

LAWS5102

ADMINISTRATIVE LAW

Exam Notes

- i. Nature of Administrative Law
- ii. Jurisdictional Prerequisites
- iii. Grounds of Judicial Review: Procedural Fairness (Breach of Natural Justice)
- iv. Grounds of Judicial Review: Decisions Not Authorised & The Rule Against Delegation
 - v. Grounds of Judicial Review: Procedures Required
 - vi. Grounds of Judicial Review: Relevancy/Irrelevancy
 - vii. Grounds of Judicial Review: Improper Purpose
 - viii. Grounds of Judicial Review: Bad Faith
 - ix. Grounds of Judicial Review: Behest
- x. Grounds of Judicial Review: Inflexible Application of Policy
 - xi. Grounds of Judicial Review: Unreasonableness
 - xii. Grounds of Judicial Review: Uncertainty
 - xiii. Grounds of Judicial Review: No Evidence
 - xiv. Grounds of Judicial Review: Fraud
 - xv. Remedies: Overview
 - xvi. Remedies: Prerogative Writs
 - xvii. Remedies: Equity
 - xviii. Remedies: Statute (ADJR)
 - xix. Remedies: Remedial Discretion
 - xx. Jurisdictional Error

O. Answering the Question

WRITE EACH PART IN A DIFFERENT ANSWER BOOK

FORMAT & CONTENT

- **(1) SECTION A: PROBLEM QUESTION 1**
 - ONE question, TWO parts
 - Part 1: 15 marks
 - Part 2: 10 marks
 - TOTAL: 25 marks
- **(2) SECTION B: PROBLEM QUESTION 2**
 - ONE question
 - TOTAL: 25 marks
- **(2) SECTION C: ESSAY QUESTION**
 - ONE short essay question
 - TOTAL: 10 marks
 - **Content:**
 - Jurisdictional error + other topics
 - Don't forget about the rule of law and separation of powers.

HOW TO ANSWER AN ESSAY QUESTION

- **GENERAL ADVICE:**
 - Read question carefully, make sure you answer it
 - Do not write an elaborate introduction, one sentence is fine
 - Make 3 main points:
 - What are the three most important points I can make and how do those points relate to the question asked?

HOW TO ANSWER A PROBLEM QUESTION

- **GENERAL ADVICE:**
 - Read question carefully, see what it is asking (excluding pre-requisites or remedies, etc.)
 - Use headings
- **(1) WHAT'S THE PROBLEM?**
 - **Decision and effect of decision:**
 - What is the decision?
 - **Decision maker:**
 - Minister? Tribunal? Original repository of power or delegation?
 - **Empowering legislation:**
 - Read carefully and apply rules of statutory interpretation.
 - Is there a purpose for the DM's exercise of power?
 - What is the DM authorised to do?
 - Is there a privative clause?
 - What does the applicant want?
 - Think about remedies.
- **(2) IS THE DECISION REVIEWABLE?**
 - Basic statutory powers are generally reviewable.

- **Things to look out for:**
 - Prerogative powers
 - Vice-regal decision-makers
 - Governor-General's decisions are not reviewable under ADJR Act (s 3(1)(c))
 - Reviewable under GL
 - Quasi-public powers
 - Do we really have an exercise of public power?
 - Or is it a private context?
 - Decisions made by private corporations may not be reviewable (**NEAT**).
 - Subject matter
 - Where there are highly political considerations, public safety, national security = courts are reluctant to interfere and they might find the matter is not justiciable.
 - Most of the time, this does not come up.
- **Justiciability flags:**
 - Nature/subject matter of dispute.
 - Identity of DM.
 - Purely hypothetical issue.
 - Privative clause.
 - * No need to check Schedule 1 ADJR.
- **(3) WHAT'S YOUR JURISDICTION?**
 - **WA:**
 - s 16 of the *Supreme Court Act* (WA) = Supreme Court has inherent jurisdiction to conduct judicial review.
 - **Federal:**
 - General law/ADJR
- **(4) DO YOU MEET JURISDICTIONAL PREREQUISITES?**
 - **WA:**
 - Requirements for getting a remedy.
 - **Federal - general law:**
 - Matter
 - Officer of the Cth
 - Entitlement to a named remedy
 - **Federal - ADJR:**
 - Decision
 - Administrative character
 - Made under an enactment
- **(5) IS THERE A GROUND OF REVIEW?**
 - **Is it CL or ADJR - are the grounds different?**
 - No evidence is completely different under ADJR Act compared to CL
 - Maybe procedures required = don't need error to be jurisdictional (most cases applying **Project Blue Sky**)
 - Uncertainty does not exist at CL (imply into statute)
 - Abuse of power + otherwise contrary to law do not exist at CL
 - **Grounds of review:**

SUMMARY TABLE			
PROCEDURAL FAIRNESS/NATURAL JUSTICE	(A) Threshold question <i>Do the rules of NJ apply?</i>	Procedural fairness (s. 5(1)(a))	
	(B) Content question <i>What do the rules of NJ require?</i>		
ULTRA VIRES	(A) Simple ultra vires <i>Was the exercise of power within the authority of the parent statute?</i> <i>Did the decision-maker have the power to make the decision?</i>	Decision not authorised (s. 5(1)(d))	
		Rule against delegation (s. 5(1)(c); s. 5(1)(d); s. 5(1)(j))	
	(B) Procedural ultra vires <i>Were the procedural requirements for the grant and exercise of power met? If not, what are the consequences of non-compliance?</i>	Procedures required by law (s. 5(1)(b))	
	(C) Extended ultra vires	<i>Reasoning process grounds (structured discretion)</i>	Relevant/irrelevant considerations
			Improper purpose (bad faith/fraud)
Inflexible application of policy			
Behest			
Uncertainty			
<i>Decisional grounds (accuracy of decision)</i>	Unreasonableness		
	No evidence		

• **(6) WHAT KIND OF ERROR IS IT?**

○ **Related grounds:**

- Procedural fairness – procedures required – relevant considerations
- Irrelevant considerations – improper purpose – bad faith
- Decisions not authorised – uncertainty
- Irrelevant/relevant considerations (weight arguments) – unreasonableness

○ **Jurisdictional error:**

- ADJR Act:
 - If the ADJR Act applies, you don't need to show jurisdictional error
- GL:
 - For general law JR, you will (usually) need to establish a jurisdictional error to obtain a remedy
- What is JE?
 - When an administrative DM acts outside the limits of the functions and powers conferred on them or does something which they lack the power to do.

- Which errors are jurisdictional?
 - This may vary according to the DM and statutory context, however most of the established grounds of review will constitute jurisdictional errors for administrative DMs.
- Conclusion:
 - A decision tainted by JE is a nullity.
 - "This is the kind of error where the result is that the decision is a nullity."
 - Is this error serious enough, that it should be invalidating? (**Hussein**).
 - Privative clauses are generally not effective to exclude judicial review for jurisdictional error.
- **JE for the purpose of seeking the writs:**
 - Often need to show a jurisdictional error to get a writ.
 - Ground of review (e.g. failure to consider relevant consideration/procedural fairness) = jurisdictional error.
 - "Breach of procedural fairness is a jurisdictional error. Therefore, the prerogative writs are available"
- **JE to avoid a privative clause:**
 - PC will not be effective to exclude review for jurisdictional error (**Kirk; S517**)
 - "Breach of procedural fairness is a jurisdictional error. Therefore, the court can review this decision."
- **(7) IS THERE A REMEDY AVAILABLE?**
 - Read the question carefully - does it tell you not to address remedies? Does it ask you for specific remedies?
 - Think about jurisdiction
 - Work out what you want the court to do
 - Consider each remedy in turn

1. Nature of Administrative Law

IDEAS ABOUT ADMINISTRATIVE LAW

- **Lane and Young:**
 - The body of principles and procedures by which the exercise of executive government power is controlled and supervised.
- **Cane, McDonald and Rundle:**
 - About how administrative power is constituted and controlled *by law*.
- **Creyke, McMillan and Smyth:**
 - With power comes responsibility and accountability.
- **Aronson, Groves and Weeks:**
 - Defining administrative law is a topic on which few commentators can reach agreement, because it ultimately depends on what they want out of administrative law.
 - We know what we want. As a minimum, we want a legal system which addresses the ideals of good government according to law.
 - We take those ideals to include openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.
- **(1) CONTROLLING GOVERNMENT POWER:**
 - Limits.
 - Separation of powers.
- **(2) PROTECTING RIGHTS AND INTERESTS:**
 - Freedom from the Cth.
- **(3) ENSURING GOOD DECISION-MAKING:**
 - Ensuring accountability of decisions.
- **(4) JUDICIAL REVIEW:**
 - Review of administrative decisions of the Cth.

KEY CONCEPTS

- **(1) SEPARATION OF POWERS:**
 - The idea that each branch is a repository for a different kind of power justifies and confines judicial review.
 - Supervising executive power.
 - Judicial power is confined by narrow boundaries.
- **(2) RULE OF LAW:**
 - Everyone subject to law, no one above law.
- **(3) RESPONSIBLE GOVERNMENT:**
 - Executive arm is responsible to the Parliament and Ministers are responsible to constituents.
- **(4) FEDERALISM:**
 - State and federal division.

CORE COMPONENTS

- **(1) JUDICIAL REVIEW:**
 - Determines whether the decisions or actions of a body are correct.
 - Defined categories of legal error and a complaint must be brought within a category.
 - The system we have now is the result of reform to past issues.
- **(2) MERITS REVIEW:**