

GROUNDS FOR JUDICIAL REVIEW – CONSIDERATIONS/PURPOSE

The purpose of JR

In JR, courts determine whether a decision or action has been legal. Threshold issues:

- Jurisdiction
- Justiciability
- Standing

Major issue:

Is there a ground of review?

Additional issues:

Legislature must not have validly excluded the court's review jurisdiction.

Court must have power to grant a remedy

ADJR Act – Grounds (also see s6(1) and s7(1))

(5) Applications for review of decisions

(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

- that a breach of the rules of natural justice occurred in connection with the making of the decision;
- that procedures that were required by law to be observed in connection with the making of the decision were not observed;
- that the person who purported to make the decision did not have jurisdiction to make the decision;
- that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
- 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;
- that the decision involved an error of law, whether or not the error appears on the record of the decision;
- that the decision was induced or affected by fraud;
- that there was no evidence or other material to justify the making of the decision;
- that the decision was otherwise contrary to law.

Grounds of review reminder:

Once threshold issues are satisfied (eg jdx, justiciability, standing) and we know that judicial review is available, the next issue is 'grounds of review.'

- Grounds of review:
- This is the substantive issue of judicial review
- What has gone wrong that necessitates review by the courts? Remember the legality/merits distinction; if it is a question on the merits, then that is, most likely, an issue for *merits review*; if it is a question of law, then it is, potentially, an issue for judicial review
- *What error of law has occurred?* This is the central question. *Identify the type of error of law that has occurred.* Different grounds of review, including procedural, reasoning and decisional grounds.

See ADJR Act, ss 5 & 6, grounds of review

Categorising grounds of review:

Overlap in many ways

- Procedural grounds:
 - Procedural fairness (fair hearing, bias), procedural error
 - Focus is on DM's conduct
- Reasoning grounds

Normally focus on the DM's reasoning process. Two major grounds:

 - Consideration grounds
 - Relevant
 - Irrelevant
 - Unauthorised or improper purpose
 - Inflexible application of policy
 - Acting under dictation
- Decisional grounds
 - Includes jurisdictional error, error of law, errors of fact, jurisdictional fact
 - Focus on content of the decision reached (or that relate to decision itself).

A jurisdictional fact is where there are preconditions to the exercise of power. Certain facts have to exist before decision maker can exercise power.

Consideration grounds

Consideration of relevancy. Decision may be invalid because the DM either (failed to take account of a relevant consideration, and/or (2) took account of an irrelevant consideration.

ADJR Act and considerations:

Section 5 – Application for review of decisions

- A person who is aggrieved by a decision to which this Act applies on any one or more of the following grounds ...
 - 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;
- The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
 - taking an irrelevant consideration into account in the exercise of a power;
 - failing to take a relevant consideration into account in the exercise of a power;
 - an exercise of a power for a purpose other than a purpose for which the power is conferred;
 - an exercise of a discretionary power in bad faith;
 - an exercise of a personal discretionary power at the direction or behest of another person;
 - an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
 - an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
 - an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
 - any other exercise of a power in a way that constitutes abuse of the power.

Test for considerations:

Similar tests for both 'relevant considerations' and 'irrelevant considerations' and the same 3 questions are reflected in both tests

When addressing relevancy grounds, ask:

- What did the DM consider?
- What was the status of the consideration? Was it required etc?
- Was the consideration significant?

Relevant considerations

See s5(1)(e), s5(2)(b)

A decision will be invalid if the DM failed to take into account a relevant consideration. What is a 'relevant consideration'?

DM must have failed to take into account a consideration which the DM was required to consider under the Act, either expressly or impliedly

So 'relevant' = 'required'

'[The relevant considerations ground] does not ... mean that a party affected by a decision is entitled to make an exhaustive list of all the matters which the decision-maker might conceivably regard as relevant and then attack the decision on the ground that a particular one of them was not specifically taken into account.' (*Sean Investments Pty Ltd v Mackellar*, (1981) 38 ALR 363, 375)

3-Step approach to interpreting and applying this test:

1. The DM failed to take account of a consideration
Either took no account at all, or gave it insufficient weight. 'To contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of'. Consideration of a document such as a representation or a submission ... involves an active intellectual process directed at that representation or submission – (*Tickner v Chapman* (1995)). A decision may be set aside if a DM fails to give adequate weight to a relevant factor, if this is required by statute: *Khan v Minister for Immigration and Ethnic Affairs* (1987) – DM required to give 'proper, genuine and realistic consideration' to the merits of the case. But see now *Minister for Immigration v SZJSS* (2010) - Cited *Khan* and it's 'litmus test' of 'proper, genuine and realistic consideration'. RRT had not erred in giving 'no weight' to letters produced by the applicant Weight to be accorded to evidence is entirely a matter of the merits of the application, unless specified by statute.
2. This consideration was a matter that, expressly or impliedly, the decision-maker must consider under the Act
This is an issue of statutory interpretation. Express provision in statute? Is the consideration one the DM is directed to consider? Or is the Act permissive about this? Implication in statute? Courts draw inferences from the language of the statute, the nature of the function being exercised and sometimes human rights implications.
3. The matter was significant for the decision; it materially affected the decision.
Did this consideration (which DM was required to consider but did not take into account) materially affect the decision? The failure to consider the relevant consideration must 'deprive [the applicant] of the possibility of a successful outcome...' (*Lu v Minister for Immi...* (2004)).

Irrelevant considerations

A decision will be invalid if the DM made an error of taking into account irrelevant considerations.

Approach to interpreting and applying this test (3 steps):

1. The DM took account of a consideration;
What amounts to 'consideration'? Just because a particular matter is omitted from the reasons for a decision does not necessarily mean that the matter was not considered (*Yusuf*). Conversely, a DM may look at a matter without considering it – DM may pick up a red herring, turn it over and examine it and then put it down without 'considering' it (*Australian Conservation Foundation v Forestry Commission* (1988) (FCA). Need more than a mere glance for 'consideration'
2. This consideration was a matter that the DM was prohibited from considering under the Act; and
It is often necessary to determine which matters are 'irrelevant' or prohibited by reference to the 'subject-matter, scope and purpose' of the legislation (*Peko-Wallsend*). This is an issue of statutory interpretation, but two points assist:
 - Who is the DM? Different DM's may account for different matters
 - DM's usually prohibited from considering 'all corrupt or entirely personal or whimsical' matters (Stephen J, *Murphyores* at 12)
3. The matter materially affected the decision.
Did this consideration materially affect the decision? Was it significant for the decision? Courts are generally reluctant to second guess whether the same decision would have been made - See *Min for Aboriginal Affairs v Peko Wallsend*

See *Tickner v Chapman* (1995)

The Minister's decision was invalid because he failed to 'consider' a relevant consideration (despite reading summary)

This hinged on the s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) requiring the Minister to 'consider' representations made under the Act

Court found that 'consider' meant actually read each representation personally

Not having done this, the Minister had therefore not engaged in an 'active intellectual process' in relation to material he was obliged to consider.

Statutory example:

Therapeutic Goods Act 1989 (Cth) s 7AA(3):

Before making a determination under this section, the Minister must have regard to the following matters:

- (a) whether it is likely that the specified goods, if not regulated under this Act, might harm the health of members of the public;
- (b) whether it is appropriate in all the circumstances to apply the national system of controls relating to the quality, safety, efficacy and performance of therapeutic goods established by this Act to regulate the specified goods;
- (c) whether the kinds of risks from the specified goods to which members of the public might be exposed could be more appropriately dealt with under another regulatory scheme.

And see subsection 4)

S11B(4) of the *Freedom of Information Act 1982* (Cth) applies to decisions about granting access to conditionally exempt documents:

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Improper or unauthorised purpose

A statutory power can only be exercised for an authorised purpose (*Schielske v Min for Imm* (1988) 84 ALR 719). Exercise of the power for a different purpose will be invalid. This CL rule is codified in ADJR:

S5(1)(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 'an improper exercise of the power' includes :

S5(2)(c): an exercise of a power for a purpose other than a purpose for which the power is conferred

Improper purpose – two step inquiry:

To establish whether a decision was made for an improper purpose, the test is a 2-step inquiry:

1. For what purpose was the power lawfully authorised under the Act?
The purpose can be express or implied, and there may be multiple purposes. Statutory interpretation: look to the purposes, aims, and/or intention of statutes
 - Express purposes - Express purposes are those stated in the statute
 - Implied purposes - If no express purpose, courts look to aims/objects of statute to determine authorised purpose by implication (see *Schlieske v Minister for Immigration and Ethnic Affairs* (1988))
2. For what purpose was the power actually exercised?
This is a question of fact to be established by the evidence.

Multiple purposes?

What to do when there are multiple purposes– and one of these purposes is a valid, statutory purpose and one is an improper, unauthorised purpose? Consider whether the unauthorised purpose was a substantial or dominant purpose.

Bad faith

Relates to improper purpose but requires a reprehensible intention. No Comprehensive definition but DM exercises a power in a way that is corrupt or dishonest or fraudulent. Full Federal Court described Bad Faith as implying

'a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the DM' (*SCAS v Minister for Imm* [2002])

ADJR:

S5(1)(e) – 'improper exercise of a power' ... includes a reference to:

S 5(2)(d): an exercise of a discretionary power in bad faith

SBBS Factors for establishing bad faith

1. Involves personal fault of the DM
2. Allegation should not be lightly made and must be clearly proved
3. Not possible to comprehensively define bad faith
4. Dishonesty is crucial
5. Bad faith is rare and extreme
6. Mere error or irrationality doesn't indicate bad faith – bad faith is far more than poor decision-making
7. Errors of law or fact and illogicality won't demonstrate bad faith without a showing of capriciousness
8. Court to draw an inference of bad faith from the decision-making process and reasons given for the decision
9. Not necessary to show DM knew decision was wrong. May be sufficient to demonstrate DM was reckless in exercising the power.

SBBS v Min for Imm (2002) 194 ALR 749(FC)

Bad faith -> Fraud

Strong similarity between the grounds of bad faith and fraud. One difference being that while the ground for 'bad faith' is only available when the DM has acted in bad faith, the fraud ground is available when the decision has been influenced by the fraud of a third party.

ADJR s 5(1)(g): decision was induced or affected by fraud

Need actual fraud, not 'real possibility' or 'real suspicion' of fraud; *Wati v Min for Imm* (1997)

Fraud of DM or, more commonly, of a third party

Must be actual fraud, not implied.