Topic: Merits Review (10 marks) - to remake the decision

STEP 1: Introduction

STATE: X could seek a merits review of DM's decision to _____. X should seek merits review prior to judicial review as, due to the doctrine of exhaustion, courts may be reluctant to issue a remedy if X has not already exhausted other options of appeal. Merits review is more beneficial for X because under the Administrative Review Tribunal (ART) allows decisions to be reconsidered on their merits (s 105 ART), with flexible procedures (ss 49–55), lower costs (s 9), and tailored support for vulnerable parties (ss 66–90 ART). It is conducted by expert decision-makers (s 39(2)) and offers broader avenues for appeal and review (Pt 5, Pt 7 ART). An important distinction must be noted between judicial and merits review, namely, that whilst judicial review will assess the validity and legality of the decision, not going beyond the declaration and enforcement of the law (Quinn), a merits review will assess the substance of the decision itself; the review is of fact in a de novo hearing. Even though you are seeking merits review, you can seek judicial review at the same time.

(if did something illegal i.e forged signature) : It is no hindrance to the ART jurisdiction that the decision made may have been attended by illegality (*Brian Lawlor*).

STATE: There are two broad forms of **merits review:** internal (appeal body operates within government department) and external (e.g. cth administrative appeals tribunal).

STEP 2: BROAD OR INTERNAL - Here internal:

Internal Merits Review -

DO NOT need to go through if it says the Secretary has already made a decision to affirm DM's decision.

STATE : Following the Minister's affirmation of the decision, there may still be a means of merits review with ART. Go to external review.

STATE: Pursuant to section X of the Act, X is able to make an application internal review of the decision-maker's (DM's) decision to reject their application for a social security benefit. As X is a person directly affected by the decision (having been excluded from the scheme), they may, within 13 weeks after being notified of the decision section X of the Act, apply to the Secretary for a review of the reviewable decision.

STATE: Under section X of the Act, the Secretary, Chief Executive Centrelink, or an authorised review officer must review the decision. The reviewer must not have been involved in the making of the original decision and must act independently.

STATE: As [insert facts – e.g., "the DM acted on standing orders or guidelines issued by the Secretary"], it is likely that the reviewer will affirm the original decision, unless additional material or

errors are identified during the review.

Once X has applied for internal review and received a decision under section X of the Act, they may then seek merits review before the (ART) under section X of the Act, provided the reviewable decision falls within the jurisdiction of the ART.

STEP 3 Jurisdiction: External Review

STATE: Here, X has sought internal review under section X of the Act, and a decision has been made under section X of the Act. Thus, jurisdiction is properly enlivened for an ART first review.

STATE: As the ART has no inherent jurisdiction, their jurisdiction can only be conferred upon the SSA and whether a provision confers a right to appeal to the ART.. The ART's jurisdiction extends to decisions that have potentially been made invalidly (*Brian Lawlor*). Under the ART, a person may apply to the Tribunal for review where authorised by an Act or legislative instrument (s 11). A decision is a reviewable decision if legislation expressly provides for Tribunal review (s 12(1)). This is made out per section X of the Act, once engaged, the Tribunal stands in the shoes of the original decision-maker, exercising all relevant powers afresh (s 54).

Decision made by delegate: The SSA specifies that the ART only has jurisdiction to review decisions made by the Secretary , however, the decision was made by [delegate], a delegate under sX. This will not prevent the ART from hearing P's application as s34AB(1)(c) of the AIA states that a decision made by a delegate is deemed to have been made by the person whom the power was conferred to, i.e., the minister. A decision made by a X, a delegate, will not hinder the ART's ability to hear the application under merits review..

STEP 4: STANDING

STATE: As X's personal interests have been affected by the decision — namely, their exclusion from receiving social security benefits — and the decision is final and conclusive, X has standing to seek merits review per ART s 17(1).

Under the **private interest model** ART s 17(1)., individuals in P's position routinely qualify for standing (Re McHatton; Control Investments). Pursuant to Re McHatton, interests are not limited to financial interests or legal rights and includes indirect interest.**Ultimately,** as a person has standing to bring judicial review under the ADJR Act or common law, they will generally have standing to seek mer;its review (Re Control).

Public interets model: Additionally, under s15 ART, an **organisation or association** is taken to be a person whose interests are affected if the decision relates to a matter within its objects or purposes at the time the decision is made and that matter has not been removed.

- Prima facie, organisations do not have interests affected in the same way as individuals (ART s 15).

STATE: In this case, X would likely have standing.

STEP 5: REASONS - 'shocked from letter and no reasons'

***even though it does not appear clear or reasons for refusal have not been argued - still say**

STATE: X has at no stage been given reasons for the DM's decision. X can get reasons as soon as his entitlement to an application arises (he does not need to make an application first). X will be advised that under ART Part 10, DM must take reasonable steps to notify affected persons of reviewable decisions, including informing them of any review rights (s 11; s178(1) SSA). A person whose interests are affected may request a statement of reasons for the decision, and if reasons are not provided or are inadequate, they may apply to the Tribunal. X will also be advised that the reasons must identify findings of fact, evidence relied upon, and the basis of the decision. An application for review of a decision does not affect the operation of the decision unless the Tribunal orders otherwise (s 11). .

STEP 6: Review by the ART -principles and powers

STATE: The ART conducts a de novo review (Drake v Minister) that will reassess P's eligibility and may admit new evidence and is not bound by the evidence/arguments raised before the DM(Re Greenham).

Correct and preferable decision:

STATE: X should be advised that under section 3 the ART conducts a **merits review** of decisions, meaning it stands in the shoes of the DM and determines whether the decision is the **correct or preferable one** based on the material before the **Tribunal**, not the material before the original decision-maker (*Shi: Drake*). The Tribunal is not confined to reviewing the decision as made, but instead undertakes a **de novo reassessment**, making its own findings and substituting a new decision if warranted.

Further, the ART has **discretion over its procedure** and is not bound by the rules of evidence. It may inform itself in any manner it considers appropriate, provided that **procedural fairness** is maintained (ART ss 49–53). This allows the Tribunal to adopt either an adversarial or inquisitorial approach depending on the circumstances of the case.

- As in Shi v Migration Review Tribunal, the ART may consider new facts post-decision, including any evidence X provides of job applications or interviews.
- X may also rely on **policy statements** provided they are not applied inflexibly (Drake No 2). The ART must maintain independence in applying policy (Drake No 1).

Change in circumstances:

STATE: X should be advised that because the ART conducts a de novo review, it may consider new evidence and arguments that differ from those presented at first instance if they result from a change in circumstances (*Shi*). This includes material not available or relied upon by the original DM (*Re Greenham*). X should be advised that the Tribunal will be able to consider that…. And in the eyes of the ART according to facts, she/he has a flawless record.

For example, consider a refugee who applies for a protection visa on the basis of religious persecution. If, while in detention, the refugee converts to a religion that is not persecuted, the ART may take this new circumstance into account when conducting its review.

Nature and Conduct of the Hearing + Evidence

STATE: X should be advised that under ss 49–53 of the ART, the Tribunal has broad discretion over its procedures and the admission of evidence. It adopts an inquisitorial approach, meaning it is not bound by formal rules of evidence. However, despite this flexibility, the Tribunal must still uphold procedural fairness, and this requirement tempers the otherwise informal nature of proceedings. While the Tribunal is not obliged to inquire into matters not raised by the parties, this does not excuse unfairness or a failure to consider key issues relevant to the review. X should be aware that procedural fairness must still be observed and balanced against any informality, as confirmed in Re Pochi.

Although X is not subject to a formal evidentiary onus, they should be informed that a civil standard of proof is likely to lead to the making of a 'correct or preferable' decision (*McDonald*; *Epeabaka*). Nevertheless, X still bears the burden of proof, as the applicant, to establish the relevant facts (*Epeabaka*).

Finally, X should be advised that the ART has **no obligation to seek out further evidence or make additional inquiries.** As such, it is essential that X raises all relevant matters, including the circumstances of the acquittal and any supporting evidence, during the application process (*SZGUR*).

Rules of Evidence

STATE: X should be advised that under s 52(1) of the ART, the Tribunal is not bound by the rules of evidence that apply in judicial proceedings. This grants it flexibility to consider a broader range of materials, provided that procedural fairness is observed.

X should be advise that the **burden of proof remains on the applicant**, who bears the responsibility of establishing the relevant facts (*Epeabaka*). Therefore, the burden of proof will likely be on the balance of probabilities.

● E.g. cannot make decision by consulting someone irrelevant (e.g. a seer or flipping a coin)

Government policy:

STATE: The new policy regarding (...) will be a relevant consideration as X depended on it to make his/her orginal decision. X should be advised that the ART should use the government's policy when remaking a decision as these are subject to political control through Parliament, and hence, the electorate, and reliance would lead to greater consistency as long as it is not applied inflexibly (*Drake No 2,* President Brennan). In doing so, the ART must exercise an independent and impartial mind when assessing the relevance and applicability of policy to X's circumstances on the facts (*Drake No 1*). The ART will have to consider the need to be consistent with policy.

Factors to Consider When Applying Policy

Several factors may influence how the ART treats government policy:

- The status of the original decision-maker is relevant. If the decision was made by a minister, there is a greater burden on the ART to give due consideration to the policy underpinning that decision.
- The subject matter of the decision may affect the weight given to policy.
- The importance of consistency in administrative decision-making also plays a role in

determining how the ART should approach policy.

If Policy is Used by the ART

Where the ART decides to apply a government policy, it must not act under the direction or dictation of that policy (*Drake No 1*). Additionally, the ART should not apply the policy inflexibly (*Drake No 2*). Instead, policy should be treated as one part of the broader merits review process.

Finally, if the ART does rely on policy, it must demonstrate that a logical reasoning process was followed in its application (*Drake No 1*).

STEP 7: DECISION, REMEDY, APPEAL

Decision

STATE: The key question is whether X should have been granted the (social security payments) as she/he meets the activity test under s6 SSA (given job-seeking intent - s6(1)(a)/(b)).

STATE: A **mandatory relevant consideration** is one the decision-maker is **bound to take into account** in exercising the statutory power: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*. The failure to consider such a matter may constitute **jurisdictional error** (*Minister for Immigration and Citizenship v Li*).

Here, a mandatory additional consideration was the relevance and **applicability of the policy** to X's specific circumstances. X provided evidence that [insert e.g., they were suffering mental illness, had caring responsibilities, or had incurred education expenses], which were directly relevant to the discretion available under [insert statutory provision, e.g., **s 5A(5)**].

However, the decision-maker [insert facts, e.g., refused the claim without engaging with the supporting documents or applied policy without reference to X's individual context]. This suggests a failure to consider relevant personal information required by law.

This is analogous to *Greenham v Secretary, Department of Social Security*, where the Tribunal failed to consider evidence of financial hardship in assessing a liquid assets exemption. The court held this was a **jurisdictional error**. Likewise, here the officer failed to weigh the personal and contextual hardship facing X.In addition, there is a **failure to exercise discretion** if the decision-maker applies a policy **inflexibly**. While policy may guide decision-making, it cannot be treated as determinative: *Annetts v McCann*, *Greenham*.

STATE: The officer appears to have relied solely on internal guidelines or thresholds, without asking whether X's situation warranted **departure from policy**. The mechanical application of policy without individual assessment indicates that discretion was not properly exercised.

SUPPORT: This mirrors *Bowser v Secretary, Department of Education*, where the Tribunal applied a rule about "non-standard courses" without genuine consideration of the applicant's circumstances. The court found this to be an unlawful fettering of discretion. A similar legal error is apparent here.

STATE: While there may be no objectively correct outcome, where the **statutory framework** demands a contextual inquiry and the decision-maker has failed to undertake one, the decision may be **legally flawed**.

CONCLUDE: Applying the reasoning in *Greenham* and *Bowser*, a properly constituted decision-maker, acting according to law, would likely have concluded that X is entitled to social security payments. X's evidence should have been weighed meaningfully against the statutory discretion and policy framework.

Remedies

STATE: The issue of whether the original decision should be stayed is not relevant on these facts, as the decision has already been made. Under the ART section 3, the Tribunal is empowered to conduct a **merits review** of administrative decisions and, upon review, may **affirm, vary or set aside** the decision (ART s 3). If the Tribunal sets aside the original decision, it may **substitute its own decision** or **remit the matter** to the decision-maker with directions (ART s 3(f)).

On the facts here, the appropriate remedy is for the Tribunal to **set aside the decision** made by the original decision-maker and **substitute a new decision** granting X the relevant social security payment. This approach avoids requiring X to undergo a further round of departmental decision-making and ensures a final, effective outcome.

Appeal - if time - but at least mention in one sentence

STATE: Although the decision will be in favour of X, I will advise X of their **right to appeal** a decision of the ART on a **question of law**, should the outcome have been unfavourable.

STATE: If the Tribunal's decision is unfavourable, X may **appeal to the Federal Court on a question of law** (ART s 3(h); Osland). The ART does not provide for an **automatic stay** of the original decision upon the lodging of a review application. The Tribunal has a discretion to **order a stay**, taking into account the interests of the parties (inferred from ARTA s 3(e), which outlines the Tribunal's procedural powers).

I will advise X that rhe ART will have a similar appeal path to the Federal Court (ART Act Part 7, s 170). The Guidance and Appeals Panel (GAP) provides a second tier of merits review for significant administrative issues, as outlined in Part 5, section 121 of the Administrative Review Tribunal Act (ART). Under section 110, the GAP may consider new evidence and make its own findings. It conducts both Initial Reviews (s 122) and Post-Decision Reviews (s 128).

In Osland, the High Court confirmed that a "question of law" does not permit a general review of the merits on appeal. Further, in Kostas, it was held that where there is no evidence to support a factual finding, this constitutes a question of law.

- The referral process can be initiated either by the **President of the Tribunal** or by a party to the proceeding following a Tribunal decision. Timeframes apply but may be extended in some circumstances. Importantly, the application does not stay the operation of the original Tribunal decision unless otherwise ordered by the Tribunal.
- If the matter is instead appealed to the Federal Court, the Court may hear the question of law, make orders it deems appropriate, and potentially remit the matter back to the Tribunal for

reconsideration. This dual pathway ensures flexibility while preserving access to both internal senior-level merits review and external judicial oversight.

Essay topics: Standing - put in policy qs - give minority and majority views

CASE SUMMARIES

(public interest litigation) - Australian Conservation Foundation v Commonwealth (1980) 146 CLR 493 (ACF)

In *ACF* the High Court adopted a narrow approach to standing that significantly constrained public interest litigation. The ACF, a prominent environmental group, challenged the federal government's approval of a tourism development near the Ranger Uranium Mine in Kakadu. The organisation did not own land in the area or suffer direct financial loss but argued that the decision was contrary to the public interest and its statutory objectives. The High Court rejected the claim, holding that a mere intellectual or emotional concern in the matter was insufficient. Gibbs J emphasised that to establish standing, a person must be "more particularly affected" than the general public. The Court held that standing requires a "special interest" in the subject matter of the litigation, and ACF had no legal, proprietary or material interest to satisfy that threshold. This decision entrenched a doctrinally conservative standing rule that favours private over collective interests, and has had a chilling effect on environmental and social justice groups seeking to invoke judicial review in the public interest.

(public interest litigation) Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247

In *Bateman's Bay,* the High Court endorsed a more purposive and liberal approach to standing in the context of public interest litigation. The Land Council sought to restrain a private company from using the word "Aboriginal" in its business name, arguing that it misled the public and undermined the Aboriginal Land Rights Act 1983 (NSW). The majority (Gaudron, Gummow and Kirby JJ) held that the Council had standing because it had a real and genuine interest in ensuring compliance with the Act, which governed its statutory responsibilities. Notably, Kirby J emphasised that rigid standing rules may confer a "functional immunity" on public authorities from legal accountability, and that the courts should interpret standing rules in a way that facilitates enforcement of public duties. In contrast, McHugh and Hayne JJ dissented, maintaining a strict view of the "special interest" requirement. The case marks a significant departure from *ACF*, signalling judicial openness to more flexible standing in public law cases, particularly where the rule of law and constitutional accountability are at stake.

(special interest test) Onus v Alcoa of Australia Ltd (1981) 149 CLR 27

*Onus i*s a key High Court decision that expanded the scope of the "special interest" test to include cultural and spiritual interests. Two Aboriginal men challenged the construction of an aluminium smelter near a culturally significant site, alleging that it would disturb artefacts and spiritual heritage. The Court upheld their standing, recognising that the plaintiffs had a direct cultural connection to the land that went beyond mere intellectual concern. Gibbs CJ held that their cultural and spiritual interest was sufficient to confer standing, even in the absence of proprietary or financial loss. This case is significant because it

broadened the interpretation of “special interest” to reflect the pluralistic nature of harm, including interests rooted in Indigenous heritage. *Onus* thus stands in contrast to *ACF* by showing that the courts can recognise non-economic interests where the harm is serious and particular to the applicant, making it an essential authority in arguments for a more inclusive standing doctrine.

(barriers faced by public interest groups) Right to Life Association (NSW) Inc v Secretary of the Department of Human Services and Health (1995) 56 FCR 50

In *Right to Life Association,* the Federal Court reaffirmed the narrow limits of standing for advocacy groups under the ADJR. The Association challenged government funding for pregnancy termination services, arguing that it violated moral and ethical standards and claimed to represent the interests of unborn children. The Court rejected the claim, finding that the Association did not have a “special interest” or qualify as a “person aggrieved” within the meaning of the ADJR Act. The decision highlighted that moral, ideological or policy-based objections are not enough to ground standing in the absence of direct legal or personal impact. This case illustrates the barriers faced by public interest groups in challenging administrative decisions, and reflects a continuing judicial reluctance to open the courts to litigation that seeks to advance broadly ideological causes. It reinforces the critique that Australian standing doctrine remains conservative and excludes voices that challenge the legality of executive action on ethical or communal grounds.

(conservative definition of standing) Argos Pty Ltd v Corbel

In *Argos*, the High Court considered whether commercial competitors had standing under the ADJR Act to challenge a government development approval. The Court held that only the applicant whose own land or interests were directly affected (Company A) could be considered “aggrieved,” while a related company (Company B), with no direct interest, lacked standing. The Court interpreted “person aggrieved” narrowly, emphasising the need for personal and direct impact. This case demonstrates that even the ADJR Act, often touted as more accessible than common law standing, is still interpreted conservatively by courts, posing hurdles for both commercial and public interest litigants.

Q1 – Standing rules in administrative law must balance accessibility to justice with the need to prevent unwarranted interference in government decision-making.
→ Use this for questions about whether standing doctrine strikes the right balance between access to courts and protection of administrative efficiency.

Q2 – The standing requirements unduly restrict access to justice, particularly for public interest litigants.
→ Use this if the question focuses on access to justice and whether current standing tests are too narrow for collective or public harms.

Q3 – Standing rules privilege economic interests over diffuse public interests.
→ Use this for questions about whether Australia's standing test should be broadened to include diffuse or moral interests to promote accountability.

Q4 – The distinction between private and public rights in standing jurisprudence undermines the core values of the rule of law.”
→ Use this if the question explores how limiting standing in public rights cases affects judicial oversight and legality.