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STRUCTURE

1. Preliminary considerations
 - a. Who is the applicant? What is their grievance?
 - b. Which decision/s is the subject of their grievance? List ALL.
 - c. Who was the decision-maker? Were others involved in dm process?
 - d. What statutory powers were exercised in the making of the decision?
2. Merits review
 - a. Internal review?
 - b. External review to AAT?
 - i. Jurisdiction?
 - ii. Standing?
 - iii. Statement of reasons?
 - iv. What will the AAT do? What does a hearing involve?
 - v. Canvas arguments in favour/against applicant, make an assessment of outcome
 - vi. What remedy will applicant get? = Decision remade.
3. Judicial review
 - a. ADJR Act
 - i. Jurisdiction?
 - ii. Standing?
 - iii. Statement of reasons?
 - iv. Grounds of review available? Argue ALL (remember jurisdictional fact).
 - v. Limitations?
 - vi. Remedy?
 - b. Common law
 - i. Remedy being sought? [s 75\(v\) Constitution/ s 39B Judiciary Act](#).
 - ii. Jurisdiction?
 - iii. Justiciability?
 - iv. Standing?
 - v. No right to request reasons.
 - vi. Grounds of review? Remember, CL grounds are effectively the *same* as under ADJR Act, say "I adopt what I said above wrt grounds of review, but I recognise that the Court might require the arguments to be cased in terms of jurisdictional error (for admin dm, refer to **Yusuf**)." No evidence ground is slightly different.
 - vii. Limitations?
 - viii. Remedy (refer back to i.)?

Introduction and Overview (TOPIC 1):

Institutions of which Admin law governs:

- Government has 3 arms:
 1. Legislature: makes law;
 2. Executive: administers law; and
 - Crown is the head of Executive branch. Crown representative at Cth level is GG and at State level is Governor.
 3. Judiciary: interprets and applies law.

The Executive:

- The executive arm of government exists at both State and Commonwealth levels and is made up of several entities:
 - a. Queen, Governor General, Attorney General;
 - b. Ministers (PM);
 - c. Cabinet (body of Ministers who make the difficult policy decisions). It is not a constitutional body, but exists by convention;
 - d. Ministerial Staff (appointed by the QR on the prime ministers recommendation);
 - e. Executive Council (who is a constitutional body of Ministers (and maybe others) who advise the Queen's reps to act on the advice of Cabinet). Note, references in the Constitution to Governor in Council;
 - f. The departments and the public service (headed by a Minister) and for whom the Minister is generally responsible;
 - g. Statutory Authorities (entities created by legislation for a particular purpose, includes commissions and tribunals); AND
 - h. Government Business Enterprises – government entities which operate in the private market, usually to promote competition or because investors do not wish to enter the market eg The National Broadband Network and Australia Post. Increasingly GBEs are being sold to private organisations such as Telstra and Medibank Private.
- Function: to execute laws and will normally establish entities to do this. For example, the ACCC administers the Australian Competition and Consumer Act and Centrelink to administer the Social Securities legislation.
- Issues:
 - Privatisation: An activity conducted in the public sector is henceforth conducted entirely by a private entity. This normally occurs through the complete sale of a public entity traditionally controlled by government. Both the function and the organisation performing the function are outsourced to private organisations and located in the private sector. Eg Commonwealth Bank, Qantas, Medicare and Telstra. This means that private organisations are making decisions in relation to matters that previously subject to administrative law regimes. Due to the increase in privatisation through outsourcing and the sale of government assets, the following question arises: if a private organisation is exercising public function – should administrative law apply?
 - Commercialisation: Govt imposes a private sector business structure, including commercial methods and profit goals, on an agency that is owned and controlled by govt. Termed 'government business enterprise' (GBE). Eg Australia Post.
 - Contracting out: A public body enters a contract with a private entity, whereby the private entity performs a function previously performed by the public body. The function remains within the public sector, but the means by which it is performed is located in the private sector. Eg Vic prisons.
- Raises questions of accountability:

- Should the body discharging the function or delivering the service be accountable? To whom? For what? And according to what standards? Can you seek judicial review of private sector functions?
- Competing objectives – preserving competitive market efficiency vs. protecting individual rights and securing public accountability.
- GBEs are subject to considerable non-administrative law regulation; eg consumer protection, fair trading and price control legislation (administered by ACCC and Essential Services Commission (Vic)); industry ombudsmen; *Corporations Act 2001 (Cth)*; public law statutes; private law remedies; and competitive market forces.
- However, private law remedies often will not avail an aggrieved person because they are not a party to the contract between the government agency and the contractor. Also, market control only works where there's competition (eg so not for Aus Post).
- As the *Industry Commission, Report No 48, 1996* agrees, "While responsibility to do certain things can be transferred, accountability for the results cannot."
- The *Administrative Review Council, ARC Report No 38, 1995* concluded that government-controlled bodies (defined as those in which Govt owns ≥50% of shares or can control governing board) should be subject to admin law *except* in relation to commercial activities undertaken in a competitive market. This prevents the GCB from, as *Keith Mason QC*, then Solicitor-General of NSW, points out, "suffer[ing] the worst of both worlds."
- Does admin law apply to private entities?
 - There are 2 potential tests:
 1. The surprise test: no one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends through the UK. Its Code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the Panel: per Donaldson MR.
 2. The major consequences test: They [the powers of the Panel] are far reaching and the sanctions for their enforcement are also formidable: they include suspension of a listing by the council of the Stock Exchange, in performance of its public duty in that's regard.
 - There are 2 approaches:
 1. UK: Functional approach:
 - Look at the function of the entity. Is it a public one (ie do they do public things?): **Datafin**.
 - In **Datafin**, The Panel of Take-overs and Mergers was a non-governmental entity in the UK which oversaw and regulated the financial market. It performed its functions without any direct/visible legal support. The Panel had no statutory, prerogative or common law powers, nor was it engaged in a contractual relationship with dealers of the financial market. The Panel was 'self-regulated' with a Code at its core. The Panel had *de facto* power to devise, promulgate, amend and interpret the Code. Issue: whether (a) the decisions of the Panel were reviewable by the Court, and (b) whether the Court could quash such a decision (certiorari). The Court of Appeal (UK) held:
 - The Panel on Take-overs and Mergers, which regulated take-overs and mergers of public companies listed on the Stock

Exchange, but had no statutory support, *did* exercise public power.

- The discretion of the Panel to make decisions wrt the Code indirectly affected the rights of citizens. It had a duty to act judicially, at least when determining whether there had been a breach of the Code. Its reason for existence (*raison d'être*) is to do equity between one shareholder and another. This is the public element.
- Its decision was affecting the rights of the public not the right of a single individual.
- The Panel is performing an important public duty (Sir John Donaldson MR), “wields enormous power” (could exclude a party from the Stock Exchange) and regulates those who have “no alternative” but to submit to the Panel’s power (Lloyd LJ).
- The Court’s role in exercising judicial review is **not** to evaluate the evidence and finding of facts, but rather to review the decision of the Panel and consider whether there has been ‘illegality’, ‘irrationality’, ‘procedural impropriety’ or ‘fundamental unfairness’.
- The judicial reviewability of non-statutory power exercised by a non-government body turns on whether the power is properly considered to be public power or the exercise of a public function.

- The UK **Datafin** functional approach has been applied in some lower courts in Australia. Although it is not clear what makes a function ‘public’ so courts consider:
 - i. Whether the government would be likely to exercise a function if it was not being performed by the ‘private’ actor;
 - ii. The extent to which the function operates as a key plank of a regulatory structure which includes government decision-makers; AND
 - iii. The legal source of the body’s power.

2. AUS: Institutional Approach:

- In **NEAT v AWB**, a private company AWBI had authority to veto a decision of a statutory public authority concerning the export of durum wheat. The statutory authority operated under the Marketing Act 1989 (Cth). This Act stipulated that the Authority’s decision was subject to the written consent of AWBI. Applicant wanted to export wheat from Australia and AWBI refused to give its consent. The applicant complained that AWBI’s decision to refuse consent of the export was not based on the considerations stipulated in the Act. The claim was on the ground of inflexible policy under ADJRA. HCA held per majority:
 - AWBI’s decision to veto an application to export wheat was not reviewable under the ADJR Act and also that the common law remedies were unavailable. They justified their conclusion on the following grounds:
 - a. That AWBI gained the power to issue its consent by virtue of its incorporation – as a legal person. For

this reason, it is neither 'necessary nor appropriate' that AWBI's decision is 'made under' the Act.

- b. That AWBI's private (commercial) objectives (to maximize profits) could not sensibly be accommodated with any administrative law obligations. In other words, the court thought it not practicable for AWBI to be obliged to comply with the public considerations when making a decision (vis the nature, scope and purpose of the power and the context in which it is found) outlined in the Act.
 - c. Have to look at the particular statutory context to determine whether public or private remedies dominate.
- It is not an admin law issue.
 - There is the private character of AWBI as a company incorporated under companies legislation for the pursuit of the objectives stated in its constituent document: here, maximising returns.
 - It is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.
 - In dissent: Kirby and Gleeson JJ argued that AWBI's decision was made under the enactment.
 - ❖ Adopted the 'functional' UK approach, and the fact that AWBI is a private corporation is relevant but not determinative. It depends on source of power of the decision actually being made on the facts. AWBI's approval decision was one made under an enactment on the following grounds:
 - a. Gave AWBI the position of a statutory monopoly; and
 - b. It incorporated the private body into the statutory regulatory scheme; and
 - c. It provides for, requires, and gives legal force to AWBI's decisions re the wheat export (per Kirby J).
 - ❖ While AWBI is not a statutory authority, it represented and pursued the interests of a large class of primary producers. It holds a statutory monopoly in the bulk export of wheat...which is in the national interest. On this, he based his conclusions that AWBI was a public functionary, who had its power to veto derived from the Act: per Gleeson CJ.