

# 1. Grounds

## I. Acting without legal authority

Intro: X could claim the DM was acting without legal authority, it is ground of review under the ADJR s5(d) and (b) as well as under the general law.

**ADJR Act:** 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:

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made; → Note s5(2) gives guidance on what the improper exercise of power is.

1. Scenario: Whether the decision-maker acts without legal power –
2. Types of acting without legal authority:
  - Temporal
  - Geographical (*ABC Learning Centres*)
3. What is the scope of the decision-maker's power:
  - Identify the section/s giving power to the decision maker and interpret the scope of the power given. *ABC v Learning Centres* – Hollingworth J looked at:
    - Purpose of the Act – does it support a wide or a narrow reading?
    - The section in question – the heading, the remaining paragraphs. – in *ABC* the other paragraphs had 'relevant premises' in them. The header of the section was 'powers of entry' – now that is part of the Act.
    - Explanatory memorandum – in *ABC* no suggestion of a broader investigative power.
    - Second reading speech – which reading does it support
    - Consistency with other sections – in *ABC* the officer had to produce a licence on request, why would that be there if not on premises?
  - Principle of legality: Requires government official to show a source of legal authority for their action. Note that courts acknowledge that where there is a statutory power there must also be implied power to do things that are incidental or consequential to that expressly authorised by the Parliament.
4. Was the decision being challenged made within that scope:

Cases:

*ABC Developmental Learning Centres Pty Ltd v Secretary, The Department of Human Services [2007] VSC 37*: Childcare centres requested to provide docs and answer questions, the request not directed at a particular person, sent by mail – the relevant act provided power to the officer to enter premises, take photos, to ask question and the centre alleges that it does not have to answer questions because they were not made in person at the premises.

Remedies: Declaration sought.

Held: The section was limited to 'premises'.

## II. Improper Purpose

Key: An administrative decision-maker can only exercise their power for the purpose for which it is conferred. Commonly statute will define the purpose for which the power can be exercised.

Intro: X could claim that the power was exercised for an improper purpose. This is a ground under the ADJR s5(1)(e) and potentially (c) as well as a ground of review under general law.

### **ADJR ACT ss 5(1)(e) and s5(2)(c)**

- (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:
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
  - (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

### **Checklist:**

1. What is the purpose for which the power was conferred?
  - Look to the purpose of the Act and the power-conferring section, what is it in the legislation for and the scope of it?
  - If the authority is not expressly qualified or conditioned – like all statutory discretions it is to be exercised in accordance with the scope and purposes of the enactment which it sources. (*Schlieske*)
    - *Schlieske*: The power and the act did not deal with deliverance of criminals to foreign authorities. It is to deport people, to effect a deportation. The power of deportation must only be used for the proper purpose of effecting a deportation.
2. What was the power used for (matter of fact)?
  - *Samrein*: the purpose was to have offices, the ulterior purpose was to secure finance through a deal with GIO.
  - *Schlieske*: The power was used to effect an extradition, it was a sham extradition.
3. Compare the proper and improper purpose (if more than one purpose)
  - *Samrein*: there is an ulterior purpose – the financing by GIO, building more floors.
  - *Schlieske*: extradition is not a proper purpose.
4. If more than one purpose – what was the dominant purpose:.
  - But for the improper purpose would X still exercise the power? If answer no – then this ground is a go.
  - *Samrein*: the improper purpose was not the dominant purpose. The finance deal was a means to an end. Purpose was to acquire a city block on which to build offices. The provision of offices was both the initiating and the abiding purpose of the acquisition. The provision of finance in exchange for extra space for GIO was subsidiary.
  - *Schlieske*: The dominant purpose was extradition not deportation. If it were not for the extradition it is unclear that the deportation would happen.
5. Conclusion:
  - If improper purpose then there will not be a real exercise of power under the Act, it will be an abuse of power if the ulterior purpose is a substantial purpose (*Samrein*).
  - *Schlieske*: Order restraining the Minister from delivering S to the West German authorities but can still deport him.

### Cases:

*Samrein Pty Ltd v Metropolitan Water Sewerage and Draining Board (1982) 41 ALR 467*: Board authorised by the Act to undertake compulsory resumption of land for any purpose of the Act – board does this with respect of land owned by S. S says that land resumed for an improper and unauthorised purpose. Board wants to build offices and they have a commercial deal with a company to build more stories than they need.

*Held (Gibbs, Murphy, Wilson and Brennan)*: *Samrein* argued that the board only needed about 21 of the proposed 42 floors in the building and that it could have a smaller land if not for the extra floors.

Makes sense that the Board would use the building commercially too, would need the land anyways. No evidence that they would need less space if building fewer floors.

*Schlieske v Minister for Immigration and Ethnic Affairs (1988) 84 ALR 719 (Federal Court – Full):* Minister signed deport order for S. West German authorities tried to extradite S on 2 occasions without success. Minister also arranged for airline travel permit and seat on a flight and essentially for the West German authorities to pick him up in Germany. S committed crimes in Australia and served time, now visa cancelled. Decided that it was improper exercise of power.

*Held (Wilcox + French JJ):* Identify the section which gives power. The section is an expression of power of Parliament to make laws with respect to immigration. Look to the scope of the statute.