Admin Law Cases

Standing

Community Organisations

ACF

Requirement of a "special interest in the subject matter of the action" if no private rights were at stake.

Held that ACF had a *mere* intellectual or emotional concern in the action.

- Gibbs J held that the Conservation Foundation had no special interest in the preservation of the relevant environment in central Qld and neither the exchange control transactions. Stephen J also arrived at the same conclusion.
- Stephen J: 'An individual does not suffer a damage as gives rise to standing to sue merely because he voces a particular concern and regards the actions of another as injurious to the object of that concern', similarly... 'the fact that a body corporate has as its main object the voiding and encouragement in the community, of just such a concern no doubt ensures that what it does to give effect to such an object will not be ultra vires; it will not otherwise improve its position'
- Mason J: 'a mere belief or concern, however genuine, does not itself constitute a sufficient locus standi in a case of the kind now under consideration'
- Murphy J dissented. His Honour said that,
    - 'The words "person aggrieved" or like words such as "persons with affected interest" or "person interested" derive their meaning ad take their colour form the context in which they appear and in the light of the particular statue concerned'
    - 'Courts have shown an increasing tendency, not always consistent, to construe expressions such as "person aggrieved" liberally'
- Ellicrott J: 'The meaning of "person aggrieved" is not encased in any technical rules; much depends upon the nature of the particular decision and the extent to which the interests of the applicant **rises above that of an ordinary member of the public'**
    - 'The applicant's interest **must not be remote, indirect or fanciful**. The interest must be **above that of an ordinary member of the public** and must not be that of a mere intermeddle or busybody'
    - 'Plainly the applicant need not have a legal, financial or proprietary interest in the subject matter of the proceeding. The applicant must establish that he is a person who has a complaint or grievance which he will suffer as a consequence of the decision beyond that of an ordinary member of the public'
    - 'it is not enough that the person established the satisfaction of righting a wrong or upholding a principle or winning a battle if the action succeeds or will suffer some disadvantage other than a mere sense of loss or grievance or a debt for costs if the action fails' (ACF Case)
    - -> broader than being affected by the direct impact of the decision and more than just being a member of public affected by any legislation
- The Court held that the appellant did not have the requisite standing- was not a 'person aggrieved'
    - Its role as a body with rights to speak and influence opinions of the public and politicians about abortions, does not amount to a right of standing to pursue proceedings in a court of law. There needs to be more than emotional attachment or intellectual pursuit or satisfaction
    - The statutes under which the decisions were made were not to do with the political and moral question of abortion, which are the questions central to the body's existence -> the appellant has no greater interest in the subject matter of the Secretary's decision than any other concerned person in the public might have. There is only intellectual, philosophical and emotional concern. The appellant is not affected in any extent greater than the public generally. There is no advantage gained if the appellant is successful, and no disadvantage if it fails- the most it can achieve is the satisfaction of correcting a wrong decision which may improve its standing in the public.

Right to Life

Facts:

RU486 was a drug with the capability to produce abortions.

Section 3 of the *Therapeutic Goods Act 1989* (Cth) defines 'therapeutic goods'; and it is agreed that RU486 is within the definition of that expression.

The Therapeutic Goods Act ensured the safety and quality of drugs in the Australian market.

- The objects of the TG Act are expressed in s 4 "to provide, so far as the *Constitution* permits, for the establishment and maintenance of a national system of controls related to the **quality, safety, efficacy and timely availability** of therapeutic goods …".

Concepts of Admin Law

Judicial Review Sources

What are the main elements of the contemporary Australian administrative law system?

- Bodies that review merits of a decision i.e. the executive branch (tribunals, ombudsman)
- Bodies that review the legality of a decision i.e. the courts

Why are there multiple sources of jurisdiction for Australian courts to engage in judicial review?

- In Australia the courts' jurisdiction or powers to engage in review are based on constitutional, statutory and common law legal sources.
- There are multiple sources of jurisdiction because they come from different sources of power, at different times.
- State Supreme Courts got jurisdiction at different time and from different place to the HC.
- State SC has inherent jurisdiction from when English law came to Australia, reflecting the powers of the King's Bench in England. Each SC has inherent power to give certain judicial remedies
- The HC gets its jurisdiction from the Constitution
- The FC and FCC gets jurisdiction from statute
- The FC exists because there is a statute, a FC Act 1976. Hence, because the FC is a creature of statute, it gets its powers from the statute- S 39B of the Judiciary Act, s 8 ADJR Act, Migration Act etc.

Rationale for judicial review

- To keep administrative decision makers within the legal boundaries of their powers
- Reflects the rule of law principle
    - Wat we want from tribunals differs from what we want from courts.
    - Tribunal aims to ensure that the correct or preferable decision is made.
    - Courts ask whether things are done legally, not whether people deserve a particular outcome. The Court's role is to patrol the boundaries of what people are entitled to do, and to make sure people are making decisions within legislative boundaries.
    - Courts don't need to do more than that because we have tribunals.
    - However, if there is no tribunal system, it may be necessary to have a court system where the Court is able to right some wrongs e.g. Africa- esp. because Africa has convention of rights.

The Legality/Merits Distinction

- The foundational principle of Australian administrative law is that when courts review administrative decisions, they must distinguish between 'legality' and 'merits' review
    - The legality/merits divide reflects a deeply ingrained concern that judicial review should not, in the name of the 'rule of law' enable judges to unduly colonise public administration by reference to their own perceptions of what 'good administration' requires.
- Brennan J has expressed in Attorney General v Quinn that courts are not equipped (lack expertise and resources) to make decisions which require individual and community interests to be balanced and that the adversarial processes are not well suited to decision-making which requires multiple interests to be considered and balanced.
    - Brennan J in *Quinn*:
    - The Court has no business to determine whether a decision is right or wrong, they can only determine whether a decision maker has made a decision beyond their statutory power (ultra vires) and correct that legal error.
    - Decisions made on facts, and subject to political control, are for the repository alone, but if the court in exercising their jurisdiction corrects a wrong decision, that is acceptable.
    - Increasingly, Australian courts have followed Brennan J's lead and have traced this distinction to the constitutionally entrenched separation of judicial power at Commonwealth level.
- There is strict separation of judicial power in Australia at Cth level- hence, whatever the 'merits' of administrative decision making involves, it is off limits for federal judges as it would involve the courts in the exercise of non-judicial functions
    - Because of the Court's position in the judicial branch, they are constitutionally limited in what they are able to do – reviewing the legality of the decision maker. Courts do not have the power to review decisions on merits because they were not given power by the legislature to do so, but tribunals can because the legislature did give them this power.
- The difference between legality and merits is not clear. There is no definition of 'merits'
    - Sir Anthony Mason said that 'merits review' is review that includes but goes beyond review for legality, in that it can secure the correct and preferable outcome. Merits of a matter is a residual concept, after the grounds of judicial review are exhausted.
    - The merits of a decision are to be found in 'that diminishing field left after permissible judicial review' (Greyhound Racing Authority (NSW) v Bragg).
    - Hence, the legality/merits distinction is simply marked by whether or not a particular ground of judicial review is available in a given case; if it is not, then judges cannot interfere with the 'merits' of the decision.

ADJR ACT

In what sense was the ADJR Act 'beneficial' legislation?

- ADJR was clearly intended to become the main vehicle for Cth JR – to make remedies easier to access.
- Judicial review at CL had become a tangled web, and it was difficult to meet the procedural requirements for remedies
- ADJR Act codified the CL and included a number of modifications to the CL such as the entitlement to a statement of reasons in relation to reviewable decisions (s 13)
- The ADJR Act also broadened the Cl grounds of review in few instances e.g. errors of law need not be classified as jurisdictional errors
- Prior to the ADJR Act, the law was remedially orientated. The ADJR Act shifted the attention away from the availability of particular remedies and towards whether or not a ground of review could be established i.e. whether a legal error could be shown

Should the *ADJR Act* be repealed or reformed?

- Reformed, but it's pretty badly broken. The ARC looked at this in 2012. A dissenting report called for repeal. The other members of the ARC called for minor reforms. The government didn't see a single vote to be won on the issue and did nothing (except to defund and essentially abolish the ARC).

Problem Solving Focus Points

Judicial Review

What Courts Give Jurisdiction?

The courts must have jurisdiction to review the impugned act or decision, based on constitutional, statutory and common law legal sources.

High Court of Australia

S 75 (v) and S 75 (iii) of the Constitution grants the High Court **original jurisdiction**

- *In all matters:*
  - *(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;*
  - ***(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;***
- *the High Court shall have original jurisdiction*

S 73 (ii) - In addition to its 'original' judicial review jurisdiction, the High Court has appellate jurisdiction in relation to the judicial review jurisdiction of other federal courts, both Constitutional and statutory.

NOTE: Even though X can appeal to the High Court, usually they will defer the case back to the Federal Court – s 44(2A)

Federal Court of Australia

S39B of the Judiciary Act provides for the original jurisdiction of the Federal Court (same as 75(v) of the Constitution)

- *Scope of original jurisdiction*
  - *(1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth*
  - S 39B(1A) increases FC's jurisdiction: includes jurisdiction in any matter- non-public law powers concurrent with that of states, allows direct review of subordinate legislation, allows for review of state legislation is there is a 'matter' arising under the Cn, supervisory functions analogous to those inherent in the State SC. [Used in Evans v NSW]

S8(1) of the ADJR Act provides jurisdiction for the Federal Court

- *(1) The Federal Court has jurisdiction to hear and determine applications made to the Federal Court under this Act.*

Federal Circuit Court

S8(2) of the ADJR Act provides jurisdiction for the Federal Court

- *(2) The Federal Circuit Court has jurisdiction to hear and determine applications made to the Federal Circuit Court under this Act.*

State Supreme Court

- The Supreme Courts of each State have **'inherent' or 'supervisory' judicial review jurisdiction**
    - Power to grant judicial review remedies inherited from the Court of the King's bench in England to supervise decisions made by the executive branch and decisions made by 'inferior' courts
- Now there is **legislation** (statutory judicial review jurisdiction), as a result, inherent jurisdiction is no longer used
    - ACT, Qld and Tasmania all have legislation which is modelled on the Cth ADJR Act
    - WA, SA, NSW, NT just uses CL.

Is there jurisdiction to hear review under S75 v / S39 B?
To bring an action under CL, there must be standing and a justiciable matter sought against an officer of the Commonwealth.

Standing

Common law standing established by the ACF test:

ACF held that an applicant must show either that the decision interferes with private rights (property/contract rights) or a 'special interest' in the subject matter.

Interest must be more than 'mere intellectual or emotional' concern – Right to Life

Generally, if the decision affects the individual personally (expulsion, refusal of a license, etc.) then the individual will have standing.

Unless they fit into one of these categories:

- Community Organisations

ACF

- ACF argued they had a special interest in environmental matters.
- Held they did not have standing because they were not the 'peak body' in environmental matters (note: though they would probably be considered so now)

Right to Life

- RTL was anti-abortion, but the Act that allowed the 3 clinical trials of RU486 drug only had the purpose of quality and safety of drug.
- Held no standing, because their interests were inconsistent with the purpose of the legislation.

- Commercial entities seeking to challenge decisions favourable to a rival
- Bateman's Bay

Argos

- New commercial shopping centre built across the road from an existing one. The existing supermarket operators, as well as the landlord, sought to challenge the decision.
  The supermarket operators succeeded, but the landlord did not. It was not an 'direct' interest
- There was no evidence that the landlord would have the sale of their land decrease, or that the lessee would fail to pay rent.

- Concerned Citizens

Ogle

- Anglican minister and Church Priest wanted to challenge a movie for being blasphemous.
- The court held they could, because it was no one's job but theirs to protect the world from blasphemy.

McBain

- Christian group intervened in decision to give IVF to a single mother. They were told they could not appeal, because they were not a party. They challenged the decision not through appeal but because the Federal Court judges were 'Officers of the Cth'
- Although they did not have standing, they were able to borrow it from the Attorney General.