

TOPIC 4 – ERROR IN DETERMINING THE SCOPE OF THE POWER

The grounds:

1. Improper delegation
2. Procedural error
3. Misconceiving the Scope of the power
4. Preconditions of power

IMPROPER DELEGATION

- **Improper delegation** – when a person who does not have power to make a decision, makes the decision.
- Common law ground – but encapsulated in clause 5(1)(c) ADJRA:
 - The person who purported to make the decision did not have jurisdiction to make the decision.
- Usually the power is derived from statute (cf. Prerogative powers).
 - Need to look to the source of the power to ascertain who has the power to make a decision
- **NOTE:** If statute doesn't refer to delegation then look at agency

Justification for this ground in the rule of law:

John Willis

“The ‘rule of law’ says that, since the common law recognises no distinction between government officials and private citizens, all being equal before the law, no official can justify interference with the common law rights of the citizen unless he can point to some statutory provision, which expressly or impliedly permits him to do so, to point to a provision justifying interference by A does not, of course, justify interference by B.”

Who is the decision made by?

- Decisions may be made:
 - Personally;
 - By a delegate; or
 - By an agent.
- Delegate vs agent
 - Decision maker may be a delegate or an agent.
- **Delegate** –
 - Is a person to whom the principal has formally **delegated the power** under a power to delegate.
 - Acts in their own right – not dictated to by the principal.
 - Has to be pursuant to statute
- **Agent** –
 - Exercises power on behalf of the principal.
 - Acts at direction of the principal.
 - No express statutory authority is needed.

When can a delegate exercise power?

- If expressed in statute

- **EXAMPLE.** S 22 of the *Transport Accident Act 1986* (Vic)
 - (1) The Commission may, by instrument, **delegate** to an officer or employee of the Commission any function or power of the Commission under this Act, other than this power of delegation.
 - (4) A person to whom a function or power has been delegated under subsection (1), (2) or (3) may, subject to and in accordance with the approval of the Commission given generally or in a particular case, by instrument or, if a body corporate, by instrument under seal, **authorize** another person to perform the function or exercise the power so delegated.

When can an agent exercise power?

- Where no delegation is expressed in statute
- To accommodate large and busy departments
- Based on the notion of ministerial responsibility
- *Carltona* principle

(*Carltona v Commissioner of Works* [1943] 2 All ER 560

- Practical necessity
- It would be impossible for ministers to personally attend to all of their statutory functions; and
- Ministers remain accountable to parliament for errors in judgement.
 - *"It cannot be supposed that this regulation meant that in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers are normally exercised under the authority of the ministers by responsible officials....Public business could not be carried on if that were not the case"*
 - *"Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible".*

When should a decision be made personally by the decision maker?

Consider:

- Construction of the statute; and practical administrative necessity –
 - This is likely to exist when a statutory power must be exercised frequently in thousands/millions of cases. Cf. High level policy decisions and decisions which have an adverse effect of individual rights

***O'Reilly v Commissioner of the State Bank of Victoria* (1983) 153 CLR 1**

– practical necessity

HCA held that the Commissioner of Taxation was entitled to act through authorized agents so as to preserve 'administrative order and efficiency'.

Facts:

- s 264 of the *ITAA 1936* the Commissioner of Taxation was allowed to issue various notices and had the power to delegate any of his functions to the Deputy Commissioner of Taxation or another person (under s 8).
- Deputy Commissioner then issued a general authorisation to the Chief Investigation Officer to issue the notices as agent of the DC.

HELD

HCA held that the issue of the notices by the CIO was valid and in doing so considered the following:

- The nature of the power
- Whether it was feasible for only the DC to be responsible for issuing notices (i.e. The practical necessity – per Gibbs J)

GIBBS “Since there are literally millions of taxpayers....it would reduce the administration of the taxation laws to chaos if the powers conferred by those sections could only be exercised by the Commissioner or a Deputy”

“[T]here exists,.... a practical necessity that the powers conferred on the Commissioner by the Act should be exercised by the officers of his Department who were acting as his authorised agents”

- Whether individual’s rights or interests would be adversely affected by the power

Although rights and interests were adversely affected by the power, the HCA held that for practical reasons, the legislation allowed for agent’s to make the decision.

- Since there are literally millions of taxpayers...it would reduce the administration of the taxation laws to chaos if the powers conferred by those sections could only be exercised by the Commissioner or a Deputy Commissioner personally. It cannot be supported that parliament intended such a result: per Wilson J.

In dissent

Mason J in dissent pointed to the fact that the Commissioner had a formal power of delegation, and therefore the implied capacity to act through an agent is not appropriate, especially when the power involves a ‘substantial exercise of discretion’ and ‘may have a great impact on the affairs of individual persons’.

***Tickner v Chapman* (1995) 57 FCR 451 – improper delegation/non-delegable power**

FACTS

- Proposal to build a bridge in Hindmarsh Island in South Australia. Involved a decision of the Minister to give an aboriginal land grant.
- The Ngarrindjeri people sought a declaration under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) that the site of the bridge was a significant aboriginal site under threat of injury or desecration.

S 10(1) empowered the **Minister to make a declaration provider he** is satisfied:

(a) That the area is a significant aboriginal area; and

(b) That it is under threat of injury or desecration; and

- Where he has received a report under subsection (4) in relation to the area from a person nominated by him and he has considered the report and any representation attached to it...

- Report (containing over 400 submissions) was provided to the Minister with the proviso that part of the report contained sensitive aboriginal knowledge which could only be read by a woman.
- The Minister sought the assistance of his female assistant to summarise the key parts of the report.
- The Minister did not read the whole report and did not read the part with the proviso.

HELD

- The Federal Court held that in failing personally to read the submissions and the secret women's business annexure, the Minister had failed to consider relevant matters.
- Black CJ expressed the view that the Act mandated that the representations attached to the report be taken into consideration by the Minister when making his decision.
- Held that **the Act required the Minister to personally consider the representations and that he was only allowed assistance from a staff member so far as helping the Minister to organise and summarise the representations. However, the Minister must not rely solely on a staff member's opinion about the relevant material.**
- Black CJ asserted that the Minister was not exempt from considering the representations on the mere fact that it is against aboriginal custom for a person of the opposite sex to be privy to the material.
- Black CJ held that **'the consideration of a representation involves an active intellectual process directed at that representation'**. It may be a legitimate concern that a Minister is too busy to meet this standard.

PROCEDURAL ERROR

Procedural error - Common law ground encapsulated:

5(1)(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed

6(1)(b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed

What is procedural error?

- That procedures that were required by law to be observed in connection with the making of the decision were not observed.

- Minimising procedural errors is important to maintain consistency and accountability in the decision making process.
- Determining procedural errors is a three steps process:

Three Steps:

1. Is there a procedural requirement?
2. Has the decision maker breached the procedure?
3. Should the breach lead to invalidity?

Procedural Error v Fairness

Error

Can accurately follow procedure
but still be unfair

Look at the Statute

Fairness

Isn't just following a list
of rules. Needs to be fair.

There is common law requirement
as well

Example of Error vs Fairness

Example 1

Section 2 of the *Vegetables Act* require that the Minister of Agriculture state in all hearings regarding farming licenses that people must eat vegetables. This has to occur before the hearing starts. The Minister did not do so, but the farmer was given adequate notice of the hearing, disclosure of information and a chance to make submissions. **PROCEDURALLY FAIR**

Example 2

In a different case, the Minister of Agriculture tells the applicant of the importance of eating vegetables. However this time the applicant has only been given a short amount of notice and was not allowed to make submissions. **NOT PROCEDURALLY FAIR**

Procedural Error Example

Step 1: Is there a procedural requirement?

(1) To assess a person, the chief executive must—

- (a) **obtain relevant information** under division 4; and
- (b) **assess** the person's suitability on the bases stated in division 5; and
- (c) **prepare** a preliminary **report** about the person's suitability; and
- (d) **give** to the person—
 - (i) a **copy** of the report; and

(ii) a **notice** inviting the person to give the chief executive, within a stated period of at least 28 days, a written response to the report, including corrections or comments about the matters stated in the report; and

(e) after **considering the person's** response, if any, decide whether the person is suitable.

Step 2: Has the procedure been breached?

Tickner v Chapman

S 10(3) Before a person submits a report to the Minister... he shall:

- (a) Public in the Gazette, and in a local newspaper,... a notice:
- Stating the purpose of the application made ... and the matters required to be dealt with in the report.

Black CJ:

" the policy of the section... requires that members of the public should have an effective opportunity to make a contribution to the decision-making process. If an application [for protection] could be quite general about the area for which protection was sought it **might well be difficult for interested persons to know what was at issue**"

Tickner v Chapman (1995) 57 FCR 451 – procedural error

Facts:

- example of DM failing to comply with statutory procedural requirement.
- concerned an application for protection of land under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1985* (Cth).
- The land was proposed to be used for the construction of the Hindmarsh Island Bridge.
- The statute required the minister to prepare a report in relation to the application.

The reporter had to follow the following statutory procedure:

(3) Before a person submits a report to the minister...he shall:

- (a) Publish in the **Gazette and in a local newspaper**, in any, circulating in any region concerned, a notice:
- (i) **Stating the purpose** of the application made under subsection (1) and the matters required to be dealt with the report;
 - (ii) **Inviting interested persons** to furnish representations in connection with the report by a specified date, being not less than 14 days after the date of publication of the notice in the Gazette; and
 - (iii) Specifying an **address** to which such representations may be furnished; and
- (b) give due consideration to any representations so furnished and, when submitting the report, attach them to the report.

HELD

- The notice stated that a claim was occurring ‘in the vicinity of Goolwa and Hindmarsh (Kumarangk) Island in South Australia’.
- The FC held that the description of the location was not specific enough to satisfy s 10(3)(a)(i) on the basis that the policy and language of the statute required the public affected by the proposed construction to be informed of the precise location it so that they knew what land was in issue. Black CJ:
- The policy of the section...requires that members of the public should have an effective opportunity to make a contribution to the decision making process. If an application [for protection] could be quite general about the area for which protection was sought it might well be difficult for interested persons to know what was in issue.
- This procedural error invalidated the decision.

Black CJ:

“ the policy of the section... requires that members of the public should have an effective opportunity to make a contribution to the decision-making process. If an application [for protection] could be quite general about the area for which protection was sought it **might well be difficult for interested persons to know what was at issue**”

Step 3: Should the Error Lead to Invalidity

Project Blue Sky

Test:

“An act done in breach of a condition regulating the exercise of a statutory **power is not necessarily invalid and of no effect**. Whether it is depends upon whether there can be **discerned a legislative purpose to invalidate any act that fails to comply with the condition.**”

PBS --- HOW TO FIND PURPOSE

*“The existence of purpose is ascertained by reference to the **language of the statute, its subject matter and objects, and the consequences for parties of holding void every act done in breach of the condition**”*

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

Facts:

- The Australian Broadcasting Authority was a statutory authority, authorised to supervise and control TV and radio broadcasting in Australia.
- S 122(1) of the Broadcasting Services Act provided that ABA must determine standards that are to be observed by commercial television broadcasting licensees.
- Pursuant to s 160(d) of the statute, ABA was **directed to prepare the content standard consistent with international conventions.**

- The ABA drafted the content standards so that it had the effect of domestic television industry holding an advantage in the market because broadcasters were required to allocate a certain amount of Australian content in their programming schedule.
- Project Blue Sky, a New Zealand company, argued that the **ABA was in breach of s 160(d) as it showed favouritism to Australian programs over NZ programs** (contrary to the Trade Agreement and Protocol).

Section 160 of the statute provided:

The ABA is to perform its functions in a manner consistent with:

- (a) The **objects** of this Act and the regulatory policy described in;
- (b) Any general **policies** of the Government notified by the Minister under section 161;
- (c) Any **directions** given by the Minister in accordance with this Act; and
- (d) Australia's obligations **under any convention to which Australia is a party or any agreement between Australia and a foreign country.**

HELD

BASIC

Factor 1 : s 160 doesn't set out the functions of the ABA, it only seeks to regulate it.

Factor 2: The nature of the obligations in s 160

"When a legislative provision directs that a power or function be carried out in accordance with matters of policy, ordinarily the better conclusion is that the direction goes to the administration of a power or function rather than its validity"

Factor 3: It wasn't clear how to comply with Australia's international obligations, since many treaties have indeterminate language.

Factor 4: Expense, inconvenience and loss of investor confidence is a possible consequence.

IN DEPTH

- HCA held that ABA had breached the procedural provision in s 160(d), but this did not invalidate the decision.
- **Held that the wording of s 160 indicated that the section regulated the exercise of functions already conferred under s 122(1), rather than prescribing essential preliminaries to the exercise of the functions.**
- The court outlined the following principles of statutory interpretation:
 - The meaning of the provisions must be determined by reference to the language of the instrument viewed as a whole: *Cooper Brookes*.
 - The process of construction must begin by examining the context of the provision that is being construed.
 - A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals: *Ross v R*.

- Reconciling conflicting provisions will often require the court to determine which is the leading provision and which the subordinate provision, and which must give way to the other.
- The test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute.
- The court found that ABA had made a legal error because it failed to exercise its power conferred by s 122 within the framework of s 160, as required by the Act. The court noted that **‘a breach of a condition regulating the statutory power is not necessarily invalid and of no effect. Whether it is depends upon where there can be discerned a legislative purpose to invalidate any act that fails to comply with the provision. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.’**
- The court noted the following considerations when determining the effect of an error:
 - Whether the provision regulates the exercise of functions already conferred on the DM rather than imposing essential preliminaries to the exercise of functions – if so, this strongly indicates that it was not a purpose of the Act that a breach of the provision was intended to invalidate any act done in breach of that section.
 - The nature of the obligations in the provision – whether they are of a rule-like quality – if so, suggests that intention was not to invalidate decision.
 - Whether the provision directs a power or function to be carried out in accordance with matters of policy - ordinarily the direction goes to the administration of power or function rather than validity.
 - Whether rendering the decision invalid would cause significant expense, inconvenience and loss of investor/public confidence – if so, probably no intention of invalidity.

Held that the legal error did not result in the content of the ACS being invalid on the ground that the legislators did not intend that to be the case. Notwithstanding ABA’s failure to comply with s 160(d), it still had authority to make the decision under s 122 (non-jurisdictional error).

The court declared that ABA had acted in breach of the Act and that, where appropriate, an injunction may be sought restraining ABA from taking any further action based on its unlawful action. (n.b. Injunction available even though non JE).

Test:

“An act done in breach of a condition regulating the exercise of a statutory **power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be **discerned a legislative purpose to invalidate any act that fails to comply with the condition.**”**

PBS --- HOW TO FIND PURPOSE

“The existence of purpose is ascertained by reference to the **language of the statute, its subject matter and objects, and the consequences for parties of holding void every at done in breach of the condition**”

PBS --- ON LANGUAGE

“the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have”.

“ordinarily, that meaning (the legal meaning) [the intended meaning] will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning”

PBS --- ON THE DIFFICULTIES OF LANGUAGE, PURPOSE AND INTENTION

“Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors