

## Admin law outline

### JUDICIAL REVIEW SCOPE

#### 1. **Scope of JR - JR jurisdiction**

##### **a. Constitutional source of JR**

- i. © *Plaintiff M68/2015* - HCA Gaydon J
  - Need Jurisdictional error: 75(v); (1) matter (2) writ of mandamus, prohibition or injunction (3) against officer of Cwth
  - If non-jurisdictional error try: 75(iii) if Cwth is being sued – can be the ANU
  - Note: 73(ii) gives the HCA appellant jurisdiction
  - Note: if state officer, Cwth const. doesn't help. (s.9 ADJR)

##### **b. Statutory source of JR**

- i. ADJR – s 3,
  - Decision – final and operative (bond)
  - Administrative character (tang)
  - Under enactment (Griffith/NEAT)
- ii. © *ABT v Bond*
  - F: F: whether or not a company owned by Bond, was the company of 'good character' to broadcast on public TV.
  - Issue: does Bonds lack of character mean the companies lack character? .... Question is 'substantive in character' – note not procedural. Whether Bond was good character, is only a step.
  - C: lack of finality of tribunal's decision meant it was not reviewable.
  - Note: what does the legislation provide for? – a procedd to be 'substantive' ... final decision is one determined by and provided for by the legislation.
  - Note: if it is a step to help you get to the decision it is an intermediate.
- iii. © *Griffith Uni v Tang*
  - Private decision/government body
  - Under enactment = (1) expressly/impliedly required/authored by legislation, (2) affects legal rights/obligations.
  - F: Student expelled from Griffith University (a public university established under Qld legislation) PhD program after what was alleged a breach of procedural fairness sought review under Qld equivalent of ADJR Act.
  - Note: note: legal impact not practical impact ... legal arguments are essential.
- iv. © *NEAT*
  - Public decision / private body
  - F: WEA – statutory body – required consent of AWB to issue licence, AWB did not give consent, and AWB's decision here is not reviewable.
  - "Not necessary or appropriate to subject the AWBI to judicial review."
  - Importantly, AWB's ability o consent did not come from statute but rather as a function of them being a company.
- i. © *Datafin* –
  - F: company oversaw merging companies and finances being essential to business and in essence a government role – as such their decisions were reviewable
  - '2016 - ionalist approach'

##### **d. Delegated legislation (brief)**

- i. Henry VIII clause:
  - R: Delegated legislation can override primary legislation.
  - Still needs to be 'necessary or convenient to give power to the act;.
  - Cases:
  - Re Dignan
- ii. © *Carltona* principle
  - Ministers are not expected to do everything, there is an implied opportunity to appoint agents.

### JR REMEDIES AND CONSEQUENCES OF LEGAL ERROR

iii. © *Evans v NSW*

- principle of legality. (World Youth Day protest).
- Legislation aimed to promote the WYD event and hope it runs smoothly, prohibiting – ‘annoyance or inconvenience’ – cannot be interpreted to prohibit protesting, and as such removing protesters is outside the scope of the primary act.

e. Other

. © *AG (NSW) v Quin – fact/merit*

- T: courts are not to engage in merits review.
- R: Brennan J – noted the conferral of authority by the legislature on government to act within the ‘limits’ and governs the exercise of the repository’s power. ... leaving the ‘merits of administrative action’

i. © *Collector of Customs v Agfa-Gavaert (1996 HC)*

- R: "The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by any distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated."

2. Judicial review remedies (and JE's central role in determining their availability)

- Note - combined w/ JE and split into two weeks

a. © *Project Blue Sky (PBS)*

- F: international obligation contradicts general claim for domestic policy to comply with Australia’s international obligations.
- To ascertain what is a judicial error: look at whether the statute intended to invalidate a decision based on breaching the statutory provision.
- Rejected mandatory/directory
- (1) language, (2) nature of the obligation, (3) effect on third parties

b. © *Ainsworth*

- F: poker machine owner, deemed not to be of proper character. Procedural fairness was not afforded as the applicant did not have the opportunity to put their side forward. Note: reputation was a sufficient interest to give rise to procedural fairness. However, certiorari – no available as reputation has no legal effect. Injunction could have been sought but event has already occurred. Declaration of unlawfulness was pointless.
- Importantly, as the matter was no hypothetical or advisory – right to procedural fairness arises. (+ decision).

c. © *Aala (check)*

- Procedural fairness will be breached when an applicant is not given notice of what the issue at stake is.
- o Second tribunal in making the decisions stated the story was all made up – ‘never raised this part of the story’ - ... yes we did they’re in the papers.
- o Breach of procedural fairness: Should have been notice as to what the issues at stake were

3. Jurisdictional errors

a. © *PBS* (From above)

- F: international obligation contradicts general claim for domestic policy to comply with Australia’s international obligations.
- To ascertain what is a judicial error
- Rejected mandatory/directory

- (1) language, (2) nature of the obligation, (3) effect on third parties
- b. © Craig
- F: driving offence, complained about courts
  - Whilst Craig suggested that JE can effectively be determined by a list, Kirk however disapproved of a list and rather stated 'it is not possible to mark the metes and bounds of JE' (kirk – push towards PBS for classifying JE).
  - the premise that a distinction should and is drawn between courts and tribunals remains, such that errors of law -> JE (tribunal), and error of law -> not JE (courts)
  - narrow interpretation of JE for inferior courts, wider interpretation of JE for tribunals.
- c. © Kirk
- Kirk however disapproved of a list and rather stated 'it is not possible to mark the metes and bounds of JE' (kirk – push towards PBS for classifying JE).
  - Statutory interpretation for JE, (1) seriousness of the error, (2) purpose PBS analysis
  - Consider the terms, nature and extend of the power in issue
- d. Consequences of invalidity and jurisdictional error
- i. © Bhardwaj -
- F: tribunal decision to cancel a visa, the applicant could not make the hearing due to illness and they sent this information to the tribunal, who in failing to view the letter ruled against the applicant. The tribunal then set this decision aside due to a breach of procedural fairness.
  - Q: whether it was open for the Tribunal to reconsider its decision after having exercised its authority
  - R: 'legislative provisions should not be construed as giving rise to an implication which gives an administrative decision greater force of effect that it would otherwise have unless that implication is strictly necessary' [614]
  - However, although a decision cannot be remade by the one authorised to make the decision ('functus officio'), as the initial decision was void, it was in fact not a decision, and thus the only decision was the second one.
  - Thus tribunal can review itself here as the first judgement was 'void ab initio'
- ii. © *Jadwan v Sec, Dept of Health and Aged Care (2003 Full FC)*
- Nursing home, there was a decision as to whether or not a nursing home should receive a licence, after recommendations from an improperly-established panel, the Minister (delegate) rejected the application for a licence. [decision was made on the assumption the panel was 'valid' and thus the decision is tainted]. As such there is an error of law (unlawful) – prospectively invalid. #OBS factor.
  - Importantly here, the requirement for a licence had become more stringent and as such the fact that the error was not 'retrospectively' corrected, was problematic for the applicant.

#### 4. Grounds of review

##### a. Review of decision s.5 (ADJR)

- 5(1)(a) Natural justice/procedural fairness (fair hearing & rule against bias)
- 5(1)(b) breaches of procedural requirement.
- 5(1) (c) no jurisdiction
- 5(1) (d) purposes was not authorised
- 5(1)(e) improper exercise of the power conferred
- 5(1)(f) error of law – no need to on the face of the record
- 5(1)(g) affected by fraud
- 5(1)(h) no evidence
- 5(1)(i) decisions otherwise contrary to law

##### b. Review of conduct (S.6 ADJR)

- Explanation of 5(1)(e)

- (5)(2)(A) taking into account irrelevant consideration
- (5)(2)(b) failing to take into account a relevant consideration
- (5)(2)(c) using a power for an ulterior purpose
- (5)(2)(d) exercising discretion in bad faith
- (5)(2)(e) exercising discretion based on someone's instructions
- (5)(2)(f) failure to take into regards merits of particular case
- (5)(2)(g) exercise of power so unreasonable that no reasonable person could have so exercised the power
- (5)(2)(h) uncertain result (explained by 5(3)(a) as no evidence and (b) as mistaken fact)
- (5)(2)(j) any other exercise of power that constitutes abuse of power

c. **Failure to make a decision (s.7 ADJR)**

- Applications in respect of failures to make decisions
- (1) Where:
  - (a) a person has a duty to make a decision to which this Act applies;
  - (b) there is no law that prescribes a period within which the person is required to make that decision; and
  - (c) the person has failed to make that decision;

d.

e.

f.

g.

h. **Procedural fairness (natural justice)**

- T: Rules of procedural fairness may be presumptively applicable to administrative decisions (McHugh and Gummow JJ in Lam).

i. **Fair hearing rule**

1. **© Kioa v West**

- Rights directly affected
- F: Kioa's were two valid visa holders who overstayed their visa and changed address, in learning this their Visa was cancelled – they were to be deported.
- Q: relevance to a fair hearing?
- Mason J: common law duty: Direct and immediate effect on rights, interests or legitimate expectations – (subject to clear parliamentary intention).
- Brennan J: (implied by statute- predominantly used now)
- Implication of Procedural fairness based on statutory requirement applying to those affected in a manner substantially different from the public at large:

2. **© Miah – check?**

- F: asylum seeker, fear of persecution 'gay' went back for sister's wedding.
- A majority of the High Court of Australia held in favour of Miah. They held (at [125]) that *'the delegate (the Minister) breached the rules of natural justice by failing to offer him an opportunity to respond to new material critical to adverse findings against his application.'*
- R: *'It is now settled that when a statute confers on a public official the power to do something which affects a person's rights, interests or expectations, the rules of natural justice regulate the exercise of that power "unless they are excluded by plain words of necessary intendment".'*

3. **© Saeed – check**

- F: skilled visa application denies on the basis employer said Aseed hadn't worked, no hearing for this to be corrected. Migration act, stated it had an 'exhaustive statement ... natural justice rule'.
- R: High Court interpreted this as not meaning that there were no obligations of natural justice applying to offshore applications, but rather that s.51A did not apply to exclude natural justice obligations in such cases.
- Read restrictively.

4. **© Plaintiff s10-2011**

- Right to procedural justice excluded w/out clear expressed words but statutory construction
- Note: this decision is often seen as a perfect storm of implied factors – unlikely to occur again
- F: opportunity for the minister to personally allow rejected visa applicants. Minister proposed guidelines of ‘in the public interest’, and his delegates enforced this. Delegate found the applicant had not met the guidelines and thus minister never saw application.
- Usually there is an obligation for procedural fairness, Minister provided the scope to single out the applicants and provide them with a benefit could be subject to natural justice obligations.
- Procedural fairness impliedly removed: (1) need for personal decision by the Minister, (2) tabled in parliament #alternative accountability, (3) breadth of the criteria - ‘in the public interest’, (4) the lack of any statutory duty to consider the decision \* the possibility of refusing to consider a decision without regard to the circumstances of the individual case, (5) the availability of alternative avenues for participation provided prior to the decision in question, (6-9) 9 factors in total.

#### 5. © VEAL

- F: in a refugee review tribunal, the tribunal received an anonymous letter which said that Veal was working for the government in his home country, unable to verify this the tribunal said it “gives [the letter] no weight” but rather decided solely on the “reasons outlined above”. Importantly the letter requested confidentiality, and the applicant was never made aware of the existence of the letter. Here lies the issue.
- R: High Court confirmed Brennan J’s view that content of procedural fairness extends to providing access to all ‘credible, relevant and significant’ material that could adversely affect the decision. They held (at [96])
- R: Thus procedural fairness requires the decision maker to ‘identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made’.

#### 6. © Lamb (check)

- While in *Lam* the applicant did not lose any opportunity to advance his case and thus did not suffer any practical injustice (distinguishable to *WZARH*.)
- R: Rules of procedural fairness may be presumptively applicable to administrative decisions (*McHugh and Gummow JJ in Lam*).

#### 7. © O’Shea

- T: limitations to procedural fairness,
- F: Mental illness, recommended by the parole board to be released back into public life, Minister in seeing this recommendation rejected the recommendation on the basis it was ‘contrary to public interest’.
- Q: does the applicant deserve a second hearing (note prior hearing in front of parole board).
- R: #PBF Factors: (1) prior hearing- no new information, (2) minister decision, (3) broad public policy consideration (4) the individual merits of O’Shea are not in question.
- C: no right to a second hearing.

### ii. Rule against bias (and statutory procedures) (natural justice)

#### 1. © Jia Legeng – actual bias

- comments by decision-maker in the past or lead up to the decision
- F: minister in seeing someone with a criminal record presumed them to be of ‘bad character’.
- F: Government policy document stated that ordinarily person not of good character if convicted of crime punishable by >1 year. But also required DM to consider all relevant factors.
- R: ‘The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already

formed as to be incapable of alteration, whatever evidence or arguments may be presented.' (Jia)

- There was no indication the minister would be unwilling to have their mind change and thus not bias.

## 2. © *Isbester v Knox City Council – apparent bias*

- T: prior involvement
- F: Local Council officer involved in the drafting of charges against Ms Isbester for being owner of a dog which causes serious injury to a person, and then in a separate process convened and was a member of a panel to consider whether to destroy the dog.

Held that even though different stages involved different considerations, the similarity of evidence and fact that the Council officer had a continuing interest in the final outcome of the matter so as to suggest an apprehension of bias.

- 
- R: Investigating the matter, you have already looked at something from a certain point of view – you thus have an interest in that opinion being upheld.
- R: Local council member – did the dog cause harm, likelihood of it reoccurring. – different factors for consideration was not enough to shift bias. (bias remained)

## 3. © *SZIZO – breach procedural rule*

- F: F: authorised representative to be given notice, not the individual, - language barriers, elderly – the notice went to the individual and not the legal representative
- Note they were fully informed, no actual impact, but they did not get the Visa, breach of statutory provision.
- Importantly: no unfairness or prejudice in failing to comply with its statutory obligation

## 4. © *Hot Holdings – bias example*

- T: personal connections or contacts with interested people
- F Minister had power to grant mining exploration licence after receiving recommendation from Mining Warden and submissions from relevant parties. Department advice was prepared with involvement by two people who had, or whose son had, shares in a company that stood to gain if granted to the appellant. Minister had no knowledge of their interests or involvement.
- R: Held that involvement of subordinates in the making of the decision can give rise to apprehended bias, but they have to participate in a significant manner in the making of the impugned decision and not just involved in giving effect to the judgment of others.

### iii. Legitimate expectation? (where should this go)>

#### 0. © *Teoh – check*

- F: Teo – international obligations obliged Australia to have the protection of children to be a 'primary consideration'.
- R: The representation of the government to enter into a treaty with another government (which Tio knew nothing about) was still enough to give rise to a 'legitimate expectation'.

#### 1. © *Coghlan UK Case*

- age care facility, promised her she would be able to stay, give you the opportunity to be heard before we move you. .... If the government makes a promise. Australia – there is no obligation of this kind.

#### 2. © *Lam*

- F: Lam's permanent visa was cancelled due to his criminal history. Lam was given an opportunity to comment on the