Daniel Stewart

Mastering Law Studies
and
Law Exam Techniques

Eighth Edition

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Preface

A few weeks into my law studies, I, along with two other students, Brian and Philip, was asked by Dale Lastman to join a study group he was trying to establish.

I was asked as a consequence of my in-class behaviour. I did not know anyone else in the class and I was not too embarrassed to ask the teachers the questions that everyone else hoped would be asked but were too self-conscious to ask themselves. I am not sure why Dale asked Brian, but it turned out to be a great choice. Brian had a brilliant sense of irreverent humour that made the hours of exam practice sessions pass quickly. And Dale asked Philip because Philip, it was clear to all of us, knew everything there was to know about law.

Any question any teacher asked, Philip had an answer. He had canvassed all the cases, studied the statutes, dissected the digests, and tackled all the texts. If there ever was a reason to feel intimidated in law school, Philip was it. After Philip's initial responses in classes, the rest of us were just about ready to pack it in. How could we mere mortals hope to pass courses when we were up against people the calibre of Philip?

But we did not quit. Instead, in addition to reviewing exams together, we agreed to share the task of review note-making, each person taking a subject. Our hope, of course, was that we would have access to at least one set of brilliant review notes from Philip.

It was when we first sat down to practise old exam questions that we realised Philip might not be infallible after all. Everyone else's review notes for a subject averaged 20 to 25 pages. Philip's were at least 100 pages. They were impressive: neatly typed and entirely comprehensive, giving the facts and holdings of every case we had studied. Inconsistencies and difficult to reconcile decisions were

ADMINISTRATIVE LAW

Daniel Stewart

Sample Question

The Australian Medical Association Ltd (the AMA) is the peak representative and advocacy body for all registered medical practitioners and medical students in Australia. The AMA's Directors are elected by its members. Its primary source of income is subscription fees from its members and it receives no direct government funding. The AMA provides various benefits to its members, publishes a journal on Medical Research, is represented on various Federal and State government bodies and committees, and publishes a Code of Ethics representing the views of its members on ethical principles guiding doctors in their professional conduct.

Under the *Health Insurance Act 1973* (Cth) (the Act) the Government subsidises — in whole or in part — various medical and other services provided by registered medical practitioners. To ensure that only those services which are medically warranted are provided, the Act also establishes the Professional Services Review Scheme. This Scheme is intended to protect patients, the community and the Government from "inappropriate practices". The Scheme is administered by a Professional Services Review Panel (Panel) which, sitting in Committees of three or more members, determines whether there have been inappropriate practices. A finding by the Panel that there has been inappropriate practice can lead to having to repay Commonwealth payments as well as other disciplinary action. "Inappropriate practice" is defined in the Act to be established where the Panel could reasonably conclude that the conduct would be unacceptable to the general body of general practitioners (s 82).

Section 84 of the Act provides:

(1) The Professional Services Review Panel is established.

(2) It consists of practitioners appointed by the Minister.

(3) Before appointing a medical practitioner to be a Panel member, the Minister must consult the AMA.

(4) Before appointing a practitioner other than a medical practitioner to be a Panel member, the Minister must consult such organisations and

associations, representing the interests of the profession to which the practitioner belongs, as the Minister thinks appropriate.

Carl has recently been appointed by the Minister as a Panel member. Carl had been chief advisor to the Minister before resigning a month prior to his appointment to begin working as a medical practitioner. While an advisor Carl had appeared openly hostile towards the AMA in various public forums. Carl had also drafted public statements by the Minister suggesting that the AMA's code of conduct protected the interests of doctors at the expense of their patients.

There had been no notice to or discussion with the AMA about Carl's appointment by the Minister, but on learning of Carl's possible appointment from a journalist, the current Chair of the AMA's Board of Directors made a public statement that the AMA could not support Carl's appointment given his lack of practical experience and lack of perceived independence from the Minister.

The Minister responded to the AMA's public announcement by releasing a press release stating that experience as a medical practitioner is not important in the appointment of Panel members, and that what is important is Carl's appreciation of the inadequacy of the AMA's Code of Ethics.

The AMA has learnt that various other organisations that included medical practitioners as members had been asked for their views and had endorsed Carl's appointment.

Advise the AMA on:

1. **Whether the AMA can force the Minister to provide reasons for Carl's appointment or provide any advice she has received from her department about Carl's appointment. 15%**
2. **Whether the AMA can successfully challenge Carl's appointment to the Panel. 30%**

Sigmund used to be on the Board of Directors of the AMA. He has been investigated by the Panel, which included Carl as a member, for alleged "inappropriate practices" relating to the use of a breakthrough method for the treatment of diabetes, including expensive DNA analysis and extensive blood tests. Sigmund has recently had promising results published in a respected peer-reviewed journal. He claims that he has fully complied with all his obligations as set out in the AMA's Code of Ethics, which he helped to draft. In its past decisions the Panel has routinely accepted practice which complies with the Code of Ethics as

being appropriate. Sigmund points to one of the clauses in the Code of Ethics which states:

> ...
>
> (y.) Protect the right of doctors to prescribe, and any patient to receive, any new treatment, the demonstrated safety and efficacy of which offer hope of saving life, re-establishing health or alleviating suffering. In all such cases, fully inform the patient about the treatment, including the new or unorthodox nature of the treatment, where applicable.

In finding that Sigmund had engaged in inappropriate practices, the Panel stated:

> On the basis that the treatment provided by Sigmund is expensive and is not a widely used form of treatment for diabetes, it has been concluded that the treatment is inappropriate. In reaching this conclusion, the Panel has decided to adopt a general policy that the AMA's Code of Ethics in its present form will not be considered in determining what is considered acceptable medical practice. Even if the AMA's Code of Ethics was applicable, however, we would conclude that the safety and efficacy of the treatment provided by [Sigmund] has not been demonstrated to our satisfaction.

Sigmund has also learnt that in light of the Panel's decision the AMA intends to amend its Code of Ethics.

Advise Sigmund on:

3. **Whether he can successfully challenge the decision of the panel, and on what basis? 40%**
4. **Could the AMA's decision to change its Code of Ethics be challenged in Judicial Review proceedings? 15%**

[Suggested time: 1 hour and 15 minutes plus 20 minutes reading time]

Administrative Law: Average Answer

Question 1

An obligation to provide reasons for a decision might be express or implied in the legislation providing for the decision (for example, *Palme*) or found in other legislation (for example, s 13 ADJR Act). Generally any person who can seek review under the ADJR Act can have reasons for the decision provided. They have to show that there

is a decision of administrative character made under an enactment. This requires that the decision be final and operative (*Bond*), not legislative or judicial in character (*Blewett*), and authorised by the enactment and affects rights and obligations (*Tang*). Here it seems as if the appointment is final, is administrative in nature and is clearly authorised by the Act and involves authorising the Panel to affect the legal interests of practitioners.

The AMA would also have to show that they have standing as a person aggrieved. Here the AMA represents the interests or medical practitioners subject to the Act, is involved in various government bodies and committees and hence would have standing (*Northcoast*).

Question 2

The AMA could bring an action for judicial review under the ADJR Act. The decision to appoint Carl is a final decision for which provision is made under the Act. It is administrative in character, is authorised under the Act and affects Carl's authority to act as a panel member. The AMA would also have standing as a person aggrieved. The AMA could also bring an action under the *Judiciary Act* for an injunction to prevent Carl from acting as a panel member.

There may be a failure to comply with procedures required by law to be observed in connection with the making of a decision. Here under s 84(3) of the Act the Minister was supposed to consult with the AMA. It is not clear whether there was any consultation as the AMA found out about the intended appointment and made their views known. Assuming that this was not sufficient consultation then a question would arise whether it was intended that a failure to comply with this statutory provision rendered the appointment invalid, unlawful or had no remediable effect (*Project Blue Sky*). This involves looking at the language of the statute, the nature of the interests affected, the nature of the condition, the role the condition plays in the Act as a whole, and the effect on third parties of the decision in question if invalidated. I think that on balance the intention is that a failure to consult the AMA means that the decision to appoint Carl is invalid.

The decision to appoint Carl is also possibly affected by bias. The test is whether a reasonable observer might consider the decision-maker might not bring an impartial mind to the decision *(Jia)*. Here the fact that Carl was an advisor to the Minister means that the Minister might be biased in favour of appointing Carl.

argument would be that there was a failure to comply with s 84(3) of the Act and that this should result in a remedy being awarded (see *Project Blue Sky*). Here the language of the statute suggests the need for consultation comes before the power to make the appointment, and the appointment of a panel member can have an important role in shaping the interests of the profession. However, the role of consultation is to reflect the views of the medical profession in the appointment, and here this has been achieved through the AMA's public statements. What constitutes consultation is not defined, and is procedural in nature that doesn't have any other role to play in the appointment process. If the appointment was invalidated then the validity of decisions of future panels would be placed in doubt, undermining the effectiveness of the scheme as a whole. It is therefore unlikely that the need for consultation would invalidate Carl's appointment.

However, it is not necessary to show invalidity for a remedy to issue under the ADJR Act. A declaration that there has been a failure to comply with s 84(3) might therefore be available. If Carl has not yet sat as part of the panel, then it might be possible to have a breach of s 84(3) remedied through an injunction preventing him from sitting as a panel member.

It could also be argued that in making the decision the Minister was obliged to consider the extent of any medical experience given the need to consult with the AMA. However, it could be argued that the Act envisages non-medical practitioners being appointed to the panel. The Minister's statement also suggests that she didn't consider the lack of medical experience to be important and hence went to the weight to be accorded to the consideration rather than a failure to consider it at all (see *Peko*). Carl's prior views about the effectiveness of the Code of Ethics arguably suggests the way he might approach his role on the panel in determining the views of the general body of practitioners and is therefore unlikely to be an irrelevant consideration. The fact that Carl used to work for the Minister doesn't mean that the Minister was biased in deciding on the appointment given there is no longer any continuing relationship and the Minister arguably was able to judge the attributes of Carl based on his previous employment.

Question 3

The ADJR Act would seem suitable as the basis of judicial review jurisdiction in the Federal Court.

(a) Widely used form of treatment

By refusing to accept the treatment as appropriate practice the Panel has arguably committed an error of law. The definition of inappropriate practice depends on the objective test of whether the panel could reasonably conclude that the practice would be unacceptable to the general body of practitioners. While the actual practice of practitioners would be relevant to this issue, it would not be reasonable to conclude that any innovative practice would be unacceptable once evidence of the benefits of the treatment were available. Therefore the Panel has committed an error of law.

(b) Policy of no longer considering the AMA Code of Ethics

The panel adopted a new policy of no longer considering the AMA's Code of Ethics. This doesn't prevent consideration of the individual merits of the decisions before the panel. It is possible that the Code of Ethics is a relevant consideration but there is little in the Act to suggest that the Panel was bound to take it into account as the views of the AMA are already reflected in the appointment process and other bodies also have medical practitioners as members who might not agree with the AMA's Code of Ethics. In any event, the Panel considered the operation of the Code of Ethics.

However, the adoption of a new policy is likely to be a credible, relevant and significant factor (*Kioa*) in the decision whether there has been appropriate practice. Therefore the failure to provide Sigmund with notice about the new policy is likely to be a breach of procedural fairness. This might apply even though the Panel went on to consider the operation of the Code given that the Panel's views on the preferred influence of the Code might have affected other aspects of the decision as well (*Veal*).

(c) Demonstrated safety and efficacy

The Panel concluded that the safety and efficacy of treatment had not been demonstrated despite the peer reviewed article. However, this is not sufficient to suggest that the Panel has failed to consider the material put before it but rather goes to whether they regarded it as sufficient. Given the Code of Ethics is not part of the legislative test it is unlikely that failing to accept a peer reviewed article is itself enough

to establish that there has been an error of law in the interpretation of the Act.

(d) Remedies

If it is found that there was an error of law or breach of procedural fairness the Court, under s 16 ADJR Act, could order that the decision of the panel be quashed and remitted back to the Panel for reconsideration.

Question 4

The AMA is not an Officer of the Commonwealth, and it is unlikely that the code of ethics will be considered authorised by a Commonwealth enactment so as to be made under such an Act (for the purposes of the ADJR Act or s 39B(1A)(c) of the *Judiciary Act* — see *Tang*). The AMA is a private body whose role is to put forward the views of its members. The only role of the code of ethics in the operation of the Act is as a possible factor in establishing the views of the general body of general practitioners. It therefore was not necessary to interpret the Act as establishing authority for the AMA to develop the code of ethics (*Neat*). The code of ethics is also not likely to be administrative in character.

The only other way to bring judicial review proceedings would be in the States relying on the *Datafin* principle, but here the indirect effect of the AMA's code of ethics in the legislation and the lack of any reference to the government stepping in to take over the role of the AMA would suggest that the AMA is unlikely to be seen as providing a public function subject to judicial review even if *Datafin* is accepted.

Administrative Law: Examiner's Comments

The question above involves only some of the many issues that may arise in administrative law problems. As the answers indicate, however, there were still a large number of potential issues and students had to carefully plan their answers to ensure that the most important issues were discussed during the time allowed. The *above average* answer is perhaps more detailed and considered than might generally be required in an examination setting but is included to illustrate the type of arguments needed in a good administrative law exam answer. The most important element in an administrative law exam is to

focus on the way the facts of the problem can be used to justify the establishment of a ground of review or other basis for administrative error and its rectification.

As with most law exams a student would not generally be marked down for the conclusion they reach on contentious issues reasonably presented by the problem. The difference between the *average* and *above average* answers is generally whether the student reached their conclusion through incorporating the factual elements of the question in their reasoning and recognised the links between many elements in the answer.

In general many administrative law students concentrate their answers on describing the administrative law avenues which, they hope, might successfully be employed rather than on the application of those avenues to the legislative provisions set out in the question and the factual circumstances presented. Shooting a scatter-gun is not a good strategy. For example, setting out all the possible sources of federal judicial review jurisdiction when the ADJR Act applies is unnecessary and wastes time. Similarly, raising grounds of review which are very weak on the facts, or are dependent on a more clearly established ground of review, achieves little, leaves insufficient time to consider the important arguments, and may give the impression that some elements of the grounds being argued were not clearly understood.

The *above average* answer will concentrate on application rather than description, and, recognising that there might be arguments both for and against any particular outcome, they will consider which side they consider the most likely legally justified outcome. While many students may identify many of the main issues, the *above average* answer is well organised and easy to follow, even if the examiner doesn't necessarily agree with the conclusions reached.

Question 1

The main issue here is whether you can get reasons under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). This requires establishing that the person seeking reasons can clear the threshold hurdles for judicial review under the ADJR Act, especially whether the AMA is a *person aggrieved* by the decision of the Minister. While many students may refer to the sort of factors considered in cases such as *Northcoast Environmental* the *above*

average answer also pointed to the explicit role provided for the AMA under the legislation in question which may be sufficient to give rise to standing, or at least to indicate that the interests of the AMA are within the zone of interests relevant to the statutory scheme (cf the *Right to Life Association* case).

Getting access to the advice received from the Minister's department would require an application under the *Freedom of Information Act 1982* (Cth). The very good answers might have recognised that any advice in documentary form would relate to the affairs of the agency (the department in this case) and therefore might be accessible under an FOI request. However, there might also be reverse FOI obligations and exceptions available that might justify withholding access.

Question 2

The main aspect of this question was to analyse the breach of s 84(3) of the Act. It seems relatively clear that whatever "consultation" might mean, the Minister's procedures fell short of it on these facts. Students should have used the approach in *Project Blue Sky* to consider the intended consequences of breach of the obligation to consult on the appointment. The various factors, such as the language used, whether procedural in nature, and the impact on panel decisions could be used in argument here. Note that mentioning the fact that other organisations were consulted on the views of Carl had to be related back to the breach of the legislation. Very good answers would also recognise that in the context of the ADJR Act the remedial consequences of a breach are not directly premised on the distinction between jurisdictional error and non-jurisdictional error.

It could also have been argued that there has been a reviewable error in: (a) not requiring extensive medical practice experience (as a failure to consider a relevant consideration); (b) placing so much emphasis on the inadequacy of the Code of Ethics (improper purpose or irrelevant consideration), or (c) perhaps even in appointing a staff member (bias). However there was limited material in the question to support these grounds. Note that s 84(3) doesn't merely lead to a failure to consider the views of the AMA as a relevant consideration. The obligation to consult also arose directly under the legislation and not through an obligation of natural justice requiring the participation of the AMA.

Question 3

Again students would be expected here to identify the appropriate forum and jurisdictional basis to challenge the decision — the ADJR Act is clearly available and would seem suitable. No standing issues arise. The main issue involves identifying and analysing the possible breach of a ground of review. While it was possible to respond to this question by reference to the grounds of review in issue, the issues are perhaps more clearly presented by concentrating on the factual circumstances, and in particular the reasons given by the panel.

(a) Widely used form of treatment

The Panel has arguably misinterpreted the meaning of "inappropriate practice" as defined in the Act and made an error of law. There is no need to show the error is jurisdictional as error of law is sufficient for the purposes of review under the ADJR Act.

The definition of inappropriate practice is defined as where the panel "could reasonably conclude", and hence there would need to be an argument made as to why this should be interpreted as a state of mind provision before questions of rationality could come into it. Whether the panel could have reasonably concluded as it did might be considered a jurisdictional fact but whether there was a jurisdictional error here is not established on the facts.

(b) Policy

The Panel adopted a new policy in relation to the way it treats the AMA Code of Ethics. It could be argued that not considering the Code is a failure to consider a relevant consideration, but students using this argument would have to establish why the Panel was bound to take it into account rather than merely permitted to do so. This is not a straightforward argument; it might seem odd that a Code released by a peak organisation could be completely ignored, but the facts also suggest that there are other bodies whose members include medical practitioners. There would also be a question about whether this ground of review could be made out given the error did not materially affect the decision (ie, the Code was applied by the Panel as an alternative argument).

Adoption of a policy without regard to the merits of the individual case is also hard to establish here given there might be good reasons why a policy could be adopted (they had arguably lawfully adopted

the policy of accepting the Code of Ethics in the past) and that it didn't preclude consideration of the merits of this particular case (the new policy suggests that compliance with the principles as set out in the Code of Ethics will not in itself be enough to justify the practice but that wouldn't preclude a finding that the practice was appropriate in this particular case). In any event, the Panel did consider the applicability of the Code as an alternative.

The stronger argument is that there has been a breach of natural justice in adopting a new policy without informing Sigmund about it and giving him a chance to respond. Students would be expected to recognise that legitimate expectations are not needed to establish procedural fairness obligations but any new criteria adopted by the decision-makers would have to be provided. The new policy would be considered a relevant, significant and credible adverse factor, or a matter critical for the making of the decision, that should have been disclosed. A good answer could have considered the extent to which the new policy could have materially affected the outcome however given the Panel's finding in relation to the breach of the Code of Ethics.

(c) Demonstrated safety and efficacy

It was also expected that some students might have argued that there has been an error in the interpretation or application of the AMA's Code of Ethics. However, even if an acceptable error can be demonstrated, the role of the Code of Ethics in the decision before the Panel needs to be addressed. Thus, the Code of Ethics is not being applied in any absolute sense, but rather as merely a relevant indication as to the standard to be applied in considering the appropriateness of the practice in question. Hence, students would have to link the error in interpreting the Code to an error in applying the legislative standard.

Question 4

The main element here was to establish how the AMA, a non-government body, can be subject to judicial review. The main aspect here is how students apply the tests in cases such as *Neat* and *Tang*, and perhaps *Datafin* (assuming there was a suitable qualification as to that case's applicability at the Commonwealth level in Australia) given the limited impact of the Code in any decision of the Panel.

EVIDENCE LAW

Miiko Kumar

Sample Question

Ben has been charged with sexually assaulting Jill at a party on 10 June 2013. The evidence the prosecution seeks to adduce at the trial includes the following:

(1) Evidence from Jill about the facts relating to the alleged assault in a room in the house where the party was being held when Ben and Jill were alone together, and evidence also that Jill said to her friend Claudia two months after the alleged assault: "You know I was raped at that party by Ben". Claudia immediately took Jill to the police station to report the sexual assault. It will be suggested to Jill during cross-examination that she falsely accused Ben of sexual assault.

(2) A report from Dr Brook. Dr Brook medically examined Jill after the alleged sexual assault (on the day that Jill reported the alleged offence to the police). The report contains Jill's account of the events in question. The report opines that the findings on physical examination are consistent with Jill's allegations of sexual assault.

(3) Evidence from David, a friend of Ben, that David had seen Ben coming out of a room in the house where the party was being held soon after the alleged sexual assault and that Ben was doing up the buttons on his shirt and looked flushed and was breathing heavily, and that Ben had said to David: "She didn't want to do it but I thought I'd do it anyway". When called for the prosecution David will say that he had no recollection of seeing Ben at the party. The prosecution has in its possession a statement by David to Detective Evans of the evidence David was expected to give.

(4) Evidence from Detective Bill that, during an interview with Ben, Ben had at first denied he was at the party on the night in question, and then had admitted that he was at the party and had consensual sexual intercourse with Jill. The interview was not tape recorded because Ben did not want it to be. Ben had consumed half a bottle of whisky before the interview. Detective Bill had told Ben at the