

### Topic 3: Jurisdictional Error

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Jurisdictional error is nearly impossible to explain to lay people even though the *Constitution* (including the central provisions in s 75(v)) belongs to them. Most non-lawyers would regard it as a lawyer's fancy.'

Kirby J in *Commissioner of Taxation v Futuris Corporation Limited*

Basic idea: Jurisdiction is the authority to decide, thus the basic idea of JE is that Governments and other decision makers should not make decisions or undertake actions in excess of their authority to decide.

Importance: This comes down to a battle between the courts and the parliament for supremacy, the ability to challenge government decision is a fundamental and entrenched common law right, parliament doesn't always like this and will sometimes seek to exclude or limit judicial review through privative clauses, and JE has been used to prevent parliament supremacy.

Ultra Vires and Jurisdictional Error: Some commentators argue maintaining a workable distinction between ultra vires and jurisdictional error is impossible, with the UK entirely removing any such distinction. *Prima facie*, both UV and JE concern jurisdiction and actions taken in excess of that authority. This strong overlap is apt to create confusion, with differentiations primarily semantic and the two largely interchangeable. The origins of this overlap turns upon historical jurisdictions, with JE originally only applying to courts as part of their inherent jurisdiction to supervise lower courts and UV to administrative decision. However, overtime to prevent parliament usurpation of judicial powers through the enactment of PC, the concept of JE was introduced into administrative law.

#### Jurisdictional Error (JE):

Jurisdiction is the authority to decide, thus a JE arises where the decision maker exceeds their jurisdiction by exercising their power without meeting preconditions (narrow) or meets the preconditions but makes an error in the course of exercising the power (broad).

- **Narrow:** Exercise of power (decision or actions) when the pre-conditions for that exercise have not been met (corresponds generally with broad UV).
- **Broad:** The pre-conditions for exercise of power have been met, but an error made in the course of the exercise of power causes it to exceed its jurisdiction (corresponds closely with broad UV)

JE arises under both common law and statute, although not exact the *ADJR* effectively codifies JE where the decision involved an error of law regardless of whether it appears on the face of the decision (s.5(1)(f) *ADJR*) and where the decision maker did not have jurisdiction (s.5(1)(c) *ADJR*).

### Narrow Jurisdictional Error Overview:

Narrow JR means acting when the preconditions for the exercise of power have not been met. It corresponds generally corresponds with narrow UV, however the key difference is the concept of jurisdictional fact (JF) applying to JE.

Narrow JE = narrow UV + JF concept (objective or subjective)

#### Jurisdictional Fact:

- Also known as a pre-condition, it may be a question of fact (did X sign the paper?) or a question of law (is this a contract?) or a question of fact and law (did X sign the contract?).
- To be a valid decision, the preconditions (jurisdictional fact) must be in existence.
- A want of jurisdiction means that the JF required to be in existence for the decision maker to validly decide is not.
- Examination of JF is an exception to the courts general refusal to review findings of fact (merits)

#### JF Case Examples:

- Applications submitted are required to be accompanied by an environmental impact statement, application was approved without statement.

### Narrow Jurisdictional Error Problem Solving:

As a presumption all grounds of narrow UV are capable of amount to JE (*Craig v South Australia*). AQA may argue that DM has made a JE by failing to meet the preconditions required for the exercise of their power (*Timbarra*; s.5(1)(c) ADJR). Pre-conditions, also known as jurisdictional facts (JF) may be a question of fact or law, or both, and illustrate an exception to the courts general refusal to review findings of facts (see *Timbarra*).

AQA may argue there is a want of jurisdiction as [precondition] should be considered an [objective/subjective] JF, which D has failed to meet by [explain how Y failed to meet]. The finding of a JF is a matter of statutory constructions (*P M70*) having regard to the factors enumerated in *Timbarra*. OFT [precondition] may be considered a JF as...

#### More Likely to be JF:

- Expressed objectively, it either exists or it does not.
- Pre-condition located prominently as an express, upfront and essential preliminary which must be satisfied before decision making process
- Provision of great importance (i.e. protecting endangered species)
- Failure to follow causes a great inconvenience (i.e. species extinction)

### Less Likely to be JF:

- Expressed Subjectively (i.e. a matter on which reasonable minds might differ, expressed as a subjective state of mind, mental state, opinion or believe of the decision maker)
  - **NB:** NOT Conclusive, could be subjective and still a JF see below
- Pre-condition located less prominently, buried in a list of factors
- Provision not of great importance
- Presumption that parliament did not legislate with the intent to cause inconvenience Lesser inconvenience to parties (i.e. business inconvenience vs. animal extinction)

### Subjective JF (SZMDS):

If it is subjective JF the court must determine to determine

1. If the DM had the opinion reasonably believed [not in the public interest, gay/ discriminatory], and
2. Cannot be based on a legal error or seriously irrationality or illogicality, this could be any of the ground of UV (cf *Timbarra* which only applied it to *Wednesbury* Unreasonable)

If it is a SF then the court can review the formation of an opinion or belief to ensure decision maker properly construed and applied the law (*P M70*).

### Objective JF (Timarra):

If it is an objective JF then AQA has a key advantage because the court will make the ultimate factual decision, and they are permitted to lead evidence to provide the factual reference actually existed because the rule of law obliged the court to satisfy themselves about the facts existence.

It is an OF then the existence or non-existence of which may be reviewed by a court (*P M70*)

### APPROACH:

Determine if precondition is a JF – Objective or subjective language? Position of precondition in the legislative scheme? Purpose of legislation? Consequence that flow from wrong decision? Inconvenience?

- A. OBJECTIVE: If objective – it is a factual reference the actual existence of which can be determined through leading evidence, then the rule of law obliged the court to satisfy themselves about the facts existence – process must also be formed in accordance with the law (UV)
- B. SUBJECTIVE: If it is subjective then it is a matter that the primary decision maker must determine for themselves – only requires the decision maker to determine and be satisfied of the opinion/believe – then all the court will enquire into is the reasonableness of the opinion not the facts themselves, and if that opinion was formed in accordance with the law (ultra vires functionality – this is a near overlap with UV)

- Ross Mining operated a gold mine and wanted to extend and modify a gold mine.
- To do this they needed to apply for and receive environmental approval
- *Environmental Planning and Assessment Act 1979 (NSW) – s 77(3)(d)* - an application to extend a mine “shall... if the application is in respect of development on land that is ... likely to significantly affect threatened species ... be accompanied by a species impact statement”.
- i.e. if you want to get an approval to modify/extend your mine and on your land there were threatened species that could be impacted, then your application must be accompanied by a species impact statement
- The application was approved without a species impact statement having been provided.
- The Council that made the decision relied on advice from the Director of Environmental Services that no species were threatened.
- Timbarra (an environmental group) challenged the extension in the Land and Environment Court arguing species were threatened.
- They challenged it on the basis that there was an error because that there was no impact statement because the conclusion that no species would be threatened was incorrect i.e. there was a JF that needed to be determined

First Court:

- Judge dismissed the challenge – Court’s role is to examine for errors of law, not to make factual findings. Court on Judicial Review don’t look at the merits and do fact finding exercises
- Timbarra appealed to the NSW Court of Appeal arguing that whether a species was threatened was a jurisdictional fact, the existence or non-existence of which the Land and Environment Court was required to determine for itself on the basis of evidence adduced by the parties.
- If this is accepted as a jurisdictional fact then the court may proceed, as it is an exception to the courts reluctant to engage in fact finding

Held:

It is a matter of statutory construction

There are a number of factors we can look at to determine if there is a JF

- Is the factual reference expressed in objective terms (either exist or does not) if it is objective then it is more likely to be a JF
- If expressed subjectively – i.e. *if the minister is of the opinion, if reasonable satisfied, if decision maker believes* – expressed as a subjective state of mind, mental state of the opinion maker – this often against the conclusion of a JF, but not necessarily
- Location of the requirement – if position as essential preliminary, expressed upfront as something that must be satisfied before decision making process start then more likely to be a JF, if singled out, likewise, if buried in a list of factors perhaps not
- Another factor could be the purpose of the provision, is it important, arguably yes in this case it was very important designed to protect species
- If something is a matter upon which reasonable minds may differ, it is likely subjective, notwithstanding this is may never the less be a JF at law.
- Here whether a species is threatened is a matter on which reasonable minds may differ, while the subjective nature exist it is not determinative
- Inconvenience – species goes extinct, or Ross Mining need to do more paper work
- Held – significant role it is appropriate to describe as essential condition and JF which the court is obliged to decide for itself

Held:

**Objective jurisdictional facts** - ... ‘Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-

existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts' [including through new evidence]

- A factual reference the actual existence of which can be determined through lead of evidence, it either does or does not exist, the court must satisfy itself of its existence including by going on a fact finding exercise

**Subjective jurisdictional facts** - 'Where the process of construction leads to the conclusion that parliament intended that the primary decision-maker could authoritatively determine the existence or non-existence of the fact then ... a court with a judicial review jurisdiction will inquire into the reasonableness of the decision by the primary decision-maker (in the *Wednesbury* sense), but not itself determine the actual existence or non-existence of the relevant facts.'

#### ***Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611***

##### **Facts:**

- SZMDS was in Australia on a visitor's visa and applied for a protection visa on grounds that as a homosexual, he would be discriminated against if returned to Pakistan.
- Application was rejected by the Refugee Review Tribunal because it didn't believe he was gay (did not apply for refugee status earlier when in the UK; visited family in Pakistan).
- Claimed that whether or not he was gay was a JF and the court should undertake this fact finding exercise as to whether he was gay, this would allow him to lead evidence to the court and try to convince someone else that he was gay

##### **Held – decision upheld.**

- Case involved a claim as to whether there was a jurisdictional error.
- Discuss the interrelationship between 'rationality', 'logic' and 'reasonableness'
- Where decision-maker must believe, be satisfied that, have the opinion that (etc) some fact exists, actual existence of such facts is not essential to validity, but existence of required belief, satisfaction or opinion is a JF (i.e.
- Required belief, satisfaction or opinion does not exist if based on:
  - (a) legal errors (irrelevant considerations etc); or
  - (b) seriously illogical/irrational reasoning

#### ***Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) – Jurisdictional Facts:***

- The plaintiffs were two Afghan refugees; one was an unaccompanied minor
- They arrived on Christmas Island seeking asylum as refugees
- On arrival, they were informed they would be deported to Malaysia where their claims for protection would be assessed according to Malaysian law (pursuant to the "Australia-Malaysia refugee swap" deal)
- Assessed under Malaysian law and subject too it.
- Central to these arrangements was a declaration made by the Minister for Immigration under s 198A(3) of the *Migration Act 1958* (Cth) that Malaysia has adequate refugee protections and procedure

##### **Plaintiffs' (refugees) arguments:**

Minister's declaration was invalid

- The criteria listed in s 198A are jurisdictional facts – they must exist before the Minister can make a declaration - this is an objective determination that can be reviewed by the court - they do not exist and therefore Minister had no power to make the declaration