

Table of Contents

**LECTURE 9: DELEGATED LEGISLATION ..... 8**

WHAT IS DELEGATED LEGISLATION? .....8

*Can be found in...* .....8

**SECTION 5 –LEGISLATIVE INSTRUMENTS ACT 2003 (CTH)** .....8

MEANING OF ‘LEGISLATIVE CHARACTER’ .....8

WHY DOES DELEGATED LEGISLATION EXIST? .....8

CONSTITUTION → PARENT LEGISLATION → DELEGATED LEGISLATION → DECISION .....9

CONSTITUTION + PARENT ACT .....9

IMPLEMENTATION .....9

*Public consultation...* .....10

*Publication* .....10

*Parliamentary review* .....10

*Sun-set Clauses* .....10

*Del leg must be within Scope of parent act* .....10

*Decisions* .....12

*What to do if unhappy with a decision made under delegated legislation.* .....12

**LECTURE 10: JUDICIAL REVIEW- AN INTRODUCTION ..... ERROR! BOOKMARK NOT DEFINED.**

*Previously...* ..... *Error! Bookmark not defined.*

*Today’s class...* ..... *Error! Bookmark not defined.*

RECALL..... **ERROR! BOOKMARK NOT DEFINED.**

*Separation of Powers*..... *Error! Bookmark not defined.*

THE EXECUTIVE ..... **ERROR! BOOKMARK NOT DEFINED.**

*Who is the Executive?*..... *Error! Bookmark not defined.*

*The Executive includes:*..... *Error! Bookmark not defined.*

*How are decisions of the Executive regulated?* ..... *Error! Bookmark not defined.*

SCOPE OF ADMINISTRATIVE LAW ..... **ERROR! BOOKMARK NOT DEFINED.**

*What is Administrative Law?*..... *Error! Bookmark not defined.*

*Authority? Accountability? Both?* ..... *Error! Bookmark not defined.*

*Purpose of Administrative Law?* ..... *Error! Bookmark not defined.*

*Scope* ..... *Error! Bookmark not defined.*

*Two main types of review* ..... *Error! Bookmark not defined.*

MAPPING REVIEW MECHANISMS ..... **ERROR! BOOKMARK NOT DEFINED.**

*Recall: Historical Reforms* ..... *Error! Bookmark not defined.*

*Mechanisms for administrative law review* ..... *Error! Bookmark not defined.*

JUDICIAL REVIEW: AN INTRODUCTION ..... **ERROR! BOOKMARK NOT DEFINED.**

*Introducing JR* ..... *Error! Bookmark not defined.*

*What is Judicial Review?*..... *Error! Bookmark not defined.*

*Stages of Judicial Review* ..... *Error! Bookmark not defined.*

*Judicial review: threshold issues* ..... *Error! Bookmark not defined.*

JURISDICTION..... **ERROR! BOOKMARK NOT DEFINED.**

*Jurisdiction: What is it?*..... *Error! Bookmark not defined.*

*Jurisdiction & Judicial Review* ..... *Error! Bookmark not defined.*

1. JURISDICTION (HIGH COURT): COMMONWEALTH CONSTITUTION..... **ERROR! BOOKMARK NOT DEFINED.**

*Constitution: Section 75*..... *Error! Bookmark not defined.*

*Section 75(v) CC* ..... *Error! Bookmark not defined.*

*Summary: Key elements s75(v) CC*..... *Error! Bookmark not defined.*

2. JURISDICTION (FEDERAL COURT)- JUDICIARY ACT, ADJR ACT..... **ERROR! BOOKMARK NOT DEFINED.**

*Federal Court* ..... *Error! Bookmark not defined.*

CONSTITUTIONAL JUDICIAL REVIEW? MODERN TREND..... **ERROR! BOOKMARK NOT DEFINED.**

*‘Constitutional’ Judicial Review* ..... *Error! Bookmark not defined.*

JURISDICTION (NSW)..... **ERROR! BOOKMARK NOT DEFINED.**

<i>Jurisdiction – State Courts</i> .....	<i>Error! Bookmark not defined.</i>
<b>LECTURE 11: JUDICIAL REVIEW: JURISDICTION (ADJR) &amp; STANDING</b> .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
RECALL: JUDICIAL REVIEW PROCESS .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
RECALL: COURTS & JURISDICTION .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
ADJR ACT JURISDICTION .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Mechanisms for administrative law review</i> .....	<i>Error! Bookmark not defined.</i>
<i>Section 8 Administrative Decisions (Judicial Review) Act 1977 ('ADJR')</i> .....	<i>Error! Bookmark not defined.</i>
<i>Section 5 ADJR: 'Decisions'</i> .....	<i>Error! Bookmark not defined.</i>
<i>Section 6 ADJR: 'Conduct'</i> .....	<i>Error! Bookmark not defined.</i>
<i>Section 7 ADJR: 'Failure to make a decision'</i> .....	<i>Error! Bookmark not defined.</i>
<i>Section 3 ADJR 'A decision...'</i> .....	<i>Error! Bookmark not defined.</i>
<i>S3(1): ADJR test for jurisdiction</i> .....	<i>Error! Bookmark not defined.</i>
1. WHAT IS A 'DECISION'? .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>'decision' v's 'conduct'?</i> .....	<i>Error! Bookmark not defined.</i>
2. 'ADMINISTRATIVE CHARACTER'? .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
3. 'UNDER AN ENACTMENT'? .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
SUMMARY: ADJR JURISDICTION .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
CONCLUDING JURISDICTION .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Recall: Courts &amp; Jurisdiction</i> .....	<i>Error! Bookmark not defined.</i>
<i>ADJR &amp; CL Jurisdiction?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Reminder: Privatisation issue</i> .....	<i>Error! Bookmark not defined.</i>
IMPEDIMENTS TO JURISDICTION? .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Threshold Issues</i> .....	<i>Error! Bookmark not defined.</i>
<i>Merits/Legality: SOP</i> .....	<i>Error! Bookmark not defined.</i>
<i>Justiciability</i> .....	<i>Error! Bookmark not defined.</i>
STANDING .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Standing: Function &amp; Purpose?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Standing: ADJR v's CL?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Standing (CL): Summary</i> .....	<i>Error! Bookmark not defined.</i>
<i>ACF &amp; public interest groups?</i> .....	<i>Error! Bookmark not defined.</i>
<i>After ACF – implications?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Standing under ADJR: s 3(4)</i> .....	<i>Error! Bookmark not defined.</i>
<b>LECTURE 12: JUDICIAL REVIEW: COMMON LAW JURISDICTION</b> .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
JUDICIAL REVIEW: AN OVERVIEW .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Recall: What is Judicial Review?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Stages of Judicial Review</i> .....	<i>Error! Bookmark not defined.</i>
<i>Judicial review: threshold issues</i> .....	<i>Error! Bookmark not defined.</i>
JURISDICTION .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
RECALL: JURISDICTION: WHAT IS IT? .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
COMMON LAW JURISDICTION .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Common law?</i> .....	<i>Error! Bookmark not defined.</i>
1. JURISDICTION (HIGH COURT): COMMONWEALTH CONSTITUTION .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Mechanisms for administrative law review</i> .....	<i>Error! Bookmark not defined.</i>
<i>Constitution: Section 75</i> .....	<i>Error! Bookmark not defined.</i>
<i>Section 75(v) CC</i> .....	<i>Error! Bookmark not defined.</i>
<i>3 key elements to s75(v)CC</i> .....	<i>Error! Bookmark not defined.</i>
<i>Summary: Key elements s75(v) CC</i> .....	<i>Error! Bookmark not defined.</i>
CONSTITUTIONAL JUDICIAL REVIEW? MODERN TREND .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>'Constitutional' Judicial Review</i> .....	<i>Error! Bookmark not defined.</i>
2. JURISDICTION (FEDERAL COURT) .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<i>Judiciary Act, ADJR Act</i> .....	<i>Error! Bookmark not defined.</i>
<i>Mechanisms for administrative law review</i> .....	<i>Error! Bookmark not defined.</i>
<i>Federal Court</i> .....	<i>Error! Bookmark not defined.</i>
<i>S39B Judiciary Act 1903 (Cth)</i> .....	<i>Error! Bookmark not defined.</i>

## Administrative Law - 2016

s39B Judiciary Act 1903 (Cth)	Error! Bookmark not defined.
s39B(1A)(c) Judiciary Act	Error! Bookmark not defined.
3. CL JURISDICTION (NSW)	ERROR! BOOKMARK NOT DEFINED.
Mechanisms for administrative law review	Error! Bookmark not defined.
Jurisdiction – State Courts	Error! Bookmark not defined.
Section 23 SCA 1970 (NSW)	Error! Bookmark not defined.
Section 69 SCA 1970 (NSW)	Error! Bookmark not defined.
CL JURISDICTION: SUMMARY	ERROR! BOOKMARK NOT DEFINED.
Common law?	Error! Bookmark not defined.
ADJR ACT JURISDICTION	ERROR! BOOKMARK NOT DEFINED.
Mechanisms for administrative law review	Error! Bookmark not defined.
Administrative Decisions Judicial Review Act (Cth) (1977) ('ADJR')	Error! Bookmark not defined.
Section 8 Administrative Decisions (Judicial Review) Act 1977 ('ADJR')	Error! Bookmark not defined.
Section 5 ADJR: 'Decisions'	Error! Bookmark not defined.
Section 6 ADJR: 'Conduct'	Error! Bookmark not defined.
Section 7 ADJR: 'Failure to make a decision'	Error! Bookmark not defined.
ADJR Act Jurisdiction?	Error! Bookmark not defined.
Section 3 ADJR 'A decision...'	Error! Bookmark not defined.
1. 'decision' v's 'conduct'?	Error! Bookmark not defined.
Summary: ADJR jurisdiction	Error! Bookmark not defined.
CONCLUDING JURISDICTION	ERROR! BOOKMARK NOT DEFINED.
Recall: Courts & Jurisdiction	Error! Bookmark not defined.
ADJR & CL Jurisdiction?	Error! Bookmark not defined.
<b>LECTURE 13- REMEDIES</b>	ERROR! BOOKMARK NOT DEFINED.
STANDING:	ERROR! BOOKMARK NOT DEFINED.
ACF v Cth:	Error! Bookmark not defined.
Standing under ADJR	Error! Bookmark not defined.
COMPLICATING FACTOR?	ERROR! BOOKMARK NOT DEFINED.
Jurisdictional error v's non-jurisdictional error	Error! Bookmark not defined.
Getting our bearings	Error! Bookmark not defined.
RECALL: JUDICIAL REVIEW PROCESS	ERROR! BOOKMARK NOT DEFINED.
CONSEQUENCES OF A BREACH?	ERROR! BOOKMARK NOT DEFINED.
Different possible outcomes	Error! Bookmark not defined.
Project Blue Sky (1998) 194 CLR 355	Error! Bookmark not defined.
Minister for Immigration v Bhardwaj (2002) 209 CLR 597	Error! Bookmark not defined.
REMEDIES	ERROR! BOOKMARK NOT DEFINED.
Questions to consider	Error! Bookmark not defined.
Our task	Error! Bookmark not defined.
What is a public law remedy?	Error! Bookmark not defined.
What are the remedies?	Error! Bookmark not defined.
Different jurisdictional avenues	Error! Bookmark not defined.
1. PREROGATIVE WRITS (CL) COMMON LAW	ERROR! BOOKMARK NOT DEFINED.
In the beginning? Prerogative Writs	Error! Bookmark not defined.
The Remedies: Certiorari ('C')	Error! Bookmark not defined.
The Remedies: Prohibition ('P')	Error! Bookmark not defined.
The Remedies: Mandamus ('M')	Error! Bookmark not defined.
The Remedies: Habeus Corpus ('H')	Error! Bookmark not defined.
The Remedies: Injunctions ('I')	Error! Bookmark not defined.
The Remedies: Declarations ('D')	Error! Bookmark not defined.
Issue: Standing & Remedies	Error! Bookmark not defined.
Issue: Damages?	Error! Bookmark not defined.
2. CONSTITUTIONAL REMEDIES COMMON LAW	ERROR! BOOKMARK NOT DEFINED.
Recall: Constitution, section 75	Error! Bookmark not defined.
Constitutional Remedial Model	Error! Bookmark not defined.

## Administrative Law - 2016

<i>Something's missing</i> .....	<i>Error! Bookmark not defined.</i>
<i>S75 &amp; JE</i> .....	<i>Error! Bookmark not defined.</i>
' <i>Constitutional writs</i> ' .....	<i>Error! Bookmark not defined.</i>
3. ADJR REMEDIES ADJR, SECTION 16 .....	ERROR! BOOKMARK NOT DEFINED.
ADJR remedies (s16) .....	<i>Error! Bookmark not defined.</i>
ADJRA remedies (s16) .....	<i>Error! Bookmark not defined.</i>
Summary of Remedies .....	<i>Error! Bookmark not defined.</i>
Discretion? .....	<i>Error! Bookmark not defined.</i>
Example? .....	<i>Error! Bookmark not defined.</i>
<b>LECTURE 14: ERRORS OF LAW</b> .....	ERROR! BOOKMARK NOT DEFINED.
RECALL: JUDICIAL REVIEW PROCESS.....	ERROR! BOOKMARK NOT DEFINED.
GROUNDS OF JUDICIAL REVIEW .....	ERROR! BOOKMARK NOT DEFINED.
Reminder: Section 5(1) ADJR.....	<i>Error! Bookmark not defined.</i>
Categorising grounds of review .....	<i>Error! Bookmark not defined.</i>
Over-arching concepts .....	<i>Error! Bookmark not defined.</i>
KEY DISTINCTIONS- A BRIEF REVISIT.....	ERROR! BOOKMARK NOT DEFINED.
Some important distinctions.....	<i>Error! Bookmark not defined.</i>
Law/fact distinction .....	<i>Error! Bookmark not defined.</i>
Law/fact Distinction.....	<i>Error! Bookmark not defined.</i>
GENERAL PRINCIPLES- A BRIEF REVISIT .....	ERROR! BOOKMARK NOT DEFINED.
RECALL .....	ERROR! BOOKMARK NOT DEFINED.
Principle of legality .....	<i>Error! Bookmark not defined.</i>
ERROR OF LAW? .....	ERROR! BOOKMARK NOT DEFINED.
Error of law: Common law .....	<i>Error! Bookmark not defined.</i>
Error of law (CL) .....	<i>Error! Bookmark not defined.</i>
Error of law (CL) - NSW .....	<i>Error! Bookmark not defined.</i>
Error of law (ADJR).....	<i>Error! Bookmark not defined.</i>
Summary: Error of law? .....	<i>Error! Bookmark not defined.</i>
JURISDICTIONAL FACT- A PARTICULAR TYPE OF JURISDICTIONAL ERROR .....	ERROR! BOOKMARK NOT DEFINED.
Jurisdictional fact.....	<i>Error! Bookmark not defined.</i>
JURISDICTIONAL ERROR .....	ERROR! BOOKMARK NOT DEFINED.
JE: multiple meanings .....	<i>Error! Bookmark not defined.</i>
Jurisdictional error: what is it?.....	<i>Error! Bookmark not defined.</i>
What is jurisdictional error? ('JE').....	<i>Error! Bookmark not defined.</i>
JE: historical operation .....	<i>Error! Bookmark not defined.</i>
England: Anisminic 'broadening' of JE .....	<i>Error! Bookmark not defined.</i>
In Australia: Craig v SA (1995) .....	<i>Error! Bookmark not defined.</i>
Craig: JE & Certiorari.....	<i>Error! Bookmark not defined.</i>
JE: Different with different DM.....	<i>Error! Bookmark not defined.</i>
JE and s75(v) .....	<i>Error! Bookmark not defined.</i>
Recall: JE summary .....	<i>Error! Bookmark not defined.</i>
BRINGING IT ALL TOGETHER.....	ERROR! BOOKMARK NOT DEFINED.
ADJR: JE, non-JE & errors of law? .....	<i>Error! Bookmark not defined.</i>
<b>LECTURE 15 – GROUNDS OF REVIEW: PROCEDURAL FAIRNESS</b> .....	ERROR! BOOKMARK NOT DEFINED.
GROUNDS OF JUDICIAL REVIEW .....	ERROR! BOOKMARK NOT DEFINED.
Grounds of Review: an introduction .....	<i>Error! Bookmark not defined.</i>
Categorising grounds of review.....	<i>Error! Bookmark not defined.</i>
PROCEDURAL FAIRNESS: A 'PROCEDURAL' GROUND OF JUDICIAL REVIEW.....	ERROR! BOOKMARK NOT DEFINED.
Procedural fairness: Overview .....	<i>Error! Bookmark not defined.</i>
Background: Natural Justice .....	<i>Error! Bookmark not defined.</i>
Natural Justice.....	<i>Error! Bookmark not defined.</i>
...and procedural fairness .....	<i>Error! Bookmark not defined.</i>
Procedural Fairness & ADJR.....	<i>Error! Bookmark not defined.</i>
1. DOES PF APPLY? THRESHOLD QUESTION OF PROCEDURAL FAIRNESS .....	ERROR! BOOKMARK NOT DEFINED.

## Administrative Law - 2016

Procedural Fairness – Hearing Rule .....	Error! Bookmark not defined.
LE before <i>Kioa v West</i> .....	Error! Bookmark not defined.
<i>Kioa v West</i> (1985) 159 CLR 550 .....	Error! Bookmark not defined.
LE: <i>Kioa</i> & beyond .....	Error! Bookmark not defined.
2. HAS PF BEEN EXCLUDED? EXCLUSION QUESTION OF PROCEDURAL FAIRNESS.....	ERROR! BOOKMARK NOT DEFINED.
Exclusions of procedural fairness: Construction of the statute .....	Error! Bookmark not defined.
Summary: Hearing rule so far .....	Error! Bookmark not defined.
<i>Kioa v West</i> : Recap .....	Error! Bookmark not defined.

## LECTURE 16- PROCEDURAL FAIRNESS CONTINUED: HEARING RULE (CONTENT) & BIAS RULE .....ERROR! BOOKMARK NOT DEFINED.

RECALL: JUDICIAL REVIEW PROCESS.....	ERROR! BOOKMARK NOT DEFINED.
<i>Kioa v West</i> : Recap .....	Error! Bookmark not defined.
3. CONTENT OF PF (HEARING RULE).....	ERROR! BOOKMARK NOT DEFINED.
Duty and content of Hearing Rule?.....	Error! Bookmark not defined.
Duty and Content (generally).....	Error! Bookmark not defined.
Core content element .....	Error! Bookmark not defined.
LE shift: From threshold to content.....	Error! Bookmark not defined.
Content - summary of cases .....	Error! Bookmark not defined.
Outcome? .....	Error! Bookmark not defined.
RULE AGAINST BIAS: GROUND OF PROCEDURAL FAIRNESS CONTINUES.....	ERROR! BOOKMARK NOT DEFINED.
PF Grounds (cont): The Bias Rule .....	Error! Bookmark not defined.
1. Actual Bias? .....	Error! Bookmark not defined.
2. Apprehended bias .....	Error! Bookmark not defined.
Circumstances of bias ....?.....	Error! Bookmark not defined.
Issue - Different decision-makers.....	Error! Bookmark not defined.
Some further issues.....	Error! Bookmark not defined.
Exceptions to the Bias Rule .....	Error! Bookmark not defined.
Consequences? .....	Error! Bookmark not defined.
Concluding Procedural Fairness.....	Error! Bookmark not defined.

## LECTURE 17- GROUNDS OF JUDICIAL REVIEW: CONSIDERATION & PURPOSE ..... ERROR! BOOKMARK NOT DEFINED.

RECALL: JUDICIAL REVIEW PROCESS.....	ERROR! BOOKMARK NOT DEFINED.
S 5(1) ADJR – Grounds listed [see s6(1) and 7(1) also].....	Error! Bookmark not defined.
Errors of law & JE: CL plus, see ss5(1)(c),(d) & (f) ADJR .....	Error! Bookmark not defined.
GROUND OF JUDICIAL REVIEW .....	ERROR! BOOKMARK NOT DEFINED.
Grounds of Review: a reminder .....	Error! Bookmark not defined.
Categorising grounds of review.....	Error! Bookmark not defined.
Grounds: Classification? .....	Error! Bookmark not defined.
Reasoning grounds .....	Error! Bookmark not defined.
CONSIDERATION GROUNDS.....	ERROR! BOOKMARK NOT DEFINED.
(IF HELPFUL, CLASSIFIED AS A ‘REASONING’ GROUND OR ‘REASONING PROCESS’ GROUND).....	ERROR! BOOKMARK NOT DEFINED.
Relevancy or ‘considerations’ grounds .....	Error! Bookmark not defined.
Section 5(1)(e) & Section 5(2) .....	Error! Bookmark not defined.
S 5(1)(e) ADJR .....	Error! Bookmark not defined.
Section 5(2) ADJR.....	Error! Bookmark not defined.
Ss 5(1)(e) & 5(2)(a) & (b) ADJR.....	Error! Bookmark not defined.
Consideration grounds: CL & ADJR .....	Error! Bookmark not defined.
Ask 3 questions... ..	Error! Bookmark not defined.
Relevant considerations? (s 5(1)(e), s5(2)(b)) .....	Error! Bookmark not defined.
Irrelevant considerations? (s 5(2)(a)).....	Error! Bookmark not defined.
Consideration Grounds .....	Error! Bookmark not defined.
UNAUTHORISED OR ‘IMPROPER’ PURPOSE .....	ERROR! BOOKMARK NOT DEFINED.
(IF HELPFUL, CLASSIFIED AS A ‘REASONING PROCESS’ GROUND).....	ERROR! BOOKMARK NOT DEFINED.
Acting for an Unauthorised Purpose.....	Error! Bookmark not defined.
Two steps.....	Error! Bookmark not defined.

## Administrative Law - 2016

Multiple purposes? .....	<i>Error! Bookmark not defined.</i>
BAD FAITH .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
(IF HELPFUL, CLASSIFIED AS A 'REASONING' GROUND) .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
FRAUD (IF HELPFUL, CLASSIFIED AS A 'REASONING' GROUND) .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
<b>LECTURE 18- GROUNDS OF DELEGATION, DICTATION AND POLICY .....</b>	<b><i>ERROR! BOOKMARK NOT DEFINED.</i></b>
IDENTITY OF DECISION-MAKER GROUNDS: DELEGATION, DICTATION, POLICY .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Reminder: Classification of Grounds.....	<i>Error! Bookmark not defined.</i>
Reminder: S 5(1) ADJR [s6(1) too].....	<i>Error! Bookmark not defined.</i>
Reminder: S5(2) ADJR [s6(2) too].....	<i>Error! Bookmark not defined.</i>
PROCEDURAL ERROR (A 'PROCEDURAL' GROUND).....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Procedural Error.....	<i>Error! Bookmark not defined.</i>
Procedural Error: How determine?.....	<i>Error! Bookmark not defined.</i>
Procedural Error: Leading cases .....	<i>Error! Bookmark not defined.</i>
UNAUTHORISED DELEGATION (A 'REASONING PROCESS' GROUND).....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
The rule against delegation .....	<i>Error! Bookmark not defined.</i>
Exception? .....	<i>Error! Bookmark not defined.</i>
Exception? Carltona Principle .....	<i>Error! Bookmark not defined.</i>
Exception? .....	<i>Error! Bookmark not defined.</i>
ACTIONING UNDER DICTATION (A 'REASONING PROCESS' GROUND).....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Acting under dictation .....	<i>Error! Bookmark not defined.</i>
Acting under dictation: Factors?.....	<i>Error! Bookmark not defined.</i>
Acting under dictation: examples .....	<i>Error! Bookmark not defined.</i>
INFLEXIBLE POLICIES (A 'REASONING PROCESS' GROUND).....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Policy?.....	<i>Error! Bookmark not defined.</i>
Inflexible Policies: Rules .....	<i>Error! Bookmark not defined.</i>
Inflexible Policies: Factors.....	<i>Error! Bookmark not defined.</i>
Illegally fettering discretion .....	<i>Error! Bookmark not defined.</i>
Policy under other grounds.....	<i>Error! Bookmark not defined.</i>
<b>LECTURE 19- RESTRICTING JUDICIAL REVIEW: PRIVATIVE CLAUSES .....</b>	<b><i>ERROR! BOOKMARK NOT DEFINED.</i></b>
FINAL GROUNDS .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Reminder: S 5(1) ADJR [s6(1) too].....	<i>Error! Bookmark not defined.</i>
For completeness: S 5(3) ADJR.....	<i>Error! Bookmark not defined.</i>
NO EVIDENCE RULE- A 'PROCEDURAL' GROUND .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
No evidence rule (CL) .....	<i>Error! Bookmark not defined.</i>
Section 5 ADJR: No evidence rule.....	<i>Error! Bookmark not defined.</i>
No evidence rule (ADJR).....	<i>Error! Bookmark not defined.</i>
Interaction of sections? .....	<i>Error! Bookmark not defined.</i>
UNCERTAINTY- (A 'DECISIONAL' GROUND).....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Uncertainty: test.....	<i>Error! Bookmark not defined.</i>
Uncertainty: example .....	<i>Error! Bookmark not defined.</i>
UNREASONABLENESS- (A 'DECISIONAL' GROUND) .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Wednesbury Unreasonableness .....	<i>Error! Bookmark not defined.</i>
Some difficulties.....	<i>Error! Bookmark not defined.</i>
IRRATIONALITY? - (A 'DECISIONAL' GROUND) .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Irrationality and Serious Illogicality? .....	<i>Error! Bookmark not defined.</i>
S20 .....	<i>Error! Bookmark not defined.</i>
S20 (cont): A new ground?.....	<i>Error! Bookmark not defined.</i>
MIAC v SZMDS (2010).....	<i>Error! Bookmark not defined.</i>
ABUSE OF POWER- (A 'DECISIONAL' GROUND).....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Abuse of power .....	<i>Error! Bookmark not defined.</i>
ENDING GROUNDS OF JR .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Multiple Grounds? Final thoughts .....	<i>Error! Bookmark not defined.</i>
RESTRICTING JUDICIAL REVIEW? LIMITS TO JUDICIAL REVIEW .....	<i>ERROR! BOOKMARK NOT DEFINED.</i>
Restricting Judicial Review.....	<i>Error! Bookmark not defined.</i>

## Administrative Law - 2016

PRIVATIVE CLAUSES- LIMITS TO JUDICIAL REVIEW.....	ERROR! BOOKMARK NOT DEFINED.
<i>What is a privative clause?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Reasons for Caution around PC?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Rationales for Privative Clauses?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Different forms</i> .....	<i>Error! Bookmark not defined.</i>
<i>For example</i> .....	<i>Error! Bookmark not defined.</i>
<i>Judicial treatment of PC's?</i> .....	<i>Error! Bookmark not defined.</i>
CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW - SECTION 75(v) CC.....	ERROR! BOOKMARK NOT DEFINED.
<i>Recall: s75(v) Cth Constitution</i> .....	<i>Error! Bookmark not defined.</i>
<i>If PC, how interpret s75(v)CC?</i> .....	<i>Error! Bookmark not defined.</i>
<i>s75(v): Entrenched minimum</i> .....	<i>Error! Bookmark not defined.</i>
<i>State constitutional protection?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Harmonisation of State/Cth</i> .....	<i>Error! Bookmark not defined.</i>
HISTORICAL POSITION- WARNING: NO LONGER THE CURRENT STATE OF THE LAW .....	ERROR! BOOKMARK NOT DEFINED.
<i>Interpreting PC's: Historically</i> .....	<i>Error! Bookmark not defined.</i>
<i>R v Hickman (1945) 70 CLR 598</i> .....	<i>Error! Bookmark not defined.</i>
<i>The Hickman principle</i> .....	<i>Error! Bookmark not defined.</i>
CURRENT POSITION: FEDERAL- AS SET OUT IN PLAINTIFF S157 .....	ERROR! BOOKMARK NOT DEFINED.
<i>Remember s474? PC in S157</i> .....	<i>Error! Bookmark not defined.</i>
<i>Plaintiff S157/2002 v Cth (2003) 211 CLR 476</i> .....	<i>Error! Bookmark not defined.</i>
<i>Plaintiff S157: Conclusions</i> .....	<i>Error! Bookmark not defined.</i>
<i>After S157? Implications for PC?</i> .....	<i>Error! Bookmark not defined.</i>
JURISDICTIONAL ERROR (REVISITED)- SECTION 75(v) CC .....	ERROR! BOOKMARK NOT DEFINED.
<i>Jurisdictional error?</i> .....	<i>Error! Bookmark not defined.</i>
<i>JE: multiple meanings</i> .....	<i>Error! Bookmark not defined.</i>
<i>JE and s75(v)</i> .....	<i>Error! Bookmark not defined.</i>
<i>Jurisdictional Error summary</i> .....	<i>Error! Bookmark not defined.</i>
CURRENT POSITION: STATE- AS SET OUT IN KIRK .....	ERROR! BOOKMARK NOT DEFINED.
<i>PC in state legislation?</i> .....	<i>Error! Bookmark not defined.</i>
<i>Leading authority: Kirk</i> .....	<i>Error! Bookmark not defined.</i>
ALTERNATIVES TO PC? - OTHER LIMITS TO JR.....	ERROR! BOOKMARK NOT DEFINED.
<i>Other limits to JR</i> .....	<i>Error! Bookmark not defined.</i>
<i>Conclusion</i> .....	<i>Error! Bookmark not defined.</i>
REVISION LECTURE .....	ERROR! BOOKMARK NOT DEFINED.
STEPS: .....	ERROR! BOOKMARK NOT DEFINED.
1. <i>Jurisdiction</i> .....	<i>Error! Bookmark not defined.</i>
2. <i>Standing</i> .....	<i>Error! Bookmark not defined.</i>
4. <i>Remedies and Privative clauses → together</i> .....	<i>Error! Bookmark not defined.</i>
5. <i>Grounds</i> .....	<i>Error! Bookmark not defined.</i>
6. <i>Conclusion → make clear remedies</i> .....	<i>Error! Bookmark not defined.</i>

## Lecture 9: Delegated Legislation

### What is delegated legislation?

Laws made by the Executive (and sometimes Judicial) branch, after Parliament delegates to them their law-making powers.

Delegated legislation = Subordinate legislation = Legislative Instruments

- Regulation = made by Ministers
  - By-laws = made by Councils
  - Court Rules = made by courts
  - Ordinances = made by eg. Territories (old term)
  - Plans of Management = made by eg. fisheries
  - Basic rules for del leg
- Sometimes parliament delegates to court – “court we need you to create your court rules” – court rules are delegated legislations. These are more enforceable than policy

Can be found in...

Subordinate Legislation Act 1989 (NSW)

Legislative Instruments Act 2003 (Cth)

### Section 5 – Legislative Instruments Act 2003 (Cth)

s(1) ... a **legislative instrument** is an instrument in writing:

- (a) that is of a **legislative character**; and
- (b) that is or was made in the exercise of a power delegated by the Parliament.

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:

- (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
- (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right

### Meaning of ‘Legislative Character’

Full Federal Court in **Minister for Industry and Commerce v Tooheys**:

*‘the distinction [between delegated legislation and administrative decisions] is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases’*

- Active administration
- Can be a matter of administration can be lots of things
- **Applying a general rule to a specific matter.**

### Why does delegated legislation exist?

**Expediency** → (quick to make and change)

- Quick flexible and efficient
- When hand over to councils bi-law making powers, because State parliament doesn’t have time to make all small rules

**Specialist** → (can go into detail by the govt body that specialise in the area)

- Let’s give to the person who knows the most about this.
- Council – making parks
- Fisheries Act – Ministers for primary industries. → cant fish for endangered dish... minister will right the regulation in baby act.

**Is it an abomination of the separation of powers that they can delegate.**



## Administrative Law - 2016

*"[T]he history of delegated legislation ... reflects the **tension between the needs of those who govern and the just expectations of those who are governed**. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a **speedy and flexible mode of law-making**. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realisation by the imposition and enforcement of appropriate controls upon the power of subordinate legislators..."*

- **Stephen J, *Watson v Lee* (1970)**

- They delegate over that separation of power.

## CONSTITUTION → PARENT LEGISLATION → DELEGATED LEGISLATION → DECISION

- Should only pass legislation that is constitutional.
- This is the same for parent legislation
- Parent legislation- legislation that empowers someone in the executive branch to make delegated legislation
- Delegated legislation- because they are made from the parent act, it has all the power and force of the parent legislation. It all depends on how much power the parent legislation wants to give it.

**So, if I don't like a decision made under Del Leg, I can attack it several ways. Eg:**

- **The Parent Act is unconstitutional!**
- **The Del Leg is outside what's allowed by the Parent Act!**
- **The Decision itself is faulty!**

## Constitution + Parent Act

- You can try make an argument on this ground but its very hard.
- Parl can delegate HUGE areas of law-making power to Exec.
- So, it is hard to find a Parent Act unconstitutional.
- This made clear in ***Dignan (1931) HC***.
  - Sneaky del legislation can be
  - Can challenge separation of powers.

## ***Meakes v Dignan (1931) HC***

**FACTS:** Transport Workers Act 1928 gave GG (ie. Cabinet) broad powers to make any regs he wants on transport workers. Labor Govt couldn't get bill through that union wharfies must be prioritised over non-union ones, so used the reg-making powers to make this law. Was this circumvention of the Senate constitutional?

**HELD:** Yes it was fine and it was constitutional. As long as it fits within a constitutional "head of power", it can be delegated to Exec. HC suggested, however, that you can't delegate an ENTIRE head of power over to the Exec.

- Trade and commerce power
- Needs to be careful to define what power they are or are not giving to that executive body.
- After this case it means this kind of things can happen again and again.
- If you already pass laws that allow delegating leg power, then can circumvent
- Need to be careful with what power they are giving to that executive body

If want to challenge delegated legislation, there are 2 ways of doing it

1. It wasn't implemented properly
2. That the legislation is beyond the scope of the parent act, its not what the parent act was trying to say.

## Implementation

- Exec must abide by proper process for making Del Leg.
- This involves:
  - Public Consultation
  - Publication
  - Parliamentary Review

## Administrative Law - 2016

- Sunsetting clauses so they cant live forever.

### Public consultation

- For some types of Del Leg, Exec is obliged to consult with public: NSW Act, s5; Cth Act, s17.
- Generally, however, if this not done, it will not invalidate the final Del Leg.

### Publication

- → public needs to be able to see it and need to be aware a new law is created that everyone in the land must follow.
- Once Del Leg is made, it must be made available to the public.
- Use to have to be published in a "Gazette".
- Now it may be "announced to the public" by being placed online: Cth Act, ss20,29; NSW's Interpretation Act 1987, s23. → not enforceable if not put online
- If Cth Del Leg is not registered online it is unenforceable: ss31,32.
- Not clear what position of this is in NSW.

### Golden-Brown v Hunt (1979) ACTSC

**FACTS:** Del Leg (ordinance) quickly passed to allow police to forcibly remove protesters at the first Aboriginal Tent Embassy. Police moved in mere minutes after "notification" placed in Gazette.

**HELD:** The notice provided was not clear and did not give info on where one could find the actual Del Leg. However, this did not invalidate the Del Leg, for it was just a technicality. ACT Govt ended up passing retrospective laws to protect police to cover all their bases.

**NOTE:** This is a famous case, but modern legislative changes suggest this no longer good precedent.

### Parliamentary review

- **TABLING:** Del Leg must be laid before both Houses of Parl.
- **SCRUTINY:** Once tabled, Del Leg will be scrutinised to see if it is in line with Parent Act. Usually done in Upper House Committee.
- **DISALLOWANCE:** Upon scrutiny, MP may move that it is disallowed. If motion accepted, it is disallowed.
- If tabling etc not done, Del Leg is rendered ineffective: eg. Cth Act, s38.

### Sun-set Clauses

Delegated legislation is automatically repealed after **10 years** (in Cth: s5) or **5 years** (in NSW: s10) and then must be remade: Cth Act, s50.

### Del leg must be within Scope of parent act

Test: Del Leg must be **reasonably proportionate**, appropriate and necessary to purposive Act: SA v Tanner (1989) HC. → Question in relation to degree of proportionately.

- Depends on **how broad the parent act defined the powers** to make delegated law.

### SA v Tanner (1989) HC

**FACTS:** SA's Waterworks Act 1932 allowed Governor to make regs for "regulating, controlling or prohibiting" land use to reduce water pollution in certain zone. Govt used power to make regs prohibiting construction of piggeries, zoo's and feedlots. Mr/s Tanner wanted to build aviary (classified as a "zoo"). Was this ban on all animal habitats excessive and beyond scope of Parent Act?

**HELD:** No. Gov's regs are within scope because they are "reasonably proportionate". The language of SA Act was broad, and thus it was open to the Gov to do such excessive things in this broad power.

### Vonstone v Clark (2005) FC

**FACTS:** Under **ATSIC Act**, Min can suspend ATSIC Commissioner for 'misbehaviour' (s40) and make del leg ("determinations") on what type of stuff counts as "misbehaviour". Min made determination (cl5(1)(k)) saying "misbehaviour includes conviction for **prisonable offence** – even if not sent to prison". Mr Clark was convicted and fined (but not sent to prison) for "**obstructing police**" during pub dispute – and was suspended from ATSIC. Clark challenged Del Leg.

## Administrative Law - 2016

- Can get sacked for misbehaviour, but need to define what misbehaviour.
- She defined misbehaviour broadly.
- If you committed a crime that could send you to jail, even if you get off with a warning. The fact that you have been found guilty of something that could send you to jail counts as misbehaviour
- C there was a dispute in pub and obstructed police, but he wasn't violent or anything, but because of how she defined misbehaviour he was suspended.
- Defining misbehaviour this was he said beyond scope of parent act, and it was not proportionate, and fed court agreed with C.
- Looking at interpretation of ATSIAC act, it is meant to mean extreme things.  
**HELD:** cl 5(1)(k) not reasonably proportionate, and thus **invalid**. The Parent Act intended for "misbehaviour" to mean serious stuff. This type of charge is relatively minor. Too broad to say anything "prisonable".

### **Shanahan v Scott (1957) HC**

**FACTS:** *Marketing of Primary Products Acts (Vic)* authorised Governor to make regs that are '**necessary or expedient**' for creating an "**Egg Board**": s43(1). Gov made reg saying "eggs can't be placed in cold storage without Board's consent" to screw NSW eggs being sold in Victoria.

**HELD:** This reg is beyond scope of Parent Act. It was not "necessary or expedient" to do this. This was to add some extra purpose to the Act of protecting Victorian farmers, which is beyond the scope. "necessary or expedient" is a phrase of limitation.

- When legislation used phrase necessary or expedient → these are restrictive words. Don't want to give much rope. Do what you need to do.
- Delegated law should be small and not do anything too grand.
- Regulations should be **COMPLEMENTING** the parents act, not adding or extending it.

"If a power enabled the making of regulations 'providing for all...purposes....**necessary or expedient** for the administration of the Act' then the regulations must be confined to complementing the legislative plan, not to supplementing or extending it."

- **Shanahan v Scott (1957) HC**

### **Faulk v Munday (1976) HC**

**FACTS:** *Health Act* gave Governor power to make regs "for or with respect to ... prohibiting ... the emission of **air impurities** from fuel burning equipment". Gov made Reg 7 prohibiting the lighting or burning of open fires without approval.

**HELD:** Reg was invalid. Gov could not make ANY reg that lead to clean air, only those dealing with fuel burning equipment. **The ends don't justify the means.**

- Ends don't always complement the means.
- HC said this was invalid.
- If you have power to regulate something, its not the same as the power to prohibit it.

### **Swan Hill Shire v Bradbury (1937) HC**

**FACTS:** *The Local Govt Act 1915 (Vic) s 198(1)(a)*: local council could make by-laws "regulating and restraining the erection and construction of buildings". Council made a bylaw prohibiting the erection of *any* building except with council's approval.

**HELD:** By-law was invalid. Power to make laws **regulating** subject matter does not extend to **prohibiting it all together!** Even the phrase "restrain" does not allow you to "forbid". The object of the Act was not to make building an exceptional privilege bestowed by the Council.

### **Foley v Radley (1984) HC**

**FACTS:** Parent Act allowed Ccl to make by-laws **regulating, controlling or prohibiting** any activity in Rundle Street Mall that was in the opinion of the council likely to affect the "use or enjoyment of the mall". Ccl made by-law forbidding anyone from distributing *anything* in the Mall.

**HELD:** This was valid. While this by-law might touch on items that don't hurt people's enjoyment of Mall, it was still **reasonably targeted** at stuff likely to affect "use or enjoyment".

- Same as the above acts – the ends don't justify means.

## Administrative Law - 2016

- Allowed to regulate control or prohibit 'anything' – council made bylaw that you cant handout anything – this was very broadly stated.
- This was challenged at HC. And HC said it was valid. All that matters is how broadly the parent act defines power.
- Might stop small things, but it was sufficiently targeted.

### King Gee Clothing v Cth (1945) HC

**FACT:** Parent Act allowed Prices Commissioner to make del leg setting a maximum price for an item sold in Australia. The Commissioner set the maximum price using a convoluted formula with various undefined concepts.

**HELD:** Del Leg is invalid. PC failed to use power in a way that lived up to basic objective standards. This was the ground of "uncertainty" and it's very rare.

- Question of uncertainty.
- If the def leg is uncertain of what it does, then can suggest it is beyond the scope of the parent act.
- People were unsure of what the max price was – the court said this was invalid.

### Minister for Primary Industries v Austral Fisheries (1993) FC

**FACTS:** Del Leg (a fisheries management plan) was based on statistical mistake.

**HELD:** This del leg is invalid. This is because it was capricious and irrational. They talked about it in the context of "**unreasonableness**". This is a ground of review you will learn about in JR. Normally, however, "grounds of review" are not used to invalidate Del Leg, but this was an exceptional case.

- Del leg didn't make sense so got rid of it.
- The unreasonableness is a big deal in judicial review.
- When is brean reasonableness – if gov uses power in a ways which is so unreasonable that no reasonable person would do this – it gives rise to an area of law. (hard to prove).
- Not meant to apply grounds of review - only administrative decisions- but they took some grounds of review of unreasonableness and used it here.
- For this reason must consider it illegal.

## Decisions

- Decisions made under del leg.
- If parent Act is constitutional, and if del leg is in scope of act, did technicalities right- tabled and published, then you are back to square one and need to deal with it in the same way as anything else- merits review, or judicial review.
- If Del Leg is valid, and one wishes to challenge the administrative decision made under it, it is treated like any administrative decision made under regular legislation.
- That is, it can be subject to **merits review** (eg. at the AAT) or **judicial review** (at the courts – which you will begin learning about next lecture!)

## What to do if unhappy with a decision made under delegated legislation.

- **Argue the decision is invalid!**
  - (in MR or JR).
- **Argue the Del Leg is invalid!**
  - either due to a technicality (eg. Tabling or publishing) or "beyond the scope of Parent Act"
- **Argue the Parent Act is invalid!**
  - Because unconstitutional (very hard! Remember **Dignan!**)