

**ADMINISTRATIVE LAW EXAM NOTES**

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## **JURISDICTION TO CONDUCT JUDICIAL REVIEW**

### **Judicial review:**

- A method for challenging administrative decisions conducted by the courts, used for a legal error (point of law)
- Comprises a set of grounds (influenced by the statutes from which administrative decisions draw their power) that reflect limitations of statutes that courts imply into the exercised powers
- Courts can't make a substantive decision or give an actual award, but can remit the decision back to the original court for re-making

### **Jurisdiction:**

- The court must have jurisdiction for it to be able to judicially review an administrative decision
- Jurisdiction (and therefore pathways to conduct judicial review) come from two sources:
  - **ADJR Act** (statutory review)
  - CL: **s 75(v) Constitution** and **s 39B Judiciary Act**

### **JURISDICTION FOR ADJR ACT JUDICIAL REVIEW:**

- ADJR is preferable over CL because there are more grounds for review, can get a statement of reasons, is quicker because can go straight to FCC under **s 8** and **s 9**
- State the SAA is not contained in **Schedule 1** (to s 3), which expressly excludes decisions made under certain legislation from the operation of the Act
- If the decision is made by the GG (who is excluded in Schedule 1), attack GG's decision under CL and use the ADJR for conduct of others who 'infected' the GG's decision

### **Judicial review can be sought in respect of:**

**S 5:** judicial review of a decision

**S 6:** judicial review of conduct in relation to a decision (people don't usually litigate the conduct, they litigate the decision)

**S 7:** judicial review of a failure to make a decision

### **Definition of decision:**

**S 3(1):** a decision means a decision of an administrative character made, or proposed, or required to be made under an enactment

**S 3(2):** a reference to a making of a decision includes a reference to making, suspending, revoking, refusing etc

**S 3(3):** a report or recommendation preceding a decision will be deemed to be a decision

Requirements needed to establish that a decision is amenable to an application for review under **ACJR Act s 3(1):**

1. 'Decision' (**s 5**) or 'conduct leading up to a decision' (**s 6**)
  - A decision ordinarily refers to a final and operative decision determinative of all issues, or
  - A substantive determination effectively resolving an actual substantive issue which is by statute required to be resolved in the course leading up to a final decision (Mason CJ)
  - Any breach in making an ancillary decision take root in the final decision ONCE MADE, therefore even error made in the process of making ancillary decisions are part of the operative decision once made and thus give rise to jurisdiction
  - For anything preparatory to the making of a decision, use the conduct clause (**s 6**)

#### **ABT v Bond**

- S 5 should be a final decision or a

2. 'Of an administrative character': means not legislative or judicial  
'Legislative' includes advancing the will of the legislature (eg fast-tracking legislation)  
**Minister for Industry and Commerce v Tooheys:** application of rules to particular cases is administrative in character  
**Roche:** creation and formulation of new rules of law having general application are legislative in character

3. 'Under an enactment':
  - a) Decision must be expressly required or provided by enactment (includes both statute and subordinate legislation)  
Decisions made pursuant to prerogative powers will not ordinarily be held to be made under an enactment  
Administrative Review Council has expressed concerns about under an enactment provision (ADJR act should be amended to allow a more broader view of 'under an enactment')  
Must have a clear link to the statute – being able to trace it back or making a decision under internal policy won't suffice
  - b) Decision must confer, alter or otherwise effect legal rights or obligations (must hold force in the enactment ie required or authorised by the enactment) (but doesn't necessarily have to later the legal right of the applicant)

#### **Griffith University v Tang**

**ANU v Burns:** decision made under a contract of employment, not an enactment

**Griffith University v Tang:** consensual relationship without contract still doesn't mean decisions are made under an enactment

4. 'Person aggrieved': means standing

A debt notice is a decision (more formal), but a preliminary notice eg computer generated notice isn't (but may still be attacked as conduct)

### **Applications made under ADJR Act go to FCA or FCC:**

**S 8:** Jurisdictions of FCA and FCC

**S 9:** Limitation of jurisdiction of state courts

### **ABT v Bond**

- Broadcasting Act conferred power on ABT to conduct an inquiry into whether the holder of a commercial broadcasting licence was a fit and proper person to hold the licence, and if not whether the licence should be revoked, suspended or have conditions imposed upon it
- Important that people in charge of media are fit and proper as it is a position of high responsibility
- Bond held TV licences
- There were allegations of bribe paid to Qld government (a generous defamation payout) by Bond, and a threat to broadcast damaging information about ABT
- ABT inquired into Bond after the two incidents and in the process, published a 'Decision of Facts' concluded that the allegations about Bond were true and that he had given misleading evidence to the tribunal
- ABT said Bond and other licences (Bond subsidiaries) weren't fit and proper persons to hold a TV licence
- Bond commenced judicial review under ADJR Act for 11 decisions and 7 instances of conduct of the tribunal

#### Jurisdiction:

- There was no reviewable decision here as to Bond, but there was as to the licensees (s 5)
- A decision ordinarily refers to a final and operative decision determinative of all issues and provided for under statute, or a determination effectively resolving an actual substantive issue which is by statute required to be resolved in the course leading up to a final decision
- A mere step taken in the course of reasoning on the way to making an ultimate decision without any statutory basis is not a decision, but may be regarded as conduct (s 6)
- ADJR is remedial, so no narrow view should be taken of the word 'decision' (s 5 doesn't speak of 'final decision' but s 3 includes decisions which all have an aspect of finality to them)
- If all intermediate steps were decisions, there would be a fragmentation of the processes of administrative decision making and the efficiency of the administrative process would be at risk
- Conduct is the way the proceedings have been conducted rather than the decisions made along the way with a view to the making of a final determination
- Eg the continuation of proceedings involving a denial of natural justice would amount to 'conduct', but once the final determination has been made, that final determination would constitute a decision reviewable for denial of natural justice
- Re LICENSEES: even though this is an intermediate determination on the way to a final decision, it was a decision of substance for which the statute provided as an essential preliminary to the making of an ultimate decision
- The finding that the licensees were not fit and proper persons was a substantive determination required to be made under the statute prior to the ultimate decision and was thus a reviewable 'decision under the Act'
- Re MR BOND (not himself a licensee): it was not a decision for which the act provided and was no more than a step in the reasoning on the way to the tribunal's finding (not a substantive determination under statute), therefore wasn't enough to have the characteristics which would qualify it as a reviewable decision
- The finding could not be attacked as 'conduct' as the challenge did not relate to the conduct of the proceedings engaged in before the making of a 'decision'

### **Minister for Industry and Commerce v Tooheys**

- Under s 273 *Customs Act*, Minister could make by-laws and determinations regarding customs duty
- Minister refused to make a determination to allow Toohey an exemption from customs tariff on importing a good
- A legislative decision creates new laws and rules which have a general application
- An administrative decision applies a general rule to a particular case
- Parliament intended that a unique good could have a lower tax coming in to Australia, but they cannot determine this ahead of time
- Therefore it is up to the administrative function to determine for the particular case (minister has flexibility to determine whether this specific good fell under a general description)
- Therefore s 273 determinations are clearly administrative (applying the law rather than making new law)

### **Roche**

- Roche challenged their weight control drug being included on the Poisons Standard via judicial review
- Much harder for people to buy the product if it is regulation because it had to be prescribed to people
- A decision to amend the Poisons Standard was legislative, not administrative, so didn't fall under ADJR act (but could use CL JR)
- Legislative decisions are the creation and formulation of new rules of law having general application
- Factors making it legislative:
  - Rules of general application
  - Applied to a substance (the compound), not a particular company (not Roche)
  - Public consultation
  - The substance was part of a national system of drug control (parliamentary control)
  - Broad policy considerations
  - No merits review
  - Decisions had to be published in the Gazette

### ANU v Burns

- Burns (professor ) was dismissed due to an adverse medical report (permanently incapacitated from performing the duties of his office)
  - Burns argued under s 13 ADJR Act he had a right to reasons
  - ANU argued he wasn't covered by ADJR Act because he was employed under contract (should perhaps argue unfair dismissal instead)
  - Under their own laws, the university had a wide range of powers with broad discretion as to termination of employment
- 
- Need to look at wording of particular statute and contract to see if it was made under an enactment
  - A university is authorised under legislation and is a public institution using public money, however here the decision to dismiss was made under contract (expressly mentioned dismissal in case of incapacitation)
  - Therefore was not made under an enactment, so not subject to judicial review
  - There was nothing in *University Act* about procedural steps to remove a professor from office
  - Cf the *Public Service Act* has a specific procedure to dismiss staff (may be different in that case)

### Griffith v Tang

- Tang was a PhD student who was excluded from being a PhD candidate for falsifying data in relation to her lab work by the Uni Assessment Board
  - Under the *Griffith Uni Act*, the Uni council was empowered to make Uni statute which may cover admission, enrolment and disciplining of students, council powers can be delegated to a committee, council had all the rights of an individual
  - There was no formal contract between the student and the university (cf Burns)
- 
- Tang wasn't entitled to judicial review as decision to terminate wasn't made under *the Griffith University Act*
  - The terms and conditions between the student and the Uni was conferred in general terms under the Act, but the decision to end the relationship was not given legal force or effect by the Act
  - Termination occurred under the terms and conditions on which the Uni was willing to enter into a relationship with Tang
  - Was a private entity terminating a private relationship without recourse to statute
  - Tang enjoyed no relevant rights under the act and Uni had no obligation under the act in relation to excluding her from her program
  - A grant of authority to make contracts and employ staff doesn't mean that when a staff member is dismissed for breach of contract, the statute from which the employer is operating has played a relevant part in the legal force or effect of the decision

### Kirby J dissent:

- Majority adopted an unduly narrow approach to the availability of statutory judicial review directed to the deployment of public power (a university is authorised under legislation and is a public institution using public money)
- Requirement of affectation of 'legal rights and obligations' was a gloss on the words in the act not warranted by its terms (was contrary to text and an erosion of the purposes of the ADJR Act)
- Look at whether the lawful source of power of the decision lies in the enactment and whether an individual would, apart from that source of power, have the power (either under CL or some other statute) to make the decision at hand
- If yes, then not made under the enactment, if no, then the source of power in the statute is established as governing the case
- The Uni receives substantial funds under legislation and was defined as a higher education provider under Act; wasn't a wholly private body therefore can't govern themselves as they please so must conform with administrative law

## JURISDICTION FOR CL JUDICIAL REVIEW:

CL jurisdiction of the courts is more flexible than the ADJR Act as was inherited by the colonies from the English prerogative writs

### HCA's Jurisdiction:

#### **Commonwealth of Australia Constitution Act**

**S 75:** In all matters;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

- HCA has same jurisdiction for JR that the Superior State Courts inherently had at federation under CL under **s 75(v)**
- Unlikely to go to HCA straight away; expensive, usually reserved for high importance, HCA can remit cases back to FCA under **Judiciary Act s 44(2A)**
- Remember that the source of this jurisdiction is the constitution, not the CL
- If the requirements are satisfied, the matter must be justiciable and not be restricted by Parliament or involve complex policy considerations **Peko Wallsend**

### FCA's Jurisdiction:

#### **Judiciary Act 1903 S 39B**

(1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

(1F) Subsections (1B), (1C), (1D), (1E) and (1EA) have effect despite anything in any other law. In particular:

(a) neither the *Jurisdiction of Courts (Cross-vesting) Act 1987*, nor any other law, has the effect of giving the Federal Court of Australia jurisdiction contrary to subsection (1B), (1C) or (1EA); and

(b) neither section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, nor any other law, has the effect of removing from the Supreme Court of a State or Territory the jurisdiction given to that Court by subsection (1B), (1C) or (1EA).

- Unlikely to go to HCA straight away; expensive, usually reserved for high importance, HCA can remit cases back to FCA under **Judiciary Act s 44(2A)**
- Therefore Parliament granted the FCA an equivalent jurisdiction almost identical to **s 75(v)** in **Judiciary Act s 39B**
- Enables people seeking to invoke the constitutionally entrenched jurisdiction of the HCA to lodge applications directly in FCA

#### **Judiciary Act 1903**

**S 44(2A):** Where a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia.

### Requirements:

1. Matter: is it a justiciable controversy capable of resolution?  
**Re McBain:** a matter is a controversy about rights, duties or liabilities that will, by application of judicial power, be quelled  
Doesn't have to be a decision of an administrative nature (cf ADJR Act JR)
2. Writ of Mandamus or prohibition or injunction is sought (certiorari is implied, despite not being mentioned)
3. Officer of the Commonwealth:  
Includes ministers, public servants (employees of government departments), statutory office holders, judges and tribunal members  
'The Commonwealth' encompasses a public corporation, a statutory office holder, a maritime officer detaining offshore foreign nationals suspected of trying to enter Australia without a visa, and officers within government agencies

Once determined that the court *can* hear the matter, also consider justiciability:

- Raises the question of whether the matter *should* be heard by the court (applies only to CL JR)
- Must establish what considerations may lead a court to conclude that a matter is or isn't justiciable
  - The status of the decision maker  
**R v Toohey; ex parte Northern Land Council** (Crown), **FAI Insurances v Winneke** (high-level decision maker)
  - The source of the power exercised: statute – is there a breach of SOP?
  - The nature of power and what is involved in its exercise  
**Minister for Arts, Heritage and Environment v Peko-Wallsend** (highly political, complex policy), **Hicks v Ruddock** (foreign affairs)
  - P's standing to commence proceedings  
**Re McBain; ex parte ACBC** (must be some immediate right, duty or liability to be established – not mere hypothetical issues)
  - The nature of the issue or relief claimed: subject matter eg does it infringe on international relations
  - The time in which proceedings were commenced
  - If the court would have to consider the competing merits of many claimants for a limited resource (eg fishing licences)
  - Note courts still hesitate to become involved in cases that involve competing policy considerations

### **Re McBain; ex parte ACBC**

- Restrictive legislation surrounding fertilisation treatment to women was held to be inconsistent with Sex Discrimination Act
- Bishops wanted to challenge the decision but weren't a part of the proceedings (were amicus curiae) so couldn't challenge the original decision
- They were granted Fiat of AG to commence proceedings in the original jurisdiction of HCA

#### Matter:

- A matter involves the existence of a real and immediate controversy about some right, duty or liability to be established by the determination of the court
- An attempt by a person who has no more than a theoretical interest in the subject matter to agitate a question about the rights, duties or liabilities of others will not give rise to a 'matter'
- If the relief sought is not available (due to standing), there is no immediate right, duty or liability and therefore no 'matter'

#### Justiciability:

- The parties bound by the decision were McBain and the State of Victoria
- There is no justiciable issue between McBain and ACBC, or McBain and AG (hypothetical issues aren't justiciable)
- People who aren't parties to litigation don't have a claim of right to have judicial decisions quashed
- A stranger's lack of standing will frequently result in the court refusing to issue either writ on discretionary grounds
- AG always has standing to apply for issue of certiorari because the Crown has an interest in seeing that courts, tribunals and public authorities stay within their jurisdiction and do justice according to law
- ACBC isn't a person aggrieved, the order doesn't affect the legal rights, duties or interest on the members, or pose any risk to their economic interests or cause any injury or detriment to them which would be a 'special interest' (the violation of their beliefs by the decision doesn't give them a 'special interest')
- A person doesn't have a 'special interest' unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a content if his action succeeds, or to suffer some disadvantage other than a sense of grievance if his action fails
- McHugh J (dissent): If the losing party doesn't appeal, a judgment or order made without jurisdiction will become precedent, so public interest may be enhanced by allowing a stranger to apply for certiorari to quash such a judgment or order
- Such considerations apply with equal, if not greater, force with respect to matters where jurisdiction depends on constitutional competence
- Kirby J (dissent): accepted that ACBC didn't have standing to apply for relief without AG's fiat, however considered that ABC did have standing because their interest was more than merely intellectual or emotional

### **R v Toohey; ex parte Northern Land Council**

- An indigenous group made a land claim over Cox Peninsula in NT and gave warning about their intent to lodge a claim
- NT Government changed the definition of Darwin to cover the peninsula to defeat land claim
- Using town planning to defeat a land claim was argued to be improper purpose
- NT government said that it was non justiciable because they had Crown immunity from judicial review:
  - Ministers are accountable to parliament (don't need court review)
  - Is a policy decision and courts shouldn't substitute their view for those matters of policy
  - Crown decisions are secret

- The issue was justiciable, taking into account the nature of the decision and its effect upon interested parties
- Unless a Parliament can be seen to have excluded judicial review, the courts will examine the exercise of powers so granted, determining whether their exercise is within the scope of Parliament's grant of power
- This will be so whether the grant of power be to the representative of the Crown, to a Minister or to some other body or person
- There is no reason to give immunity to Crown from judicial review
- Doubted NT's argument that parliamentary oversight is an effective form of control

### **FAI Insurances v Winneke**

- FAI had been on the list of approved providers of workers compensation insurance for 20 years
- Government decided not to renew FAI as an approved provider, and gave reasons for doing so
- FAI issued proceedings against Vic Government, arguing they had not been given natural justice
- Government argued that the issue wasn't justiciable because final approvals were made by the Governor in Council acting on ministerial advice

- The issue was justiciable; just because a decision was made by a high-level decision maker, isn't reason to exclude judicial review
- Exclusion from review would create a big gap in review of the range of mundane to important decisions the EC makes
- Found the Governor in Council's decision was void for denials of natural justice

### **Minister for Arts, Heritage and Environment v Peko-Wallsend**

- Nomination for Kakadu to be on World Heritage List
- Needed a proclamation by Cabinet (authority came from the fact that Australia was a part of a treaty), which was made
- Was going to impede on the future rights of P, a mining company in the area (but not their existing interests)
- Report said part of Peko's area would be covered by claim, when in fact all of its area would be covered
- Aboriginals would also have the power to refuse to grant a mining lease, or set terms and conditions for it
- Peko wrote to the minister to get the report amended and have Peko's detriment reassessed
- A response was given but no decision made, Government changed and new Minister made land grant in favour of the Aboriginals
- Peko argued that Cabinet had failed to give them a hearing in accordance with the requirements of natural justice
- Peko argued the Minister relied on the non-amended departmental brief which did not refer to all of Peko's submissions about the full detriment caused to them by the land grant, therefore failed to take into account relevant considerations

#### Justiciability:

- Was non-justiciable and immune from JR because the subject matter was a highly political cabinet decision
- Bowen CJ: the whole subject matter of the decision involved complex policy questions relating to the environment, the rights of aboriginals, mining and the impact on Australia's economic position, affecting private interests, placing the decision beyond review by the court even if the private interest of the respondents was thought to have been inadequately considered
- Justiciability turns of nature and subject matter of the power (inappropriate for a court to interfere with cabinets decisions)
- Issues arising out of international relations have widely been regarded as non-justiciable especially the executive's treaty-making power (although later cautioned by Gummow J)
- The decision was made under the prerogative (being an act done to a nation or body under an international treaty), but the finding of non-justiciability didn't come from the origin or the power (whether prerogative or statutory)
- Courts can review ministers decisions notwithstanding the decision is carried out in pursuance of a power derived from the prerogative
- The law has not yet reached the stage of applying the obligation of natural justice to every decision with disadvantages individuals (government would become unworkable)
- Here, Cabinet could not possibly provide a hearing to everyone affected by a decision that was in the political arena
- The detriment must be direct and immediate to a particular individual to give rise to a right of natural justice, which was not the case here as Peko's present rights remained
- Wilcox J (dissent): cannot exclude judicial review merely because it was a decision of the Cabinet or because it was taken in exercise of the prerogative powers of the Crown
- This is justiciable because of the direct and immediate consequence suffered by Peko

### **Hicks v Ruddock**

- Hicks was detained in Guantanamo Bay, Minister for Immigration (Ruddock) made a decision to not request release
  - Hicks sought judicial review of the decision to not request release
  - Minister argued there was no justiciable issue and that the Act of State doctrine required a court of one nation to abstain from hearing proceedings that might require it to pass judgment on the legality of acts of a foreign sovereign government
  - Hicks argued was a fail to exercise of s 61 (to protect citizens overseas), and extraneous and irrelevant considerations led the executive to not request his return to Australia
- Court held the matter was justiciable and ruled proceedings should go to a hearing
  - The fact that the s 61 powers were exercised in relation to some aspect of foreign affairs or diplomatic relations doesn't automatically exclude the conduct of the government from JR