

# Admin Notes

|  |         |
|--|---------|
| Topic 2 - Jurisdiction                           | Page 2  |
| Topic 3 – Standing                               | Page 4  |
| Topic 4 - Reasons                                | Page 6  |
| Topic 5 – Grounds of review: Acting Beyond Power | Page 10 |
| Topic 6 – Grounds of review: Procedural Fairness | Page 20 |
| Topic 7 – Jurisdictional Error                   | Page 26 |
| Topic 8 - Remedies                               | Page 28 |
| Topic 9 – Privative Clauses                      | Page 32 |
| Topic 10 – Merits Review                         | Page 36 |

Step 1: First Paragraph – set out

- Who is the applicant?
- What is the decision?
- What enactment/provision is it made under?
- Who is the decision maker?
- What does the applicant want?

# TOPIC 2 – JURISDICTION

Decision of the governor general? → Go straight to CL (ADJRA s 3 – ADJRA does not apply to GG)


## ADJRA

If they have standing (discussed below), [X] can apply to have [whatever the issue is] reviewed under the ADJRA in the *Federal Court* or *Federal Circuit Court* (s 8 ADJRA) if it is a decision of an administrative character made under an enactment (s 3 ADJRA).

**Was it a decision (s 5) or conduct for the purposes of making a decision (s 6) or failure to make a decision (s 7)?**

- **A decision**
  - Includes: a final decision OR an intermediate decision *if* the legislation provides that the intermediate decision must be made – *Bond* (1990)
  - Includes:
    - making, suspending, revoking or refusing to make an order, award or determination; (s3(2)(a))
    - giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; s 3(2)(b)
    - issuing, suspending, revoking or refusing to issue a license, authority or other instrument (s 3(2)(c))
    - imposing a condition or restriction (s 3(2)(d))
    - making a declaration, demand or requirement (s 3(2)(e))
    - retaining, or refusing to deliver up, an article; (s 3(2)(f)) or
    - doing or refusing to do any other act or thing (s 3(2)(g))
  - Includes reports/recommendations before a decision where required by legislation (s 3(3))
- **Conduct**
  - The doing of any act or thing preparatory to the making of the decision (s 3(5))
    - Including the taking of evidence or the holding of an inquiry or an investigation (s 3(5))
  - Examples:
    - Refusing an adjournment – *Bond* (1990) per Mason J [337]
    - Summoning a witness – *Ross v Costigan* (1982)
    - Communication of a decision – *Shepherd v Griffiths* (1985)
    - Waiving of time limits – *Century Metals and Mining NL v Yeomans* (1988)
    - Taking evidence or holding an inquiry/investigation
  - Cannot be used once a decision has been made – *Ozmanian* (1996)
  - Must be leading up to a reviewable decision.
- **Failure to make a decision**
  - Where the person has a duty to make a decision but has either failed to make within the prescribed time period (s 3(2)), or (where there's no time period) there has been an unreasonable delay in making the decision (s3(1))

**Was it of an administrative character?**

- If the decision is neither judicial (determining a dispute in court) nor legislative (enacting law) then it is administrative.
- If the law is being applied to specific facts, other than in a judicial/legislative sense. 
- Examples:
  - *Roche*: Amending poisons standard is a legislative decision
  - *Toohey*: Changing definition of a town to include Cox Peninsula is an administrative decision

### Was it made under an enactment?

[The applicant] is seeking review for a decision made under [section whatever] of the *Antarctic Treaty (Environment Protection) Act*. Therefore, the decision is made under an enactment (and the enactment is not precluded as it is not contained in schedule 1 of the ADJRA)

- Cf *Tang* – made under a contract (didn't matter that the statute gave the Uni the power to enter into contracts)

### COMMON LAW (*flag privative clauses*)

[X] can apply to the High Court (s 75(v) of the *Constitution*) or the Federal Court of Australia (s 39B *Judiciary Act*) if there is a matter where a writ is being sought against an officer of the commonwealth. They will also need to show that the matter is justiciable.

### Is there a matter?

- Is there a controversy between the parties that is capable of being quelled? *McBain*
- Matter is a controversy about rights, duties or liabilities (*McBain*)
- Not a hypothetical (like in *Luna Park Ltd v Commonwealth* – relevant question was if the company elects to X, will it have to Y (Knox CJ))
- Not an advisory opinion

### Writ sought?

- S 75(v) – writ of mandamus or prohibition or injunction is sought
- Court implied certiorari because mandamus not possible without it.

### Officer of the Commonwealth?

*Possibility: As the DM is the minister, the writ is sought against an officer of the commonwealth (Woodward per Murphy J)*

- Officer is interpreted broadly.
- Think: paid by the commonwealth? Responsible to/removable by the commonwealth? - *Broadbent*

| Examples of officers of the commonwealth:   | Examples of not officers of the commonwealth:  |
|---|--|
| <ul style="list-style-type: none"><li>• <i>Woodward (1982)</i> per Murphy J – 'the prime minister, Ministers, Justices of Federal Courts, officers of statutory bodies and federal public servants'</li><li>• <i>SAAP v Minister for Immigration</i> – the refugee review tribunal (a tribunal established by the Cth, pursuant to Cth legislation etc.</li></ul> | <ul style="list-style-type: none"><li>• <i>Broadbent (2011)</i> – Queensland statute but a national scheme for regulating the health workforce, so argued that the Queensland medical board was an officer of the commonwealth – no.</li></ul> |

### Justiciable?

In addition to the court having jurisdiction to deal with the application, the dispute itself must be justiciable.

|   |  |
|---|--|
| Status of the decision maker - inconclusive | High level DM is not determinative <ul style="list-style-type: none"><li>• Eg. NT administrator changed definition of Town = justiciable (<i>Toohy</i>)</li><li>• Eg. Governor-in-council (on advice of minister) decided not to renew FAI as an approved provider = justiciable - <i>FAI v Winneke</i></li></ul>  |
| Source of the power - inconclusive          | Source of the power not decisive – <i>Peko</i><br>Decisions made using prerogative power are not automatically immune – <i>Peko</i>  |
| Nature of the power - relevant              | <ul style="list-style-type: none"><li>• Complex policy questions: national security, treaties, mercy, grant of honors etc.</li><li>• Eg. 'environment, the rights of aboriginals, mining and the impact on Australia's economic position' – <i>Peko</i></li><li>• Act of State doctrine – <i>Hicks</i><ul style="list-style-type: none"><li>◦ Prima facie: non-justiciable, however, in this instance was reviewed anyway because deprivation of liberty for 5 years w/o charge is so severe</li></ul></li></ul> |

# TOPIC 6 – GROUNDS FOR JUDICIAL REVIEW – PROCEDURAL FAIRNESS

## Source:

- **S 5(1)(a)/s 6(1)(1)** – can apply for judicial review on the ground that the rules of natural justice
  - Were breached (**S 5**)
  - Have been, are being or are likely to be breached by conduct relating to the decision (**s 6**)

## Definition of ‘natural justice’

- Not given by the act – look to the CL
- The ADJRA specifies natural justice as a ground of review, but this is *only available where the CL principles require observance of natural justice*.

## QUESTION 1: IS [THE DM] OBLIGED TO AFFORD [PLAINTIFF] PROCEDURAL FAIRNESS?

- Relevant interests
- How affected
- Subject to statute

## RELEVANT INTERESTS

To establish that they deserve procedural fairness, [PLAINTIFF] must show that their rights or interests were affected by the decision – *Kioa v West*

**Right or interest:** ‘personal liberty, status, preservation of livelihood and reputation... proprietary rights and interests’ *Kioa v West*

*Examples where the decision affected their rights or interests*

- Eg. deprivation of property – *Cooper (1863)* – *demolishing a house*
  - *Even though the act did not expressly state natural justice was required, the board should have given him notice and an opportunity to respond.*
  - *The statute gave the board power to affect an individual’s property rights, so the board had to observe the rules of natural justice before acting to detrimentally affect those rights.*
- Eg. dismissal from employment – *Ridge v Baldwin [1964]*
  - *He was still owed procedural fairness even though there had been a trial (where he was heard) because the matters weren’t identical*
- Eg. Damage to commercial reputation (this can be extended to any type of reputation – *Ainsworth*)
- Eg. You’d expect to be heard before being deported – *Kioa v West*

*Example where the PROCESS affects their rights or interests*

- Eg. Deprived of liberty while decision pending even though they were “CONTENT to have detention prolonged” – *Offshore Processing (2010)*

## HOW AFFECTED

- The person must be affected in a 'DIRECT AND IMMEDIATE' way (Mason J in *Kioa v West*)
  - NOT if affected as a member of (a class of) the public (eg. impose/increase rates)

## SUBJECT TO STATUTE

### No excluding words argument

- As [the statute] does NOT contain 'plain words of necessary intendment' (*Annetts* per Mason CJ, Deane and McHugh JJ) it is likely that [PLAINTIFF] was owed procedural fairness in this circumstance.
- Furthermore, as there is a right to reasons, one can assume that it is unlikely that parliament intended to exclude the rules of procedural fairness (*Kioa v West*)

### Excluding words argument

- [The DM] might argue that [the statute] contains a 'clear intent to exclude the operation of the rules' (Wilson J in *Kioa v West*) by saying [blah blah blah] at section [number].
- If this argument is accepted, [plaintiff] will not have been owed procedural fairness in this circumstance.

Example: A statute may qualify the hearing rule by stating that an oral hearing will not be afforded to the applicants, or that an applicant is entitled to have legal representation at a hearing.

Note: the statute would have to be VERY clear to oust rules of procedural fairness

| Example of UNSUCCESSFUL attempts  | Example of SUCCESSFUL attempt  |
|---|--|
| <ul style="list-style-type: none"><li>• In <i>Ex Parte Miah</i>, none of the following were successful:<ul style="list-style-type: none"><li>◦ A portion of the Act is headed a 'code' for, inter alia, fairness<ul style="list-style-type: none"><li>▪ Not declared to exhaustively define content of fair procedure</li><li>▪ Indication that not comprehensive: no provisions regarding bias</li></ul></li><li>◦ A section provides that non-compliance with 'code' does not invalidate<ul style="list-style-type: none"><li>▪ But avenues of review exist, so may still be set aside</li><li>▪ Complaint that breach of procedural fairness rather than 'code'</li></ul></li><li>◦ There is a right to a full <i>de novo</i> appeal to a tribunal – CAN point towards no obligation arising<ul style="list-style-type: none"><li>▪ Consider: if there is a right to appeal, is it to an internal body or a court?</li><li>▪ Consider: what kind of procedures are in place in that instance? (eg. requirement to give reasons?)</li></ul></li></ul></li><li>• After <i>Miah</i>, amendment to migration act to say "this code is <u>exhaustive as to natural justice</u> in relation to the matters it deals with"<ul style="list-style-type: none"><li>◦ Still not good enough – <i>Saeed</i> (2010)</li></ul></li></ul> | <p><i>Plaintiff S10/2011</i> (note: VERY unusual powers)</p> <ul style="list-style-type: none"><li>• Dispensing Powers<ul style="list-style-type: none"><li>◦ Minister must think it is in the public interest to exercise the power</li><li>◦ Power may only be exercised by the minister personally</li><li>◦ Minister does not have a duty to consider whether to exercise the power</li><li>◦ If power is exercised, Minister must inform Parliament (including why this is in public interest)</li></ul></li><li>• <i>'The... distinctive nature of the powers conferred upon the minister (as personal, non-compellable, 'public interest' powers), and of the availability... only to persons who... have not established their right to, a visa is of determinative significance. It reveals the 'necessary intendment' referred to in the Offshore Processing case (Gummow, Hayne, Crennan and Bell JJ)</i></li></ul> |