

LAWS 5102

Administrative Law



SAMPLE EXTRACT

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Improper Exercise of Power

RELEVANCY/IRRELEVANCY (CL & ADJR ss5(1)(e), 5(2)(a)-(b), 6(1)(e) & (2)(a)-(b))

- ❖ DM must consider all matters that are relevant & not those that are irrelevant.
- ❖ *Padfield (1968)* HL – milk-marketing scheme, boards established to make recommendations about fixing price, some milk producers asked Minister to appoint a committee of investigation under the relevant legislation (investigate any complaint about operation of the scheme & report to the Minister), Minister did not set up a committee because if the committee recommended upholding the complaint then Minister would politically have had no option but to follow that recommendation (politically embarrassing). Held: **Minister had taken into account an irrelevant consideration by declining to appoint committee due to political embarrassment** [likely not decided the same way today].
- ❖ *Peko-Wallsend (1986)* HCA – issue whether submissions by PK were relevant considerations that had to be taken into account. Held: yes. Mason J: five-point framework.
 - **Bound to take into account or bound not to take into account?**
 - **A question of construction (whether bound).**
 - Can be exhaustive or inclusive list (within scope/subject matter/purpose).
 - If no list, then consider scope/subject matter/purpose of Act.
 - Three kinds of considerations on these facts:
 - Things that must be taken into account.
 - Things that must not be taken into account.
 - Things entitled to take into account but not required (between matter bound to consider & irrelevant considerations may be wide range of permissible things that can be weighed/disregarded without error of law (*A v CCC*)).
 - If unconfined discretion, factors to be taken into account may be similarly unconfined (broader discretion, more difficult to challenge).
 - **Material factor?**
 - A factor may be so insignificant that failure to have regard to it could not have materially affected the decision [would have to be something so miniscule to not materially affect the decision; rare in jurisprudence].
 - *Lansen (2008)* FFC – argued considerations missed so similar to that considered that failure would not have materially affected the decision. Held: argument rejected.
 - **Not an inquiry into weight.**
 - Not for the court to determine appropriate weight to be given to particular relevant considerations (matter for DM unless statutory direction re weight).
 - If a DM has given no weight to something of great importance or too much weight to something of little importance then you need to challenge under unreasonableness. [suggestion that DMs had to give proper, genuine & realistic consideration to relevant factors but now likely not relevant to inquiry (sounded like straying into merits (*Anderson (2008)*); weighing of factors should be left to DM (*SZJSS (2010)*)].
 - **Due allowance for policy.**
 - Whilst the principles apply equally to decisions made by public Ministers, due allowance may have to be made for the broader policy considerations which may be relevant to the exercise of ministerial discretion.

Policy: [depends on context]

- ❖ *Murphyores (1976)* HCA – permission to export mineral sands from mining operations on Fraser Island. Minister took environmental protection policy into account which had no direct connection with the statutory power, argued the policy was irrelevant. Held: **Minister entitled to have regard to environmental impact** [fairly unconfined discretion in this case].

Degree of Detail:

- ❖ *Foster (2000)* – relevant provisions of *Extradition Act* required person not be surrendered if DM satisfied that by reason of the trivial nature of the offence or other sufficient cause it would in all the circumstances be unjust/oppressive/too severe a penalty, F argued Minister required to take into account that further imprisonment in UK unlikely & later argued this matter had not been adequately considered. Gleeson CJ & McHugh J: if arguing something has not been considered with sufficient degree of detail then **can only succeed if an obligation in the Act to investigate at the level of particularity** (legislation contained no obligation) [no requirement to descend into exhaustive detail].

Duty to Inquire: [theoretically possible].

- ❖ *Foster (2000)* – argued Minister should have inquired into UK re what would likely occur post-extradition. Held: **not required to inquire further & would have been difficult to obtain that info.**
- ❖ *SZAI (2009)* HCA – applicant provided tribunal with certificate purporting to confirm membership of persecuted community in Bangladesh, tribunal sought to verify (inquired at a relevant body in Australia which made inquiries to the body in Bangladesh), tribunal informed that certificate was a forgery, applicant argued the Bangladeshi info was wrong & tribunal should have made further inquiries. Held: **no duty to inquire further in these circumstances** (bare fact info may not be true insufficient), **might have to inquire if an obvious query, critical fact to the decision & info is easily ascertained.**
- ❖ *SZGUR (2011)* HCA – applicant for review sought a number of adjournments based on suffering depression, applicant submitted it was necessary for tribunal to have regard to an expert mental health assessment in part to enable them to assess reliability of his evidence. Held: **tribunal not required to investigate all possible matters raised by the applicant on the basis of possible relevance.**

Considerations vs. Evidence:

- ❖ *Macedon Ranges (2008)* – failure to consider community opposition to gaming machine approval, argued not a consideration & all that had been missed was a piece of evidence. Held: consideration, can distinguish between a consideration & evidence but here VCAT had not thought about community opposition at all so had missed the entire consideration [if considered, then perhaps only evidence; depends on significance of evidence, statutory context & whether classified as consideration].

Difficulties of Proof:

- ❖ No free-standing CL duty to provide reasons (only available under ADJR s13).
- ❖ *Applicant A169 (2005)* FFC – Held: lack of mention in reasons of home country info did not necessarily mean it was not considered, whole context showed tribunal was aware of the matters.
- ❖ *SZGUR (2011)* HCA – Gummow J: affirmed *Applicant A169*, **courts should not lightly draw inferences about non-consideration of factors.**
- ❖ *SZSRS (2014)* FFC – Held: drew inference that tribunal had not considered material bearing on the application that the applicant was a Christian (characterised evidence as conflicting when it was not).

IMPROPER PURPOSE (CL & ADJR ss5(2)(c) & 6(2))

- ❖ Likely accompanies irrelevant consideration argument.
- ❖ If DM power conferred for particular purpose, it must not be exercised for a different one.
- ❖ Harder to prove than irrelevant consideration.

Identifying Authorised Purposes:

- ❖ Express.
 - *Campbell (1925) PC* – legislation allowed a local council to resume land for purposes of improving/re-modelling an area or widening/extending a public way, land resumed purportedly for this purpose. Held: **real purpose was to defray costs** incurred in relation to other work by reselling the land.
- ❖ Implied.
 - *Marrickville Metro (2010) NSWCA* – local council levied a higher rate on land containing a shopping centre & then on other land in the same area, argued that this was done for the improper purpose of imposing a greater rate burden on a single land owner. Held: **statute specifically contemplated different rates could be levied on different categories of land.**
 - Tobias J: the **structure of the Act was such as to allow unequal treatment of rate payers for logically if all rate payers had to be treated the same, then there would be no place for the category system** contained in the Act.
- ❖ *Toohy (1981)* – under *Aboriginal Land Rights Act*, aboriginal people could lodge claim to unalienated Crown land, did not include land within a town, in 1977/78 the Northern Land Council notified the NT government it was going to lodge a claim for land, after notification but before claim lodged the NT Administrator made a regulation under planning legislation extending the boundaries of Darwin by a substantial amount, challenged. Held: improper purpose.
- ❖ *Schlieske (1987) FFC* – concerned deportation of West-German national for drug offences, prior to deportation Australia had twice tried to extradite S & had failed, deportation power under *Migration Act* used & Australian officials were in discussion with German officials not just to deport but to deliver S into the hands of the German police. Held: **improper purpose, trying to extradite someone using a deportation power** (can only use steps for deportation).
- ❖ *Mandurah Enterprises (2010) HCA* – power of WA Planning Commission to compulsorily acquire land to build railway, WAPC resumed several lots of land & most was to be used to build the railway but some resumed for constructing roads providing access to the rail facility in a way designed to avoid building a level crossing, appellants claimed whole resumption invalid since the purpose of avoiding constructing a level crossing was not within the purposes allowed to resume land. Held: **purpose was not proper but this does not mean that the total resumption of land fails, only the resumption of the bits of land for the level crossing were not permitted.**
- ❖ *Plaintiff S4 (2014) HCA* – P was an unlawful maritime arrival & could not apply for a visa unless Minister decided he could under *Migration Act* s46A, while Minister was deciding whether to lift the bar to allow application P held in detention, Minister made inquiries that took over 2 years to complete, conclusion reached by department was that P met the criteria for permanent protection, Minister exercised power under another section of the Act to grant two temporary visas (effect that P could not apply for permanent protection visa), not in dispute that the reason the Minister granted one of the temporary visas was to engage a prohibition on applying for a permanent protection visa. Held: improper purpose, **where an unlawful non-citizen is detained for the purpose of power under the Migration Act s46A & prolonging detention other powers under the Act are to be construed as not permitting the making of a decision which could foreclose exercise of power under s46A** before decision made & so depriving prolongation of detention of its purpose.

Multiple Purposes:

- ❖ *Thompson (1950)* HCA – local authority acquired more land than needed for the authorised statutory purpose with a view to selling off the land to defray costs, argued the applicant had to show that the improper purpose was the sole purpose. Held: **sufficient if the unlawful purpose was a substantial purpose of the power**, substantial purpose in this case (much of the land was not required to build).
- ❖ *Samrein (1987)* HCA – under the relevant legislation the Water Board (NSW) was authorised to resume land for any authorised purpose under the Act, Board wanted to resume land in Sydney for the purpose of putting up a building mostly to provide accommodation for the Board, going to build a building a bit larger than needed with the additional floors to be made available for commercial leasing. Held: dominant purpose was to provide accommodation for the Board (authorised), **addition of further floors & commercial leasing of those floors was simply a means to achieve or augment the main purpose** [does not appear to be any difference between substantial & dominant purpose; courts now tend to use the term 'substantial'].

Problems of Proof:

- ❖ *Haneef (2007)* FCA – H in custody on suspicion of terrorism offences & granted bail, on the same day the Minister for Immigration cancelled H's visa which meant he could be put into immigration detention, day after AG issued a criminal stay certificate which prevented H from being removed from Australia, argued cancellation of the visa was not to remove H from Australia but to hold him during investigation. Held: **not sufficient to show an improper purpose** [courts will not likely draw an inference of improper purpose; consider the context of public safety in this context].

Multi-Person Decision Maker:

- ❖ One person has improper purpose.
- ❖ Unclear how this will be resolved.

BAD FAITH (CL & ADJR ss5(2)(d) & 6(2)(d))

- ❖ Egregious improper purpose [traditionally rare & difficult to establish].
- ❖ Implied a lack of honest/genuine attempt to undertake the task & involves a personal attack on the honesty of the DM (SCAS [2002] FFC).
- ❖ *SBBS (2002)* FFC – Held: allegation **should not be made lightly**, no single way in which bad faith can be identified but it will **often be crucial to establish dishonesty or something very akin to it such as reckless disregard for truth**.
- ❖ *SBAN* – Held: **'recklessness' not an objective test** (look to actual state of mind of DM).
- ❖ *MIMIA v NAOS (2003)* FFC – Held: court must direct inquiry to actual state of mind of the DM, not enough merely to point to illogical findings of fact that were made leading up to the decision, it **has to be accepted that DMs are not perfect & are apt to make mistakes, bad faith may manifest if the DM exhibits actual bias**.
- ❖ *NAOX v MIC (2009)* FC – tribunal breached significant requirements of PF in finding that the appellants were not in a homosexual relationship that would have prejudiced them upon return to their home country, tribunal sought to make findings seeking to give effect to a pre-ordained result. Held: **decision of the tribunal had been made in bad faith, tribunal was not truly concerned to find facts but to arrive at a predetermined conclusion** on the important issue of the applicant's sexuality.

Certiorari & Prohibition

- ❖ Prohibition = prevents whole/part of a decision from being made or enforced.
- ❖ Certiorari = quashes whole/part of the original decision.
- ❖ Scope similar, available against same types of authorities, mostly subject to the same legal principles.
- ❖ Direct (DM)/collateral (defence to prosecution for not following an order/notice) challenge.

- ❖ Time limit
 - C = within 6 months (SC Rules, O 56, r1-2).
 - P = DM not *functus officio* (not finished decision) or not finished implementing (SC Rules).

AVAILABILITY

- ❖ *R v Electricity Commissioners (1924)* UK – Atkin LJ: operation of writs has extended to control the proceedings of bodies which do not claim to be & would not be recognised as Courts of Justice, wherever any body of persons having legal authority to determine questions affecting the rights of subjects & having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division [**Supreme Court**] exercised in these writs.
 - Three jurisdictional prerequisites.
 - Respondent body must have **legal authority** [**character of legal authority?**].
 - Its determination **affects the rights of subjects** [**citizens/persons**]
 - Must have a **duty to act judicially** [**might distinguish acting legislatively**].
 - Fourth requirement = **acting in excess of jurisdiction** [**jurisdictional error**] (*Kirk* (2010) – legislature cannot take away power of the courts to review a decision for jurisdictional error).

LEGAL AUTHORITY (PUBLIC POWER)

- ❖ Clearly covers public authority, court or tribunal exercising statutory powers.
- ❖ Certiorari or mandamus not available against Governor in Council (*Enfield* (2000) HCA).

- ❖ Includes prerogative power (royal commission, GG, typically in the form of an order in council).
 - *Ex parte Lain (1967)* – purpose of CICB to consider claims for criminal injury & authorise payments, CICB established by prerogative power to administer *ex gratia* (no right) compensation scheme, L (widow of police officer) claimed compensation & was denied, L sought certiorari of the decision arguing errors of law, CICB argued that it was not exercising legal authority (prerogative power). Held: CICB subject to writs, **prerogative authority is legal authority, CICB is performing a public function (concerns public money)**.

Public Body involved in a Private Action:

- ❖ *Whitehead v Griffith Uni (2002)* QSC – vice-chancellor censured a staff member pursuant to university disciplinary proceedings under the workplace agreement (between academic union & university), applicant sought declarations re denial of NJ & an order quashing the decision to censure, applicant argued the university was a public authority exercising public power. Held: **university not exercising public power but was exercising contractual authority not particular statutory powers** [**may need to read in light of Tang**].

Private Body involved in a Public Action:

- ❖ Adjudicator performing public function needs to get the law right. Therefore, certiorari available if decision made was not IAW with law.
- ❖ Chase Oyster Bar (2010) NSWCA.
 - Spigelman CJ: whether DM exercising public (statutory) power
 - Bastion J: little doubt that exercising statutory function of determining progress payment amount & date payable by adjudicator is within the scope.
- ❖ Datafin (1987) UK – panel determined compliance with city code regulating takeover/merger actions, panel made up of industry people & acted in a self-regulating mode with no statutory authority, D sought judicial review & certiorari & mandamus. Held: judicial review available because the panel performed public duties with legal support of other public bodies, though normally would not give prerogative writ (more likely to give declaration) [**may not apply in Australia (Bastion J; Chase Oyster Bar), more likely to apply equitable remedies**].

AFFECTING RIGHTS OF SUBJECTS

Nature of Legal Rights = Remedy Granted:

- ❖ Regulatory Scheme affecting Rights/Obligations/Interests
 - R v Electricity Commission (1924) UK [**electricity suppliers**].
 - Re Smith (1991) – S was Minister for Planning & R was neighbour, large area of bushland reserved for general public purposes, government attempted to rezone that land for residential purpose, R liked to use the area to walk dogs [**landholders & users**].
- ❖ Right to Compensation.
 - Ex parte Shaw [1952].
 - Ex parte Lain (1967) – right to have ex gratia payment determined IAW with prescribed criteria (right to rule of law).
- ❖ Grant/Renewal/Cancellation of Statutory Rights (Hot Holdings (1996) [**mining tenement**]).
- ❖ Dismissal from Office (Parker v Anti-Corruption Commission).
- ❖ Right to Contractual Progress Payment (Chase Oyster Bar).
- ❖ Right to Hearing before Tribunal (SZFDE v MIC).

Rights not Affected:

- ❖ Ainsworth (1992) HCA – CJC published report re machines in Qld, recommended A not be permitted to participate, A sought judicial review for breach of PF seeking certiorari (to quash findings of the report) & mandamus (to do the report again). Held: CJC bound by PF, but no certiorari as **no legal rights affected (A only worried about reputation, not a legal right; rights to get licence dealt with under other legislation)**, gave declaration, A could have been awarded prohibition if applied in time.

Preliminary Determinations:

- ❖ Specific content of report pre-conditions later exercise of power.
 - Lain (1967) – CICB's **eligibility decision precondition to authority** to make payment.
 - Re Smith (1991) – re-zoning under planning scheme, **issue of certificate was precondition**.

- ❖ Hot Holdings (1996) HCA – warden conducts a hearing & then makes a recommendation to Minister re mining tenements, one thing on which the warden had to recommend was which application was first in time (Act required where there are competing applications then the 1st in time has the prior right) therefore this finding was significant for Minister making the grant, Minister had to receive warden’s report & could grant/refuse any of the applications consistently or inconsistently with the warden’s report (therefore could disregard applications re 1st in time). Held: **warden’s report & recommendation were a mandatory relevant consideration for the Minister even though the Warden’s finding of priority was not binding, judicial review & certiorari available.**
- ❖ Parker (1999) – ACC makes findings against applicants (improper/criminal conduct), led Police Commissioner to give notice of disciplinary process under different Act, officers sought certiorari & declaration that ACC report was beyond power & in breach of PF, referring to *Hot Holdings* there was a **connection between ACC report & Police Commissioner’s action despite different Acts, ACC Act authorised ACC to report to other govt agencies** [certiorari could correct excess of power].
- ❖ Byrne (2008) VSC – solicitor lodged professional misconduct complaint against another solicitor, statute required lodgement with investigator who refers to commissioner who decides whether to investigate, investigation could involve compulsory process & result in recommendation of disciplinary action in CAT, commissioner ordered investigation & then sent notice to solicitor who sought certiorari of the decision to request the investigation without first giving him a hearing (statutory duty). Held: requirement to give notice & receive submissions before deciding investigation should occur implied from Act, **decision procedural (no certiorari because no rights affected at that stage).**
- ❖ Carcione (2005) WASC – Held: decisions no more than recommendations that the Planning Commission (PC) endorse a strategy (no legal effect) & recommend an amendment to the Minister for approval (PC not bound to act), **neither recommendation was a condition, certiorari refused.**

DUTY TO ACT JUDICIALLY

- ❖ R v Wright (1955) HCA – WWF unhappy with arbitral award for workers’ rights & conditions. Held: CC definition of ‘judicial act’, prohibition not available because not a determination affecting existing rights (declared future rights/obligations; judicial DM only about existing rights), **prohibition & certiorari therefore lies only re acts done judicially** [criticised by Aaronson].
- ❖ Chase Oyster Bar [2010] – Spigelman CJ: **long since superseded by the development of administrative law** [applied in *Eclipse Resources (2010)* WASC].

DISTINCTIONS BETWEEN CERTIORARI & PROHIBITION

- ❖ Certiorari = for jurisdictional error & error of law on the face of the record (*Ex parte Shaw (1952)*).
- ❖ Prohibition = jurisdictional error (*Electricity Commissioners; Wright*) & breach of NJ (*Aala (2000)*).
- ❖ **No need for effect on rights for prohibition** (*Ainsworth*), can be appropriate before rights affected.
- ❖ Prohibition may issue where certiorari refused.
 - Re Wakim (1999) HCA – Held: people relying on cross-vesting, it is invalid but prohibition issues (orders prevented from being implemented in future, but does not affect past decisions).
- ❖ HCA Jurisdiction (CC s75(v)).
 - **Prohibition is a constitutional writ** (CC protected (*Plaintiff S157*)).
 - **Certiorari not a constitutional writ** (*McBain; Edwards*) (CC protected (*Bodrudzazza*)).
- ❖ FCA Jurisdiction (*Judiciary Act* s39B(1)).
 - Read in the same way as CC s75(v) (*CFMEU v AIRC*).
 - JA s39B(1A)(c) – possible review for non-jurisdictional error.