

## Merit Review

- Purpose: fair, just, economic, informal and quick s 2A;
- Jurisdiction: a decision (s 25 & *Brian Lawlor*), the person (s 27),
- Process: step into shoes and review on question of law/fact with same factor *Brian Lawlor*
  - Request reason, by the person s 28; by AAT s 37
  - Procedures: s 33, s 35, s 39
  - Independent judgement & critical use of policy *Drake, MZZW*
  - decision based on material before AAT (relevant consideration ground) *Shi*
- Result: to arrive correct and preferable decision *Drake & s 3(3)*
  - Give reason: s 43(2)
  - Appeal to FC: s 44; ADJR Act; JA s 39B

## Juridical Review

### 1. Jurisdiction & Remedy he wants?

Court	Writ/Statute	Remedy	Issue
Federal Court *preferred as to obtain reason s 13	ADJR Act - only to cth - not apply to GG, s 3(1) - administrative decision	▪ S 16	S 3(1) a decision of an administrative character made under an enactment 1. Decision (final & determinative) vs intermediate determination (reasoning on the way to final decision): <i>Bond</i> , dissent & see ADJR s3(3) 2. Admin character v legislative (create new norm, general application, review by parliament, policy consideration): <i>Roche</i> 3. Under enactment: - Capacity <i>Telstra</i> - authorized by enactment & affect rights or obligation <i>Tang</i> (Kirby dissent) - Private interest <i>NEAT</i> (Kirby dissent)
NSW Supreme Court	▪ Prerogative writs ▪ SCA ss 23, 69	▪ JE: Certiorari (retro), mandamus, prohibition, ▪ Non-JE: Certiorari (pros)	1. Reviewable? Private body exercising public power: → <i>Panel on Takeovers &amp; Mergers</i> : govt regulation → <i>Forbes</i> : duty to public → <i>Chase Oyster Bar</i> : statutory power  2. <i>M61</i> : HC jurisdiction covers private company
High Court	▪ Prerogative writs ▪ s 73 appellate ▪ s 75 original	▪ JE: Certiorari (retro), mandamus, prohibition, ▪ Non-JE: Certiorari (pros)	
Federal Court	▪ Prerogative writs ▪ JA s 39B cth officer or cth legislation	▪ JE: Certiorari (retro), mandamus, prohibition, ▪ Non-JE: Certiorari (pros)	

- Compare the practical benefit of different jurisdiction; Consider the troubles of privative clause

### 2. Standing

Common law	ADJR s 5
1. Private action: sufficient connection with the subject matter <i>Australian Institute of Engineers</i>  2. Private person for public interest → Special interest=economic gain/loss, more than intellectual/emotion concern <i>ACF</i> → Culture/spiritual significance, greater interest <i>Onus v Alcoa</i> → Stop unlawful spending for public <i>Bateman's Bay</i>	"a person aggrieved by a decision" → Professional interest, cultural significance, greater effect on him than others <i>Ogle v Strickland</i> → Participate in decision making process <i>US Tobacco</i> → Capacity to represent public (funding, recognition, org purpose, research) <i>ACF v Minister</i> ; → Org size and funding level not matter <i>North Coast Council</i> → Interest advanced must relate to the purpose of the law; right to speak not warrant standing <i>RoL</i> → Sufficient connection between decision and interest affected <i>Argos</i>

- Any person in Land and Environment Court
- Amicus Curiae: assist the court
- Intervenor: legal interest affected *Roadshow Films*

### 3. Whether the delegated legislation is valid?

- Construe the terms of the act (what power?)

- Ascertain the scope of the reg and legal effect
- Determine whether the scope and legal effect of the reg is within the ambit of the power
  - For convenience or necessity only, complement not supplement *Shanahan*
  - Not interference with freedom of speech *Evans*
  - Regulate/prohibit distinction: subject to an unstructured discretion to alleviate prohibition? *Swan Hill; Foley*
  - Means/end
    - 1) Must not adopt means not authorised by the Act *Paull v Munday*
    - 2) Must prescribe means to secure the end rather than imposing an absolute duty *Utah v Pataky*
    - 3) Must be reasonably proportional *AG (SA) v Adelaide* (unreasonableness ground)

Review:	Lower Court <i>Kirk</i>	Tribunal/decision maker
Narrow JE	<ul style="list-style-type: none"> <li>- act wholly outside the jurisdiction</li> <li>- misinterpret the statute</li> <li>- act without certain conditions fulfilled (jurisdictional fact)</li> <li>* consider any relevant material</li> </ul>	<ul style="list-style-type: none"> <li>- misinterpret the statute</li> <li>- jurisdictional fact errors</li> <li><i>Craig</i></li> <li>- Identifies a wrong issue</li> <li>- Asks a wrong question</li> <li>- Make irrelevant considerations</li> <li>- Makes an erroneous finding</li> <li>- Reaches a mistaken conclusion</li> </ul>
Board JE	*Procedures, unreasonableness, consideration are not reviewable, but you may appeal against the decision on the substance of the case	<ul style="list-style-type: none"> <li>- Procedural grounds <i>Aala</i> (McHugh dissent)</li> <li>- Consideration grounds <i>Yusuf</i></li> <li>- Unreasonableness <i>Li</i></li> <li>- No evidence <i>Melbourne Stevedoring</i></li> <li>- Breach of statutory requirement? <i>PBS, Wei, Forrest</i>, also see <i>Palme, Wingfoot</i></li> </ul>
Non-JE	Breach of statutory duty to give reasons <i>Palme, Wingfoot</i> *consider the record of inferior court only	Breach of statutory duty to give reasons <i>Palme, Wingfoot</i>

#### 4. Grounds for review: Narrow Jurisdictional Error (also see ADJR Act s 5)

- Misinterpreting legislation-question of law *May*
  - Reject US Chevron doctrines *Enfield*
  - No evidence ground of review-apply the wrong test *Melbourne Stevedoring*
  - Failure to identify evidence is not "no evidence" *Holden*
- Whether it is a jurisdictional fact?
  - Error of law (technical legal meaning) or fact (non-legal ordinary meaning)? By construction *Pozzolonico*
  - = a precedent condition to exercise of power. If the condition is not fulfilled (=no fact but not insufficient!), it will be unlawful and there is no decision.
  - The court will be obligated to decide for itself, first identify the "key words of facts"
  - Objective jurisdictional fact *Enfield, Ross Ming, M70* (subjective JF by necessary implication)
  - Subjective jurisdictional fact *Connell* (reasonable man who correctly understand the law, if not correct, unlawful)
  - If not jurisdictional fact, may be statutory requirement *PBS*
- Whether logical or rational mind might adopt different reasoning *SZMDS*; incomplete review *Haritos*

#### 5. Procedural Fairness Grounds

- Implication principle (flexible depend upon subject matter): where right or interest affected, in individual capacity *Kioa v West*
  - Statutory procedures does not extinguish common law PF unless parliament intention is clear *Miah*
  - include offshore entry person and private contractor *M61*
  - include investigation & recommendation where reputation is at stake *Annetts, Ainsworth*
  - multi-state decision is viewed in its entity to see if PF accord *O'Shea*
  - exclude senior official standing at the peak of the administration for public interest *S10, O'Shea*
    - however, executive must afford PF if consider new material
    - however, where policy impacts closely relate to individual, he should have an opportunity to make submission in matter of public interest
  - exclude when urgency *Marine Hull*
  - National security reduce PF to nothingness *Leghaei*

- exclude failure to give reason *Osmond* but see s 13 ADJR Act
- The hearing rule
  - Must disclose nature of purpose of the inquiry, issues to be considered and info adverse *SZSSJ*
  - Must disclose adverse info that is creditable, relevant and potentially significant, even it is confidential *Veal*
  - Must disclose critical issues, though no running commentary *SZBEL*
  - Must disclose adverse conclusion with some specification of issues, but no particularize allegation *Bond*
  - Fair hearing: undue delay is deplored *NAIS*
  - No absolute right to cross-examine unless PF requires-credibility issue *O'Rourke*
  - Tribunal to decide whether to call witness and the order *Bond*
  - Must respond to substantial clearly articulated argument *Dranichikov*
  - Fraudulent action of 3<sup>rd</sup> party *SZFDE*
- Rule against bias = reasonable apprehension of bias = observer reasonably apprehends he might not bring impartial mind
  - Start with two steps test: 1) the source of bias 2) logical connection between participation and bias *Ebuner*
    - Pecuniary interest results in automatic disqualification *Dimes* but for judges only if the litigation affects share value (Kirby dissent)
    - But for executive only if the financial interest significantly (central or peripheral role) involves in decision making *Hot Holding* (Kirby dissent)
  - Prejudgment
    - Ok to have provisional view but cannot have pre-judgement; Minister is entitled to be forthright to the public *Jia*
    - A judge previously decided my case affect the appearance of fairness *Liversey*
    - A judge can disclose his preconceived views between bench and bar *Vakautu*
  - Cannot involve extraneous info (personal feelings and experience) *Koppen*
  - Multi-member committees: one bias, all bias *Isbester*
  - Necessity when the panel has multi-functions/statutory exclusion *Rauber, Laws*
  - Standing by=waive *Vakaulu*

## 6. Consideration Grounds

- Relevant/irrelevant consideration
  - International convention are not mandatory relevant consideration *Kioa*
  - Start with what to consider: relevance determined by construction of statute: subject matter, scope and purpose → mandatory to consider? *Peko-Wallsend*
    - Weight given to the fact is not reviewable *SZJSS* but may be unreasonable
    - Did he “consider”? consideration=active intellectual process, not tick-a-box *Ticker*
    - Failure to have regard to mandatory consideration may be breach of statutory requirement *PBS*
  - Must not have regard to irrelevant considerations *Roberts*
  - Minister’s political embarrassment is irrelevant *Padfield*
  - Minister can have regard to other relevant legislation *Murphyores*
- Improper or authorized purpose
  - Start with: Statutory power can only be exercised for the purpose for which it is conferred *Toohey*
  - Where multiple purpose, substantial purpose test *Samrein*
  - Where minister can use multiple powers to achieve the same purpose, must use only the power which is conferred for that purpose *Schlieske*
- Polices
  - Issue 1: ultra vires-Policies must be consistent with the Act *Green*
  - Issue 2: Discretion
    - must not be applied inflexibly *British Oxygen*
    - must not usurp discretion as intended by parliament *Rendell*
- Representation and estoppel
  - Generally no estoppel unless no substantial satisfaction *Kurtovic* but not where ultra vires

- Minister cannot be estopped from changing police unless it cause greater harm to public by causing injustice to individual *Quin*
- No estoppel if it make no difference *Lam*
- Acting under dictation ≈ inflexible polices
  - Start with: discretion must not be exercised at the behest of another *Rendell*
  - Minister' power to make policy should not circumscribe the discretion of the secretary *Riddel*
  - Issue: minister policy
    - Department head cannot give conclusive weight to minister's policy *Anderson* (minority position, majority emphasis ministerial responsibility), also see *Ansett Air*
    - Can consider policy as long as make one make final decision *Bread Manufactures*
- Unauthorized delegation
  - If provided in statue, minister can delegate his power to make a decision. If not, whether minister can act through agency?
    - Minister is allowed to act through agency because of multifarious *Carltona*
    - Ok to delegate because of administrative necessity *O'Reilly* (Mason dissent)
    - *Nelson Bay* pick up Mason' s dissent: exercise public power with legal right affected

## 7. Unreasonableness and Uncertainty Grounds

- Wednesbury Unreasonableness: so unreasonable that no reasonable person could come to that decision
- Unreasonable=not proportionate=a decision harsher than necessary *Li*
  - Construction of statue: reasonableness is an essential condition of exercise of power *Stretion*
- Burden or benefit unequally distributed *Pestell*
- Oppressive treatment, not proportionate to purpose *Edelstain*
- Failure to inquire when the material is obvious available *Prasad, SZIAI*
- Must prescribe objective standard *King Gee, TV Corp*

## 8. Board Jurisdictional Error

- Breach of procedural fairness: reject trivial breach *Aala*
- Breach of consideration grounds: Yusuf
- Unreasonableness: it is a default position of exercise power *Li*
- No evidence *Melbourne Stevedoring*
- Breach of statutory requirement of exercising power: mandatory or dictionary? legislative purpose test *PBS*
  - Invalid cause public inconvenience? If yes, non-JE *PBS*; if no JE *Wei*
  - Whether the requirement is an essential preliminary step, not intermediate tone? If yes, JE *Forrest*
  - Whether giving reason is a condition precedent to the exercise of power? If yes JE *Palme*; if not, non-JE *Wingfoot*
- ADJR Act s 5(1)(b)" in connection with making a decision" *Our Town FM*

## 9. Non-Jurisdictional Error

- Failure of statutory duty to give reason *Palme, Wingfoot*
- Error of law on the face of the record: failure of statutory to give reason *Wingfoot*
  - What is record? *Craig, s 69(4) SCA*

## 10. Privative Clause

- Whether PC valid? *S 157*
  - If JE, not valid
  - If non JE, valid
- No invalidity clause? *Futuris*
  - If JE, not valid
  - If non JE, valid; but if act for corrupt purpose or deliberate fail, then JE, not valid
    - Because no common law right to give reason, so valid *Palme*
- Time limit clause: not valid if JE *Bodrudazza*
- Other restriction: affect s 75(v) jurisdiction? *Graham*
- State PC: state court has supervisory a jurisdiction protected by Cons Chp III, *Kirk*

## 11. Remedy as conclusion

- After discuss JE/non JE, determine whether the remedy available
  - Certiorari: quash a decision & remove legal effect *Ainsworth*; Prohibition; Mandamus: command to perform a duty *Pamle*
  - Equitable remedies: injunction, declaration
- Issue: absolute theory vs relative theory *Bhardwaj*