

LAWS50032 Administrative Law 2018SEM1 Exam Notes

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CTH JUDICIAL REVIEW

Grounds	<p>Act without legal <u>authority</u></p> <ul style="list-style-type: none"> • Incidental to exercising power • Consequential to exercising power • Observe procedure 	s 5(1)(d)
	<p>Exercise power for <u>improper purpose</u></p> <ul style="list-style-type: none"> • Statutory purpose • Real purpose (<i>Schlieske</i>) • Substantial purpose (<i>Samrein; Toohey</i>) 	ss 5(1)(e), (2)(c)
	<p>Fail to take into account <u>relevant</u> considerations ⇒ <u>Reasonableness?</u></p> <ul style="list-style-type: none"> • Duty to consider (<i>Peko; Tickner</i>) • Substantial involvement (<i>Tickner; Carrascalao</i>) • Materially affect (<i>Peko</i>) 	ss 5(1)(e), (2)(b)
	<p>Take into account <u>irrelevant</u> considerations</p> <ul style="list-style-type: none"> • Implied consideration as a matter of public interest • Materially affect (<i>Peko</i>) 	s 5(1)(e), (2)(a)
	<p>Impermissibly <u>delegate</u> power / act through <u>agency</u> ⇒ Under <u>dictation?</u></p> <ul style="list-style-type: none"> • Procedural requirement • Require personal involvement (<i>O'Reily; Pattenden</i>) • Implied allowance for delegation / agency (<i>Carltona; cf Peko</i>) 	s 5(1)(c)
	<p>Act under <u>dictation</u></p> <ul style="list-style-type: none"> • Responsible government / Ministerial accountability (<i>Ipec</i>) • Principle of legality (<i>Ipec</i> per minority; <i>CPCF</i>) • Independence of non-ministerial agency 	ss 5(1)(e), 2(e)
	<p>Inflexibly apply (unlawful) <u>policy</u></p> <ul style="list-style-type: none"> • Policy arbitrary and contradictory (<i>Green v Daniels</i>) • Consider individual (<i>Yang</i>) or exceptional circumstances (<i>NEAT</i> per Kirby J (dissenting); <i>M64</i>) 	ss 5(1)(e), 2(e)
	<p>Breach <u>procedural fairness</u></p> <ul style="list-style-type: none"> • Duty to accord procedural fairness ⇒ Interests affected (<i>Kioa</i>) <ul style="list-style-type: none"> ○ Presumption displaced (<i>WZARH</i>) ○ Principle of legality (<i>Saeed</i>) • Hearing: opportunity to deal with <u>adverse</u> information (<i>Saeed</i>) that is <u>credible, relevant and significant</u> to the decision (<i>VEAL; WZARH</i>) • Bias <ul style="list-style-type: none"> ○ <u>Prejudgement</u> incapable of alteration and not open to <u>persuasion</u> (<i>Jia</i>) ○ Vested <u>interest</u> logically connected to the <u>apprehended deviation</u> from the course of deciding the matter on merits (<i>Isbester</i>) <ul style="list-style-type: none"> – Decision maker's position (<i>Jia</i>) 	s 5(1)(a)

Administrative Matters of the AAT and the VCAT

	AAT	VCAT
Composition	<p>Members include (s 5A)</p> <ul style="list-style-type: none"> • (a) president must be a judge of FCA (ss 7(1), 7A) • (b) deputy president must be <ul style="list-style-type: none"> ○ A judge of FCA, or ○ Enrolled as a legal practitioner of HCA or state supreme court for at least 5 years, or ○ In the opinion of GG have special knowledge or skills relevant to the duties (ss 7(2), 7A) • (c)-(d) senior members and Other members <ul style="list-style-type: none"> ○ Cannot be a Judge (s 6(2)) ○ Must be enrolled as a legal practitioner of HCA or state supreme court for at least 5 years, or ○ In the opinion of GG have special knowledge or skills relevant to the duties (s 7(2)) 	<p>Members include (s 8(3))</p> <ul style="list-style-type: none"> • President must be a judge of VSC who is recommended for appointment by the Minister after consultation with CJ (s 10(1)) • VPs (s 11), DPs (s 12) • Senior members (s 13) and ordinary members (s 14) • Principal registrar and registrars <p>Full-time, non-judicial member must not engage in the practice of profession or paid employment outside his office duties without the consent of the President (s 18).</p>
Tenure and Remuneration	<p>Members appointed by GG (s 6(1))</p> <ul style="list-style-type: none"> • No more than 7 years but eligible for re-appointment (s 8(1)) • Minister determines in writing terms and conditions of office (s 8(7)) <p>Appointment is only terminable if GG makes address to both Houses of CP in the same session on grounds that a member has proved misbehaviour or is unable to perform the duties of his office because of physical or mental incapacity (s 13(1)).</p> <p>If the member becomes bankrupt, GG may terminate the appointment (s 13(2)).</p>	<p>Terms and conditions determined by order of G in Council (s 17(1))</p>
Immunity		<p>Same immunity as a SC judge (s 143(1))</p>

III. Grounds

[●] might challenge [■]'s decision / conduct / failure to make decision on the following grounds. Unless otherwise stated, the grounds are available at common law and the *ADJR Act*.

A Substantive

1 Acting without legal authority (s 5(1)(d))

... [■] acted without legal authority because

- [■]'s decision, purported made under ... *Act*, was not authorised (*ADJR Act* s 5(1)(d))
 - Plain reading of ... in its context only authorises [■] to ...
 - Act enacted before 1 January 2001 ⇒ may be considered as an aid to interpretation (*Interpretation of Legislation Act* ss 35(b), 36(4))
 - [■] might however argue that the decision / conduct of ... was incidental / consequential to his exercise of statutory power.
 - [●] should in turn rely on the fact that there are alternatives that cause less intrusion available to [■] and demonstrate that the decision / conduct of ... was not reasonably necessary.
- [■] did not observe the procedure required under ... *Act* in making the decision (*ADJR Act* s 5(1)(b))

2 Improper purpose (ss 5(1)(e), (2)(c))

... [■] improperly exercised his power conferred by ... *Act* because the power was exercised for a purpose unauthorised by and extraneous to the statutory scheme (*ADJR Act* ss 5(1)(e), (2)(c); *Schlieske* (Toohey J)).

- ... *Act* empowers [■] to make a decision of ... / conduct ... for the purpose of ...
 - Such purpose can be implied from the title / structure of the ... *Act*.
- There is admissible evidence demonstrating that [■] exercised such power for the purpose of ...
 - Like the Immigration Minister and his colleagues in *Schlieske*, [■] had made thorough preparation for carrying out the purpose of ..., which is extraneous to making the decision empowered by the ... *Act*.
 - [■] may however argue that ... was merely a consequential result of exercising ... power.
- Such purpose, unlike in *Samrein*, was the substantial purpose for which [■] made the decision because
 - Like in *Toohey*, [■] made the decision to forestall [●]'s purported claim to ...

D Human Rights

[■], as a public authority within the meaning of *Victoria Human Right Charter* s 38 (*HR Charter* s 4), breached his charter duty because ...

- [■] acted in a way that is incompatible with a human right (*HR Charter* s 38(1)).
- [■], in making the decision, failed to give proper consideration in relation to a relevant human right (*HR Charter* s 38(2)).

[■] might in turn argue it could not have acted differently / made a different decision (*HR Charter* s 38(2)).

[■] is a public authority because ...

- ... as an employee of the public service, [■] is a public official (*HR Charter* s 4(1)(a)).
 - Head of department / office
 - Victorian Public Sector Commissioner
 - Directors and staff of public entities
 - Court staff
 - Parliamentary officers
 - Holders of statutory / prerogative offices
- [■] is an entity established by a statutory provision that has functions of public nature (*HR Charter* s 4(1)(b)) because ...
 - [■] is statutorily conferred the function by ... *Act* (*HR Charter* s 4(2)(a)).
 - [■]'s function is connected to, generally identified with, government functions (*HR Charter* s 4(2)(b)).
 - [■]'s function is of regulatory nature (*HR Charter* s 4(2)(c)).
 - [■] performs the function on public funding (*HR Charter* s 4(2)(d)).
 - [■]'s shares are held by or behalf of the state (*HR Charter* s 4(2)(e)).
- [■] is an entity exercising non-public function on behalf of the state / public authority (*HR Charter* s 4(1)(c)), it is immaterial that there is no agency relationship between [■] and the state / public authority (*HR Charter* s 4(4)).
 - [●] might point to the fact that [■] performs its duty under public fund to prove that [■] is a public authority, although public funding alone is insufficient for the characterisation (*HR Charter* s 4(5)).
- [■] is Victoria Police (*HR Charter* s 4(1)(d)).
- [■] is a Council (*HR Charter* s 4(1)(e)).
- [■] is a Minister (*HR Charter* s 4(1)(f)).
- [■] is a member of a Parliamentary Committee acting in an administrative capacity (*HR Charter* s 4(1)(g)).
- [■] is declared by ... *Act* to be a public authority for the purpose of *HR Charter* (*HR Charter* s 4(1)(h); ... *Act* s ...).