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TOPIC 2: JURISDICTION TO CONDUCT JUDICIAL REVIEW

CL Jurisdiction to Conduct Judicial Review

Introduction

- Historical purpose was to enable a court to examine whether a public sector body was complying with the limits imposed by law
- Constraints on jurisdiction of courts:
    - Separation of powers
    - Parliamentary supremacy
- Five elements to a successful judicial review challenge:

1. The person seeking redress has standing
2. The matter is justiciable (able to be reviewed by a court)
3. The court has jurisdiction/authority to review the matter
4. There is an available ground of review
5. There is an appropriate remedy

Jurisdiction of Superior Courts to Review Administrative Action

- Supreme Courts in England have long held they have a prerogative/inherent jurisdiction to review the legality of administrative action
- This prerogative jurisdiction was inherited by the superior courts of the colonies
- Al CL, superior courts have the jurisdiction to issue various remedies, which corrected the unlawful actions of certain bodies:
    - Mandamus: Compels the exercise of public duty
    - Declaration: Declares the legal rights and obligations of parties
    - Certiorari: Quashes certain unlawful action
    - Injunction: Prevents someone from acting contrary to law
    - Prohibition: Prohibits a person from acting outside the scope of their powers

Attorney-General (NSW) v Quin (1990) 170 CLR 1

- Brennan J (What is judicial review):
    - "The court has no jurisdiction simply to cure administrative injustice or error "
    - "…What is the law? And that question, of course, must be answered by the court itself"
    - "The scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise."
- Brennan J (Justification for Judicial Review of Administrative Action):
    - "The essential warrant for judicial intervention is the **declaration and enforcing of the law** affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government."
    - "The duty and jurisdiction of the court to review administrative action **do not go beyond the declaration and enforcing of the law** which determines the limits and governs the exercise of the repository's power."
- Brennan J (Limits on judicial role):
    - "The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."
    - "the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual…The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice"
    - "If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk."

Limits on Review

- Court can only review the legality of administrative action and not the merits
- Justiciability

Justiciability

- Idea that certain cases are either not capable of, or not appropriate for, resolution by courts
  - Closely related to the notion of jurisdiction as it raises the question of whether the court is capable of considering a matter
- Historically, prerogative power was non-justiciable
  - However *Council of Civil Service Unions (CCSU)* held prerogative power is no longer automatically non-justiciable (HC hasn't ruled expressly on this, but most likely Aus will abolish old prerogative rules)
  - Roskill L: Proposed subject matter approach → Some matters are inherently non-justiciable, such as treaty-making; defence; mercy; grant of honours; dissolution of Parliament; appointment of Ministers
- Just because a decision has been made by Cabinet, doesn't automatically make it non-reviewable
  - But not clear what test to apply to make a decision non-reviewable
- CL doctrine that applies only to judicial review cases commenced outside the *ADJR Act*
- Raises two separate but related questions:
  - Whether a decision/controversy is amenable to judicial determination (whether the court can resolve the case)
  - Whether a decision/controversy should be resolved by a court

FAI Insurances v Winneke (1982) 151 CLR 342

- W was governor of Vic. His agent decided to refuse a licence to FAI on the ground that they didn't have sufficient funds to support insurance claims
  - FAI's licence had been renewed for twenty years previous to this decision
- Mason J: FAI were owed procedural fairness because non-renewal had serious commercial repercussions for FAI
  - Following *Plaintiff M61*, it is clear that procedural fairness should still be applied once the process of making decisions is initiated

Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 75 ALR 218

- Cth Cabinet made decision to make nominate Kakadu National Park for World Heritage List, under the prerogative power of the Crown concerning Australia's rights and obligations as party to the UN Convention
  - Decision didn't directly affect any existing interest of Peko group of companies, however it was disadvantageous to Peko EZ concerning the future opportunity to undertake mining within the existing mineral leases it held in the park
  - Peko EZ commenced proceedings under s 39B *Judiciary Act* to challenge the validity of the decision on the grounds that Cabinet had failed to give hearing to Peko EZ in accordance with the requirements of natural justice
- At first instance Beaumont J upheld the claim, declaring the decision was void
- FFC upheld Cth appeal on two grounds:
  - Bowen CJ & Wilcox J: The decision of Cabinet was non-justiciable
  - Sheppard & Wilcox JJ: Peko EZ had been given an adequate opportunity for presenting a case and hadn't been denied with natural justice
- Bowen CJ: The Cabinet's decision to nominate Kakadu for World Heritage List was non-justiciable, not just because it involved a treaty, but also policy reasons
  - Seems to endorse Lord Roskill in *CCSU*
- Exercise of judicial power is restricted to cases that require a determination of legal rights and interests of/claims made by, an individual
  - Entering into treaty is non-justiciable

- A judicial ruling must have a direct and immediate consequence for the legal rights/interests of a party
- Just because it was an exercise of prerogative power, doesn't mean it's not reviewable

Hicks v Ruddock (2007) 156 FCR 574

- H was confined at Guantanamo Bay, sought judicial review of a decision made by Minister for Immigration not to request his release
  - Minister argued there was no justiciable issue
  - H was seeking an order of *habeus corpus* (individual's right to challenge his incarceration and have the charges against him presented in a court)
- Summary judgment found in favour of Minister
- FCA refused to make summary order dismissing the claim by H that the A-G decision not to request his release non-justiciable
- Tamberlin J: The two principles of Act of State and justiciability are to some extent distinct but they are interrelated in the present case
  - Neither the Act of State doctrine nor the principle of non-justiciability justify summary judgment at this stage of the proceeding
- Just because decision is made by high-up Minister/prerogative, doesn't automatically make it non-justiciable

Privitised/Outsourced Functions

- When can these functions be reviewed – No Aus authority
- English position: Donaldson MR *R v Panel on Takeovers and Mergers; ex parte Datafin:*
  - "It is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centre-piece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation"
  - Inherently public function
- Australian position on *Datafin*
  - Acceptance by State superior courts
    - Eg *Victoria v Master Builders' Association of Victoria*
    - Cf. *Mickovski v Financial Ombudsman Service Ltd*
- Suggested that a person's right to review shouldn't depend on whether a function was contracted out or not (Aronson & Groves)
  - Government shouldn't be able to contract out of its responsibilities

TOPIC 4: REASONS FOR DECISIONS

Introduction

- Reasons are important in an effective system of administrative review as you cannot gauge the correctness of a decision until you know why it was made
    - Cth Administrative Review Committee (Kerr Committee) recommended an 'aggrieved person should be able to apply for and receive reasons for the decision'
    - Recommendation was heeded and legislation imposed a reasons requirement
- A duty to provide reasons can help people affected by a decision in deciding whether to challenge that decision
    - Underpins values of transparency and accountability that permeate administrative law
- Serves at least three purposes (McHugh JA, *Soulemezis v Dudley*):
    - Enables parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision
    - Furthers judicial accountability
    - Courts don't just resolve disputes, also formulate precedent
        - Giving reasons enables legal practitioners, legislature and public to ascertain how future cases will be decided
    - Enhances transparency of decisions
- Arguments against reasons:
    - Efficiency: time-wasting and counter-productive
    - Temptation to use template/standard set of reasons

1 Common Law

- No general duty to provide reasons at CL
- Court of Appeal attempted to establish such a duty in *Osmond* however it was reversed by the HC
    - There is no general rule of CL that requires administrative decision-makers to provide reasons for their decisions (*Osmond* upheld in *Wingfoot*)
    - But that such a duty may arise in 'special' (Gibbs CJ) or 'exceptional' (Deane J) circumstances (*Osmond*)
- Four arguments in favour of requiring administrators to provide reasons for their decisions:

1. Instrumentalist argument: Encourages better and more rational decision-making
2. Political theory argument: Enhances government transparency and accountability, gives legitimacy to a decision by showing it wasn't made arbitrarily and that issues raised by parties were considered
3. Respect an individual's dignity, regardless of instrumental consequences
4. Natural justice: Matter of fairness

Public Service Board of NSW v Osmond (1986) 159 CLR 656

- O was employed under NSW legislation, applied for promotion but wasn't recommended for the position
    - Requested Board's reasons for the decision but was refused. No statutory duty on the Board to provide reasons
- Gibbs CJ: There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions except in special circumstances
    - Great policy reasons for statement of reason, however there are significant efficiency concerns and various other things that might weigh against such a general duty
    - Not the role of the court to resolve that policy question – role for legislature
    - Rejected Kirby J's contention that a right could be founded upon the judicial incident of providing reasons
        - Held even if such a right would be desirable, it wasn't the role of courts to introduce one, but parliament
    - Even under the assumption that in special circumstances, natural justice may require reasons to be given, in the present case it wasn't so

Wingfoot Australia Partners Pty LTd v Kocak (2013) 88 ALJR 52

- K employed by W, a tyre manufacturer, from 1992-2001. In 1996 he injured his neck on the job and by 2009 suffered a significant spinal medical condition
    - Claimed the neck injury caused his condition, sought entitlement of medical expenses as compensation, but W denied liability was argued it was unrelated
    - W requested a Medical Panel to answer certain questions about the condition, and they were obliged to give written reasons
    - Medical Panel rejected K's argument, but didn't provide explanations as to why, so the court rejected the report. W appealed
- HC: Unanimously allowed W's appeal, found the Panel's reasons were adequate
- Restated the position that there's no CL obligation on administrative decision-makers to give reasons for their decisions in the absence of an express statutory requirement
    - Confirmed *Osmond*
    - Similar decision reached in Canada

Special or Exceptional Circumstances

Natural Justice Exception

- Despite the reservation of Gibbs CJ *(Osmond)* about natural justice imposing an obligation to provide reasons, courts have continued to rely on procedural fairness arguments to justify this result

Right of Appeal Exception

- When a statutory right of appeal would be frustrated

Quasi-judicial Nature of Proceedings Exception

- Eg. Body like VCAT is required to give reasons due to mix of powers

2 Statutory Duties to Give Reasons

ADJR Act 1977 (Cth) ss 3, 13, 13A, Sched II

- Cth Administrative Review Committee (Kerr Committee) recommended an 'aggrieved person should be able to apply for and receive reasons for the decision'
    - Recommendation was heeded and s 13 *ADJR Act* and s 28 *AAT Act* imposed a reasons requirement
- Reasons aren't required to be given under the *ADJR Act* for all administrative decisions, including:
    - S 13(1): Decisions not covered by the Act (eg. not 'administrative' or made 'under an enactment'
    - S 13(5): If a request for decisions has not been made within 28 days
    - S 13(11): If reasons have already been given
    - Decision related to conduct or a failure to decide (Act only applies to decisions)
    - Decisions excluded under Sch 2 of the Act:
        - Defence forces, intelligence operations, aircraft design, diplomatic and consular privileges and immunities, administration of criminal justice and civil courts, matters of security, monetary and financial matters, public service employment
- S 14: Statement mustn't include information if the A-G has certified disclosure would be contrary to public interest as:
    - It would prejudice the security, defence or international relations of Australia
    - It would disclose Cabinet deliberations or decisions
    - Other reasons such as Crown privilege or legal professional privilege