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# PRINCIPLES OF ADMIN LAW

## EXAM TIPS

When advising a client with an admin law problem...

### 1) Who will **hear a challenge**?

Internal review

Merits review before an appeal tribunal

Judicial review under ADJR Act in the Federal Court/ Federal Crct Ct

Judicial review under common law in Federal Court/High Court of Australia

### 2) Who can **bring a challenge**?

One who has **standing** and has obtained the **reasons** for the decision.

### 3) **How can the decision be challenged**?

Judicial review > Legal grounds of review have to be made out

Merits review > Applicant can attack general merits of primary decision (i.e. argue primary DM got it wrong on the facts and the law.

### 4) What **remedies** are available if the challenge is successful?

Judicial review > remedies are limited in scope as judicial review court cannot substitute its own decision for that of the primary DM

Merits review > see scope for the merits review body to substitute its own decision.

### 5) If **more than one course** of challenging the decision is available, **which course is best**?

## Sources of administrative power

Directly conferred by express provision (“principal” repository)

Indirect conferred where:

- Principal delegates (the “delegate” effective becomes the Repository)
- Principal has an authorised Agent (the “agent” acts as the Principal Repository)
- Principal, Delegate or Agent has an administrative assistant (the “Assistant” helps out with the Repository)

Sub-ordinate/delegated legislation

- Parliament confers authority on Executive (via Statute) to make rules relating to administration of that Statute (i.e., regulation, by-laws, etc.)
- Rules must be lawfully within scope of the primary Statute
- Powers otherwise conferred similarly to Statutes (i.e., directly or indirectly)

Quasi-legislation

- Policy documents, booklets, memoranda to staff and other internal documents (which are not legislation);
- Used to provide guidance in administrative decision-making process;
- Must be consistent with governing legislation;
- Must not be applied inflexibly

Common Law Powers

- Royal prerogative powers that have existed for centuries (e.g., the power to pardon, to confer honours, to enter treaties, etc.);
- Executive powers (i.e., powers that ordinary citizens have).

## **Review of legality VS merits**

Constitutional doctrines (especially Separation of Powers and Parliamentary Supremacy) impact on Administrative Law.

In particular, note the following:

- If the Parliament decides to make a person within the Executive branch a repository of administrative decision-making power, it is not for the Courts to usurp that function if the repository makes a bad decision.
- The Executive (politically mandated by the community) must be permitted to carry out its administration without being restrained by the courts.
- But the Executive cannot determine the limits of its own power for that is the role of the Courts.

An ongoing tension between the three branches of government.

Judicial Review of administrative decisions is therefore restricted to the legality of the decision and decision-making process.

### **LOOK AT EXAM QUESTION CAREFULLY:**

Advise Client about the prospects of success in JR

- Take out ART discussion
- Address ADJR and CL JR.

Advise Client on prospects of success under ADJR Act

- Discuss ADJR only

Advise Client on grounds of judicial review under ADJR Act

- Discuss grounds only

## Merits Review (ARTA 2024)

- Goes to the heart of the decision (ARTA, s 105)
- Accessible and informal (ARTA, ss 49-55)
- Lower costs than court (ARTA, s 9)
- Broader assistance for vulnerable parties (ARTA, ss 66-90)
- Timeliness - generally faster resolution
- Flexibility in evidence and procedure (ARTA, ss 49-52)
- Expertise and specialised focus (ARTA, s 39(2))
- Broader options for review and appeal (ARTA, Pt 5; Pt 7)

**Doctrine of exhaustion** – you have to exhaust other remedies before you go to the Court. Try MR before JR. Decisions in JR is discretionary. If A has standing, Court has jurisdiction and one of more grounds breached, court will grant remedy and send decision back to be redecided.

In some circumstances, the court is less likely to grant remedy – one is where there are other remedies of appeal where Applicant could have sought such as ART.

**A strong impetus stand to undertake MR before JR.**

### Step 1: Introduction

Merits Review (MR) is a statutory avenue of appeal to the ART. MR should be sought before JR, as courts may decline to issue a remedy in JR if MR is not exhausted.

MR mainly considers the merits of the decision.

### Step 2: Jurisdiction: ss 11, 12

- **ARTA s 11:** "A large number of Acts and legislative instruments allow people to apply to the Tribunal for review of decisions made under them."
- **ARTA s 12(1)** – "A decision is a reviewable decision, *if an Act or a legislative instrument provides* for an application to be made to the Tribunal for review of the decision."
  - A piece of legislation can give permission to the ART to hear appeals of decisions made under that Act. Legislation under which the decision is made has to give the ART permission to hear appeals. Legislation can have in it a section that the decision may be appealed to the ART under the legislation *of* jurisdiction under ADJR Act that requires a decision enacted (automatic operation, no need external act to give permission)
- Tribunal exercises of all powers of the statutory decision maker (**ARTA, s 54**)

### ***Collector of Customs (NSW) v Brian Lawlor Automotive***

- *discussing the equivalent jurisdiction section to the ARTA - s 25(1) AAT Act "An enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment"*.
- **Issue:** whether administrative activity had been "*made in the exercise of powers conferred by that enactment*" - does tribunal have the power to hear and appeal the decision?

**Held** (Bowen CJ): A wide meaning is given to the word 'decision' by s 3(3) of the AAT Act. The word simply refers to a decision in fact made, **regardless of whether or not it is a legally effective decision.**

The words "*made in the exercise of powers conferred by that enactment*" could have one of three meanings.

- that there was a decision made in pursuance of a legally effective exercise of powers conferred by the enactment; or (**Rejected**)
- that there was a decision made in the honest belief that it was in the exercise of powers conferred by the enactment; or (**Rejected**)
- **that there was a decision made in the purported exercise of powers conferred by the enactment.**

In s 25 of the AAT act, the words “made in the exercise of powers conferred by that enactment” are to be interpreted as in purported exercise of powers by conferred by the enactment. Accordingly, this means the AAT would have jurisdiction to entertain an appeal from a decision in fact made, which purported to be made in the exercise of powers under an enactment. The AAT then determines whether that decision (“in fact made”) was properly made in fact and in law.

**Under s 175, the ART has jurisdiction to hear appeals of decisions either affirmed/varied or set aside by the Board in its review. (EXAM LEGISLATION)**

### **Step 3: Standing**

#### **ARTA s 17 Who can apply**

(1) A person whose interests *are affected by a reviewable decision* may apply to the Tribunal for review of the decision.

#### **ART Act s 15 Organisation or association whose interests are affected by a decision**

An organisation or association of persons, whether incorporated or not, is taken to be a person whose interests are affected by a decision if:

- (a) the decision relates to a matter included in the **objects or purposes of the organisation or association** at the time the decision is made; and
- (b) the matter has not been removed from the objects or purposes of the organisation or association.  
(e.g. Public Interest Groups)

N/B: The standing test under the ARTA is evidently similar to that for judicial review under the AJDR Act and at common law. BUT not everyone can claim standing in the AAT.

***Re McHattan & Collector of Customs (NSW)* – court held no standing, decision is too remote**

- “Interests” not limited to financial interests or legal rights and **includes indirect interests.**

#### **Held (Brennan J, President of the AAT):**

→ no standing, reputation of Collector of Customs too remote. Mr McHattan’s interest not affected, even indirectly. But in this case it was too tenuous.

The interest of which s 27(1) speaks is an interest which is affected by the decision to be reviewed, not by the review. The relevant “interests” do not have to be pecuniary interests or even specific legal rights. However, a decision which affects interests of one person directly may affect the interests of others indirectly. The problem is determining the point beyond which the affection of interests by a decision should be **regarded as too remote** for the purposes of s 27(1). There is no “hard and fast rule” as to what interests may be relatively affected by a demand for payment of customs duty.

X is directly affected by the Commission’s decision as it determines eligibility for war service pensions.

### **Step 4: Reasons**

#### **S 11 Simplified outlines of [Part 10 ART Act]**

Generally, decision-makers **must take reasonable steps to give notice** of reviewable decisions to anyone whose **interests are affected**. This requirement also applies to some decisions that are related to reviewable decisions. **Notices must include notice of any review rights and decision-makers must have regard to matters prescribed by the rules.**

**The Substantive Part (cite this): S 268 ARTA: person whose interests are affected by a reviewable decision (aka those with standing) may request the decision-maker to give a statement of reasons for the decision.**

Applications can be made to the Tribunal **if a statement of reasons is not given or is inadequate.**

- Make request for a reason. DM has 28 days to provide reasons. Reasons need to contain material findings, evidence relied on and reasoning behind the decision. If reasons refused or lack detail, A can go to tribunal and ask for an order mandating that the DM apply those reasons.