

Administrative law 2011

1. Merits review2

- 1.1 Legality/merits distinction (based on SOP)
- 1.2 Full merits review
- 1.3 Judicial review
- 1.4 Statutory appeal
- 1.5 Commonwealth (AAT) merits review
- 1.6 State (ADD or District Court) merits review

2. Jurisdiction5

- 2.1 State judicial review
- 2.2 Commonwealth judicial review

3. Justiciability6

- 3.1 Status of decision-maker
- 3.2 Review of prerogative power
- 3.3 Key factors to consider
- 3.4 Examples of non-justiciable review

4. Standing7

- 4.1 Personal/private standing
- 4.2 A-G's role in public interest litigation
- 4.3 Public interest litigation standing
- 4.4 Statutory provision for joinder and amicus curiae

5. Preconditions to power9

- 5.1 Preconditions to existence & exercise of power
- 5.2 Jurisdictional fact error: S 5(1)(c)
- 5.3 Subjective opinion
- 5.4 Effect of non-compliance with statutory requirements

6. Law, fact & evidence 11

- 6.1 Facts/law distinction
- 6.2 Errors of fact
- 6.3 Making administrative decisions
- 6.4 What constitutes questions of fact & questions of law?
- 6.5 *Collector of Customs v Afga Gevaert Ltd*: Composite phrases
- 6.6 No evidence: s 5(1)(h)
- 6.7 Drawing unreasonable inferences of fact

7. Procedural fairness..... 13

- 7.1 When does procedural fairness apply? S 5(1)(a) ADJR Act

- 7.2 Bias rule
- 7.3 Hearing rule

8. Substantial grounds of review 16

- 8.1 Procedural error (precondition): s 5(1)(b)
- 8.2 Simple ultra vires: s 5(1)(d)
- 8.3 Error of law: s 5(1)(f)
- 8.4 Abuse of discretion: 5(1)(3)
 - Improper purpose
 - Bad faith
 - Irrelevant & relevant considerations
 - Unreasonableness
- 8.5 Failure to exercise discretion
 - Failure to make decision
 - Delegation
 - Direction/policy
 - Acting under dictation
 - Inflexible application of policy
 - Fettering statutory discretion by representation

9. Jurisdictional error 20

- 9.1 When is jurisdictional error important?
- 9.2 Types of jurisdictional error
- 9.3 *Craig v SA*
- 9.4 Plaintiff S157: Procedural fairness if JE for tribunal
- 9.5 Court or tribunal?: *Mitsubishi Motors v Kowalski*
- 9.6 Certiorari for error on face or record or natural justice
- 9.7 *Kirk v Industrial Court*: upheld *Craig* at State level

10. Privative clause 21

- 10.1 Privative clause
- 10.2 *Hickman* principle
- 10.3 Commonwealth privative clauses
- 10.4 State privative clauses

11. Remedies 22

- 11.1 Prerogative writs
- 11.2 Equitable remedies
- 11.3 ADJR flexible remedies: s 16(1)

12. Obtaining reasons 22

- 12.1 Common law right
- 12.2 Statutory right

1. MERITS REVIEW

1.1. Legality/merits distinction (based on SOP)

Executive makes substantive admin decisions while judiciary ensures decisions are made according to law.

1.2. Full merits review

MR undertaken by admin tribunals (and some courts) under statute. Thus relevant statute may give *less* than full MR. MR is a fresh decision:

- Original decision disregarded;
- Reviewing body stands in shoes of original D-M so will consider afresh all relevant questions of law and fact and re-make original decision based on facts and law at the time of review.

As ground of review argue decision was 'wrong' or that it was not the correct or preferable decision.

No burden of proof (subject to statutory intent).

Remedy is to re-make the decision correctly and substitute it in place of original.

1.3. Judicial review

JR undertaken by superior courts under common law. It examines procedure not substance of decision made.

Grounds of review are essentially procedural in nature but some grounds are close to saying decision was 'wrong.'

Burden of proof on applicant to show legal error.

Remedy is to order administrator to make a decision according to law.

1.4. Statutory appeal

Nature of statutory appeal depends on terms of statute conferring right of appeal: ***Coal & Allied Operations AIRC***

1.4.1. Appeal on question of law only: can be validly conferred to court exercising fed judicial power. Appeal any error or law.

1.4.2. Appeal in strict sense: no further evidence admitted, changes in law disregarded. Only intervenes where error in D-M process, or finding of fact is 'clearly wrong'.

1.4.3. Appeal by re-hearing: can hear new evidence. Absent new evidence, original findings of fact cannot be overturned unless original D-M made error.

1.4.4. Re-hearing de novo ('full MR'): fresh start. Typical right for AAT review, although statute may confer lesser appeal rights.

1.5. Commonwealth (AAT) merits review

1.5.1. Jurisdiction

AAT has jurisdiction to review a particular decision, only if statute provides actual authorisation.

S 25(1): An enactment may provide application may be made to AAT:

- (a) For review of decisions made in exercise of powers conferred by that enactment; or
- (b) For review of decisions made in exercise of powers conferred by another enactment having effect under that enactment.

Act may give AAT *full* MR power, limit review to *particular decisions* rather than *all* made under Act, or may impose *pre-conditions* on review (eg, prior review by lower-level specialist tribunal).

'Decision' defined in s 3(3) of AAT Act and includes *failure* to make decision in s 25(5). Also:

1.5.1.1. ***ABT v Bond***: AAT can only review 'final & operative' decisions

1.5.1.2. ***Collector of Customs v Brian Lawlor***: includes 'decisions made in purported exercise of powers conferred by enactment' thus can review legally ineffective (or invalid) decisions.

1.5.2. Standing

S 27(1): Applications may be made by any person whose interests are affected by the decision.

S 31(1): Tribunal decides. If decides is person whose interests are affected, this decision is conclusive.

S 44(2): If tribunal decides interests are not affected, person may appeal to FCA from this decision.

S 27(2): Organisation/association taken to have interests affected by decision, if it relates to a matter included in objects/purposes (*before* decision made: ss (3)).

S 30(1A): AAT may, in its discretion, allow any other person whose interests are affected to be made a party to the proceeding.

1.5.3. Powers/remedy

S 43: AAT can affirm, vary, substitute or remit the decision (amounts to full MR power: *Drakes case*)

Limits on AAT power:

- May be limited by statute conferring jurisdiction.
- Cannot conclusively determine questions of law.
- Decisions cannot form binding precedent
- Does not have jurisdiction to State decisions and some Cth decisions.

1.5.3.1. **Shi:** Undertakes contemporaneous review standing 'in shoes of primary D-M' thus not restricted to case stated or material before primary D-M so can admit new evidence (subject to statute)

1.5.4. Procedure

1.5.4.1. Right to access information

S 28(1): If decision reviewable by AAT, person entitled to apply may request D-M give reasons, including; findings on material questions of fact, evidence on which findings based, and actual reasons for decision.

S 37: Relevant D-M must lodge with AAT (a) findings on material qu of fact & (b) any document relevant to review.

1.5.4.2. Pre-hearing procedures

s 33(1A) provides for directions hearing; s 34 provides for pre-hearing conferences; s 34A provides for mediations.

1.5.4.3. Procedure during hearing

S 33(1): proceeding conducted with as little formality & technicality as possible. AAT not bound by rules of evidence.

s 32: allows 'representation' which includes legal representation.

S 40: gives AAT power to summon witnesses & administer oaths.

1.5.4.4. Legal constraints on flexibility

In same position as original D-M, can be review by Courts, so must follow rules of procedural fairness etc.

S 44(1): party to Tribunal proceeding may appeal to FCA, on qu of law, from decision in that proceeding.

Although rules of evidence do not apply, has to make correct & preferable decision which involves correctly ascertaining correct facts, thus rules remain in background.

1.5.4.5. Social constraints on flexibility

AAT looks like court with similar powers, members usually FC judges, barristers usually represent parties (adversarial).

1.5.5. Role of policy in AAT review – *Drakes case*

Function is to independently determine correct & preferable decision on material before it (subject to statute).

Although govt policy is a relevant consideration, AAT cannot limit itself to determining whether original decision conformed to govt policy.

1.5.6. **Collector of Customs v Brian Lawlor Automotive: legally ineffective decisions can be reviewed**

Collector of Customs decided to revoke warehouse licence held by B under *Customs Act* which only empowered him to revoke licences for non-payment of fees thus decision was legally ineffective.

Held decision was purported to be made in exercise of powers conferred by *Customs Act* so AAT had jurisdiction to review.

1.5.7. **Drake v Minister for Immigration: must make 'correct/preferable' decision on material (subject to statute)**

D convicted of possessing drugs thus Minister for Immigration decided under s 12 of *Migration Act* to deport. AAT affirmed decision so appealed to FC under s 44 arguing AAT failed to exercise own indep judgment in applying policy.

Held AAT reasons failed to make indep assessment & determination thus failed to perform function and decision quashed and remitted to AAT. AAT not bound by govt policy but will accord it due weight and not depart unless cogent reason to contrary.

1.5.8. **Shi v Migration Agents Registration Authority: look at evidence at time of review**

MARA found Shi had breached Code of Conduct but allowed to practice until AAT appeal heard. AAT affirmed breach but did not find Shi was not a fit and proper person thus set aside cancellation of registration.

Held AAT rightly took account of evidence of conduct after MARA decision up until AAT decision.

1.6. State (ADD of District Court) merits review

1.6.1. Jurisdiction

ADD has jurisdiction to review a decision, only if statute provides actual authorisation.

'Decision' in s 42B of *District Court Act (SA)* includes act (such as giving or making of notice, direction, determination, requirement or order) and failure or refusal to make decision or act.

1.6.2. Standing: *see conferring statute*

1.6.3. Powers/procedure

S 42E(1): must **examine decision of original D-M** on evidence/material before original D-M, but may allow further evidence/material to be presented to it.

S 42E(2): (a) not bound by rules of evidence but may inform itself as it thinks fit; and (b) must act according to equity, good conscience and substantial merits of case without regard to technicalities & legal forms.

S 42E(3): must give due weight to decision and reasons for it and **not depart except for cogent reasons**.

S 42F: ADD may affirm, rescind & substitute or remit the decision.

1.6.4. ***Registrar of Veterinary Surgeons Board of SA v Mooney & Veterinary Board of SA***: **'cogent' describes an argument or reason clearly expressed and persuasive, compelling or convincing ... something more than mere disagreement with the decision ... is required.'**

Registrar brought disciplinary proceedings against M alleging unprofessional conduct on basis that took x-rays of horse without licence. Board dismissed complaint without considering previous convictions for same act.

Held this error gave ADD 'cogent reason' to depart from original decision. Thus decision set aside and substituted.

2. JURISDICTION

2.1. State judicial review

- Under s 17 *Supreme Court Act*, SA Supreme Court has 'inherent' CL jurisdiction to review State admin decisions.
- Procedure for review is laid down in Rules 199-201 of *Supreme Court Civil Rules 2006*.
- Remedies of prerogative writs, declarations and injunctions available in Rule 98.
- Applies to justiciable decisions & require jurisdictional error for remedy.

2.2. Commonwealth judicial review

2.2.1. ADJR Act

- S 8: Confers judicial review on Federal Court and Federal Magistrates Court to review Commonwealth decision.
- S3(1): Applies to 'decision of an administrative character, made ... under an enactment, other than a decision by GG or decision listed in Schedule 1 (incl. prerogative powers as not made under statute).'
- No justiciability or jurisdictional error required.
- S 13(1): Persons who can apply for review have a right to obtain reasons for admin decision (no right at CL).
- But s 13(11): Excludes decisions listed in Schedule 2.

2.2.1.1. 'decision' and 'conduct'

ABT v Bond: 'Reviewable decision' is a 'substantial and final or operative decision' or 'an essential preliminary step required by statute'. 'Reviewable conduct' is an 'administrative activity preceding a decision that reveals a flawed administrative process'.

Statute provided as an essential preliminary step to ultimate decision of revoking/suspending TV licence, for finding on whether licensee is a 'fit & proper person'. ABT found Bond was not a fit & proper person, & because of his influence over licensee companies, they too were not 'fit & proper persons' to hold licence.

Upheld decision to revoke/suspend licence. Finding of licensees was intermediate decision required by statute on a matter of substance thus was reviewable. But finding of Bond was not required by statute (only relevant as licensees happened to be controlled by Bond) thus was an unreviewable decision.

Although finding Bond was not a fit and proper person was a preliminary step to the ultimate decision (finding licensees were not fit and proper persons), it was not required by statute thus was an unreviewable 'decision'.

2.2.1.2. 'of an administrative character'

Anything that is not legislative or judicial can be reviewed.

2.2.1.3. 'under an enactment'

Griffith v Tang: decision is made 'under an enactment' if it 'derived from the enactment the capacity to affect legal rights and obligations' or 'took its legal force or effect from statute'.

Uni committee made decision Tang had engaged in academic misconduct and was excluded as PhD candidate.

Held internal decision was not made 'under an enactment' as there had subsisted between the parties no legal rights and obligations under private law (contract) which were susceptible of affection by decisions in question.

2.2.2. S 75(v) Constitution

- Under s 75, High Court has original jurisdiction in matters:
 - (v) where mandamus, prohibition or injunction are sought against an 'officer of the Cth'; or
 - (iii) where the Cth (or person on Cth's behalf) is a party.
- Although certiorari and declaration not mentioned, HC is usually willing to grant either where appropriate.
- HC can (in most cases) remit case commenced within s 75(v) jurisdiction to, and only to, Federal Court (s 44 *Judiciary Act*, s 9 *ADJR Act*).
- Applies to justiciable decisions. & require jurisdictional error for remedy.

2.2.3. S 39B Judiciary Act

- Confers additional judicial review jurisdiction on Federal Court which is same jurisdiction s 75(v) *Const* confers.
- Designed to overcome more limited jurisdiction of *ADJR Act*.
- Applies to justiciable decision & require jurisdictional error for remedy.