Admin law - Alex Exam Script 2008

Q1

V1

V1 has the option to appeal the decision made by the commissioner under 14(3) under the statutory avenue of appeal provided in 14(4) to the VCT. The tribunal appears to have power to give full do novo review. The powers are similar to the AAT therefore the duty of the tribunal is to make the correct and preferable decision.

We will start by noting that she has satisfied the statutory criteria set out in s14. Undoubtedly regarding her loss of earnings. There is a clear causal relationship with the injury and inability to work due to her requirement to drive. She will note her employment history which shows five years constant employment with no indication there requires speculation about her loss of earnings certainly at least until this point.

Further she has no access to alternative compensation or other support which would result in financial hardship for her. Notwithstanding the definition of victim of crime as suffering physical injury, her loss resulting from psychological suffering is financial not non-pecuniary mental anguish as it directly affects her ability to work. therefore she is eligible for compensation for this mental injury through the second limb of the definition relating to financial loss.

To establish this she would need to bring evidence to the tribunal which helps establish the genuiness of this injury and its causal link to the injury, incident.

V2

The decision of the tribunal has been made under s23 of the VCT Act SA. Therefore judicial review will lie to the SA Supreme Court under its inherent jurisdiction per s17 SCA to grant orders per R199-201 SC Rules. V2 will seek certiorari 199(b) and mandamus to have decision remade according to law (c). V2 will clearly have a special interest as the decision affects her private right to compensation.

Fettering

V2 may first appeal on the ground of unlawful inflexible application of policy. There are 2 issues. First is whether the guideline is UV the Act. Notwithstanding the requirement to consider Guidelines these may not be UV the Act. – Green v Daniels

In requiring that a victim be innocent the minister is arguably adding unlawfully to the requirements set out by p.4 in s14. A policy will be UV if it requires taking into account an irrelevant consideration or exercise for improper purpose – Drake/Murphyores.

Although the consideration in 14 may not be exhaustive there is no indication from the nature or subject matter that innocence is impliedly relevant. – Peko Wallsend/ Sean Investments

Even if the policy is valid the tribunal appears to have applied is inflexibly by not taking into accounts V2's particular circumstances – British Oxygen. She has unique circumstances surrounding the incident which the body has not considered in its application of policy.

This will overlap with an argument of failure to consider relevant considerations. If the policy is relevant the tribunal has failed to consider the details of V2's actual role in the crash. There is no actual evidence they have looked at the transcript of the case –Peko Walllsend.

Procedural Fairness

Pf will presumably apply if the decision is of administrative character, which has a direct and immediate effect on V2's rights/interests to gain compensation and there is no statutory exclusion – Kioa v West. While content is flexible disclosure of the case against one is fundamental requirement where potential adverse findings may be made – VEAL. Here there has been no disclosure of the fact that the tribunal would take into account the factor of V2's contributory negligence. Rather the VCT has created a legitimate expectation that this would be considered by public purporting to be no fault -Teoh – Lam (not Teoh Lam)

While the VCT is not bound by this it will require them to give notice if is to be deported from and has been detrimentally relied on – Lam? This has clearly occurred for V2 as she has had no chance to bring evidence showing her role. Further the VCT has stated they will look at the transcript to make a determination and they have not done so this may create a separate legal issue.

Improper Purpose

While the tribunal is not bound by the guideline in the schedule under 14(4) it is arguable that by lowering the amount they have exercised their discretion for an improper purpose. The purpose of the discretion is knuted by nature purpose/subject matter of the Act – Woolhara when (3) and s(5) are read together it may be seen as a discretion only to raise the compensation not to reduce it as (3) relates to inadequate – not excessive compensation.

- Misinterpreting and misapplying the stat criteria – ie def of victim

The VCT is likely to be an inferior court given the test in Skiwing and its composition of a judge and powers to administer oaths, etc. Also given cases such as Craig v WCT. Only jurisdictional errors will be reviewable under CL.

This will examine pf – Lymberoplions although certiorari will be available regardless if not excluded by PC (31).

The unlawful fettering arguably fits cat 5 of the craig errors – While acting wholly within its jurisdiction the court has misconceived the nature of its powers and thus its jurisdictional limits although this will be difficult to establish. The seriousness of the error may be sufficient. The same argument may apply re. Improper purpose.

The Privative Clause refers to the decision of the tribunal. This will be construed narrowly to mean actual or valid decisions. This would exclude those affected by lE which are only purported – s157. Therefore the PC will not apply.

However the decision will validly prevent seeking out for non –JE for want of pf. Here there is no indication that the lack of pf isolates any of the Hickman Proviso's or the inviolable limits or imperative duties of the Act. –s157 Mitchforce. It could be argued that the Act as a whole its nature granting compensation makes pf an imperative duty although this is not strong.

School

The government is likely to have special interest in the case as they are both granting the compensation from a fund they set up and claiming it through a public school. In any case the AG may apply his fiat to challenge the law in the public interest. – Bateman's Bay

The first ground of review in the Supreme Court as noted above, is Error of Law. This is a weak argument but the Govt may claim that 14(1)(i) as not been satisfied as sentenced has a special legal meaning which means custodial sentence not suspended. This is unlikely to succeed as the legal meaning of sentence ordinarily includes suspended sentence.

A more substantive argument is that the VCT has made an error of law in construing 'Person' in the meaning of Victim as including legal person or body corporate. This is an error in ascertaining the legal meaning of a word defined in the AIA (SA). Therefore it is a question of how Pozzloanic. This is arguably a case of cat 5 Craig's Case acting within jurisdiction in granting a remedy by misunderstanding the statute and – the nature and limits of the power. Although it is a cat 2 mistake of acting partially outside the jurisdiction in granting a remedy to a person it had no jurisdiction to grant to.

The act as a whole in referring to physical injury indicates the meaning in this case refers to natural person.

Alternatively this would be characterised as a jurisdictional fact. Where a person of the type exists is objectively determinable and essential to the exercise of the power – Timbarra. Is is early in the stat process and defines whether the body has jurisdiction – Enfield. This would be JE as described in Craig.

As noted above the PC is unlikely to apply to JE's. However if it did, such an essential failing is likely to make the decision either a) not referable to the power – Hickman proviso 3 or an inviolable limit of the act by granting compensation to a body wholly outside that contemplated – s157 Mitchforce.

Q2

i)

Both decisions to grant approval under s106 to M will be challengeable on similar grounds. However, as the first has expired only the second approval need be challenged. The decision was made under the Cth Act therefore rev hes either by the ADJR Act or 39B JA or HC orig juris 75(v).

The simplified expanded remedies under ADJR make it preferable.

The decision appears to be made under the Act pursuant to s156 – under an enactment. Further it is final operative and determinative of the right in question not withstanding its limited time frame – ABT v Bond. It is clearly of an administrative character. Therefore it is reviewable under s5 (3) by any person aggrieved (discussed pt 2/e GEMO).

The main ground of review is of improper purpose. Here the purpose of the power under s20 is ascertained form the nature of the purpose and subject matter of the Act Woolhara. The express purposes look to safe introduction. To achieve this s103 sets out a scheme of approval for the continued and large scale production of wheat. This indicates that the purp of 106 is only to provide short term approval (ie one period) for experimental production. That significantly hurdles attached to s3 support the restriction on 106 – Shop Dist Allied Employees.

Here the purpose for which 106 was exercised appears to be for more long term operations. This is supported by A)referral of the already trialled wheat B)its increased scale. C) its scale for profit to AWB. However M may argue that it needs to trial on a larger scale. However, if the reason for the increase has been shown ie why scale should affect the wheat growth, which is not clear, it appears 106 is being used to bypass 103 impermissibly. The fact that the minister is doing so with good intentions is irrelevant if the purpose of the power is misunderstood. –Woolhara.

Bias

Alternatively an applicant can charge apprehended bias against the minister based on the process as a whole involving the min assisting. There must be reasonable suspicion of bias by a fair minded observer based on these circumstances – Livesey v NSW

Here the fact that might lead to decision on other than the facts is the inappropriate association of the min assisting.

Delegation?

ii) GEMO

the grant of approval to GEMO may be challenged under the ADJR Act as the decision is of admin character and is made under an enactment (103) and is final operative and determinative – ABT v Bond.

It may be challenged by anyone with standing ie person aggrieved. This may be a person body who is representative of the interests protected by the Act – Right to Life provided they have more than a mere emotional, intellectual concern ACF v Cth.

This would require pre-eminence in their field as such a rep body and may be assisted by govt funding (ACF v Min Res), recognition or significant in put in the stat process. – US Tobacco

Or a specialised interest NCEL v Min

Alternatively it may include a competitor of GEMO where there is a significant effect on their interests such as a neighbouring wheat producer who may be affected – Batemans Bay. However this will generally be restricted – R v Comm of Cr Coke

Grounds

Impermissible Delegation

The most obvious ground is impermissible delegation. As the power is reposed in the DM it is presumed that it is to be exercised by them exclusively. There is no power to delegate. However a subordinate may exercise the power as agent where the stat allows for admin. Necessity. – carltona.

Here the indicia favour non-delegation first the discretionary nature of the power requiring min satisfaction. – Alvaro

Second the relatively low frequency of decisions made – O'Reily

But most importantly the centrality of the power to the Act – Peko Wallsend. The power is the ultimate decision to be made and purpose of the Act. Therefore it is implied it is only to be exercised by the minister. This has clearly not sucumed. In establishing this once a ground of review is available under s 5 or person entitled to enforce it may obtain reasons under s13 ADJR. This may help establish that the min has not considered the issue at all but has delegated instead.

Procedural Precondition

It may be argued that there has been a lack of a procedural precond. As there has arguably been no condition attached as required by s103 where the GMAC report is adverse. The requirement is arguable not a condition. The meaning of conditions would be ascertained from the relevant carsrds of 103. This would be a difficult ground to make.

An alternative is to claim that there is a failure of the subjective precondition that the min is satisfied of the 103 requirements. This will be difficult to establish as they need only be subjectively held by the min directly understanding their power. There is no evidence of misconstruction. The app may claim no evidence. The fact that there is a positive request of satisfaction on the min to reach the decision based on the evidence 5(3)(a) and there was no evidence he found as he did not ever consider the matter himself.

There is also a failure to consider Relevant considerations 5(2)(a). It appears the GEMO report has not been considered. This may be difficult to establish as the weight of the consids is generally unreviewable although as express consids they must be considered and given paramount importance. This would be determined from the reasons stated.

Finally there is an inflexible application of policy based on taking a UV policy into account. The policy refers to competition and free trade. These are clearly outside the scope of the Act. A DM cannot be required to apply policy which requires consideration of irrelevant considerations as it is UV – Drake.

iv) GREEN

Green may apply first on a ground of simple UV – s5(1)(a) his appointment is for 2 years and there is no evidence of a stat power to terminate this before then. Therefore the min lacks the power..?

If this power be implied from appt (unlikely as contrary to fixed term). He may also appeal on a ground of taking info ace on irrelevant consid (5)(2)(a). His commercial interest is not only relevant it is the direct reason for his appointment as a member in that capacity.

Further if there is any ground of impropriety Green has clearly been denied pf by refusing him a disclosure of the allegation and a chance to meet the case against him. Pf will presumptively apply – Kioa as the decision 13 of an admin character with direct and immediate effect on his interests as a member. While the content is flexible without stat displacement the requirement to know of a case (Annanunthido) and to be able to present an argument against that case is an irreducible requirement – Miah.