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Administrative Law

Cram Notes

1st Edition

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1. INTRODUCTION

A. HOW TO USE CRAM NOTES

The Administrative Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

Issue	State the legal issue relevant to the problem
Law	Identify the relevant case law and legislation
Analysis	Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
Conclusion	Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS

The Administrative Law Cram Notes will refer frequently to the following legislation using abbreviations.

Legislation	**Abbreviation**
Administrative Decisions (Judicial Review) Act 1977 (Cth)	ADJR Act
Federal Court Australia Act 1976 (Cth)	FCA Act
Freedom of Information Act 1982 (Cth)	FOI Act
Administrative Appeals Tribunal Act 1975 (Cth)	AAT Act

In addition, the High Court of Australia will be referred to as the HCA, the Federal Court of Australia as the FCA, and the Administrative Appeals Tribunal as the AAT.

2. WHAT POWER WAS EXERCISED IN MAKING THE DECISION?

Administrative law deals with the exercise of power conferred by legislation. Before a decision is challenged, the power exercised in making the decision must be identified.

A. STATUTORY POWER

i. SUB-ORDINATE/DELEGATED LEGISLATION

Delegated legislation is a legislative rule made by an executive agency pursuant to an authority delegated by the legislature in an Act.

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In addition, policy must not be applied so rigidly as to reject an applicant without hearing what he has to say (*Sagnata v Norwich*)

Where there is no genuine attempt to exercise the discretion, but rather a "blind following of an arbitrary departmental instruction", the policy will be inherently unjust and will be regarded as unlawful (*Goodson*)

3) How does the policy affect discretion?

The AAT is "at liberty to adopt whatever policy it chooses, or none at all" (*Drake (No 2)*). However, a balance must be struck between the public and the individual's interest. As the AAT is not part of the chain of responsibility from the Minister to the Government to the Parliament, departing from policy would remove any mechanism for parliamentary scrutiny.

High-level policy

However, the status of policy is also important in deciding the weight to be given to the policy.

- Policy may be internal departmental policy (little weight) or high level governmental policy (great weight)
- Political level
  - Policy formed at the political level by Parliament may be scrutinised, approved or decided after consultation with industry. The "tribunal, which is not accountable politically, must give such policy a great weight" (*Re Aston*)
  - Caution is to be exercised against consciously departing from a lawful and administrative policy made by the repository of a discretionary power (*Jetopay*).
  - *Drake No. 2*
    - There should be "cautious and sparing departures from Ministerial policy, particularly if Parliament has in fact scrutinised and approved that policy."
    - Ministerial policy should be applied "unless there are cogent reasons to the contrary."
    - A cogent reason would be where the Ministerial policy would work an injustice, as consistent policy is not preferable to justice.

In summary, the AAT should apply policy unless:

1) The policy is unlawful (application of the policy vitiates the decision)
2) The policy produces an unjust decision in that particular case (if there are cogent reasons not to apply it, or the discretion is truncated)

D. PROCEDURE, EVIDENCE AND ONUS OF PROOF

In the AAT, proceedings are conducted with as little formality and technicality as possible (s 33(1)(b)). The AAT is also not bound by the rules of evidence (s 33(1)(c)). However, there is the base requirement that all relevant material be disclosed before the commencement of hearing (s 37).

Each party is given a reasonable opportunity to present their case (s 39). While the AAT may interfere with the way parties present their case, it is not a requirement that the AAT ensure that the party takes the best advantage of the opportunity (*Sullivan v Dept of Transport*).

i. EVIDENCE & FACT-FINDING

In *Re Pochi*, the AAT and the Minister are equally free to disregard formal rules of evidence, but must bear in mind that desirable flexible procedure does not go as far as to justify orders

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without a basis in evidence having rational probative value (i.e. material which tends logically to show the existence or non-existence of facts)

ii. ONUS OF PROOF

There is no onus of proof in the AAT – the test is simply whether the AAT is satisfied or persuaded one way or the other.

Briginshaw
- "It is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal."
- Reasonable satisfaction must be placed in the context of the nature and consequence of the facts to be proved.

McDonald
- There is no legal onus of proof, because the AAT is an appeal tribunal making its own decision anew
- There is also no evidential onus unless the legislation provides for it.
- If AAT is uncertain and cannot decide either way on the balance of probabilities
  - Determine if there is a "default" decision (i.e. "if decision maker is satisfied"). Thus, if the AAT is not satisfied either way, then no action will be needed.

E. APPEAL TO THE FEDERAL COURT

Parties may appeal the decision of the AAT to the FCA on any question of law (s 44(1)). In addition, the AAT may, but its own motion or on a party's request, refer a question of law to the FCA (s 45).

i. APPLY FOR THE AAT'S REASONS FOR THE DECISION

Under s 43(2), the AAT shall give reasons, either orally or in writing, for its decision. Thus it is recommended that decisions be applied for before a party appeals to the FCA.

7. JUDICIAL REVIEW

A. BACKGROUND

Judicial review arises under the:
- Common Law
  - Inherent jurisdiction of the Supreme courts (prerogative writs and equitable remedies)
  - Under s 75(v) of the Constitution in the HCA
  - Under s 39B of the Judiciary Act in the FCA
- Statute
  - ADJR Act 1977 in the FCA, Federal Magistrates Court and the HCA.

i. JURISDICTION

1) Federal Court

The Federal Court has only the original jurisdiction conferred upon it by legislation (s 19, *FCA Act* 1976). Under s 8 of the ADJR Act, the FCA is given jurisdiction to determine cases under the ADJR Act.

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Under s 39B of the *Judiciary Act 1903*, the scope of the original jurisdiction of the FCA includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth, including matters:
- (a) in which the Commonwealth is seeking an injunction or a declaration; or
- (b) arising under the Constitution, or involving its interpretation; or (e.g. constitutional validity of subordinate legislation)
- (c) arising under any laws made by the Parliament.

As such, the three requirements under s 39B(1) is that there:
1) Must be a matter – a justiciable controversy;
2) Must establish an entitlement to remedies specified in the section (e.g. mandamus, prohibition etc) even if an ancillary remedy is sought;
3) Must be against an officer of the Commonwealth

2) <u>Federal Magistrates Court</u>

The ADJR Act grants the Federal Magistrates Court jurisdiction under s 8, but the court does not have the broad original jurisdiction of FCA under the *Judiciary Act* s 39B.

3) <u>High Court/Supreme Court</u>

The HCA has original jurisdiction under s 75 of the Constitution in all matters in which the Commonwealth is a party and in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Under s 75(v), for there to be a matter, there must be a justiciable controversy. The applicant must establish their entitlement to remedies specified under s 75 (e.g. mandamus, prohibition or injunction) even if an ancillary remedy is sought.

The HCA thus provides a "backup" jurisdiction where judicial review is denied or unavailable. In addition, as Federal Court judges are officers of the Commonwealth, s 75(v) provides for review of a FCA decision in the original jurisdiction of HCA, even where there is no right of appeal from the FCA (*R v Gray*).

B. Has justiciability been met?

This is a boundary that courts have set for themselves in relation to matters considered not appropriate for judicial determination.

i. Is there a justiciable matter?

The exercise of judicial power is restricted to cases that require a determination of legal rights and interests of, or claims made by, an individual. The ruling must have a direct and immediate consequence for the legal rights or interests of a party (*Peko*).

McBain
- There must be some immediate right, duty or liability of the applicants that can be established by the determination of the court. This does not include purely hypothetical questions.
- The matter relating to the party's immediate rights must also be able to be quelled by relief (i.e. not where the controversy has already been decided and relief granted)

Decision must have consequences which affect some person by altering their rights or obligations, or by depriving them of some benefit or advantage (*CCSU*).

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ii. IS JUDICIAL REVIEW INAPPROPRIATE?

For the matter to be justiciable, the matter must not be for which judicial review is inappropriate. The nature of the decision/issue must be considered, including:
- Is the issue amenable to judicial processes? (*CCSU*)
- If the decision relates to national security – it must be justified *(CCSU*)
- For complex policy issues requiring a balance of competing interests, these are best dealt with in the political arena (*Peko*)

C. IS IT A DECISION (IF APPLYING FOR REVIEW UNDER THE ADJR ACT)?

The ADJR Act only applies to a decision as defined under the Act, being a decision of an administrative character made under an enactment (s 3).

i. REVIEWABLE DECISION OR CONDUCT

1) Decision

A decision must be a reviewable decision in order for judicial review to take place (s 3).

ABT v Bond
- The decision provided for by statute must be one which is substantive, final and operative, with the "character or quality of finality". It must be determinative, and not merely procedural.
- A conclusion reached as a step in the course of reasoning (i.e. an intermediate determination) leading to an ultimate/operative decision would not be a 'decision' unless it was a determination for which the statute provided for.
  - That is, it must be an essential preliminary decision to the making of the ultimate decision.
  - This may include findings of fact (if it were not just a step along the way)
- A preparatory act is not a decision (but it may be reviewable conduct – see below)

2) Conduct

Alternatively, conduct may also amount to a reviewable decision if it was done "for the purpose of making a decision" (s 6). This refers to action taken, rather than a decision made. Section 3(5) also provides that a reference to conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of the decision.

Right to Life
- where matters and circumstances have been brought to attention of the decision maker, relating to a question under the Act, and the decision maker decides not to act, this would amount to a reviewable decision due to the decision maker's conduct
  - This is especially where to act would constitute a reviewable decision.
  - This is because a decision includes a reference to doing or refusing to do a relevant act (s 3(2)(g)).

3) Reports

Section 3(3) deems the making of a report or recommendation as a decision, where provision is made under an enactment that the report or recommendation is a condition precedent to the making of a decision.

Kelson v Forward
- Facts: There was a provision to make a report, but the provision specified no action to be

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taken on the findings of the report. However, the report was capable of real impact upon rights.
- Held: the report is capable of review irrespective of whether subsequent action is taken upon the report itself. It is a separate and discrete decision, since provision is made for it in the Act.
- Note that the report must be substantive, final and operative.

ii. ADMINISTRATIVE CHARACTER

A decision is determined to be of an administrative character by deduction – that is, if it is neither legislative nor judicial.

Case	Legislative	Administrative
Central Qld Land Council v AG	- rules of general, prospective application - requirement for public consultation - binding legal effect (affecting other statutory provisions)	- application of rules to particular cases - review on the merits
Aerolineas	- general application - created enforceable obligations binding on the public - changed the content of the law	- application of policy
QLD Medical Lab	- However, sometimes legislative power may validly apply only to the action of a single person on a single occasion	

iii. MADE UNDER AN ENACTMENT

The decision must be made under an enactment, not being a non-statutory decision (e.g. under executive, prerogative power). The force and effect of the instrument under which the decision was made must be traced to the statutory base of the empowering enactment *(Lewins*)

1) Enactment

- An enactment is defined under s 3(1) as a Commonwealth Act or instrument (including regulations).
- The instrument includes those with a:
  - Legislative character
  - Some administrative documents, if it is (*Chittick v Ackland*):
    - A document made under an Act
    - A document under which decisions of an administrative character can be made
    - Has the capacity to affect legal rights and obligations.

2) Made Under

The principles for determining whether a decision as "made under" an enactment are espoused in the case of *Griffith University v Tang*. The decision must be expressly or impliedly required, or authorised by the enactment, in order for it to be made under that enactment.

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detriment or *unfairness*.
  - The breach of procedural fairness must have materially affected the decision, such as a loss of opportunity to present new information to the decision maker.
- McHugh, Gummow JJ
  - Legitimate expectation serves to focus on the content of the requirement for natural justice
- Callinan J
  - Legitimate expectation only applied where
    - There is an actual expectation
    - If they had turned their mind to it, they would reasonably have believed that procedural fairness would have been available

NAFF case
- Facts: the decision maker promised that the applicant would be given chance to clarify inconsistencies
- Failure to extend the right to clarify would mean the review process was incomplete – procedural fairness demanded that the person affected had the opportunity to make it complete by clarifying the inconsistencies, but the Tribunal did not allow him to do so
- Alternatively, if the decision maker reconsidered the evidence and believed there were no inconsistencies, the decision maker had to advise person affected that it was no longer an issue. However, this was not done.

2) Exclusion

The parliament may exclude some or all of the requirements of natural justice.

Miah
- Does the right of appeal affect procedural fairness at the earlier stage of the decision making process? (i.e. an indication that parliament has excluded need for procedural fairness at first instance because there is procedural fairness in a latter stage.)
- Consider the:
  - Nature of the original decision – preliminary or final
    - Procedural fairness less likely to attach to preliminary decisions
    - The more final the decision, the more likely that procedural fairness attaches
  - Original decision made in public or private
    - Will the applicant's reputation be affected?
  - Formalities required for original decision
    - Where there are formalities (e.g. reasons for the decision), procedural fairness applies
  - Urgency of the original decision
  - Nature of appellate body – judicial or internal
    - If the right of appeal is to a judicial body, this may limit procedural fairness at the earlier level
    - Internal review is less likely to be independent, such that procedural fairness applies
  - Breadth of appeal – de novo or limited
    - Complete de novo review – procedural fairness is limited
  - Nature of interest and subject matter
    - Procedural fairness will attach where there are severe consequences for an individual – e.g. in migration case

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3) Content

The content of the natural justice rule requires fairness and detachment.

Fairness - Hearing Rule

The hearing rule may require:
- Judicial hearing - legal representation, formal presentation and cross-examination of evidence
- Administrative – exchange of correspondence between government agency and person
- Telephone conversation or interview

Content depends on the circumstances of the case:
- nature of inquiry (probably the most important factor)
- individual circumstances
- subject matter of the decision
- scope of the act/statutory framework
- rules of the tribunal

Minimum requirements of the hearing rule
- Prior notice that a decision will be made
- Disclosure of an outline or the substance of the information on which the decision is proposed to be based (the case to be met)
- Opportunity to comment on that information and to present the individuals own case (respond to the adverse material – opportunity to present case)

Prior Notice and Disclosure
- This requires notice that is adequate to allow the applicant to meet the case against them. The notice should:
  - Be in writing
  - Provide adequate time, or a "reasonable opportunity" to prepare
  - Contain details of the date/place at which the hearing will take place
- Disclose with "sufficient particularity"
  - Sufficient information for the applicant to know the case they have to meet (e.g. on what grounds the adverse finding was based)
  - If information relied on is adversely to the person's interest, this will need to be highlighted
  - Disclose only allegations that are credible, relevant and significant (*Kioa)*

Alphaone
- Where there is adverse material, the applicant has the right to rebut, qualify or comment on the material
- Must identify any issue critical to the decision which is not apparent
- However, the requirements of natural justice do not require mental or thought processes to be exposed.

SZBEL case
- Facts: The Tribunal reached their decision on a different basis to the original decision maker
- If the tribunal takes no step to identify new issues, and relies on the issues the prior decision maker considered dispositive, and does not tell the applicant what the issue is, the applicant is entitled to assume that the Tribunal relied on the same issues that the prior decision maker considered dispositive.

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- As the prior decision maker had not based the decision of these issues, the Tribunal in not identifying these issues as important had not revealed to the applicant that these were issues in dispute.

Opportunity to Comment

Consider the seriousness of the issues, nature of the issues and seriousness of the consequences

Who should conduct the hearing?

- need not be undertaken personally by the decision maker – can be delegated
- It is sufficient that the person is given a proper hearing, as long as the decision maker is fully aware of everything that was said (*FAI & O'Shea*)
  - decision maker must be fully informed of the evidence and submissions arising during hearing
  - if any new credible, relevant and significant information arises after the hearing, it is proper to hold another hearing (*O'Shea*)
  - if the summary of the hearing contains adverse allegations, disclose to the aggrieved person and give them an opportunity to comment (*Kioa*)

Detachment – Bias

Where there is bias in the decision making, the decision may be invalidated.

The categories of bias include:

- interest
  - financial or other interest that will be affected by outcome of case
- conduct
  - communication in private with one party (regardless of motive)
  - expressed views which suggest possibility of prejudgment
  - strong animosity, hostility, partiality or favouritism
- association
  - close relationship with one of the parties
- extraneous information
  - using evidence not presented by parties, e.g. TV, media
- institutional bias

Consequences of Bias

- The consequence of bias depends upon when the bias occurred:
  - prior to decision being made – decision maker is disqualified and may be excluded (it is up to the decision maker to decide whether to exclude themselves)
  - after decision has been made – the decision is invalid

Exceptions/Defences to Bias

1) Necessity
   a) Where there is a limited number of members who could adjudicate the dispute, the apprehension of bias rule will not apply, whereas the actual bias rule will still apply
   b) Presumed that parliament would have intended decision makers would proceed despite apprehension of bias
2) Consent
3) Waiver
   a) Implied waiver – by not raising the issue of bias at the time of occurrence
   b) Actual waiver – at start of the proceedings when judge divulges interests

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4) As modified by statute

Actual Bias

- Consider the subjective state of mind of the decision maker
- This is particularly hard to prove, as the decision maker's reasons may not be published.

Jia

- Facts: the AAT reverse the Minister's decision to deport, Minister then acts personally to deport Jia. Before the Minister remade decisions, he was interviewed on radio and said – "unhappy with the way AAT dealt with immigration cases" naming Jia on the radio.
- The decision maker's mind is so closed to persuasion, that any arguments against the decision makers view is ineffectual
- Decision makers sometimes approach their task with a tendency of mind or predisposition, publicly expressed or not.

Apprehended Bias

- Apprehended bias occurs where there is prejudgement of the decision
- Where a fair minded lay observer might reasonably apprehend that a judge or decision-maker might not bring an impartial mind to the resolution of the question the judge is required to decide (*Ebner*)

A fair minded lay observer is: *(Johnson v Johnson)*

- Not a lawyer, but knows something about the legal process
- Knows enough about the issues to know what is needed to be decided
- Knowledge of particular facts in question, not just broad knowledge
- Sometimes decision makers get pressured to say things that in retrospect might not have been wise to have said and will take them back (*Vakauta*)
- Conscious of time constraints of decision makers, as well as professional pressures
- Not overly sensitive or suspicious

Ebner

- The test for apprehension of bias

1) Identify the conduct that might lead to a decision other than on its legal and factual merits
2) Determine how this conduct is logically connected with the biased outcome

Hot Holdings v Creasy

- Facts: The impugned decision was that of the Minister, but the Minister had no pecuniary interest creating apprehension of bias. Minister did not actually know that the officers who made the decision had an interest – no indication that the Minister wanted to further the interests of the officers. Can bias be imputed to the Minister responsible for the decision?
- The court rejected vicarious partiality - cannot impute bias to the Minister
- Bias is personal – must directly link it to the decision maker
- The court was persuaded by the peripheral role in decision making process played by the subordinates, as there was no significant contribution to the ultimate decision.

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