NOTES

LAWS2010 – ADMINISTRATIVE LAW

TOPIC 1 – INTRODUCTION TO ADMINISTRATIVE LAW

A. DEFINITIONS

Administrative Law: set of rules/principles about how government should perform its tasks.
Judicial Review: principal court based mechanism by which the legality of public authorities' actions may be addressed. – ONLY LEGALITY OF DECISION, NOT MERITS.

B. JUDICIAL REVIEW

- Sources of Judicial Review Jurisdiction
  - Federal Level:
    - **High Court's 'original' judicial review jurisdiction derives from the Constitution.**
    - **Federal Court** shares this 'constitutional' jurisdiction by way of statute and also has sources of jurisdiction from **Administrative Decisions (Judicial Review) Act 1977 (Cth) and Judiciary Act 1903 (Cth).**
  - **State Level:** State court has 'inherent' or 'supervisory' judicial review jurisdiction.
    - Previously thought to be sourced from Common law, but HC held in *Kirk's case* (2010) that aspects of this jurisdiction are like the HC's original jurisdiction, derived from and protected by the **federal Constitution.**
- Judicial Review Requirements:
  - **Jurisdiction:** Court must have **jurisdiction** to judicially review the impugned act or decision
    - it must accept that the application raises 'justiciable' issues
      - Matters with high level political content, unless there is a particular legal regime applies, it will be found to be non-justiciable
      - Matters relating to internal parliamentary process are non-justiciable
  - **Standing:** Applicant must be an appropriate person to bring the application, their interest must be affected
  - **Grounds of Review:** Must be a breach of an administrative law norm, a reason the court would intervene
    - Procedural grounds
      - Hearing rule: person affected by decision is given opportunity to be heard
      - Bias – decision maker should be impartial
    - Reasoning process grounds
      - Decision maker must consider relevant factors
      - Decision maker must disregard irrelevant factors
    - Decisional grounds
      - Decision maker must have jurisdiction
      - Wednesbury unreasonableness
  - Court must have **power to grant remedy**
  - **No statutory restriction** on court's review jurisdiction

C. LAW/MERITS DISTINCTION

Attorney General (NSW) v Quin (1990)
Facts:

- NSW set up a new magistrate's court. Policy was that anyone from old court could become magistrate on new court provided they met certain criteria. 95/100 of the magistrates were appointed to the new court but not Quin.
- All but 5 appointed to the new Local Courts. The 5 succeeded in JR of A-G's decision (denial of fair hearing – MacRae (1987) 9 NSWLR 268). On remittal, A-G announced a new policy – to consider the appointment of the 5 former magistrates ' on merit' i.e. on same footing as other candidates.

Issue: Was the A-G's adoption of a policy to appoint 'on merit' was in the circumstances unfair to the 5 magistrates? Would the court be appropriate to step in and review the AG's decision?
Held:

- The High Court of Australia found in favour of the Attorney General ruling that Courts were not able to overrule government policy as the appointment of magistrates is a role of the executive. That "the court has no power to protect a person's rights against adverse decision other than enforceable rights.". "Judicial review has undoubtedly been invoked to set aside administrative acts which are unjust or otherwise unlawful but only to the extent the purported exercise of power is excessive and or otherwise unlawful."
- Takeaway:

- "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.
- If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.
- The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

TOPIC 2 – MERITS REVIEW

- 'Merits review' is an established part of administrative law landscape, however bear in mind: all merits review is a creature of statute.
- Shared understanding – 'full'/ 'de novo' merits review:
  - reviewer is external and independent of decision-maker (regardless of type of error);
  - reviewer asks – is the decision under review 'correct and preferable', on the materials available to the reviewer and in the circumstances at the time of the review; and
  - if considers decision made is not the correct and preferable one – reviewer may exercise all the powers of the decision-maker to vary or substitute decision.
- Full/de novo 'merits review' can be contrasted with JR:
  - Wider substantive criteria ('correct and preferable' cf lawful).
  - Wider remedial powers (including to exercise the administrative power to make substitute decision/remit issue back to original decision maker (quash)).
- Merits review is only available where statute provides for it.

Tribunals are institutions that provide merits review in Australia.

A. TYPES OF TRIBUNALS

- Civil/appeal tribunals
  - Civil: disputes between individuals (eg NCAT civil jurisdiction)
  - Appeal: review of decision made by a government official
- Generalist/specialist tribunals
  - Generalist: may determine appeals in many different areas of law (eg AAT)
  - Specialist: tribunal hears appeals in a particular area (eg RRT – now merged into the AAT)
- Adversarial/inquisitorial tribunals
  - Adversarial: parties determine issues, collect and present evidence
  - Inquisitorial: tribunal determines issues and collects evidence

B. COMMONWEALTH ADMINISTRATIVE TRIBUNAL – AAT

Key Provisions:

- Section 2A – Tribunal objectives;
- S 27 – Applicants, any person whose 'interests are affected' (see also 30);
- S 33 – Tribunal Procedure (see also s 39);
- S 43(1) – Remedial powers of the Tribunal [we'll come back to]
- S 43(2) – Reasons for decision.
- S 44 – Appeals to Federal Court from AAT decisions.

Issue 1: What can the AAT review?

- **S 25 (1)(a) of AAT Act:** An enactment may provide that applicants may be made to the AAT for review of decisions **made in exercise of powers conferred by the enactment**
- 2 Questions to ask:
  - Does the application relate to a 'decision'?
  - Was the decision made in exercise of a power conferred by an enactment that confers jurisdiction on the AAT to review that decision?
    - AAT has jurisdiction to review a decision only if a Cth statute expressly confers jurisdiction to review a decision of that class
- **Decision:**
  - **S 3(3) of AAT:** "Decision" means making, suspending, revoking or refusing to make an order or determination
  - Tribunals can decide on question of law but cannot decide on question of law 'conclusively' (courts can)

        - Conclusive decision could be challenged only by way of an appeal
        - Non-conclusive decision can be challenged by way of judicial review or in collateral proceedings
    - The 'decision' in s 25 includes decisions that are invalid/ineffective in law ('purported')

Collector of Customs (NSW) v Brian Lawlor Automotice Pty Ltd (1979) 41 FLR 338

Facts:

- Lawlor's warehouse licence was cancelled by the Collector of Customs. Lawlor successfully appealed to the AAT. Collector of Customs had no power to cancel the licence. Collector of Customs appealed to the Federal Court.
- Collector of Customs' arguments to Federal Court:
    - Collector did have power to revoke the licence
    - If the Collector did not have power to revoke then the AAT had no jurisdiction to determine Lawlor's application

Issue:

- If a decision is not in law a decision within the power conferred by the Customs Act, is it a decision for the purpose of AAT Act s 25(1)?
- Did "decision" in s 25 of the AAT Act mean:
    - in pursuance of a legally effective exercise of powers conferred by the enactment [here the Customs Act]; or
    - in the honest belief there was an effective exercise of powers under the enactment; or
    - in purported exercise of the powers conferred by the enactment?

Held:

- Position adopted (c) in "**purported exercise of powers conferred by the enactment"**

Issue 2: Who can apply for Review?

- Standing
    - **Section 27(1):** The application may be made by or on behalf of any person whose interests are affected by the decision
    - **Section 30(1A):** The Tribunal may, in its discretion, make any other person whose interests are affected by the decision a party to the proceedings - on application by the person

Issue 3: Administrator's Reason for Decision

- Administrative Appeals Tribunal Act 1975 (Cth), **s28**
    - Request for reasons
        - by a person who is entitled to apply to the Tribunal for review of the decision
        - request is made in writing to the decision-maker
    - Reasons are to set out
        - findings on material questions of fact
        - referring to the evidence or other material on which those findings were based, and
        - giving the reasons for the decision
- AAT Act, **s 37(1)**
    - The administrator must lodge with the AAT:
        - a statement of reasons for decision; and
        - every other document that is relevant to review of the decision by the Tribunal
- AAT Act, **s 38**
    - AAT may order the administrator to lodge with the Tribunal an additional statement
- AAT Act, **s 43** – AAT's decision on review
    - (2) The Tribunal shall give reasons either orally or in writing for its decision.
    - (2A) If oral reasons are given a party may request the Tribunal to give to them a statement in writing of the reasons of the Tribunal for its decision

The ability of the tribunal to substitute its own decision – and to exercise all the powers and discretions of the original decision-maker in doing so – is what is meant by saying the Tribunal "stands in the shoes" of the decision-maker under review – *Pochi* (1980)

Issue 4: Powers of the AAT

- AAT Act, **s 43 (1)**
    - (1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:
        - (a) Affirming the decision under review;
        - (b) Varying the decision under review; or
        - (c) Setting aside the decision under review and:

        - i. Making a decision in substitution for the decision so set aside; or
        - ii. Remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal
    - The ability of the tribunal to substitute its own decision – and to exercise all the powers and discretions of the original decision-maker in doing so – is what is meant by saying the Tribunal "stands in the shoes" of the decision-maker under review – *Pochi* (1980)

Shi v Migration Agents Registration Authority (2008) 235 CLR 286
Facts:
- Mr Shi was a migration agent whose registration had been cancelled in 2003 on the basis that he had breached codes of conduct.
- The AAT set aside the decision and substituted a new one, relying on evidence of Mr Shi's changed conduct between 2003 and 2005.

Issue: Could the Tribunal rely on evidence that arose after the primary decision? YES
Held:
- It was for the Tribunal to reach its own decision upon the relevant material including any new, fresh, additional or different material that had been received by the Tribunal as relevant to its decision.
    - Administrative decision-makers are generally obliged to have regard to the best and most current information available.
    - **The nature of the decision does not support the contention that review was limited to the particular time in the past when the decision was made by the primary decision-maker.**
    - Any limitation on AAT's power to review on basis of circumstances at time of its review must be a statutory limitation
    - The Tribunal has been said to stand in the shoes of the original decision- maker as though it were performing the same function.

- **AAT must act consistently!**
    - *Drake (No 1):* the consistent exercise of discretionary administrative power in the absence of legislative guidelines will in itself almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power
    - Although AAT is not bound by its own previous decision, it should aim to be consistent in its decision making, and consistentency is most effectively realized by the formulation of general norms (nature of policies) to structure AAT's decision making
- **Government Policy**
    - AAT and the original decision maker needs to take into account considerations stated expressly in statute
    - However, when relevant considerations are not fully specified by statute but expressed in less formal form "policy" (i.e. general guideline, hence not binding), administrative decision makers are typically under prima facie obligation to give effect to government policy (because of ministerial responsibility).
    - **Government policies are relevant factors to be considered by the tribunal (Drake No. 1); however the tribunal should remain independent and should not apply unlawful or manifestly unjust policies (Drake No. 2)**

Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409
Facts:
- Drake is an American citizen; he commits an offence and the Minister of Immigration makes a decision to deport him.
- This decision was governed by policy conclusively outlining relevant considerations: gravity of offence, likelihood of recidivism, etc.

Issue: Should AAT follow government policy?
Held:
- AAT's review criterion is: whether decision made was the correct or preferable one, on material before the AAT.
- AAT cannot abdicate responsibility by merely asking whether decision conforms to whatever relevant government policy may be. AAT decision to apply a particular policy must be the result of independent assessment of:
    - (i) the propriety of the policy;
    - (ii) that the circumstances of the case are such that correct decision results from applying the policy

- Possible role of government policy:
  - Apply strictly without question OR
  - Disregard entirely and remain independent
- No universal rule. Tribunal must weigh policy in context
  - Advantages of following policy:
    - Policies must be applied consistently to ensure broad fairness
    - Government policy should be followed in deference to the democratic will it presumably reflects
  - On the other hand,
    - Inflexibly applying policy means that the merits of the individual case are not fully taken into account

Conclusion: Policy is a relevant consideration

Re Drake and Minister for Immand Ethnic Affairs (1980) ("Drake No. 2")

- Brennan J gives practice direction as to basis on which AAT may depart from government policy in exercising 'merits review' of discretion vested in a Minister:
  - **AAT will ordinarily apply Ministerial policy**
  - **Unless it is unlawful or its application tends to produce an unjust decision in the circumstances of the particular case**
  - An argument against applying a policy will be considered by the AAT **but cogent reasons** will have to be shown against its application

- **Failure to Perform Function**

MZZZW v Minister for Immigration and Border Protection [2015] FCAFC 133

Facts:

- Applicant was an asylum seeker who was refused a protection visa by the departmental delegate and the RRT.
- Applicant sought judicial review in Federal Court and succeeded – case remitted to RRT. RRT with different member reconsidered claim to refugee status.
- RRT rejected applicant's claim. RRT's reasons were very similar to initial RRT member's reasons. Looked like it was copied.

Issue: Did the second RRT fail to perform its merits review function?

Held:

- AAT has duty to arrive at correct or preferable decision on review according to the material before it
- In SZDFZ v Minister for Immigration and Citizenship [2008], Flick J spoke of reconstituted tribunal being called upon to resolve afresh the claims made.
  - "Afresh" means "with fresh eyes"
- Here, AAT member did not consider appellant's claim "afresh: in this manner. She listed 4 subheadings describing 4 aspects of appellants claim, 3 out of which involved substantial copying from previous decision
- Result: Tribunal decision set aside

- **Outcomes of Merits Reviews**
  - Federal merits review tribunals are not courts, they cannot be given power to enforce their decisions (judicial function). AAT Act establishes no such mechanism.
  - Some merits review tribunal decisions may be self-executing, but if it is not self-executing and decision maker fails to comply with tribunal's order, proceeding before a court would be necessary to secure enforcement.
  - Review of AAT decisions by the Federal Court:
    - Appeal on a question of law (s44): "A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding".

C. MERITS REVIEW IN NSW (For More Detail LAWS1021)

- NSW Civil and Administrative Tribunal commenced operation 1 Jan 2014, established by Civil and Administrative Tribunal Act 2013 (NSW).
- Administrative and Equal Opportunity Division exercises administrative review jurisdiction pursuant to Administrative Decisions Review Act 1997 (NSW).

Administrative Review Act 1977 (NSW)

- s 6 (2): "For the purposes of this Act, a decision is made under enabling legislation if it is made in the exercise (or purported exercise) of a function conferred or imposed by or under the enabling legislation."

- S 63 (1): "In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:
    - (i) any relevant factual material,
    - (ii) any applicable written or unwritten law."
- S 64 Application of Government Policy
    - (1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the administratively reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.
    - (2) The Premier or any other Minister may certify, in writing, that a particular policy was Government policy in relation to a particular matter.
    - (3) The certificate is evidence of the Government policy concerned and the Tribunal is to take judicial notice of the contents of that certificate.
    - (4) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal may have regard to any other policy applied by the administrator in relation to the matter concerned except to the extent that the policy is contrary to Government policy or to law or the policy produces an unjust decision in the circumstances of the case.
    - (5) In this section:
        - Government policy means a policy adopted by:
            - the Cabinet, or
            - the Premier or any other Minister,
            - that is to be applied in the exercise of discretionary powers by administrators.

TOPIC 3 – JUDICIAL REVIEW: JURISDICTION

- On an application for judicial review:
    - In the State/Territory Supreme Court if it involves State/Territory administrative action
    - In the High Court/Federal Court/Federal Magistrates Court if it involves Federal administrative action

A. STATE AND TERRITORY COURTS: Common Law Inherent Jurisdiction

- ***NSW Supreme Court 1970 (NSW)***
    - s 23: "The court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales"
    - s 65: The Court may order any person to fulfil any duty in the fulfilment of which the person seeking the order is personally interested and make an interlocutory order in any case where it appears to the Court just or convenient so to do.
    - s 69: The Court has jurisdiction to grant any relief or remedy by way of writ, whether of prohibition, mandamus, certiorari or of any other description
        - This section simplifies the form of proceedings, i.e. maintains the common law remedies, but removes procedural requirements previously attaching to that remedy, i.e. the writs.
- *Kirk v Industrial Relations Commission [2010] HCA* 1 → The states' inherent jurisdiction is not entirely based in the common law. It is also protected by the Constitution
    - It was held that legislation purporting to remove the power exercised by a Supreme Court of judicial review of unlawful decisions is invalid as it alters the defining constitutional characteristics of a Supreme Court.
    - 'A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals {within the limits of their authority to decide} by granting' prohibition, mandamus and certiorari for jurisdictional errors – Kirk v Industrial Court of NSW (2010)
- ***Uniform Civil Procedure Rules 2005, Rule 59.9*** o Where JR proceedings filed in relation to a decision of a 'public authority', statutory provision for Ct to order authority to comply with a request by Pl for statement of reasons for decision.

B. HIGH COURT OF AUSTRALIA: Constitutional Jurisdiction

- **Appellate Jurisdiction: Constitution, s73**
    - The High Court shall have jurisdiction ... to hear and determine **appeals** from all judgments, decrees, orders, and sentences:
        - - (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
- **Original Jurisdiction: Constitution, s 75**

SCAFFOLD

JURISDICTION

(1) State - *NSW Supreme Court 1970 (NSW)* – Common Law Inherent Jurisdiction

- s 23: General Jurisdiction clause
- s 65: The Court may order any person to fulfil any duty, in the fulfilment of which the person seeking the order is personally interested and make an interlocutory order in any case where it appears to the Court just or convenient so to do.
- s 69: remedies; prohibition, mandamus, certiorari or of any other description
- *Kirk v Industrial Relations Commission [2010] HCA* 1 → The states' inherent jurisdiction is not entirely based in the common law. It is also protected by the Constitution

(2) Federal – High Court of Australia - *Constitution*

- Constitution s 73: Appellate Jurisdiction – any and all judgements
- Constitution s 75: Original Jurisdiction
    - (iii): Where cth or person suing or being sued on behalf of cth is a party
        - No jurisdictional error is required; *Plaintiff M61/2010E, Project Blue Sky*
        - Encompasses corporate bodies; *Plaintiff M61/2010E*
        - HCA may order certiorari and declaration
        - Not protect from privative clause
    - (v): Where writ of of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth [nb certiorari –available as ancillary remedy]
        - Narrow since: is only applicable where a writ is sought against an **'officer of the Commonwealth' (*see below*) AND there is a jurisdictional error**
        - Traditionally, an 'officer of the Commonwealth' is a person **appointed by** the Commonwealth to an **identifiable office** who is **paid by** the Commonwealth for the performance of their functions and **who is responsible to and removable by** the Commonwealth – *Broadbent v Medical Board of Queensland*
- *Plaintiff M61/2010E:*
    - Court will read down legislation to facilitate JR where Commonwealth is implicated
    - An ordinary Act of Parliament cannot abrogate the Court's constitutional jurisdiction

(3) Federal – Federal Court – *Judiciary Act 1903*

- Judiciary Act, s 39B(1) = s75(v)
- Judiciary Act, s 39B(1A) includes:
    - (a) In which the Cth is seeking an injunction or declaration or
    - (b) Arising under the Constitution, or involving its interpretation; or
    - (c) Arising under any laws made by the Cth Parliament, other than criminal prosecutions
        - There must be a dispute relating to a *right* or *duty* under a law made by the Commonwealth Parliament and not merely an *interpretation* of a federal law: *R v Cth Court of Conciliation and Arbitration*
- Judiciary Act, s 44: Allows HCA to remit any matters commenced in its original jurisdiction to the FCA
    - Can hear appeals on questions of law from various tribunals and appeals from the Federal Magistrate's Court

(4) Federal – Federal Court – *Administrative Decisions (Judicial Review) Act 1977*

- s 5: Decision
- s 6: Conduct/Procedural steps leading to a decision

    Australian Broadcasting Tribunal v Bond (1990)
        - Conduct' is 'essentially procedural in character'
        - 'Conduct' is the way in which the proceedings have been conducted ... rather than decisions made along the way with a view to the making of a final determination
        - Substantive decisions and findings of fact are generally not capable of review as 'conduct'. Unless what is alleged is some breach of procedural requirements in the course of the conduct involved in reaching the relevant conclusion

    ADJR s3(5)
        - 'Conduct engaged in for the purpose of making a decision' includes the doing of any act or thing preparatory to the making of the decision
        - Including the taking of evidence or the holding of an inquiry or investigation
- s 7: Failure to make decision

ADJR is available if:

1. **Decision** (*Australian Broadcasting Tribunal v Bond)*
    a. An intermediate finding or ruling is only reviewable if it is *provided for in an enactment* and if it would resolve an *important substantive issue*

b. Reviewable decisions *are final, operative or determinative decisions* rather than steps in the reasoning process (unless provided for in statue)

2. Of Administrative Character

a. If it is not judicial or legislative it must be administrative (*Central Queensland Land Council*) – legislative and judicial decisions are not reviewable
b. Administrative decision is a decision that *applies* the law, whereas a legislative decision is one that *creates* the law; *R G Capital Radio Ltd v Australian Broadcasting Authority (2001*
c. Some of the indicators of a "**legislative**" character: *Roche* (med taken off register)
    i. decision determining the content of rules of general application
    ii. parliamentary control of the decision - parliamentary disallowance
    iii. public consultation and notification of the making of the regulation
    iv. broad policy considerations imposed/involved
    v. public notification of the making of he regulation
d. Indicators of an "**administrative**" character: *Roche*
    i. applying rules to particular cases
    ii. provision for merits review
    iii. power or executive variation or control

3. Made under an enactment

a. Decision must be **expressly or impliedly required or authorised by the enactment**; **AND**
    i. The enactment need not be the *'proximate source of power'* for the decision; it suffices for the enactment to be the *'ultimate source'* of power for the decision – *Griffith*
    ii. Decisions made *under contracts* or are made according to *consensual arrangements* are *not made "under an enactment*" (*General Newspapers; Griffith v Tang*)
        1. The mere grant of capacity to contract to a statutory body, without more, does not render all ensuing contracts reviewable – *General Newspapers*
            a. Because a contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute
        2. The exercise of a corporation's personal power in furtherance of its private interests is not sufficient – *NEAT*
b. Decision must itself **confer, alter or otherwise affect legal rights or obligations**, and in that sense the decision must derive from the enactment
    i. Though the decision need not alter or affect legal rights *arising under the enactment* in question; *any legal right, whatever its source, will suffice – Griffith*
    ii. No decision 'under' an enactment if only a *consensual relationship* existed as between the parties – *Griffith*
c. **Document** which is an enactment: Enactment means an Act of Parliament or an instrument under such an Act. Instrument includes rules, regulations or by laws.

4. Other than a decision by the GG or a decision included in Schedule 1 (includes privative clauses)
5. IMPORTANTLY, if you are challenging **delegated legislation**, you **CANNOT** seek review under the ADJR Act (as it is not a decision of an *administrative character*)): *Queensland Medical Laboratory v Blewett*

ERRORS OF LAW AND FACT

ADJR Act s5(1)(f) (*ABT v Bond)*

- To be reviewable under this ground, the error **must be material** in the sense that, **but for** the error, the decision would or might have been different
- *ADJR Act s 5 (1)(f)* reflects the CL

1. **Fact finding** – nearly always a question of fact

General principle: determining the facts by way of primary findings and inferences generally involves questions of fact.

Three Exceptions:

- **Jurisdictional Facts**
- **No Evidence** → ADJR s5(1)(f/h) → JE
  - If established that there was *no evidence* to reach conclusion that body did, then fact-finding is not legal. *Strict requirement that there be no evidence or probative material* for the finding
  - Even if the evidence is *minimal and unsubstantial* (i.e. flimsy), this *still constitutes evidence*. The *inadequacy of material is not enough*: *Melbourne Stevedoring*.
  - If there is evidence or probative material, there is no error of law just because reviewing court prefers a different version of the evidence: *Azzopardi*
- **Illogical/Perversity in Finding of Facts** → ADJR s5(1)(f)
  - The reasoning process from original facts leading to decision is illogical/perverse
  - Fact finding is not reviewable on basis that finding is illogical or perverse; *Azzopardi*
  - *Haritos*:
    - Federal Court judges are embracing a new "*substance rather than form*" approach to identifying questions of law; → "mixed questions of fact and law" may fall be within the jurisdiction of the Court to review
    - Accepted that *irrational, illogical and not based on findings or inferences supported on logical grounds* as error of law

2. **Rule-stating** – nearly always a question of law

- Generally a judicial appeal case (s44 Judiciary Act)
- **Pozzolanic Principles** (1st 4 of 5):
  1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a *question of law*
  2. The ordinary meaning of a technical legal term is a *question of law*
  3. The meaning of a technical legal term is a *question of law*
     - i.e. legal concept/words used by judges e.g. 'consideration' in contract law
  4. The effect or construction of a term whose meaning or interpretation is established is a *question of law*
- Generally, *statutory construction* is a question of law. If a word or phrase is a *composite phrase*, it is a question of law: *Collector of Customs v Agfa- Gavaert* (1996) (e.g. "silver dye bleach reversal process")
- All that is required to be identified is that the words are used in a "*sense different to ordinary speech*"; *Collector of Customs v Agfa- Gavaert*
- If it requires the *linking of phrase and the purpose of the act* as a whole it is a question of law; *Collector of Customs v Pozzolanic Enterprises Pty Ltd*

3. **Rule application** – generally a question of law

- *Hope v Bathurst City Council (1980)*
  - The application of a statutory word or phrase is '*wrong in law'* if:
    - There is *more than one reasonable answer* to the question of whether the facts found fall within or outside of legal term, it will *intervene only if an unreasonable answer* is given
    - Only *one conclusion is open* (that the facts necessarily fall within or outside a statutory or legal term) it will *correct any wrong answer given*
- **Pozzolanic Principle 5**: The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.
  - Except where ordinary words are used in the Statue; *Hope*
  - Applying *technical words* or phrases to the facts as found is a *question of law*
    Applying *ordinary words* or phrases to the facts is a *question of fact*