JUDICIAL REVIEW

Factual Questions: Decision maker, decisions, content of the decision, procedure followed, considerations taken into account, statutory provisions followed.

1. Is it State or Federal?

Determines the relevant legal instrument for judicial review:

a) State: s 17 Supreme Court Act 1935 – inherited JR from UK, primarily based on Common Law.

b) Federal: ADJR act or S 75(v) of the Constitution

2. Is the matter reviewable?

Is it a decision?

ADJR reviewable:

I. <ABT v Bond> decision: Final, operative, determinative and substantive.

II. Administrative in Character (applying the general law to the existing law) – excludes those of a legislative (making or changing a law) or judicial character. Application of the law to a person or particular class of persons. <s 3 ADJR>

III. Arising directly under a Commonwealth enactment <ANU v Burns; s 3 ADJR>

IV. Do any exclusions apply?

– privative clauses – (if so can still use s 75(v) <Plaintiff S157 v Cth>)

i. Is there a privative clause?

Examples:

➢ Clauses expressly stating the decision is FINAL; or
➢ Clauses prescribing time limits on any potential judicial review (or even deny JR)
➢ Privative clause cannot take away jurisdiction of the High Court – can still use s 75(v) <Plaintiff S157/2002>
➢ Time limit clauses ‘may be accepted by the courts only if preserves some degree of a citizen’s access to the courts’ <Public Service Association (SA) v Federal Clerks Union>
➢ No-certiorari clause – can be effective to ‘limit the courts review function’ <Houssein v Under Secretary>
➢ A privative clause will not generally be effective to exclude judicial review of a jurisdictional error <kirk>

ii. Do any exclusions from Schedule 1 of the ADJR Act apply?

– E.g ASIO Act – national security
– Decision of Gov-General not reviewable s 3 ADJR

Just say: ‘assume that it is a decision that is reviewable under the ADJR as it is a Bond decision and it is administrative in character, arising under an enactment (state the Act) and no exclusions apply. Therefore it is ADJR reviewable and the relevant grounds are Jurisdictional error and error of law.’ If there is a privative clause then only s 75(v) of the Constitution can be used.
S 75(v) reviewable?
I. Is the decision maker an officer of the Commonwealth?
   <ACCS v AMC (2015) 326 ALR 521 at [41]-[43]>
   i. ‘an “officer” connotes an “office” of some conceivable tenure’,
      appointment and usually salary’ <R v Murray; Ex parte Cth quoted in
      ACCS v AMC>
   ii. Not a corporation <ACCS v AMC>
   iii. Members of tribunals appointed by Cth <SAAP v Minister for
      Immigration and Multicultural and Indigenous Affairs>
   iv. Not staff of Universities even if obligations imposed by Cth
      legislation <Luck v University of Southern Queensland>
3. Grounds?

**Jurisdictional Error**

Must show that the error ‘goes to jurisdiction’ – essential to overcome a Privative clause (<Kirk>) because it is the basis of s 75(v) review – which is the only avenue open if ADJR excluded in the federal jurisdiction.

Also a ground of review under s 5(1)(c) ADJR

1) What is the purpose of the statute?
   a. Section 3 – interpretation, or derived from the title of the Act. 
      *Timbarra Protection Coalition v Ross Mining NL*
      o The act under question was the ‘environmental planning and assessment act’ therefore purpose may be akin with protecting the environment and threatened species.
      o (An order for the control of live export animals. 2015 example)

2) Is there a Jurisdictional Fact?
   Did the statute lay down mandatory factual findings as a necessary preliminary to arrive at a conclusion?

   If an objective matter/fact is required before a power is to be exercised, this is a jurisdictional fact, if not observed it is a jurisdictional error.

   Does the statutory provision that gives the decision maker the power, lay down procedural steps making the decision maker consider certain matters?

   - Do they have to come to a decision on matters of fact before they can exercise power?
     o E.g. *Corp of Enfield v DAC* if the waste treatment plant was found to produce noxious or offensive odours, then it was mandatory for the court to classify it as a ‘special industry’. There was clear evidence that there were noxious odours but the court classified it as a general industry – failed to find a Jurisdictional Fact = JE.

   e.g.
   *Timbarra*
   - Environmental impact statement had to be produced before decision was made – failed to do so – JE.

   *Plaintiff M70/2011 v MIMIA*
   - Unlawful boat person claiming asylum arrived in Australia.
     Minister decided to send to Malaysia BEFORE establishing that
Malaysia met the objective criteria as an appropriate place to be taken for processing.

3) What is the category of jurisdictional error?
There are 8 categories of JE outlined by Kirby J in \textit{Futuris} – these are the first 3.

NOTE – the ground must go to jurisdiction (if it is clear that the statute made this an essential to the decision making process, then it becomes jurisdictional)

- **Must show either** (a) statute mandated/required this to be done or (b) that it was an essential preliminary to later steps in the decision making process.

a. **Mistaken assertion or denial of jurisdiction?**
   - i. Industrial Relations Commission refused to hear a case about an industrial dispute because they determined it not to be. Whether it was an industrial dispute was a jurisdictional fact (had to be determined before the decision was made). The court got it wrong – Jurisdictional Error. \textit{<Public Service Association of SA v Industrial Relations Commission>}
   - ii. Assertion of jurisdiction that they did not have \textit{<Kirk>}

b. **Acting wholly or impart of jurisdiction by deciding a matter or making a decision not entitled to be made:**
   - i. \textit{<Kirk>} the court was not entitled to consent to ignore the rules of evidence and call K as a witness for the prosecution.
   - ii. ‘Trespassing outside their jurisdiction.’
   - iii. ‘Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its function and powers’ \textit{<Craig v SA> at 177}

c. **Acting in the absence of jurisdictional fact**
   - If there is a preliminary mandatory requirement and not followed.
     - i. A jurisdictional fact is a set of circumstances set out in a statute that must exist before a government official can act.
     - ii. E.g. a fact that must be found before further steps must be taken.
     - iii. In \textit{Kirk} they failed to give particulars of the charge so could not convict him of it.
     - iv. \textit{Craig v SA} – JE means that a decision maker has not made a valid decision.
Error of Law

Error of Law usually involves the misinterpretation of a statutory provision or the misapplication of the law to the facts.

Key phrase or provision – has it been correctly interpreted – has it been correctly applied?

Is it State or Federal?

a. State= must be on the record (Craig v South Australia)
   i. The record does not normally include the transcript of the proceedings, exhibits, or reasons for the decision
   ii. The record is normally confined to the formal order or decision (not the reasons/arguments)
   iii. Unless the formal order refers to the reasons or transcript – therefore is incorporated by reference in the formal order.

b. The record includes:
   i. The documents that initiate the proceedings because this grounds the jurisdiction of the court
   ii. The pleadings (formal arguments that are raised)
   iii. And the determination

c. Federal: not limited to the record.
   ➢ ADJR s 5(1)(f)

5 Propositions from Pozzolanic

1) The question of whether a word or phrase in a statute is to be given its ordinary meaning or some technical meaning is a question of LAW;
2) The ordinary meaning of a word or its non-legal technical meaning is a question of FACT;
3) The meaning of a technical legal term is a question of LAW;
4) The effect or construction of a term whose meaning or interpretation is established is a question of LAW;
5) The question whether facts fully found fall within the provision of a statutory enactment properly construed is a question of LAW.

What is the issue in this Case?

➢ Is there an issue with the meaning of a term or phrase? Apply 1-3
➢ Is there an issue with the construction or interpretation? Apply 4
➢ Is there an issue whether the facts fall within the enactment? Apply 5

Is the error of LAW or FACT?
<table>
<thead>
<tr>
<th>Case names</th>
<th>Facts</th>
<th>Principle</th>
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<tr>
<td><strong>Gouriet v Union of Post Office Workers</strong></td>
<td>Union refused to send mail to Zimbabwe because of racist government over there. Mr Gouriet (private person) thought it would breach the post office act – sought standing. As he was not directly affected he asked A-G to lend his name. Was refused – sought review of the decision.</td>
<td>Decision for AG to grant standing in itself not reviewable.</td>
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<td>This was a prerogative matter for AG only.</td>
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<td><strong>ACF v Commonwealth</strong></td>
<td>Japanese company wanted to develop tourist resort in QLD. Approval sought from reserved bank. Environment Minister directed that an environmental impact statement be considered in making the decision and once this was published public could comment. ACF made comments – before responding Minister gave resort permission. ACF sought JR for an injunction and declaration against the minister but they had no standing.</td>
<td>Held they did have standing because: 1) ACF did not seek to enforce a private right 2) They sough to enforce a public wrong i.e. non compliance with administrative rules 3) An ordinary member of the public with no special interest cannot enforce the law i.e. do not have standing 4) Special damage is not limited to actual pecuniary loss and need not be unique damage 5) Mere intellectual or emotional concern is not sufficient to meet special interest (Desire to right wrong is not enough) 6) Mere incorporation of an association does not by itself given standing 7) The sending in of comments did not give standing.</td>
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<td>The determination of standing as a matter of discretion may be made at the outset of the case or later once the substance of the case has been heard.</td>
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