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ADMINISTRATIVE LAW EXAM NOTES

If asked to advise on Judicial Review → look at AD(JR) and CL (but not AAT)

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?

Advise X on the avenues of review available in relation to Y's administrative decision.

MERITS REVIEW

X should first seek a merits review of the decision by the AAT under the *Administrative Appeals Tribunal (AAT) Act 1975* before seeking judicial review (JR) as it is generally cheaper, more straightforward and a new decision can be substituted. By contrast, JR is often used as a last resort, and courts may not issue a remedy if statutory appeals haven't been exhausted.

1. Jurisdiction to conduct MR

- The AAT has no inherent jurisdiction, so [the decision] will be reviewable if the relevant statute accords them the power to review that decision per s 25(1)(a) of the *AAT Act*
- Section 57 of the *Hazardous Waste Act* states certain types of decisions can be appealed to the AAT → check if relevant (Pg 33)
- Decisions by delegate also reviewable via MR per s 34AB(1)(c) of the *Acts Interpretation Act*

AAT Act, s 25

- (1) An enactment may provide that applications may be made to the Tribunal:
 - (a) for review of decisions made in the exercise of powers conferred by that enactment; or
 - (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.
 - This phrase has been interpreted to mean anything purportedly done can be challenged where legislation grants merits review, even illegal decisions (*Brian Lawlor*)
- If no standing via statute → stop discussion

2. Standing under MR

- s 27(1) - an application for appeal may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.
- s 27(2) - "an organization or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association".
 - Refers to public interest bodies – can still have standing
 - Similar to Peak Body
- *Re McHatton*: "Interests not limited to financial interests or legal rights and includes indirect interests"

- BUT can't be too indirect/minor eg. potential damage to reputation

3. Reasons

- *S 28 AAT Act* allows a person entitled to bring an application to the AAT to request written reasons
- *S 37* obliges the decision-maker to lodge material documents (including reasons) with the AAT within 28 days of receiving notice of the application for review

4. What will the Tribunal do?

- The AAT will make the decision *de novo* and has all the powers of the original decision-maker (*s 43(1) AAT Act*)
- BUT may rely on different evidence or different arguments from those heard at first instance (*Re Greenham*)
- Tribunal will attempt to make the correct/preferable decision (*Drake (No 2)*) **
- The Tribunal applies the law in force at the time of appeal not OG decision
 - UNLESS it would deprive someone of a right accrued under the OG legislation and there is an absence of a contrary intention in the amending Act to deprive this right per *s 7(2) of the Acts Interpretation Act* (*Esber*)
- AAT will adopt the relevant government policy (*Drake No 2*) **
 - UNLESS the policy is unlawful (eg. inconsistent with statute, allows for irrelevant considerations, serves improper purpose) OR doing so would cause injustice in the particular case (NB: this is applied cautiously)
- *S 33(1)(a)* – the procedure the Tribunal adopts is at their discretion **
- *S 33(1)(c)* – the Tribunal is not bound by the rules of evidence **
 - Must still base decision in evidence that logically shows some existence of the facts and has 'some rational probative force' (*Re Pochi*) eg. hear-say = unreliable **
- Also not bound by civil onus of proof (*McDonald*)
 - BUT it is more likely to arrive at the correct decision if it applies by this standard (*Epeabanka v Minister*)

5. Remedies

Under *s 43*, the tribunal can:

- affirm** the decision under review;
- vary** the decision under review; or
- set aside** the decision under review and:
 - make a decision in substitution** for the decision so set aside; or
 - remit** the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

6. Conclude