

ADMINISTRATIVE LAW

Semester 1, 2016

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PRINCIPLE OF LEGALITY

Check: Is there any breach of rights, interests or liberties of a person? - Yes, then the Act must clearly state it coz presumption is that P doesn't intend to interfere with rights except by clear and unequivocal language (*Momcilovic v The Queen; Potter v Minahan*)

Principle: Exec action is invalid unless there is legal authority to support it (*Entick v Carrington*) – power cannot be exercised inconsistently with statute (*Barton v Cth*)

BUT if matter of social security, then courts arguably reluctant to intervene in decisions of exec (*Church of Scientology v Woodward*)

DELEGATION AND DELEGATED LEGISLATION

(Relevant in Raising Ques on Validity of the given Reg/Policy in Exam)

Can a Minister delegate? where a minister is entrusted with admin function, he may act through a duly authorised officer of his Department (*Carltona Ltd v Commissioner of Works; Peko*). Mostly applied in cases where the nature, scope and purpose of function vested in Minister is such that it is unlikely that P intended that it was to be exercised by Minister alone.

Stat Interpretation: Starting point is ordinary meaning (*Cooper Brookes v Federal Commissioner of Taxation*)

Use purposive approach also (*Project Blue Sky*) – nature of subject matter being regulated and interests (*Church of Scientology v Woodward*)

S15AA Acts Interpretation Act – Allows looking at purpose or object

S15AB Acts Interpretation Act – Use of extrinsic material

Who is making the decision?

A **delegate** is a class of persons or agency who has been given the power to make decisions. An

agent is a person who has to act on the instruction of the delegate – look at the nature of power also (*O'Reilly*)

If such that Min must exercise, then cannot imply it on an agent or delegate and must exercise with proc. Fairness (*Plaintiff M61/2010 v Cth* – Act reqd minister to exercise power himself and not delegate to someone)

What is the power concerned with? Look at the subject-matter. Courts may interpret reg based on part of community life it affects (*Woodward* – read broadly coz affecting security)

Validity:

The requirements to make delegation legally valid are held within the ***Legislative Instruments Act 2003*** (Cth).

Regulation/By-Laws/Codes/Manuals: These are legislative instruments – must meet the definition of leg instrument in *Leg Instrument Act 2003*(Cth) + be tabled in Parliament and be on federal register => If not then not enforceable (ss32, 33)

Policy: Must be within the four-corners of statute (*Green v Daniels*)

- **Considerations** – Look at the statutory function, nature of ques to be decided, nature of views expressed on behalf of govt (*Bread Manuf of NSW v Evans*) – **CHECK WHETHER IT IS USING WORDS LIKE ‘MUST’ WHEN STATUTE SAYS ‘MAY’** (limiting discretion – is it not allowing merits of the case to be considered?)
- **Validity:** Inapplicable if not published in accordance with ss9 and 10 of FOI Act – if not published then govt can rely on it to the extent that it does not cause detriment to anyone

If argument that particular officer did not have the power

- A. Check delegation – delegate or agent?
 - a. **Principal:** retains the authority, even when the power has been delegated to other officers: s34B(d) *Acts interpretation Act 1901*
 - b. **Delegate:** Scope of auth set in instrument of delegation. Exercising power in own name (*Owendale Pty Ltd v Anthony*)
 - c. **Agent:** Make decision on behalf of principal/delegate – when admin necessity (*Re Reference*)
 - i. If no delegation – Caltona Principle (implied agency relationship when no delegation – act is done in name of authority) (*Plaintiff M61/2010E v Commonwealth*)
 - d. **Admin Assistant:** To conduct research, interview someone, other minor jibs (*Alvaro*)
- B. Interpret Legislation
 - a. Ordinary meaning of words – subject-matter of leg

- b. Used consistently with same meaning between Act and Regulation – Good presumption though can give rise to tensions
- c. Interpreting words in context of section as a whole:
 - i. **‘Ejusdem generis’** – where legislation uses general words and specific words together, the general words will be limited in meaning to things of the same kind as the particular word.
 - ii. **‘Expressio unius est exclusion alterius’** – the express mention of one thing is to the exclusion of others
 - iii. **‘Noscitur a sociis’** – meaning of the word is derived from its context
- d. **Parliament does not intend legislation to be retrospective** - If something has been amended, you must know what the statute said on that date. And as it was at the relevant time is required!

Validity of DL

1. Meaning within 4-corners of statute : Use process of stat construction. Check for words like ‘Must’ when Act uses ‘May’
2. Raise a point on valid creation of legislative instrument under the Leg Instruments Act – Seek FOI to know more
3. See whether invalid due to any of the following reasons

Points to Argue for Invalidity of Legislative Instrument:

- Lack of Substantive Stat Authority
- Infringes Constitutional Guarantee (*Tasmania v Cth*)
- Complement/Supplement Distinction – DL can complement not supplement main Act (*Shanahan v Scott*)
- Regulate/Prohibit Distinction – DL can regulate but not outright prohibit activities (*Foley v Padley*); but prohibiting part of activity subject to discretionary dispensation is permitted (*O’Connell v Nixon*)
- Means/Ends Distinction – DL can give means but not only ends (*Paul v Munday*)
- Reasonable Proportionality – valid connection between exec action and purported source of authority (*South Aus v Tanner* – zoo case where reg stopped him from having aviaries on his farm. Court said purpose of Act to stop pollution and reg connected) – reg be sufficiently connected with purpose of Act

INFORMATION

(On ques of evidence that Pf can bring to make his case)

Start: Pf will need evidence in the form of reasons of the DM and other documents relied upon the DM to support his case. To apply for MR to AAT, he can make an application to obtain reasons under s28 AAT Act + s11 FOI Act

Reasons from Decision Maker:

- **s13 ADJR Act** – Person aggrieved who satisfies the requirement for making an application to FCA on grounds of JR under s5 may request DM to furnish statement of reasons under s13 ADJR – **PREFER THIS FOR JR**
 - (13)(2) - A request for a decision statement must be made within 28 days of the day on which the terms of the decision were furnished to the person making the request: s 13(5)(a). The request must be made in writing: s 13(1).
 - Reasons may be avoided under Sch 2 of ADJR
 - A reasons statement is not required to refer to processes that proceeded a hearing (unless specified otherwise by statute): *Minister for Immigration v SZGUR (2011)*.
- **s28 AAT Act** – Person must have **standing** (s27 – whose interest are affected by decision) + decision be such that it can be reviewed by AAT - USE THIS IF DECISION NOT OF ADMIN CHARACTER OR NOT UNDER AN ENACTMENT
 - Application procedure: written notice given to person who made the decision asking in writing findings on material facts referring to evidence
 - Decision-Maker to give the reasons within 28 days – if has to refuse then also within 28 days ((28(1AA))
 - Decision maker CAN REFUSE (28(1A)) – if application not made within 28 days or within reasonable time
 - **If Statement Given**, can still apply to AAT if it doesn't contain adequate info on evidence, facts, reasons (28(5)) – **CHECK THIS IN EXAM!!!**
 - **S25D Acts Interpretation Act** – requires reasons to have this finding on evidence, facts, reasons
 - **S28(2) – AG can certify against disclosure:** may certify that disclosure of a matter in a statement would be contrary to the public interest because:
 - ❖ it would prejudice the security, defence or international relations of Australia;
 - ❖ it would involve the disclosure of deliberations of the Cabinet or of a committee of the Cabinet; or
 - ❖ for any other reason specified in the certificate, it would form the basis for a claim of public interest immunity in which case the decision-maker must notify the applicant that such is the case and give the reason for not including a matter certified by the Attorney-General.
 - **S28(5) – Inadequate reasons** - An applicant who has been given a statement under subsection (1) may apply to the Tribunal for a declaration that the statement does not contain one or more of the following:
 - (a) adequate particulars of findings on material questions of fact;
 - (b) an adequate reference to the evidence or other material on which those findings were based;
 - (c) adequate particulars of the reasons for the decision
- **s43(2) AAT Act** – **AAT must give reasons for decision** – If no reasons given, then PF can seek within 28 days (**s43(2A)**)

Reasons Under CL:

- There is no *general* rule of common law or principle of natural justice that requires administrative decision-makers to provide reasons for their decisions, but such a duty may arise in 'special' (*Gibbs CJ*) or 'exceptional' (*Deanne J*) circumstances: *Public Service Board of NSW v Osmand (1986)*; affirmed in *Wingfoot Australia Partners v Kocak*

- **When reasons give: Adequacy of Reasons (*L&B Linings v WorkCover Authority of NSW*): +**
 - content and length of statement of reasons can vary depending on nature and importance of decision, complexity, time available to make it (*Wraith*)
 - **Reasons be intelligible + deal with substantial points (*Re Poyser And Mills Arbitration*) - ARGUE IN APPLICATION!!**
 - A review body must be able to see the **reasoning linking facts to the outcome and the information** given must get out the agency's subjective thought process not merely the findings (*Yusuf*)
 - The grounds for judicial review also have a bearing; 'unreasonableness is a condition which may be applied to a decision which lacks an evident and intelligible justification': *Minister for Immigration v Li* (2013).

Other Docs:

- Pf can get assistance from FOI Act to support case – All Aus jurisdictions have FOI which promotes good governance and transparency
- **Docs and enactment defined in s4** – includes policy, Reports, Other docs received from third parties, pvt info contained in agency docs about indiv, corp, govt, etc - It is an extensive list but is essentially defined as any method of recording information, whether it be in writing, is a sound or is an image
 - But the scope of documents that Pf demands must be in possession of an agency or minister relation to the affairs of the minister S 11 (2) and S 4 (1)
 - **Requirement that minister or agency must possess the document sought after:** A document is a document of an agency if the document is in the **possession** of the agency, whether created in the agency or received in the agency: s 4(1). Further, an '**official document of a minister**' is taken to mean a document that is in the **possession** the Minister concerned, that is, being a document that relates to the affairs of an agency: 4(1). Possession requires the right and power to deal with a document as opposed to mere custody: *Re Guide Dog Owners' and Friends Assn and Northern Thanet and Commissioner for Corporate Affairs* (1988). A document will not meet the necessary criterion if it has been made or kept by a minister or an officer in some private capacity: *Parnell and Prime Minister of Australia (No 2)*
- **s11 FOI Act – Access to Docs on Request**
 - Right to 'every person' (s11(1)) – **PLAINTIFF CAN APPLY!**
 - Every person broadly interpreted to encompass legal as well as natural persons: *Re Morris and Australian Federal Police*
 - Not necessary to show reasons or have standing (s11(2))
 - Requirements to Make Application (s15(2)) – be in writing + provide necessary info to locate the doc; Agency/minister must assist in making request (15(3))
 - Notification of Application – 14 days
 - Respond to Request – 30 days
- **s11B FOI Act – Public Interest Exemptions** - Exempt Docs (national security and international relations, cabinet docs, docs with confidential info); Conditional Exemptions (using two level public interest test)
- There are certain documents which cannot be access and the agency bears the onus of justifying their denial to grant these documents **S 61**

Application Procedure

1. **s15** - The request for documents must be in writing and providing an *adequate description of the document* to enable a responsible agency officer to identify it: s 15(2); Minister must assist person in making application

2. The agency must acknowledge the request in 14 days and make a decision in 30 days as to the documents S 15 (5)

a. It can be transferred to another agency (s16) or an extension may be granted if:

- i. It is a complex or voluminous request (15 AB) or
- ii. Time is needed for third party consultation (S 15 (6))

b. If no decision is reached in 30 days, this is a deemed refusal (S 15 AC)and charges apply S 29

Exemptions: 2 categories

- If a document is an exempt document under Div 2 (exemptions) or under para (b) or (c) of the definition of exempt document in sub-s 4(1), then access to the document is *not required* to be given because of sub-s 11A(4).
 - ❖ Documents listed under sub-s 4(1)(c) is an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department of State.
 - ❖ Documents listed under s 7, as identified by sub-s 4(1)(b), include those in possession of the following agencies:
 - ❖ ASIS;
 - ❖ ASIO;
 - ❖ Inspector-General of Intelligence and Security;
 - ❖ Office of National Assessments;
 - ❖ Australian Geospatial-Intelligence Organisation;
 - ❖ Defence Intelligence Organisation;
 - ❖ Australian Signals Directorate;
 - ❖ National Audit Office: *Brett Goyne and ANO [2014]*;
 - ❖ ABC (in relation to program material): *Re ABC and Herald and Weekly Times (2012)*;
 - ❖ Medicare and Australia Post (in relation to commercial activities): s 7(2AA).
- There are certain documents which cannot be access and the agency bears the onus of justifying their denial to grant these documents **S 61**
 - These documents are covered in **Part IV Div 2** of the FOI Act and can include:
 - S 33 Documents affecting national security, defence or international relations
 - S 34 Cabinet documents
 - S 37 Documents affecting enforcement of law and protection of public safety

- S 38 Documents to which secrecy provisions of enactments apply
- S 42 Documents subject to legal professional privilege
- S 45 Documents containing material obtained in confidence
- S 45A Parliamentary Budget Office Documents
- S 46 Documents disclosure of which would be contempt of Parliament or contempt of Court
- S 47 Documents disclosing trade secrets or commercially valuable information
- S 47A Electoral rolls and related documents
- There is a second class of conditional exemptions which are public interest conditional exemptions and they are listed in **Part IV Div 3 S 47 B-J** and include:
 - S 47B Public interest conditional exemptions--Commonwealth-State relations etc.
 - S 47C Public interest conditional exemptions--deliberative processes
 - S 47D Public interest conditional exemptions--financial or property interests of the Commonwealth or Norfolk Island
 - S 47E Public interest conditional exemptions--**certain operations of agencies**
 - S 47F Public interest conditional exemptions--**personal privacy**
 - S 47G Public interest conditional exemptions--**business**
 - S 47H Public interest conditional exemptions--**research**
 - S 47J Public interest conditional exemptions--**the economy**

If not received, there is an appeals process available to have the case reviewed by the Information Commissioner and it is available in **s 54 F, Part VII** of the FOI Act

MERITS REVIEW

(Use statute and facts to make arguments)

Check the statute and see if it mentions any statutory appeal process – whether any appeal process? Can the body receive fresh evidence? Whether body can make fresh decision? – EXTENT OF STAT APPEALS IS DISCRETE FROM TERMS OF STATUTE (*Shi*)

START: the avenue which is best for Pf, is wholly dependent on the his/her circumstances and the relief that they are requiring

INTERNAL REVIEW: Before considering external review, the Pf may first seek IR – It is a merits based review by another internal officer. Cheap + informal but issue of neutrality as officer is of the same deptt – **Only if statute provides** : SAY – If review specified by statute, internal review is not substitute (*Meschino*)

- **Overview:** '[A] process of review on the merits of an agency's primary decision. It is undertaken by another officer within the same agency, usually a more senior officer': *Administrative Review Council (2000)*. Can be afforded by way of either administrative action, or by a statutory provision.

MERITS REVIEW:

Power (s43 AAT Act) – AAT has the power to exercise all powers and discretions conferred by an enactment - stands in **shoes of DM** (*Pochi; Shi*) and can remake a decision using all power + discretion

- Vary, affirm or set aside decision of original DM

Decision: : Under s 3(3), a decision for the purposes of the *AAT Act* includes:

- (a) making, suspending, revoking or refusing to make an order 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.

Standing (s27(1) AAT Act)

- By or on behalf of person whose interests are affected by decision
- **An indirect link is not sufficient** to create standing *McHatten* – interest is one which is affected by decision and not potential outcome of review
- **Standing of Org (s27(2))**: Org or association of persons is taken to have interests affected by decision if the decision relates to matter included in objects or purpose of org/association : *Re Control Investments*
 - Davies J said that the **object of review and the purpose of the association “must be a real or genuine one**. It is not enough that points of correlation can be found” (*Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 1)*)
- **s30 Another Party can Join Proceedings** if its interests are genuinely associated with decision under review (*Re Control Investments and ABT*) + joining would expedite disposition of issue (*Re Stemcor*)
- **If person rejected** on basis of no standing, can appeal to FCA (**s44(2)**)

Jurisdiction (s25(1) AAT Act) - Where AAT Act or any other enactment provides that an application can be made to AAT for review of decision (**SEE IF SOMETHING STATED IN STATUTE/POLICY/REGULATION REGARDING THIS**)

- If stated, then it also applies to delegate when exercising power (**s25(3A)**)

Application (s29) – writing (29(1)(a)) + fee + statement of reasons (Inadequacy of decisions doesn't matter - *Greenham*). Within **prescribed time (29(1)(d))** – **prescribe time** is taken to be no more than 28 days once the reasons for the decision are provided to the applicant: **s 29(2)**.

Onus of Proof – not on any of the parties; on AAT to be reasonably satisfied (*McDonald v DG of Soc Sec*)

Procedure of AAT (s33) – At the discretion of Tribunal; proceedings with little formality without rules of evidence binding; procedure not determined by any principles of law but is discretion of member (*Sullivan*) – whether the AAT applies the principles in *Bringshaw* are upto the discretion of AAT (*Sullivan*)

- S39 AAT Act – AAT shall ensure that every party is given a reasonable opportunity to present its case

Reasons:

- **S28** – Any person entitled to apply to AAT can get reasons from original DM in writing setting out finding on material fact, evidence or other material. DM to give reasons within 28 days
 - **S28(2) – AG can certify against disclosure:** may certify that disclosure of a matter in a statement would be contrary to the public interest because:
 - ❖ it would prejudice the security, defence or international relations of Australia;
 - ❖ it would involve the disclosure of deliberations of the Cabinet or of a committee of the Cabinet; or
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- **Reasons Under ADJR (s13):** Person aggrieved who satisfies the requirement for making an application to FCA on grounds of JR under s5 may request DM to furnish statement of reasons under s13 ADJR
 - A request for a decision statement must be made within 28 days of the day on which the terms of the decision were furnished to the person making the request: **s 13(5)(a)**. The request must be made in writing: **s 13(1)**.

- Reasons may be avoided under Sch 2 of ADJR

Hearing: De Novo – AAT puts itself in shoes of decision-maker (*Re Control Investments*) (s43(1))

Unless the governing statute says otherwise (*Re Greenham; Drake; Shi*); BUT may limit the scope of review by limiting ques of fact, evidence and issues it considers (s25(4A)); Can take **Policy/Reg/By-Laws** into consideration (*Collector of Customs v Brian Lawlor Automotive*)

- **Where no temporal element is imposed:** Where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the AT in the process of informing itself (*Shi*). Whether this is so will depend in the construction of the particular statutory provision
 - AAT will have to distinguish from *Shi*, *Remman*; and *Jebb*

Evidence – new and differential evidence allowed - Not restricted by rules of evidence (s33(1)) but may decide inform itself in any manner it thinks appropriate (s33(1)(c)) or to limit its scope (s25(3A))

- most recent evidence+ facts that exist on date of AAT decision (*Shi; Re Greenham and Min for Capital Territory*; s43)
- **Pf can bring new evidence as proof of character, behaviour, qual, etc** (*Shi* – Migration Agent brought new evidence to prove – Decision should be based on most current info)
- **Finding of facts** is based on **legally probative material** – ‘probative’ means legally connected and assisting in establishing or rejecting a fact – decision of AAT be based on fact finding instead of mere suspicion (*Pochi*)
- **AAT is not a fully inquisitorial body but has responsibility to seek out info** (*Sullivan*)

Policy: AAT entitled to consider policy as relevant consideration but not abdicate only using policy (*Drake No 2; Hneidi*); irrespective has to make an independent assessment while also making clear that it has considered the propriety of policy and expressly indicate the considerations which have led to that conclusion (*Drake No 2*)

- Mostly will consider and apply policy where issue is technical and policy made by those with subject-matter expertise (*Re Jetopay and Aus Fisheries Mgt*)
- If Pf is raising ques on validity of Subordinate Leg/Reg/Policy then can use s39B(1A) to go to FCA

Decision – Correct or preferable based on material before AAT(*Drake (No 2)*)

- **‘Correct’** – decision be rightly made in law or fact (*Shi*)
- **‘Preferable’** – w.r.t discretionary decision –preferred based on fact + public interest (*Shi; Re Visa Cancellation*)
 - Where purpose of Act says ‘public interest’ proper basis of evaluating whether the ‘preferable decision’ has been reached or not is said to be in reference to community values: *Re Visa Cancellation and Minister for Immigration*
- **No presumption to be placed on the original decision** *Re Greenham*
- ➔ Ultimate task for AAT is to decide whether, on the facts and evidence before it, it is satisfied or persuaded of the issues – task is not undertaken by requiring one of the parties

to bear onus of proof; Responsibility of the AAT to be reasonably satisfied and feel an **actual persuasion** on each important issue (*Bringshaw v Bringshaw*) – **MENTION IN EXAM!!**
****Look at gravity of the decision, seriousness of allegations** also to make a point about the way decision will go (loss of income, impact on family, etc.) – *Pochi*

Relief to be Granted

- **Remedies:** In reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision: s 43(1). Upon reaching a decision, the tribunal must either:
 - ❖ **affirm** the decision under review: s 43(1)(a);
 - ❖ **vary** the decision under review: s 43(1)(b); or
 - ❖ **set aside** the decision under review and: s 43(1)(c):
 - ❖ **make a decision in substitution** for the decision to set aside: s 43(1)(c)(i); or
 - ❖ **remit the matter for reconsideration** in accordance with any directions or recommendations of the Tribunal: s 43(1)(c)(ii).
- **Stays:** The Tribunal may make an order **staying** or otherwise affecting the operation or implementation of the decision under review: s 41(2). Before exercising its discretion to make such an order, the Tribunal must take into account the interests of parties to the proceedings: s 41(2). *****IMP See Application in Exam**

Appeal from AAT Decision (s44 AAT): FCA on ques of law within 28 days from date of receiving the decision (44(2A))