

# **ADMINISTRATION LAW**

## **READING SUMMARIES: SAMPLE**

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## III JUDICIAL REVIEW – GROUND OF REVIEW I – LACK OF POWER

### *A Introduction*

#### *1. Grounds of Judicial Review*

An aggrieved party must have a ground of review to apply for judicial review of an administrative decision. This must be within one of the established grounds of review, whether under common law or statute.<sup>1</sup> There is a presumption that a decision will be valid, and therefore the party disputing its validity bears the onus of establishing invalidity.<sup>2</sup>

The common law categories of judicial review are (1) lack of power; (2) improper exercise of power; (3) breach of/failure to perform a statutory duty; (4) denial of natural justice. Each of these grounds have subcategories. The common law grounds are applied in judicial review pursuant to the Constitution and *Judiciary Act*. The *ADJR Act*, however, expressly provides for its own grounds of appeal, although many of these mirror common law grounds. The common law grounds may therefore be applied, although sometimes with some modification according to the Act.

#### *2. Power*

A decision-maker must hold the power which they purport to exercise in making a decision. This requires that (1) the power is exercised within its authorised area;<sup>3</sup> (2) the person is authorised to exercise the power;<sup>4</sup> and (3) essential preliminaries to the power are satisfied. If one or more of these threshold requirements are not satisfied, the decision-maker does not act with the power they purport to.<sup>5</sup>

### *B Authorised Area*

An aggrieved person may apply for judicial review on the ground that the decision-maker lacked the power to make the relevant decision/conduct, in that he/she was acting outside the authorised area of their power.<sup>6</sup> The boundaries of the relevant power must be ascertained by interpretation of the empowering statute.<sup>7</sup>

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<sup>1</sup> *A-G (NSW) v Quin* (1990) 170 CLR 1 (Brennan J), 35-6.

<sup>2</sup> *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154, 164.

<sup>3</sup> *London City Council v Attorney-General* [1902] AC 165; *ABC Development Learning Centres Pty Ltd v Secretary, Department of Human Services* [2007] VSC 37.

<sup>4</sup> *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560; *O'Rielly* \_\_\_\_\_; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>5</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135; *Foley v Padley* \_\_\_\_\_; *Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87; *Plaintiff M70* \_\_\_\_\_.

<sup>6</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(c), 5(1)(d), 6(1)(c), 6(1)(d).

<sup>7</sup> *ABC Development Learning Centres Pty Ltd v Secretary, Department of Human Services* (2007) 15 VR 489.

This ground falls under the following grounds for judicial review: decision-maker did not have jurisdiction;<sup>8</sup> decision not authorised by the enactment.<sup>9</sup>

## 1. *Interpretation*

The authorised area of a power may be expressly provided for by the empowering statute.<sup>10</sup> However, an act which is incidental/consequential to the expressed power is deemed within the authorised area of the power by implication.<sup>11</sup> This is because powers are construed as authorising everything which can be fairly regarded as necessary for its exercise.<sup>12</sup>

Further, some rebuttable presumptions apply to the scope of statutory powers. It is presumed that exercising a power more than once is within the authorised area, as a power may be exercised ‘from time to time’.<sup>13</sup> It is presumed that a power to make a legislative/administrative instrument includes the power to vary/revoke/etc it.<sup>14</sup> Further, a power to make an appointment includes a power of reappointment.<sup>15</sup>

EG: A expressly authorised to run trams, but not buses – buses are not incidental and there is no express authorisation, so the act is void.<sup>16</sup>

EG: Empowered to require a person to answer questions on the premises, but required person to answer off premises – acting outside authorised area;<sup>17</sup>

## 2. *Delegated Legislation*

A decision-maker will act outside the authorised area of their power to create delegated legislation where that legislation does not fall within the empowering statute.<sup>18</sup> This occurs where the delegated legislation deals with a subject not within the scope of the empowering Act.<sup>19</sup>

Delegated legislation does not fall within the empowering Act if there is inconsistency between them as interpreted.<sup>20</sup> Further, where the empowering clause provides for the repository to do what is ‘necessary or convenient’ to give effect to the Act, this does not allow the repository to widen the scope/general operation/purposes of the Act or to vary/depart from that legislature’s plan.<sup>21</sup>

### *C Authorised Person*

<sup>8</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(c), 6(1)(c).

<sup>9</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(d), 6(1)(d).

<sup>10</sup> *London City Council v Attorney-General* [1902] AC 165.

<sup>11</sup> *London City Council v Attorney-General* [1902] AC 165.

<sup>12</sup> *Johns v ASC* (1993) 178 CLR 409 (Brennan J), 428-9.

<sup>13</sup> *Acts Interpretation Act 1901* (Cth), s. 33(1); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (Gaudron and Gummow JJ).

<sup>14</sup> *Acts Interpretation Act 1901* (Cth), s. 33(3).

<sup>15</sup> *Acts Interpretation Act 1901* (Cth), s. 33AA.

<sup>16</sup> *London City Council v Attorney-General* [1902] AC 165.

<sup>17</sup> *ABC Development Learning Centres Pty Ltd v Secretary, Department of Human Services* [2007] VSC 37.

<sup>18</sup> *Vanstone v Clark* [2005] FCAFC 189 (Weinberg J), [104].

<sup>19</sup> *Vanstone v Clark* [2005] FCAFC 189 (Weinberg J), [104].

<sup>20</sup> *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46.

<sup>21</sup> *Shanahan v Scott* (1957) 96 CLR 245, 250.

An aggrieved person may apply for judicial review on the ground that the decision-maker lacked the power to make the relevant decision/conduct, in that they were not authorised to exercise the power.<sup>22</sup> It is presumed that the only person authorised to exercise a power is the person in whom the Act expressly confers the power upon. However, this is subject to the exceptions of delegation, agency and de facto officers.

This ground falls under the following grounds for judicial review: decision-maker did not have jurisdiction;<sup>23</sup> decision not authorised by the enactment.<sup>24</sup>

## 1. Delegates

A decision-maker validly exercises the power of a repository where they act as the latter's delegate.<sup>25</sup> This allows the delegate to exercise a portion of the repository's power on their behalf in accordance with particular terms. The delegate's authorisation must be written, and cannot be retrospective.<sup>26</sup> A delegate acts in his/her own name<sup>27</sup> and their authority continues where the principle leaves the office.<sup>28</sup> A Minister is generally able to delegate their power.<sup>29</sup>

Delegation is permitted where the relevant statute expressly permits delegation.<sup>30</sup> The power to delegate may also be implied, however, as a matter of statutory interpretation.<sup>31</sup> There must be a legislative intention that the repository may delegate.<sup>32</sup> This construction will be supported where it would be impractical for the repository to exercise the power personally due to administrative necessity.<sup>33</sup>

## 2. Agents

A decision-maker validly exercises the power of a repository where they act as the latter's agent.<sup>34</sup> Agency is permitted where the statute evinces a legislative intention for the principles of agency to apply.<sup>35</sup> The agent's authorisation does not need to be written, and they act in the name of their

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<sup>22</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(c), 5(1)(d), 6(1)(c), 6(1)(d).

<sup>23</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(c), 6(1)(c).

<sup>24</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(d), 6(1)(d).

<sup>25</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>26</sup> *LS v Director-General of Family and Community Services* (1989) 19 ALD 134, 138.

<sup>27</sup> *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 (Brennan J), 94.

<sup>28</sup> *Kelly v Watson* (1985) 10 FCR 305.

<sup>29</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

<sup>30</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>31</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>32</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>33</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 11.

<sup>34</sup> *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

<sup>35</sup> *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

principle.<sup>36</sup> An agent's authority ceases where the principle leaves the office.<sup>37</sup> A Minister is generally able to delegate their power.<sup>38</sup>

The empowering statute must evince a legislative intention for the principle of agency to apply.<sup>39</sup> In general, a Minister may act through their duly authorised officers or Department when conferred with an administrative function.<sup>40</sup> Such an intention will be evidence where administrative necessity indicates that it is impractical that the repository exercise the power personally and not through officers responsible to him/her.<sup>41</sup> The following are relevant factors:

- Importance of subject-matter;
- Nature, scope and purpose of power;
- Consequences for administration of the Act if principle of agency not allowed;
- Whether repository has 'multifarious functions'

### 3. *De Facto Officers*

A decision-maker has authority to exercise power where they are a de facto officer under the common law.<sup>42</sup> This is a public officer who is not validly appointed at law, in that there is a defect in their title, but who is accepted as having the authorisation they purport to have.<sup>43</sup> This is a matter of public policy, as it ensures the public can have faith in the decisions of public officers and inconvenience does not result.<sup>44</sup> However, this common law doctrine does not apply if it is inconsistent with the empowering Act as interpreted.<sup>45</sup>

It is presumed that an exercise of power is not invalid merely because of: defect/irregularity in appointment; appointment ceased effect/not arise; occasion to act not arisen/had ceased.<sup>46</sup>

EG: A act as Magistrate for 10 years and then it is discovered that there was a defect in their title. A's decisions as Magistrate are not invalid because A is deemed a de facto officer.

A decision-maker validly exercises the power of a repository where they are a de facto officer. This is a public officer who is not validly appointed at law, but who is accepted as having authorisation to

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<sup>36</sup> *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 (Brennan J), 94; *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

<sup>37</sup> *Kelly v Watson* (1985) 10 FCR 305.

<sup>38</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

<sup>39</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (Mason J), 38.

<sup>40</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (Mason J), 38.

<sup>41</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* \_\_\_\_\_ (Mason J), 38; *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

<sup>42</sup> *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503.

<sup>43</sup> *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503.

<sup>44</sup> *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503.

<sup>45</sup> *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503.

<sup>46</sup> *Acts Interpretation Act 1901* (Cth), s. 33AB.

exercise the office they purport to.<sup>47</sup> However, this is subject to any statutory implication which is the result of a determination that a procedural obligation is an essential preliminary (below).<sup>48</sup>

## D *Essential Preliminary*

An aggrieved person may apply for judicial review on the ground that the decision-maker lacked the power to make the relevant decision/conduct, in that an essential preliminary was not satisfied.<sup>49</sup> An essential preliminary is a requirement which must be satisfied prior to the decision-maker having jurisdiction to exercise the power. If the repository fails to comply with the essential preliminary, their decision is rendered invalid.<sup>50</sup> There are two forms: procedural obligation and jurisdictional fact.

This ground falls under the following grounds for judicial review: decision-maker did not have jurisdiction;<sup>51</sup> decision not authorised by the enactment;<sup>52</sup> procedures required in connection with making decision not observed.<sup>53</sup>

### 1. *Procedural Obligation*

A procedural obligation is a procedural requirement which must be satisfied in order for the repository to have jurisdiction to exercise the relevant power.<sup>54</sup> It is a requirement which is for which compliance is mandatory and therefore failure to comply renders the exercise of power invalid.<sup>55</sup> This must be full compliance, as there are no degrees of compliance.<sup>56</sup>

The characterisation of the requirement may be inferred from the Act if it states the consequence of non-compliance. Where the Act does not, whether it is an essential preliminary is a matter of interpretation of the empowering statute.<sup>57</sup> The Act must evince a legislative intention to invalidate an exercise of power which fails to comply with the requirement.<sup>58</sup> If not, the exercise is not invalid as the requirement is merely a procedural condition which is directory in exercising the power, not mandatory.<sup>59</sup> A requirement which is expressed as regulating a power already conferred upon the repository is unlikely to be an essential preliminary, as the repository already enjoys the power.<sup>60</sup>

### 2. *Jurisdictional Fact*

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<sup>47</sup> *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 (McHugh JA), 525.

<sup>48</sup> *Kutlu v Director of Professional Services Review* [2011] FCAFC 94, [47].

<sup>49</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(b)(c)(d), 6(1)(b)(c)(d).

<sup>50</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

<sup>51</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(c), 6(1)(c).

<sup>52</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(d), 6(1)(d).

<sup>53</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss. 5(1)(b), 6(1)(b).

<sup>54</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

<sup>55</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

<sup>56</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, approving *Hunter Resources Ltd v Melville* (1988) 164 CLR 234, 249.

<sup>57</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

<sup>58</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

<sup>59</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, approving *Pearse v Morrice* (1834) 111 ER 32, 37 and *R v Loxdale* (1758) 97 ER 394, 395.

<sup>60</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

A jurisdictional fact is a finding of fact which must be made in order for the decision-maker to have jurisdiction to exercise the relevant power.<sup>61</sup> It is a fact which must be objectively determined prior to exercise of a power, and therefore exists independently of that power.<sup>62</sup>

The characterisation of the finding may be inferred from the Act if it states the consequence of non-compliance. Where it does not, whether a fact is such is determined through interpretation of the empowering statute.<sup>63</sup> The Act must evince a legislative intention that the finding of fact be a preliminary condition to the decision-maker exercising the power, and therefore that failure to comply would invalidate any exercise of that power.<sup>64</sup> A provision with the following language will indicate the existence of a jurisdictional fact: 'where/when/if X exists, then A may...'; 'where/if, in the opinion of A, X exists, then A may...'; 'when A is satisfied that X exists, A may...'.<sup>65</sup> However, a provision which does not refer to the objective existence of a finding of fact, but rather to the making of a decision by the repository, will not indicate that finding is a jurisdictional fact which must be satisfied because the repository may exercise the power.<sup>66</sup>

The question of a jurisdictional fact is determined by the Court upon the evidence before it and upon its own construction of the law, not that before/of the decision-maker.<sup>67</sup> Further, where the jurisdictional fact is the existence of an opinion of the decision-maker, the Court may only review the reasonableness of the opinion and not substitute its own.<sup>68</sup> However, the Court is permitted to give weight to (but not to defer to) the decision-maker's finding where (1) the evidence before the Court is substantially the same as that before the decision-maker; (2) the Court has confirmed the decision-maker's decision; and (3) the issue of fact regards knowledge of industry which the decision-maker was equipped to answer.<sup>69</sup> This will require consideration of the decision-maker's field of operation, how the decision-maker was appointed, materials upon which they acted and the extent to which their decisions are supported by disclosed processes of reasoning.<sup>70</sup>

## E Case Law

### 1. *London County Council v Attorney-General* [1902] AC 165.

#### (a) Court

House of Lords

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<sup>61</sup> *Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87.

<sup>62</sup> *Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87.

<sup>63</sup> *Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87.

<sup>64</sup> *Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87.

<sup>65</sup> *Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87.

<sup>66</sup> *Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87.

<sup>67</sup> *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.

<sup>68</sup> *Foley v Padley* \_\_\_\_\_.

<sup>69</sup> *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135, approving *R v Alley; Ex parte New South Wales Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 (Mason J), 390.

<sup>70</sup> *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.

Lord MacNaghten

(b) *Material facts*

- A empowered under statute to operate business of 'tramways';
- A acquired business of tramways and bus services;

(c) *Procedural history*

- R commenced proceedings against A, seeking a declaration that A was acting outside its authorised area of power and therefore its actions were void, and an injunction restraining further action;
- Trial judge, Cozens-Hardy J, granted relief;
- A appealed;
- Court of Appeal upheld trial judge's decision;
- A appealed

(d) *Issues*

Whether business of bus services outside the authorised area of A's power, so that A was acted without power?

(e) *Holdings*

Yes.

(f) *Reasons*

- A had express authorisation to carry on tramway business and no authority to carry on bus services business – true that they can be worked together, but they are not incidental to one another

(g) *Law*

(h) *Order*

Appeal dismissed.

*2. ABC Development Learning Centres Pty Ltd v Secretary, Department of Human Services* (2007) 15 VR 489.

(a) *Court*

Supreme Court of Victoria

Hollingworth J

(b) *Material facts*



- R empowered by statute to require a person to answer questions and provide information: *Children's Services Act 1996* (Vic), s. 36(1)(f).
- A carried on childcare business;
- R received reports of incidents at A's centres;
- R's officers wrote to A requiring answers to specific questions and production of documents;

(c) *Procedural history*

- A initiated proceedings against R, claiming request outside authorised area of power b/c must be exercised upon premises

(d) *Issues*

Whether request for information off premises outside R's power, and therefore R's request invalid?

(e) *Holdings*

Yes

(f) *Reasons*

- Unit of inquiry: all other subsections of provision explicitly mentioned requirement to be within premises;
- Act as a whole: other provisions conferred powers which could be exercised in writing; s 41 conferred obligation on officer to show ID when exercising power – would be impossible if not done in person, on premises;
- Legislative history: explanatory memorandum noted that s. 36 conferred powers of entry and inspection – no suggestion of broader investigative powers; second reading speech noted powers exercised 'on site';

(g) *Law*

(h) *Order*

Appeal allowed.

**3. *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.**

(a) *Court*

Court of Appeal (UK).

Lord Greene MR, Goddard and du Parc LL

(b) *Material facts*

- A owned food manufacturing factor;

- R's assistant secretary sent letter to A notifying A of intention to take possession of premises;

(c) *Procedural history*

- A initiated proceedings, seeking declaration that decision was void, b/c R's assistant secretary not authorised to exercise power, and an injunction to restrain action on the decision;
- Trial judge, Hilbery J, dismissed the action;
- A appealed

(d) *Issues*

Whether R's assistant secretary was authorised to exercise R's power?

(e) *Holdings*

Yes

(f) *Reasons*

- Commissioner of Works confers with power – body which never meets, and its power exercised by the First Commissioner of Works;
- R's assistant secretary agent of R - high official of R's department and acted for the First Commissioner in sending the letter;
- Legislation cannot be interpreted as intending R exercise the power personally;

(g) *Law*

- Principle of agency based on public policy – seeks to ensure public business can be carried out – if no agency then Ministers would be unable to personally exercise powers;
- Decision of an agent is a decision of the repository him/herself;

(h) *Order*

Appeal dismissed.

4. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

(a) *Court*

High Court of Australia

Gibbs CJ, Mason, Dawson, Deane and Brennan JJ.

(b) *Material facts*

- Aborigines made native title claim over land in NT;

- R applied for mineral lease in same land;
- Commissioner investigated native title claim and complied report under *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s. 50(1)(a) which recommended granting native title; Commissioner required to 'comment' on matters in s. 50(1)(b), including any detriment to persons/communities which the native title grant would cause; Commissioner failed to comment on detriment of R;
- Minister made decision to grant native title on basis of Commissioner's recommendation in the report

(c) *Procedural history*

- R initiated proceedings seeking review of Minister's decision, on basis that Minister had not taken into account R's submission;
- FC dismissed proceedings;
- R appealed to Full Court of FC;
- FCFC allowed appeal;
- A appealed to the HC

(d) *Issues*

Whether A permitted to delegate his/her power so that his staff's consideration of R's submission constituted A's own, and therefore A's decision was valid?

(e) *Holdings*

No.

(f) *Reasons*

(g) *Law*

- Minister may delegate administrative functions to staff in general<sup>71</sup> - must be legislative intention that repository may delegate – evinced where impractical that repository exercise power personally due to administrative necessity<sup>72</sup> - therefore matter of interpretation;

(h) *Order*

Appeal dismissed.

**5. *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.**

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<sup>71</sup> *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

<sup>72</sup> *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 11.

(a) *Court*

High Court of Australia

Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ

(b) *Material facts*

- A had objective of promoting profitable growth of NZ film and TV industry;
- A empowered to determine standards in relation to TV content pursuant to *Broadcasting Services Act 1992* (Cth), s. 122;
- A required to exercise power in manner consistent with Australia's international obligations pursuant to *Broadcasting Services Act 1992* (Cth), s. 160(d);
- Australia and NZ had Trade Agreement;
- R determined standard pursuant to s. 122;

(c) *Procedural history*

- A challenged validity of R's standard on the ground that R had not performed its power consistently with s. 160(d)

(d) *Issues*

Whether R's determined standard was invalid b/c s. 160(d) was an essential preliminary to an exercise of power under s. 122?

(e) *Holdings*

No – s. 160(d) was not an essential preliminary.

(f) *Reasons*

- s. 160(d) not an essential preliminary to the exercise of power conferred by s. 122 – rather just a legal duty on R and breach does not result in invalidity – act nevertheless unlawful and therefore may be subject to action by person with sufficient interest;
- s. 160 regulates power already conferred on R – strongly disproves legislative intention that breach invalidate act;
- s. 160 imposes obligations to comply with policies and general directions – these are not easily ascertained - indicates that s. 160 does not have a 'rule-like quality' which must be complied with;
- International agreements expressed in intermediate language – difficult to ascertain obligations – Australia member to 900+ treaties – likelihood of R breaching obligations far from fanciful;
- Result of invalidating act by reason of non-compliance with intentional agreement would cause inconvenience to public;

(g) *Law*

- Breach of essential preliminary to exercise of power invalidates act made in exercise of that power – b/c compliance mandatory – relates to jurisdiction of person to exercise power;
- Essential preliminary where legislative intention that act be invalid if fails to comply with condition – matter of interpretation;
- If no legislative intention to invalidate non-compliance then merely procedural condition – merely directory in exercising of power – that is, contains mere matter of direction in exercising power<sup>73</sup> – compliance not mandatory and failure doesn't result in invalidity;
- Degree of compliance irrelevant – either compliance or non-compliance;<sup>74</sup>

(h) *Order*

Appeal dismissed.

*6. Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.

(a) *Court*

High Court of Australia

Gleeson CJ, Gummow, Kirby and Hayne JJ

(b) *Material facts*

- Legislation requires that proposed developments obtain approval – approval refused if development 'non-complying' – development deemed 'non-complying' if for 'special industry';
- X sought approval for a development;
- R made finding that X's development was not for special industry and gave approval;

(c) *Procedural history*

- A commenced proceedings against R, arguing that R had erred in its finding that the development was not for special industry and in giving approval;
- Trial judge held the developed constituted special industry and quashed R's decision;
- R appealed;
- Full Court held the trial judge erred and that it was for R to determine whether the development was for special industry;
- A appealed;

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<sup>73</sup> Approving *Pearse v Morrice* (1834) 111 ER 32, 37; *R v Loxdale* (1758) 97 ER 394, 395.

<sup>74</sup> *Hunter Resources Ltd v Melville* (1988) 164 CLR 234, 249.

(d) *Issues*

(e) *Holdings*

(f) *Reasons*

- FC erred in holding that Court to determine jurisdictional fact issue from standpoint that Court defer to practical judgement of R ‘in grey areas of uncertainty’ – Court to determine issue upon evidence before it;

(g) *Law*

- Court to determine question of jurisdictional fact independently upon evidence before it and upon its construction of the law – not upon evidence before the decision-maker;

- Court may give weight to finding by decision-maker, however, where (1) evidence remains substantially the same;<sup>75</sup> (2) the Court has confirmed the decision of the decision-maker, and (3) the issue of fact is in regards to knowledge of industry which that decision-maker was equipped to answer;<sup>76</sup>

- Court no required to give weight to finding by decision-maker, just permitted to;

- Whether Court gives weight to decision-maker’s findings will depend on circumstances, such as field in which decision-maker operates; criteria for appointment of members; materials upon which it acts; and extent to which decisions supported by disclosed processes of reasoning.

- Wrong finding of fact alone does not constitute error of law;<sup>77</sup>

(h) *Order*

Appeal allowed; matter remitted to the Full Court for determination of issues.

*7. Anvill Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3; 244 ALR 87.

(a) *Court*

Federal Court of Australia, Full Court

Tamberlin, Finn and Mansfield JJ.

(b) *Material facts*

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(1) empowered Minister to make determination whether project a ‘controlled action’ – Act prohibited activities with significant impact on environment to be undertaken without Minister’s approval: Part 3;

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<sup>75</sup> Approving *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178, 184.

<sup>76</sup> Approving *R v Alley; Ex parte New South Wales Plumbers & Gasfitters Employees’ Union* (1981) 153 CLR 376 (Mason J), 390.

<sup>77</sup> *Waterford v Commonwealth* (1987) 163 CLR 54, 77.

- X sought favourable determination by R for mine project;
- R's delegate found that project was not a 'controlled action';

(c) *Procedural history*

- A sought review of R's decision on basis that essential preliminary not complied with and therefore R did not have power to make determination – argued that whether or not project would have a significant impact on matter within Part 3 was a jurisdictional fact to exercise of power under s. 75(1);
- Trial judge, Stone J, held that R's powers weren't conditioned on whether the project was in fact a 'controlled action' in the sense that it had a significant impact on a matter within Part 3;
- A appealed;

(d) *Issues*

Whether finding that a project would significantly impact on a matter within Part 3 was a jurisdictional fact to R's power to under s. 75(1), and therefore the latter finding was invalid?

(e) *Holdings*

No.

(f) *Reasons*

- Interpretation of statute did not reveal legislation intention that finding of 'significant impact' a jurisdictional fact to exercise of power, and therefore failure to comply would didn't invalidate the act;
- Unit of inquiry: s. 75(1) – expressed as conferring upon the Minister the power to exercise the power without satisfaction of objective fact of significant impact, but merely subjective satisfaction – did not condition power upon finding that there is significant impact, such as 'Where the Minister is of the opinion that the project would significantly impact \_\_\_, he/she may...';
- Act as a whole: source of considerations for power informal – suggests decision depend on objective finding of fact;
- Act as a whole: exemptions depended on Minister's decision, not on an objective finding of fact;
- Act as a whole: consequences depended on Minister's decision, not on an objective finding of fact;
- Act as a whole: object of Acts include efficient and timely environment assessment – objects would not be promoted if A's arguments accepted;

(g) *Law*

- Jurisdictional fact is determined objectively prior to exercise of power and therefore exists independently of that exercise – must determine on basis of statutory interpretation;
- Following language will indicates the decision-maker must form an opinion as a preliminary condition to exercising the power, and therefore a jurisdictional fact: 'where/when/if X exists then A

may...'; 'where in the opinion of A X exists'; 'when A is satisfied X exists'; and 'if in the opinion of A X exists';

- Provisions were to use the above language and requires the decision-maker to be satisfied of X, but also Y and Z indicates that X is not a conclusive fact which raises the power – therefore not a jurisdictional fact;<sup>78</sup>

- Language which refers to opinion/belief/satisfaction of the decision-maker indicates not a jurisdictional fact, except where the opinion itself is a jurisdictional fact;<sup>79</sup>

#### (h) *Order*

Appeal dismissed.

### 8. *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503.

#### (a) *Court*

NSW Court of Appeal

McHugh JA, Kirby P, Hope JA

#### (b) *Material facts*

- R constituted of one judge and two assessors;
- R's three members made informal agreement that judge would sit alone to address minor matters;
- R's judge sat in on A's matter, which addressed multiple important issues;

#### (c) *Procedural history*

#### (d) *Issues*

Whether the doctrine of de facto officer applied so that R's exercise of power was valid?

#### (e) *Holdings*

#### (f) *Reasons*

#### (g) *Law*

- Failure to perform essential preliminary invalidates any act depended on the fulfilment of that condition – exception where power exercised by de facto officer;
- De facto officer doctrine validates the decision-maker's exercise of power despite a defect in their title – ensures that inconvenience is not caused and public can have faith in decisions;

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<sup>78</sup> *Sutherland Shire Council v Finch* (1970) 123 CLR 657.

<sup>79</sup> *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 (Spigelman CJ) 64.



- Doctrine cannot apply where inconsistent with empowering statute as interpreted;
- Decision maker's action, made under an appointment, is not invalid merely b/c of defect/irregularity in the appointment, the appointment ceased to have effect, the occasion for appointment hadn't arisen yet, or the occasion to act hadn't arisen yet/had ceased;<sup>80</sup>

(h) *Order*

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<sup>80</sup> *Acts Interpretation Act 1901* (Cth), s. 33AB.