PART X – ADMINISTRATIVE REVIEW

I *Introduction*

A *Types of Review*

1 *Merits review*

Merits review may be available under the following avenues:

1 Avenue of review

(a) Commonwealth decision-makers: Administrative Appeals Tribunal
(b) State decision-makers: Victorian Civil and Administrative Tribunal (or similar)

2 Jurisdiction
Has the statute pursuant to which the decision was made conferred jurisdiction upon the Tribunal to hear applications for review? (*AAT Act* s 25)

3 Standing
Is the applicant 'affected by the decision'? Organisations with relevant objectives may also be included (*AAT Act* s 27(1), (2))

4 Time limit
Applications must be brought within 28 days from the date the applicant was notified of the first-instance decision (*AAT Act* s 29(2))

5 Application of policy
Government policies are relevant factors to be considered by the Tribunal (*Drake [No 1]*); however, the Tribunal should remain independent and should not apply unlawful or manifestly unjust policies (*Drake [No 2]*); see *VCAT Act* s 57(2)

6 Appeal
Unsuccessful applicants can appeal to the Federal Court of Australia (*AAT Act* s 44) or Supreme Court of Victoria (*VCAT Act* s 148)

2 *Judicial review*

The following procedure should be used to determine whether judicial review is available to an applicant aggrieved by a decision:

1 Avenue of review

(a) *Constitution* s 75
(b) *Judiciary Act 1903* (Cth) s 39B
(c) *Administrative Decisions (Judicial Review) Act 1975* (Cth)
(d) *Administrative Law Act 1978* (Vic)

2 Preliminary requirements

What are the essential requirements for bringing action under this avenue?

(a) *Constitution* s 75(v): 'officer of the Commonwealth'
(b) *AD(JR) Act*: 'decision under an enactment' of an 'administrative character'

3 Jurisdiction

What court or courts can exercise jurisdiction under this avenue?

4 Standing

Who can apply for review under this avenue?

(a) *AD(JR) Act*: by a 'person aggrieved'
(b) Common law: special interest test (*ACF*)

5 Grounds

What must such a person establish in order to succeed?

(a) *Procedural fairness*
    (i) Hearing rule
    (ii) Bias rule

(b) *Jurisdictional error*

(c) *Broad Ultra vires*
    (i) Account of irrelevant consideration
    (ii) Omission of relevant consideration
    (iii) Improper purpose
    (iv) Inflexible policy
    (v) Behest of others
    (vi) Unreasonableness

6 Remedies

What can a court order if the applicant is successful?

II *Administrative Review of Executive Action*

A *Introduction*

Merits review entitles a statutory tribunal to re-examine the circumstances of an applicant's case and make the appealed decision again. Merits review places the decision before an Administrative Appeals Tribunal, comprised by members other than the original decision-maker, whose task it is to determine the 'correct or preferable decision' (*Drake's Case*):

> *The question for the determination of the Tribunal is whether the decision was the correct or preferable one on the material before the Tribunal…*

The Tribunal is able to reconsider all relevant facts, law and policy relevant to the decision. Having regard to the evidence, the Tribunal determines the 'correct or preferable' decision.

1 *Commonwealth decisions*

For Commonwealth decisions, the procedure for review and powers of the reviewer are set out in the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*').

The tribunal has all the powers of the original decision-maker: s 43(1). Consequently, it can grant or refuse applications, set levels of payment or other awards, or order such other tasks as may be required to carry out the substance of the revised decision.

If an application for merits review is successful, the new decision will take the place of the original one. This is provided for by the Act: the decision of the Tribunal is directly substituted in place of the decision of the original decision-maker: s 43(6).

If the application for review is unsuccessful, the Tribunal affirms the decision of the original decision-maker.

2 *State decisions*

For state decisions, the procedures and powers are described in state legislation. In Victoria, the relevant act is the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*').

As for Commonwealth decisions, the decision of the Tribunal is substituted for that of the first-instance decision-maker if the application for review is successful: *VCAT Act* s 51.

3 *Rationale for merits review*

Merits review aims to provide an avenue for review that is 'fair, just, economical, informal and quick': *AAT Act* s 2A.

It does so by enabling a decision to be reviewed on its substance and not just for technical, legal or procedural omissions (the subjects of judicial review).

Administrative review may also be justified on the same rationales that support administrative law generally:

- The right for a decision to be made with regard to all relevant circumstances;
- The right for a decision to be made according to law (judicial review);
- The expectation that a decision will be fair and reasonable (merits review);
- The right to due process; and
- The objective of better decision-making.

B *Decisions Subject to Merits Review*

1 *Current position*

Decisions are not automatically capable of review. Merits review is *only* available where an enactment specifically provides for such review. In many cases, statutory instruments conferring administrative power upon a decision-maker will provide for merits review; however, such a provision is required before a Tribunal can hear any applications in respect of decisions made pursuant to it.

For example, s 25 of the *Social Security Act* confers jurisdiction on the AAT to hear review cases. The *FOI Act*, *Income Tax Assessment Act*, and s 42 of the *VCAT Act* also provide for review to the AAT.

First step: identify a statutory provision which confers a right to administrative review by the AAT or VCAT. If no such provision exists, no merits review is possible.

2 *Proposed reforms*

The Administrative Review Council has recommended, as a starting point, that

> *an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review.*

It suggests that the scope of reviewable decisions should be defined negatively. *Prima facie*, it recommends, all decisions are inherently suitable for administrative review. However, there will be two classes of decisions which are never suitable for merits review:

- **Political or policy decisions**
  It is undesirable to review these matters since the Tribunal is not democratically elected; and

- **Automatic results**
  Where the decision is not discretionary, being the automatic result of the operation of statutory conditions or rules, it is unnecessary to review since the result cannot change.

Additional factors indicate may that a decision is unsuited to merits review:

- **Effect of the decision**
  - Preliminary or procedural decisions;
  - Decisions allocating a finite resource between competing applicants;
  - Controversial policy decisions;
  - Decisions enforcing the law;
  - Financial decisions with a significant public interest element;

  - Decisions to delegate a power or task;
  - Recommendations to decision-makers;

- **Cost of the decision**
  - Decisions involving extensive inquiry processes; and
  - Decisions of little impact.

However, the following factors should not exclude merits review:

- Decisions affecting national sovereignty or prerogative power;
- Decisions made by reference to government policy;
- Decisions made by an expert;
- Decisions made by a person with a high reputation;
- Decisions that may also be subject to judicial review; and
- Where granting review will be likely to spurn many additional applications.

C *The Administrative Appeals Tribunal*

The Administrative Appeals Tribunal is comprised by members appointed by the Governor–General. Its President is a Federal Court judge (upon whom power is conferred in a personal and not judicial capacity). The procedure for appointing and eligibility requirements for Deputy Presidents, Presidential Members, Senior Members, and Members are set out in ss 6–7 of the *AAT Act*.

Members are appointed for a fixed term (*AAT Act* s 8) with statutory provisions for removal in case of misbehaviour (s 13). (Division 1, pt 2 of the *VCAT Act* also provides for removal on certain grounds.) Grounds include demonstrated incapacity, proved misbehaviour and the like.

Note that the appointment of a Federal Court judge as President is perfectly compatible with the second limb of the *Boilermakers* principle. The decision-maker is not exercising judicial power for the Tribunal; however, he or she acts as *persona designata* (an exception to the separation of powers) so that power is conferred to the judge as a designated individual and not the Ch III Court itself. See further above Part II.

D *Requirements of Review*

1 *Standing*

Second step: is the applicant entitled to request administrative review?

To be eligible for review of a decision, the applicant must be a person 'whose interests are affected by the decision': *AAT Act* s 27(1) (see also *VCAT Act* s 5).

Section 27 — Persons who may apply to Tribunal:

(1) Where this Act or any other enactment (other than the *Australian Security Intelligence Organisation Act 1979*) provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.

Section 27(2) is a deeming provision which widens the class of people entitled to challenge decisions under the Act, creating a looser test of standing than the common law position:

Section 27 — Persons who may apply to Tribunal:

(2) An organisation …, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association.

A person who makes a reviewable decision must take reasonable steps to notify potential applicants of their right to review the decision: s 27A.

Section 27A — Notice of decision and review rights to be given:

(1) …a person who makes a reviewable decision must take such steps as are reasonable in the circumstances to give to any person whose interests are affected by the decision notice, in writing or otherwise:
    (a) of the making of the decision; and
    (b) of the right of the person to have the decision reviewed.

Thus, the original decision-maker is generally obliged to notify the affected individual of their ability to apply for merits review.

2 *Reasons*

If the applicant is entitled to apply for administrative review, and their interests are sufficiently affected, then the applicant also has the right to apply for a statement of reasons.

- The right is not general: it is confined to eligible persons
- The right is further confined by certain exceptions
    - Time period and public interest certificate: *AAT Act* s 28(2) (*VCAT Act* ss 45–7, 53–4)
        - The Attorney–General can issue a public interest certificate where disclosure would prejudice international relations, national security, etc
    - If the decision itself is itself accompanied by a written statement of reasons

A potential applicant would probably want to obtain a statement of reasons before applying review. This way they can determine whether it is feasible to have the decision overturned.

3 *Time period*

The *AAT Act* requires by s 29(2) that applications be made within 28 days of a decision being given to the applicant, subject to discretionary extension by Tribunal: s 29(4).

Assuming these requirements are met and the application is made, the application may be brought before the relevant tribunal (AAT or VCAT).

E *Role of Government Policy*

***Drake v Minister for Immigration and Ethnic Affairs* (1979) FCA:**

Facts

- Drake is an American citizen; he commits an offence and the Minister of Immigration makes a decision to deport him
- This decision was governed by policy conclusively outlining relevant considerations: gravity of the offence, likelihood of recidivism, etc

Issue

- 'The question for determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether the decision was the correct or preferable decision on the material before the Tribunal'

Reasoning

- Possible role for government policy
  - One extreme: apply strictly and without question
  - Other extreme: disregard entirely and maintain independence

- There is no universal rule; the Tribunal must weigh policy in context
  - Policy is a 'matter for the Tribunal itself to determine in the context of the particular case and in light of the need for compromise…'
  - On the one hand: good government and consistency
    - Policies must be applied consistency to ensure broad fairness
    - Government policy should be followed in deference to the democratic will it (presumably) reflects
  - On the other: justice in the individual case
    - Inflexibly applying policy means that the merits of the individual case aren't fully taken into account

- Statutes may also oblige a tribunal to take into account matters of government policy
  - In such cases that tribunal will be bound to apply the policy to the extent required
  - However, even if there is not such a requirement, policy is still a relevant factor to be considered when determining what is the correct or preferable decision

- Nevertheless, a tribunal cannot uncritically or blindly apply government policy
  - The tribunal must make it clear that it has considered the policy, approves it and

is *therefore* applying it
    - Otherwise, the tribunal would simply be abdicating its function to the government

Decision
- Policy is a relevant factor to be taken into account

In the context of immigration, consistency is particularly important. For this reason the application of government policy may be more warranted in this area (see *Al Kateb*).

Re Drake v Minister for Immigration and Ethnic Affairs [No 2] (1979) HCA:

Reasoning (Brennan J)
- Arguably, the policy factors make the decision more transparent, reasonable and consistent
- Enquiry of a reviewer:
    - Can the Minister order deportation?
    - If a policy exists on the matter, is it consistent with the legislation?
    - If so, is there 'any cause shown why the Tribunal ought not apply that policy, either generally or in the specific case'?
    - If not, then 'on the facts of the case and having regard to any policy considerations which ought to be applied, is the Minister's decision the right or preferable one?'

- Brennan J:
    - Consistency is very important
    - Inconsistency is inelegant and brings the administrative process into disrepute, making it seem arbitrary
    - As a general rule, 'the Tribunal will ordinarily apply [the] policy in reviewing [a] decision'
    - However, policy will not apply if it is unlawful (contrary to the statute) or if its application would be unjust (cogent reasons must be shown against its application)
    - Parliamentary scrutiny confers democratic legitimacy, and has the effect of subjecting it to debate, making it more justifiable to influence decision-making
    - Tribunals should defer controversial decision-making to the Parliament and executive

Also consider *Swift* and weight given to different types of policy

Swift's Case:

Facts
- Concerns a taxation ruling made by the Australian Taxation Office

Decision
- Federal Court reviews policy of ATO

In Victoria, s 57(2) of the *VCAT Act* obliges the Tribunal to apply government policy in particular circumstances with a few to reaching the correct decision:

- A Minister can certify that government policy is applicable: s 57(1); or
- If the Tribunal is satisfied that any of the following exist, it must apply the policy: s 57(2)
    - The applicant was aware of the policy;
    - Such people could 'reasonably have been expected to be aware' of it; or
    - The policy must was published in the Government Gazette; and
- The decision-maker must have stated that they relied on that policy in making the decision.

However, at a state level, if no certificate has been issued, if the policy was not public or if the decision-maker has not stated their reliance on the policy, then the enquiry falls back to the normal Commonwealth-style guidelines concerning the application of government policy (relevant factor, generally but not always appropriate).

F *Appealing against Merits Review*

Following the tribunal's redetermination of a matter, there are no further avenues for merits review.

1 *AAT*

Questions of law and standing can be appealed to the Federal Court within 28 days: s 44. However, such appeals are not concerned with merits, only technical issues.

The Tribunal may also refer questions of law to the Federal Court: s 45.

2 *VCAT*

An appeal to the Supreme Court of Victoria may be made within 28 days and if leave to appeal is granted: *VCAT Act* s 148.

G *Other Relevant AAT Provisions*

- Applications to the Tribunal: s 29
- Informal hearing: s 33
- Preliminary conference: s 34
- Material furnished by the respondent: s 37
- Procedural fairness applies: s 39
- Inquisitorial powers exist: s 40
- Decision-making powers: s 43(1)
- Obligation to provide reasons: ss 43(2), 43(2B)
- Enforceability of decisions: s 43(6)
- Appealing on questions of law: s 44(1)
- Seeking judicial review: *ADJR* s 10(2)(b)(ii)

H *Evaluating the Success of Merits Review*

- Merits review is often more effective for claimants than judicial review because they can have the decision permanently changed
    - By contrast, if judicial review is successful, the decision is usually just made again by the original decision maker, bringing with it the possibility of bad faith towards the claimant and the ease with which the same decision can be made under a more legitimate guise
- Merits review is a relatively simple and informal procedure, but costs can be prohibitive for some parties
- More objective than internal review (but also more expensive and slower)

III *Judicial Review of Administrative Decisions*

A *Introduction*

Judicial review is a process for evaluating the legality of a decision. Unlike merits review, it does not permit the reconsideration of substantive issues. Review is based on purely technical or procedural issues. In order to succeed, the decision must be found to be unlawful in some way. The various grounds on which may be possible are explored later (see below Part XI).

There are several reasons why judicial review processes are important:

- **Rule of law**
  They uphold the rule of law by ensuring statutory decision-making proceeds lawfully

- **Representative government**
  Statutes under which the executive make decisions form expressions of the legislature, and indirectly the will of the people; consequently, when courts enforce statutory law, they uphold the will of the people, and, thus, representative democracy

- **Responsible government**
  This convention is upheld in both narrow and broader senses:
  - Narrow: procedural fairness and due process are guaranteed
  - Broad: government must act appropriately and be responsive its citizens, etc

- **Simplification of remedies procedure**
  Previously, applications for review and common law remedies were complex:
  - The constitutional right to apply for judicial review of actions by 'officers of the commonwealth under s 75(v) of the *Constitution*
  - Prerogative writs of mandamus, certiorari, and the like
  - These avenues for review were limited; their complexity and the requirement that applications be made for a specific remedy out of a fixed set of remedies, from the outset, were extremely prohibitive
  - The *AD(JR) Act* was intended to simplify the process of applying for judicial review and make available a more flexible range of remedies to successful applicants

- **Accessibility**
  Making more accessible judicial review through applications to the Federal Magistrates Service and the Federal Court (rather than just the High Court or other such courts as are conferred jurisdiction)

- **Reasons for decision**
  In general, persons affected by administrative decisions had no entitlement to reasons; the *AD(JR) Act* sought to confer a confined right to reasons.

The right to reasons under the *AD(JR) Act* is 'confined' because reasons are only available to applicants able to demonstrate that they satisfy the preliminary requirements of standing (aggrieved by a decision or by conduct to which the Act applies).

B *Common Law*

If the applicant has standing, he or she may apply for one of the following remedies:

- Orders in the nature of a prerogative or common law writ; and
- Equitable remedies such as declarations and injunctions.

Whether a court has jurisdiction to hear such an application depends on the nature of the decision-maker, the legislation conferring decision-making authority and the jurisdiction in which the decision was made.

- The original jurisdiction of the High Court of Australia includes the grant of constitutional (prerogative) writs: *Constitution* s 75(v)
- The original jurisdiction of the Federal Court of Australia is set out in s 39B of the *Judiciary Act 1903* (Cth) in the same terms as s 75(5) of the *Constitution*
- However, it is subject to statutory modification (eg, by the *Migration Act 1958* (Cth))
- Section 44 of the *Judiciary Act* enables the High Court to remit 'matters' to the Federal Court
- The state supreme courts have inherent supervisory jurisdiction by virtue of the *Constitution*

General law review of executive decisions proceeds by means of applications for writs. Courts also recognise certain grounds of review, which bear some similarities to the *AD(JR) Act* grounds but are also slightly different.

See further below Part XII.

C *Statutory: Commonwealth Decisions*

The *AD(JR) Act* formalises common law review mechanisms in ss 5–6. However, it also imposes several preliminary requirements which must be satisfied before a decision will be reviewable. Here we are concerned with whether a decision is reviewable by a party.

Section 5 — Applications for review of decisions:

(1) A person who is aggrieved by a decision to which this Act applies … may apply … for an order of review in respect of the decision on any one or more of the following grounds …

Section 6 — Applications for review of conduct related to making of decisions:

(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply … for an order of review in respect of the conduct on any one or more of the following grounds …

The basic requirements and procedure for review are as follows:

- A 'person aggrieved' by
  - Section 5: a 'decision'; or
  - Section 6: 'conduct for the purpose of making a decision'; or
  - Section 7: 'failure to make a decision'
- May apply for an 'order of review': s 11
- To the Federal Court, which has jurisdiction: s 8
- Complying with the requirements for applications: s 11; and
- If one or more grounds of review can be successfully asserted: ss 5–6; then
- A remedy may be granted: s 16; and in any event
- The applicant will be entitled to reasons: s 13.

The Federal Court and Federal Magistrates Court have jurisdiction to hear applications made to each respective court:

Section 8 — Jurisdiction of Federal Court of Australia and Federal Magistrates Court:

(1) The Federal Court has jurisdiction to hear and determine applications made to the Federal Court under this Act.

(2) The Federal Magistrates Court has jurisdiction to hear and determine applications made to the Federal Magistrates Court under this Act.

The state supreme courts do not have jurisdiction to hear applications:

Section 9 — Limitation of jurisdiction of State courts:

(3) …a court of a State does not have jurisdiction to review:
  (a) a decision to which this section applies [a decision that is a decision to which this Act applies]; … or
  (d) any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power.

Sections 3 ('decision to which this Act applies'), 5 and 6 delimit the scope of judicial review and the Court's jurisdiction to review decisions. Namely, the decision must be a 'decision', 'of an administrative character' and 'made under an enactment', or 'conduct' that is engaged in for the purposes of a 'decision'. The applicant must be a 'person aggrieved' by such a decision.

These requirements are now discussed in turn.

1 *'decision'*

Section 5 limits judicial review to decisions 'to which this Act applies'. This phrase imports several limiting requirements which are sometimes raised as threshold issues in response to an application for review:

According to s 3(1), 'decision to which this Act applies' means:

Section 3 — Interpretation:

(1) …
decision to which this Act applies means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not …):

(a) under an enactment …; or
(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment …;

other than

(c) a decision by the Governor–General; or
(d) a decision included in any of the classes of decisions set out in Schedule 1.

In summary, a decision will be reviewable if it is

- A 'decision'; which is
- Of an 'administrative character';
  - Cf policy or making regulations (legislative character);
- Made (whether in exercise of a discretion or not) under an enactment;
  - Cf exercise of prerogative or common law powers;
- Other than a decision by the Governor–General or a decision included in any of the classes of decision set out in Schedule 1.

There is no general definition of 'decision'. However, s 3(2) does state that it includes various actions:

Section 3 — Interpretation:

(2) In this Act, a reference to the making of a decision includes a reference to:

(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or

> (g) doing or refusing to do any other act or thing;
>
> and a reference to a failure to make a decision shall be construed accordingly.

It is also deemed to include the making of a report that is required to be made before a decision is given to be part of that decision: s 3(3). These inclusions have the effect of expanding the concept of a decision quite considerably.

Because of these examples and the context in which they arise, intermediate decisions are not reviewable unless provided for by the statute. To be reviewable, 'a decision [must be] final or operative and determinative' of the issue of fact being considered and not a step along the way. It must be 'a substantive determination' (rather than a procedural one) (*Australian Broadcasting Tribunal v Bond*).

Australian Broadcasting Tribunal v Bond (1990) HCA:

Facts

- To hold a broadcasting licence, the *Broadcasting Act* requires that the holder be 'a fit and proper person' to hold such a licence
- The Australian Broadcasting Tribunal ('ABT') finds that the Bond company is not a 'fit and proper person' to hold licences because, among other things, found Bond himself is not a fit and proper person
- The ABT's decision is to revoke the broadcasting licences of Bond and companies that he controls
- In order to reach that decision, they form the few that the companies are not fit and proper persons to hold licences (as required by the statute)
- The principal ground for reaching that view is that Mr Bond himself is not a fit and proper person (because he controlled the other companies)

Issue

- The final decision (revoking licences) is clearly reviewable, but are there grounds reviewing the basis for the ABT's ultimate finding under the *AD(JR) Act*?
- What is a 'decision'?
- What is 'conduct'?

Reasoning (Mason J)

- Adopts a purposive approach: relevant policy considerations determine meaning
- Considerations in interpreting the meaning of the word 'decision' include:
    - Policy considerations: remedial nature of the *AD(JR) Act* being balanced the efficient administration of decision-making
        - The statute is remedial in nature; designed to make judicial review more accessible
        - Therefore, the broader interpretation should be preferred
        - But it might also be argued that a narrower interpretation is justified by the need for efficiency in administering the matters of the tribunal
        - Opening grounds to challenge intermediate reasoning might open the floodgates to thousands of aggrieved parties seeking to challenge their decisions or various aspects of them
        - This points towards a narrow meaning
    - Textual considerations: 'under an enactment'; examples in s 3(2); s 3(3) extension; s 3(5): 'conduct'

        - All the examples given in s 3(2) (licence revocation, making suspending or revoking an order, &c) suggest a sense of finality
        - This also points towards the narrower meaning
        - Making a report has to be *deemed* to be a decision (by s 3(3))
        - This suggests that a broad meaning was not intended
            - The report itself is final, but not the grounds supporting it
    - Thus, a 'decision' is 'one for which provision is made by or under statute'
    - Qualities of a 'decision':
        - Final and operative: does not typically include 'intermediate' conclusions unless statute provided for a finding or ruling
        - Does not include findings of fact unless expressly provided for under statute
        - Substantive: does not include procedural determinations

Decision

- Although the decision that the companies were not fit and proper persons was provided for by the Act, and hence a decision and therefore reviewable, the ground on which that finding is predicated (ex rel Bond) is not such a decision
- The finding that Mr Bond was not a fit and proper person was a finding of fact
- Finding that Bond was not fit and proper person is neither
    - A 'decision' such as to be reviewable; nor
    - 'Conduct' that is reviewable
- Thus, the premise is not directly reviewable and must be attacked indirectly (probably unsuccessfully, as by arguing that the conclusion it supported was 'so unreasonable that a reasonable decision-maker could not have made it')

By contrast, *Lamb v Moss* (1983) adopts a broader interpretation of 'decision'. According to *Bond*, it is arguably too broad having regard to practical and textual considerations.

2 *'conduct'*

Section 6 allows for judicial review of conduct engaged in for the purpose of making a decision to which this Act applies:

There is no general definition of 'conduct'. However, it but stated to include doing of any act or thing preparatory to the making of a decision, including the taking of evidence or the holding of an enquiry or investigation.

Section 3 — Interpretation:

(5) A reference in this Act 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, including the taking of evidence or the holding of an inquiry or investigation.

'Conduct' is a 'process of decision-making' (*Bond*). It concerns procedural and not substantive matters.

Australian Broadcasting Tribunal v Bond **(1990) HCA:**

Reasoning (Mason J)

- What is 'conduct'?
  - 'the concept of conduct looks to the way in which the proceedings have been conducted, the conduct of proceedings ... conduct is essentially procedural and not substantive in character.'

Decision

- The finding that Bond was not fit and proper person is not 'conduct'

3 *'of an administrative character'*

To be 'of an administrative character', a decision cannot embody legislative or judicial characteristics.

A broad interpretation was adopted in *Minister of Commerce v Tooheys Ltd* by the Full Court of the Federal Court of Australia, which treated the making of a by-law as administrative and not legislative.

Minister of Industry and Commerce v Tooheys Ltd **(1981) FCA:**

Facts

- The *Customs Act* imposes duties on imported goods
- The Minister had power to create by-laws with the effect of reducing the amount of duty payable on particular goods
- He could also issue determinations under s 273 of the Act identifying certain classes of goods as falling within a particular category
- The Minister refuses to issue a determination with respect to goods Tooheys wants to import (automatic palletisers)
- Tooheys seeks review of the decision (the refusal to make the determination)

Issue

- Was the Minister's refusal to make the declaration 'of an administrative character'?

Reasoning (Full Court of the Federal Court)

- Citing Latham CJ from *Grunseit*:
  - The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases'
- The delegation of legislative power sets down a general rule of broad application — general guidance
  - 'The appropriate categorisation of by-laws is determined by their context and subject-matter'
- On the facts, the restricted scope of the determinations is evidence that they are administrative

Decision

- Determinations under s 273 of the *Customs Act* are 'of an administrative character'

A rather different approach was adopted by Gummow J in *Blewett*. Whereas *Tooheys* looks to the content (general or particular) of the power to determine whether it is legislative or administrative, *Blewett* suggests that what is relevant is not so much the content of the determination as its effect.

Namely, a decision will be legislative if it has the effect of changing the content of the law. On the facts, the insertion of a table into an Act was a 'legislative decision' because it had the same effect as if the statute had been amended by Parliament and, were it not for the vesting of power by the Parliament in the executive, such an insertion could not have been made.

This is a narrower view of administrative conduct than that adopted in *Tooheys*.

Queensland Medical Laboratories v Blewett **(1988) FCA:**

Issue

- What is the distinction between legislative and administrative acts?

Reasoning (Gummow J)

- Making delegated legislation is legislative in character
    - 'the primary characteristic of the activities of administrators in relation to enactments of the legislature is to maintain and execute those laws, as is indicated by the terms of s 61 of the *Constitution* itself.'
    - When making delegated legislation, 'the executive is not exercising the power contained in s 61 of the *Constitution*. The prerogative power to make law without statutory mandate is limited … Rather, the federal legislative powers of the Parliament (found principally in ch I of the *Constitution*) authorise the Parliament to repose in the executive an authority of an **essentially legislative character**, at least where the exercise of the authority is subject to a measure of Parliamentary control.'
    - 'So it is that a decision made under an enactment of the Parliament by a Minister or his delegate under statutory power may be essentially legislative in character in a direct and immediate rather than in any incidental sense. And such a decision will be excluded from review under the *AD(JR) Act* as much as if it had fallen within the direct terms of exclusion of decisions, under an enactment, by the Governor–General in Council.'

- The effect is what is relevant
    - In *Commonwealth v Grunseit* (1943), Latham CJ said:
        - 'The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular case.'
    - 'Thus, it is difficult to see how a sufficient distinction between legislative and administrative acts is that between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases: cf *Minister for Industry and Commerce v Tooheys Ltd*'
    - 'Nevertheless, in my view, when the Minister makes a determination that the table specified in the determination be substituted for the pathology services table then set out in Schedule 1A of the Act, he is making a decision of a legislative rather than an administrative character'
    - 'This is because, to adapt the expression of Dixon J, sub-s 4A(8) has reposed in

him an authority of an essentially legislative character (*Dignan's Case*…).'
    - 'The Minister is in a sense executing a law of the Commonwealth because were it not for sub-s 4A(8), he would lack competence to make the determination; but that law was a permitted delegation by the Parliament of legislative authority and to decide to exercise the power conferred by the law is to act as delegate of the Parliament and thus to act legislatively.'

- Regardless of the content of a determination, if its effect is to change the content of the law (a statute), then it is a legislative and not administrative act
    - Accepting Latham CJ's distinction does not mean accepting that that legislative acts must result in 'a rule of general application' hence, legislative acts can still apply to particular occasions
    - An act is legislative if it 'has the immediate effect of changing the content of a law as a rule of conduct…'

- Application:
    - 'The Schedules to the Act plainly are parts of that statute (the *Interpretation Act* s 13) and upon the [the delegated legislation] coming into effect … the result is that the old table in Schedule 1A ceases to have effect and the new table has effect as if it were set out in Schedule 1A in place of the old table.'
    - 'Medicare benefits will thenceforth be calculated by reference to the fees set out in the new table (s 9) and the quantum of the entitlement to payment to medicare benefits will be modified accordingly (ss 10, 20, 20A).'
    - 'The result is the same as if the Schedule had been changed by an amending statute'

Decision
- Here, the effect is essentially the same as if a schedule in the Act was changed
- Because of this effect, the law is effectively changed
- The Plan is therefore of a legislative rather than administrative character

In *SAT FM*, the Court looks at a series of factors to determine whether the conduct is administrative or otherwise in character.

***SAT FM v ABA* (1997) FCA:**

Facts
- The ABA prepared a Broadcasting Plan that entailed not granting any further licences for the Kalgoorlie area

Issue
- Is the making of the plan conduct 'of an administrative character'?

Reasoning (Sundberg J)
- Relevant factors:
    - The Plan set out rules of general application;
        - Similar to *Tooheys*
    - Notification was provided in the Gazette;
    - There was public consultation prior to adoption;
        - The process embodies legislative features
    - It takes into account wider public considerations;

- It has a binding legal effect once adopted.
  - Effect of the plan is legislative (similar to *Blewitt*)

Decision
- The Plan is of a legislative rather than administrative character

The current test thus appears to include a series of factors.

NEAT Domestic Trading Pty Ltd v Australian Wheat Board Ltd (2003) HCA:

Facts
- Section 57 of the *Wheat Marketing Act* bans the export of wheat, but makes provision for permission to export to be granted in certain cases:
  - i) Permission to export is to be given by the WEA;
  - ii) Permission is not to be given unless consent in writing is given by the Australian Wheat Board International;
  - iii) *TPA* immunity is provided to AWBI for actions taken under this section;
- AWBI is owned by AWB; both companies are limited by shares and incorporated under the *Corporations Act*;
  - AWBI is wholly controlled by the Wheat Board
  - Its shareholders are (most of) the wheat growers of Australia
- However, AWBI does not need permission to export – effectively, they had a monopoly, and they could also determine who else could export wheat
  - There were several reasons for retaining an export monopoly and 'single desk system' (mostly related to the value of wheat)
  - The statutory body intended to increase its bargaining power by unifying the international sale and distribution of wheat, and thereby prevent the overseas market being flooded by an excess of wheat exports
- NEAT wanted to export a lower grade wheat, not in direct competition to AWBI's brand of export, to be used by Italian pasta manufacturers
- NEAT, upon being refused permission to export, argues breach of *TPA* and applies for judicial review of the refusal of consent by AWBI ('the refusal')
- NEAT argues that the action is unlawful, therefore not authorised by s 57, therefore not immune from *TPA* actions

Issues
- a) Is the refusal 'a decision of an administrative character under an enactment'?
- b) If yes, then was the decision unlawful because of an improper exercise of discretion?

Reasoning
- Gleeson CJ:
  - The decision is of an administrative character
    - This is because AWBI is not 'representing purely private interests'
    - Their actions were supposed to be subject to public scrutiny
    - Therefore, the determination is not purely private
    - It would be to mischaracterise AWBI to say that it solely pursues private interests
  - However, on the facts, the decision was lawful

- McHugh, Hayne and Callinan JJ: no, the refusal is not 'a decision of an administrative

character under an enactment' because:
    - The decision whether or not give consent is authorised by the constitution of the company under corporations law
        - That is the source of the power – it is not a decision made under s 57 of the WMA, but rather under the company's structure
        - Thus, the power to refuse etc, while being given statutory significance under WMA, 'derived from AWBI's incorporation and the applicable companies legislation'
    - Of the 'private' character of AWBI and impossibility accommodating its pursuit of private interests while subjecting it to public law obligations;
        - This raises difficult issues about whether private bodies should be subject to public law remedies (ie administrative review provisions)
        - The decision is of a private character: its constitution requires directors to maximise returns to shareholders
        - It is therefore not a decision made under the Act itself but rather the company
        - Because of its private character, and what the judges describe as the impossibility of forcing a profit-seeking entity to comply with public law obligations (which would require them to consider other interests), the determination is not 'of an administrative character'
    - Their Honours do not address the more general question of whether public law remedies can be granted against private bodies

- Kirby J (dissenting):
    - The issues must be determined in a constitutional context and in light of the convention of responsible govt
    - The focus should be on the nature of the decision
    - The nature of the body is relevant but not determinative
    - Refusal is 'a decision of an administrative character under an enactment' because:
        - The power to refuse permission was integral to the statutory scheme;
        - That power is 'public power' because of the legislation and their export monopoly
        - The decision was made 'under an enactment'
        - AWBI has a special statutory position (a state-sanctioned monopoly)
    - The fact that AWBI is a private corporation is not decisive
    - Therefore, the decision is of an administrative character
    - If yes, was the decision unlawful because of an improper exercise of discretion?
        - Yes, the board did not consider individual applications on their merits

<u>Decision</u>

- McHugh, Hayne and Callinan JJ: source of power is private document; not administrative, unnecessary to decide
- Gleeson CJ: the body is not really private; administrative, lawful
- Kirby J (dissenting): focus on the nature of the decision; administrative, unlawful

4 *'under an enactment'*

An 'enactment' means an Act of Parliament or an instrument under such an Act. An instrument includes rules, regulations or by-laws. Under means 'in pursuance of' or 'under the authority of' the Act.

The issue of 'under an enactment' often arises in employment situations involving public servants or government commercial contracts. In such cases, it may be that the decision to terminate an employee or breach a contract was conferred by a contractual, and not statutory, authority (*Burns*).

Further issues arise in the context of private corporations. The approach of the majority in *NEAT Domestic Trading* (cf Gleeson CJ) illustrates that a decision may be authorised by an alternative source of power to a legislative instrument. In *NEAT*, that source is the company's constitution.

NEAT Domestic Trading Pty Ltd v Australian Wheat Board Ltd (2003) HCA:

Issue

- Was the decision to refuse permission made 'under an enactment'?

Reasoning

- Gleeson CJ:
  - Yes, is a decision under an enactment: s 57
    - '**[27]** While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds what amounts, in practical effect, to a virtual or at least potential statutory monopoly in the bulk export of wheat; a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established to manage the export monopoly in wheat; or, in legal terms, it has power to withhold approval which is a condition precedent to a decision in favour of an applicant for consent. Its conduct in the exercise of that power is taken outside the purview of the *Trade Practices Act*.'
    - '**[29]** the character of what it does, which is, in substance, the exercise of a statutory power to deprive the Wheat Export Authority of the capacity to consent to the bulk export of wheat in a given case.'
  - The *AD(JR) Act* is therefore applicable
  - However, NEAT fails to establish a ground and so its case fails on its 'administrative law merits'

- McHugh, Hayne and Callinan JJ:
  - Focus on the nature of the decision-maker
  - 'Unlike the Authority, AWBI needed no statutory power to give it capacity to provide an approval in writing. As a company, AWBI had power to create such a document. No doubt the production of such a document was given statutory significance by s 57(3B) but that sub-section did not, by implication, confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing. Power, both to make the decision, and to express it in writing, derived from AWBI's incorporation and the applicable companies legislationhttp://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/2003/35.html?query=neat - fn31. Unlike a statutory corporation, or an office holder such as a Minister, it was neither necessary nor appropriate to read s 57(3B) as impliedly conferring those powers on AWBI.'
  - On the facts, a public law remedy did not lie against the private body in question

- Kirby J:
  - Focus should be on the nature of the decision, not the decision-maker

- Citing Murphy J: 'there is a difference between public and private power, but … one may shade into the other'
- '*The decisions were made under an enactment*: In *Australian Broadcasting Tribunal v Bond*, Mason CJ held that the phrase "decision of an administrative character made ... under an enactment", read as a whole, indicated that a decision "which a statute requires or authorizes" or "for which provision is made by or under a statute" is reviewable under the ADJR Act. That approach recognises that the elements of "decision", "administrative character" and "under an enactment" in the definition cannot be construed in isolation. They are inter-related. Each informs the meaning and content of the others.'
- 'AWBI was an identified repository of a power conferred upon it by an Act of the Parliament. As the primary judge found, without a decision by AWBI "a large part of the scheme created under s 57 would become unworkable". In the Full Court, Gyles J … expressed a view accepting that s 57(3B) may impose "an enforceable duty upon [AWBI] to give an answer when requested". I regard it as unthinkable that AWBI could simply ignore, or unduly delay, a consultation that the Authority was obliged by the Act to conduct with it upon receiving an application for consent to the export of wheat. In the result, AWBI did not do either of those things. In each case it acted with a speed made possible by its inflexible and publicly stated approach to all such applications.'
- The decision here was administrative in character, and made under an enactment

5 Standing

Standing raises the issue of who should be entitled to challenge, or take part in the challenge to an exercise of administrative power. The requirement of standing is what distinguishes public law from private law. It serves a gatekeeper function, preventing unrelated parties from challenging decisions which do not really affect them or with which the primary party is satisfied.

The *AD(JR) Act* limits review to a 'person who is aggrieved' by a decision: ss 5(1), 6(1):

Section 3 — Interpretation:

(4) In this Act:

(a) a reference to a person aggrieved by a decision includes a reference:

(i) to a person whose interests are adversely affected by the decision; or

(ii) in the case of a decision by way of the making of a report or recommendation—to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and

(b) a reference to a person aggrieved by conduct … includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

Section 3(4) is an inclusive (non-exhaustive) definition. '[P]erson aggrieved' *includes* a 'person whose interests are (or would be) adversely affected'. This sub-section effectively imports the common law test of standing to the *AD(JR) Act*:[1]

Australian Conservation Foundation Inc v Commonwealth **(1980) HCA:**

Reasoning

- 'A person or entity has standing if he, she or it has special interests in the subject matter'
- 'Such special interests will be held if he, she or it is affected in a manner different to that in which the general public is affected'
    - Their proprietary interests must be affected
    - The fact that they possess a mere intellectual or emotional concern does not give rise to a special interest in the subject matter

Decision

- On the facts, ACF does not have standing
- Gibbs CJ: it has a 'mere emotional or intellectual concern'

This requirement that a proprietary interest be affected is stricter than that applied in relation to merits review. Section 27(a)(2) of the *AAT Act* confers broader standing to certain parties.

For example, in *NEAT Domestic Trading* (Kirby J):

> *It was not disputed that NEAT was a 'person aggrieved' by AWBI's refusals to approve its applications.*

Only the Attorney–General has an absolute right to seek an injunction to protect public rights. An individual must demonstrate a special interest in the subject matter.

If no legal right is affected, the individual must demonstrate an interest over and above that held by an ordinary member of the public (*Tooheys*).

C *Statutory: State Decisions*

See below Part XIV.

[1] See further D&J 386–90.