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Judicial Review

Judicial review is the review of an administrative decision by the judiciary

REQUIREMENTS

- Court must have **jurisdiction**
- Court must accept that it is a **justiciable** issue
- Legislature has **not validly excluded** court's review
- Court must have **power to grant remedy**
- Applicant must have **standing**
- **Ground** of review available

1 STATUTORY INTERPRETATION

1.1 LEGISLATION

- General rules applied to a particular situation
- Interpretation
 - Common law rules – not changed at will – *Corporate Affairs Comm of NSW v Yuill*
 - Statutory rules ***Acts Interpretation Act 1901 (Cth); Interpretation Act 1987 (NSW)***

1.1.1 Parts of legislation

- Preamble – reason for legislation
- Titles – long and short titles
- Parts and divisions
- Sections
 - Traditional division of legislation
 - Section headings – not part of Act

1.2 COMMON LAW INTERPRETATION

1.2.1 Literal Approach

- Language of statute
- ***Amalgamated Society of Engineers v Adelaide Steamship Co***: Higgins J – examination of the language used in its ordinary and natural sense
- ***Cooper Brookes (Wollongong) v FCT***: Gibbs CJ – ordinary and grammatical meaning
- Limitation – golden rule

1.2.2 Purposive Approach

- Origin in ‘mischief rule’
- Purpose from statute as a whole
- Not always clear – ***Avel Pty v AG for NSW*** – Kirby P – statute a jumble of ill-matched and poorly integrated enactments

1.3 STATUTORY AIDS TO INTERPRETATION

1.3.1 Acts Interpretation Act 1901

- s 2B: definitions
- s 3A(1): Commencement of Acts – ‘28th day after the day on which that Act receives the Royal Assent’
- s 18A: Parts of speech and grammatical forms have corresponding meanings
- s 15AA: Construction that promotes purpose is preferred: ***Mills v Meeking*** displaced common law approaches
- s 15AB: reference to extrinsic material
 - To confirm meaning
 - To determine meaning if:
 - ambiguous or obscure
 - ordinary meaning manifestly absurd

- **Re Australian Federation of Construction Contractors; Ex parte Billing:** extrinsic material only if condition met
- **Re Bolton; Ex parte Beane:** words of Minister don't replace text of law

1.4 GRAMMATICAL AIDS

- Acts to be read as a whole
 - Section limited by other sections
 - **Metropolitan Gas Co v Federated Gas Employees Industrial Union:** read as whole instrument
 - **K & S Lake City Freighters v Gordon & Gotch:** words read in context
- Words assumed to be used consistently
 - **Craig Williamson v Barrowcliffe:** same meaning to same words
 - **Comm of Taxes (Vic) v Lennon:** rebuttable presumption
- Words have ordinary and current meaning
 - Act may intend to depart from meaning
 - Current meaning – 'an Act ... is always speaking'
- Legal technical words
 - Legal meaning: **AG (NSW) v Brewery Employees Union NSW**
 - Technical words – whether common usage – e.g. if commercial term is widely used and understood, it may sway the court to reading it technically rather than ordinary meaning

1.5 SYNTACTICAL PRESUMPTIONS

Noscitur a sociis – meaning **derived from context**

- **Avondale Motors v FCT:** meaning depends on context
- **Prior v Sherwood:** meaning limited by context: 'house, office, room or place' did not include public lane

Ejusdem generis – general matters **constrained by particular** matters

- **Re Latham (dec'd):** 'trustee, guardian, committee or other person...' excluded person beneficially entitled; limited to persons in fiduciary capacity
- **Canwan Coals v FCT:** 'railway, road, pipeline or other facility' excluded storage facility

Expressio unius est exclusion alterius – **express reference to one matter excludes other matters**

- **Heatley v Tasmanian Racing and Gaming Comm:** hearing for revocation of licence, but not for warning off
- **Houssein v Under Secretary, Dept of Indus Relations and Technology:** applied with care, valuable servant but dangerous master

Generalia specialibus non derogant – **specific prevails over the general** if a conflict

- Within an Act rather than between Acts
- **Purcell v Electricity Comm of NSW:** only if inconsistent provisions not reconciled
- Last resort – later sections prevail over earlier

Reddendo singula singulis – two or more subjects qualified by two or more matters, **qualifications attach to subject in order that they appear**

- **Bishop v Deakin**: person disqualified from being elected or being a member if within 5 years before election or since election, convicted; 'within 5 years' attached to 'being elected'; 'since elected' attached to 'being a member'

1.6 COMMON LAW PRESUMPTIONS

- Implied incidental power
 - Power for incidental and consequential functions – **Herscu v The Queen**: Qld minister charged for bribes, but what was sought wasn't part of his duties
 - Limitations
 - Clear language to interfere with fundamental rights
 - Not for unauthorised purpose
 - Activity must complement not supplement – **Kent v Johnson**
- Established freedoms and immunities
 - Not to abrogate fundamental common law rights:
 - **Coco v R**: Police and listening device which was legal but the information was illegally obtained
 - **Evans v State of NSW**
- Fiscal and taxing Acts
 - Cannot raise a tax without parliamentary approval
 - **AG v Wilts United Dairies**: clear legislative authority for a pecuniary burden
- Reasonable grounds
 - Requirement that decision maker has 'reasonable' belief
 - Objective test if circumstances to support decision
 - **Goldie v Cth**: 'reasonable' requires justifiable on objective examination of relevant material
 - **McKinnon v Secretary, Dept of Treasury**: objective test of reasonable grounds
- Minimise discrepancy with international law
 - **Jumbunna Coal Mine NL v Victorian Coal Miners' Assoc**: interpreted to be not consistent with international law
 - **Chu Kheng Lim v MILGEA**: interpretation to facilitate international agreement
 - **MIEA v Teoh**: construction consistent with international agreement

2 ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977

- Scope of ADJR – decisions, conduct while making a decision, failure to make a decision can all lead to judicial review
- Decisions defined under s3 – there must be a decision, of an administrative character, under an enactment
- Applied to Commonwealth legislation, only by Federal Court and Federal Magistrate's Court (ss8, 9 respectively)

2.1 SCOPE

2.1.1 S5: Aggrieved persons

5 Applications for review of decisions

- (1) A person who is **aggrieved by a decision** to which this Act applies that is made after the commencement of this Act may apply to the **Federal Court** or the **Federal Circuit Court** for an **order of review** in respect of the decision on any one or more of the following grounds:

3 Interpretation

- (4) In this Act:
- (a) a reference to a **person aggrieved** by a decision includes a reference:
 - (i) to a person whose interests are adversely affected by the decision; or
 - (ii) in the case of a decision by way of the making of a report or recommendation—to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and
 - (b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

2.1.2 S6: Conduct

6 Applications for review of conduct related to making of decisions

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

2.1.3 S7: Failure to make a decision

7 Applications in respect of failures to make decisions

(1) Where:

- (a) a **person has a duty to make a decision** to which this Act applies;
- (b) there is **no law that prescribes a period** within which the person is required to make that decision; and
- (c) the person has **failed to make that decision**;

a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

(2) Where:

- (a) a **person has a duty to make a decision** to which this Act applies;
- (b) a **law prescribes a period** within which the person is required to make that decision; and
- (c) the person **failed to make that decision before the expiration of that period**;

a person who is aggrieved by the failure of the first-mentioned person to make the decision within that period may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision within that period on the ground that the first-mentioned person has a duty to make the decision notwithstanding the expiration of that period.

2.2 APPLICATION OF THE ACT

3 Interpretation

(1) In this Act, unless the contrary intention appears:

decision to which this Act applies means a **decision** of an **administrative character** made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

- (a) **under an enactment** referred to in paragraph (a), (b), (c) or (d) of the definition of *enactment*; or
- (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of *enactment*;

other than:

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

2.2.1 "Decision"

- **'Final and operative decision'** that affects people's rights, not an interim decision (*Australian Broadcasting Tribunal v Bond* – recommendation is not a decision)
 - Must be **substantive** and have **immediate consequences** (*ABT v Bond*)
 - **Interim decisions** not usually considered to be decisions. However, may be reviewable as part of the review of the final, ultimate decision (*Kelson v Forward*)
 - Ultimate decision or reasoning (*Right to Life Association v Secretary Dept of Human Resources and Health*)
 - **Preliminary investigations** are not decisions until reports have been made (*Edelsten v Health Insurance Commission*)

- **Delays** in a decision are not held to be a reviewable decision (*Hand v Hell's Angels Motorcycle Club*)
- **Two decisions** are reviewable if they both have a **substantive** effect:

2.2.2 "Administrative Character"

2.2.2.1 Administrative vs legislative – making rules and applying rules

- Must be administrative in nature – involves the **application of rules**, rather than the creation of laws which are legislative in nature (*Federal Airports Corp v Aerolineas Argentinas*)
- **Legislative decisions:**
 - Creates new rules of general application, doesn't apply existing rules to a particular case
 - Generally publicly notified
 - Generally made after wide public consultation and policy considerations
 - Cannot be varied by the Executive but may be reviewed in Parliament

Min for Industry & Commerce v Tooheys: **Distinction between legislative and administrative:**

legislating is creating and formulating new rules that will have a general effect. Administrative is the application of those general rules to a particular case

Qld Medical Laboratory v Blewett: Primary character of administrative is to **maintain and execute laws**. Parliament can give a Minister the power to formulate new laws (delegation). It wasn't an administrative decision, it was a legislative decision because Parliament had given the Minister the power to make quasi-legislation. Therefore not reviewable

2.2.2.2 Administrative vs judicial

- *Hamblin v Duffy*: Legislative acts involve formulation of new rules of law having general application. This is distinguished from **judicial acts, which determine questions of law** of fact by reference to established rules and principles.
- Judicial decisions not reviewable under ADJR
- Administrative tribunals – subject to review
- Decisions of registrars: depends on facts whether it is administrative or judicial

2.2.3 "Made under an enactment"

- There must be a source of power that allows for the decision – what is the legislation in the problem question that allows for the decision? (*Griffith University v Tang*)

Griffith University v Tang: [TEST FOR UNDER AN ENACTMENT]

- **Expressly required** or **impliedly required** or authorised by the enactment. The act must expressly or impliedly require the decision to be made or authorise the decision (*Hutchins v DFCT*)
- The decision itself must confer, alter, or otherwise affect legal rights or obligations

Facts: Tang researching at Griffith Uni, investigations into academic misconduct allegations and such a review was made, she appealed and university dismissed her appeal

Held: University decisions were not under an enactment. Only act that had any relevance was the University act.

Hutchins v DFCT: the **right to make a decision** has to be **expressly** given by statute to be included under the ADJR. The ability to make the decision **cannot be just hinted at** in a general way in the legislation, it has to be express or clearly implied

MIEA v Mayer: The Act didn't give the Minister the express power to determine refugee status, but gave the power to give entry grants to those who they have determined to have refugee status. This was a **strong enough implication** that the Minister could make the determination of a refugee status

General Newspapers v Telstra: Decisions under an enactment are decisions **authorised or required under the enactment**

2.3 REMEDIES

16 Powers of the Federal Court and the Federal Circuit Court in respect of applications for order of review

- (1) On an application for an order of review in respect of a decision, the Federal Court or the Federal Circuit Court may, in its discretion, make all or any of the following orders:
 - (a) an order **quashing or setting aside** the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
 - (b) an order referring the matter to which the decision relates **to the person who made the decision for further consideration**, subject to such directions as the court thinks fit;
 - (c) an order **declaring the rights** of the parties in respect of any matter to which the decision relates;
 - (d) an order directing any of the parties **to do, or to refrain from doing**, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

If a claimant successfully seeks judicial review under an enactment; the FCA or FCC may seek orders under s 16 under its **discretion and flexibility**, to provide remedy that will do justice in the circumstances (**Park Oh Ho v MIEA**)

- **MIEA v Conyngham:** court may direct the decision maker to **remake the decision** – the decision will be set aside and remitted to the decision maker. In an appropriate case, the court may issue an order to make a decision maker make a decision in a particular way

2.3.1 Reasons for a decision

13 Reasons for decision may be obtained

- (1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Circuit Court **under section 5** in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, **referring to the evidence or other material on which those findings were based** and **giving the reasons** for the decision.

- No common law right to reasons (**Public Services Board of NSW v Osmond**)
 - Unless where circumstances of the case are so exceptional the general rule would not apply, i.e. right of appeal from a decision, that may suggest that reason should be made available
- Statutory right to reasons for a decision – s 13
 - Finding on material question of fact
 - Evidence on which findings based

- Reasons for decision
- ***Ansett Transport Industries (Operations v Wraith)***: Must set out decision maker's **understanding of relevant law**, what the **finding** of facts were, the **reasoning processes** that led to those conclusions, and in clear and unambiguous language, the **reasons for the decisions**

3 JURISDICTION

- High Court, Federal Court and State Supreme Courts can exercise judicial review
- Other courts (inferior courts) are part of the executive for this purpose
- Decisions of inferior courts are reviewable under judicial review on the basis of whether the inferior court was acting lawfully by what they did

3.1 THE HIGH COURT

- **s75(v) Constitution:** "In all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth"
- **s77** if remedies sought are prerogative writs
- Writ of **certiorari** included in s75(v) (**Aala**)
- High Court does not have original jurisdiction unless prerogative writs are remedies

3.2 FEDERAL COURT AND FEDERAL MAGISTRATE'S COURT

8 Jurisdiction of Federal Court and Federal Circuit Court

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

- **ss. 8 of Administrative Decisions Judicial Review (ADJR) Act:** FCA and FCC have jurisdiction for judicial review
- **s39B Judiciary Act:** FCA has judicial review
- **s44 Judiciary Act:** HCA can remit cases back to the FCA
- Jurisdiction limited to what statute confers
- Federal Court now has original jurisdiction which corresponds to the HC 'in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'

3.3 STATE SUPREME COURTS

- Original power by virtue of their status as superior courts of record
- Some States have passed legislation to give State Supreme Courts the power to engage in judicial review: see **Supreme Court Act 1970 s 23:** NSW Supreme Court to engage in judicial review
- State Supreme Court only has jurisdiction to engage in judicial review for **State legislation**, not Commonwealth legislation

9 Limitation of jurisdiction of State courts

- (1) Notwithstanding anything contained in any Act other than this Act, **a court of a State does not have jurisdiction to review:**
- (a) a decision to which this section applies that is made after the commencement of this Act;
 - (b) conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision to which this section applies;
 - (c) a failure to make a decision to which this section applies; or
 - (d) any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power.

4 JUSTICIABILITY

4.1 NATURE OF POWER

- Prerogative power (non-statutory executive power)
- Policy, national security, defence
 - ***Council of Civil Service Unions v Minister for the Civil Service (CCSU)***
 - ***Minister for Arts, Heritage and Environment v Peka Wallsend***
- Determine legal rights
 - ***Re McBain; Ex parte Australian Catholic Bishops Conference***

4.2 STATUS OF DECISION MAKER

- Governor General once outside judicial review. Now changed: ***R v Toohey; Ex parte Northern Land Council***

4.3 NON-JUSTICIABLE POWERS

- **No manageable legal standards** in the case
- Judicial intervention may **not be considered to be constitutionally appropriate or legitimate** in a particular case
- Open discretion given to a decision maker – unfettered power, no boundaries on what the person can do – therefore impossible to say they have breached their power. However, perhaps because they have unfettered power then they **SHOULD** have judicial review
- Academic grading decisions are not subject to judicial review – they are referred back to the institution
- **Religious questions**
- Questions that are inherently **political**
- ASIO, **national security** (***Church of Scientology v Woodward***)
- Capacity to function, e.g. the Ombudsman, courts etc are all dependent on Government funding. The Government can reduce funding
- **Privatised government companies** cannot be reviewed (***NEAT v AWB***)