Act* applies under s 6(1)?
 - a. Apply s 3(5) definition of conduct. *Bond* is also relevant – *see below*.
 - b. Apply s 3(4)(b) person aggrieved test – *as above*.
- 4. ASK: if not a decision or conduct, is it a failure to make a decision (s 7)?
 - a. Apply s 7(1) definition.
 - b. Apply s 7(2) criteria for standing.
- iii. IF NO AD(JR): *STATE: s 39B Judiciary Act* replicates the High Court's original jurisdiction under s75(v), conferring that original jurisdiction upon the Federal Court. Section 75(v) constitutionally entrenches judicial review of decisions made by 'officers of the Commonwealth'.
 - 1. Is the matter justiciable?
 - a. Per *Minister of Arts Heritage and Environment v Peko Wallsend*, the court cannot review polycentric issues!
 - b. The decision must not be within 'the field of politics, not of law', and not 'amenable to the judicial process': *Victoria v Commonwealth and Hayden*.
 - c. BUT, a matter will not be non-justiciable merely because it is politically sensitive or has political consequences: *Bennett v Commonwealth*.
 - d. ALSO, the source of the power is not relevant, only the subject matter of the decision: *Minister of Arts Heritage and Environment v Peko Wallsend*
 - e. Exercise of prerogative powers is also not likely to be justiciable – *Maxwell v The Queen*
 - 2. Does [plaintiff] have standing?
 - a. If the plaintiff is seeking the remedies of injunction, declaration or mandamus, per *ACF v Commonwealth* they must show that they have a 'special interest' in the matter. If they are seeking orders of certiorari and prohibition, then this is associated with the 'person aggrieved' test.
 - i. *See below*

- b. Are they an intervenor, or *amicus curiae*? See below!
- b. IF SOUTH AUSTRALIA:
- i. *STATE*: [Plaintiff] could apply to the SA Supreme Court, given that under s 17 *Supreme Court Act 1935* (SA), the inherent jurisdiction of Supreme Court is invested with the jurisdiction of the UK Court of Kings Bench. Thus, it has jurisdiction to grant orders in the nature of the prerogative writs as well as equitable remedies, consistent with *Supreme Court Civil Rules 2006* (SA) s 199(1).
 - ii. Consider justiciability and standing as above under the common law!
- c. GROUNDS: The *AD(JR)* grounds in practice mirror that of the common law. If Common Law, then argue that the grounds constitute jurisdictional error
- i. The **procedural fairness** ground of review: also located under *AD(JR) Act* s 5/6(1)(a):
 1. Hearing rule and bias rule.
 - ii. The **improper delegation** ground of review: also located under *AD(JR) Act* s 5/6(1)(c):
 - iii. The **Procedural error** ground of review: also located under *AD(JR) Act* s 5/6(1)(b):
 - iv. The **statutory preconditions to exercise a power** ground of review: also located under *AD(JR) Act* s 5/6(1)(c):
 - v. The **misconceiving the scope of the power** ground of review: also located under *AD(JR) Act* s 5/6(1)(d) or (f):
 - vi. The **taking into account irrelevant considerations** (*improper exercise of power*) ground of review: also located under *AD(JR) Act* s 5/6(1)(e) and (2)(a).
 - vii. The **failing to take account of relevant matters** (*improper exercise of power*) ground of review: also located under *AD(JR) Act* s 5/6(1)(e) and (2)(b)
 - viii. The **improper purpose** (*improper exercise of power*) ground of review: also located under *AD(JR) Act* s 5/6(1)(e) and (2)(c)
 - ix. The **bad faith** (*improper exercise of power*) ground of review: also located under *AD(JR) Act* s 5/6(1)(e) and (2)(d)
 - x. The **acting under dictation** (*improper exercise of power*) ground of review: also located under *AD(JR) Act* s 5/6(1)(e) and (2)(e)
 - xi. The **inflexible application of policy** (*improper exercise of power*) ground of review: also located under *AD(JR) Act* s 5/6(1)(e) and (2)(f)
 - xii. The **unreasonable exercise of power** (*improper exercise of power*) ground of review: also located under *AD(JR) Act* s 5/6(1)(e) and (2)(g)
 - xiii. The **fraud** ground of review: also located under *AD(JR) Act* s 5/6(1)(g)
 - xiv. The **no evidence** ground of review: also located under *AD(JR) Act* s 5/6(1)(h)
 - xv. *NOTE*: Error of law on the 'face of the record'?
- d. Is there a PRIVATIVE CLAUSE? – if not, say this!
- i. The supervisory role of the courts in common law judicial review is an inherent power of the State Supreme Courts and the original jurisdiction of the High Court under s 75(v).

- ii. Accordingly, *Plaintiff S157* (for Commonwealth) and *Kirk* (for SA) are authority that a privative clause cannot remove the constitutionally protected supervisory role of the High Court and State Supreme Courts to review *jurisdictional error*. – See below.
 - e. REMEDIES:
 - i. For review under *AD(JR)* Act: see s 16 (*below*)
 - ii. For review under the common law/*Constitution*:
 - 1. Certiorari, prohibition, mandamus (common law and constitutional remedies) - *below*
 - 2. Declaration and injunction (equitable remedies) - *below*
 - iii. *Note judicial discretion to refuse relief*. – *below*
- 4. Is it review of delegated legislation?
 - a. Challenge the subordinate act with judicial scrutiny:
 - i. IF SA: go through requirements under the *Subordinate Legislation Act* – see *below*
 - ii. IF COMMONWEALTH: go through requirements under the *Legislation Act* – see *below*
 - b. Judicial review of the decision to make the subordinate act:
 - i. What is the decision? – *see below*
 - ii. Who was the decision maker? – *see below*
 - iii. What is the jurisdiction? – *see below*
 - iv. Is the matter justiciable? – *see below*
 - v. Does [plaintiff] have standing? *Apply tests as above*
 - vi. What grounds will be argued? *Same as above* – *see below*
 - vii. What remedy will be sought? – *see below*
 - viii. NO AD(JR), so only constitutional/common law/equitable remedies

Merits Review

1. Check the Jurisdiction: Check the relevant statute to determine whether the merits review will be under the Commonwealth, or SA jurisdiction.

1. ALSO, ensure that the legislation grants the merits review body jurisdiction to undertake the merits review. If the right is not conferred in the legislation, merits review will not be available.
 - a. Per s 25(1) AAT Act, the enactment will provide that applications may be made to the Tribunal, (a) for review of decisions made under the enactment, or (b) for review of decisions made in exercise of powers conferred by another enactment having effect under the enactment.
2. Following this, check that the decision made is a reviewable decision under the relevant Act!

2. Internal Review? A more senior person within the department will review the original decision. *State: It is advantageous as it is generally faster, more accessible, and cheaper than external merits review and is capable of addressing the individuals' grievances efficiently. The only drawback is that it lacks independence from the original decision-maker.*

1. Does the complaining party have standing?
 - a. *Check the legislation establishing the review body and the relevant legislation that grants jurisdiction for limitations.*
2. What are the powers of the internal reviewer?
 - a. *STATE: Is it full a *de novo* hearing or a limited re-hearing? – *To determine compare to legislation in cases, like the AAT Act.*
 - i. In a *de novo* appeal, the merits review body 'stands in the shoes' of the original decision maker: *Shi*. The merits review body will go through the decision-making process afresh, with the parties able to present any relevant material, even if they did not present it to the original decision maker, per *Coal and Allied Operations v AIR Commission*. The decision maker will reach the 'correct or preferable decision': *Drake*.
 1. The power to 'affirm, vary or set aside and substitute a decision' indicates *de novo*, per *Drake*.
 - ii. However, a mere re-hearing is conducted on the basis of the material before the original decision-maker, although the merits review body may have discretion to admit fresh evidence. Further, a re-hearing involves a search for errors in the original decision, rather than a completely fresh decision-making process, per *Allesch v Maunz*. If there is no factual or discretionary (placing too much emphasis on a fact) error, the review body cannot alter the original decision.
 - b. *Check the legislation establishing the review body and the relevant legislation that grants jurisdiction for limitations. – Draw analogies/distinctions with cases like Drake and Shi!*
3. What arguments will be made under the review? – *apply to facts*
 - a. What is the correct or preferable decision, per *Drake*? – *apply to facts*
 - i. 'Correct' means lawful.