

JUDICIAL REVIEW

LIMITATIONS AND LIMITS OF JR

- Jurisdictional and non-jurisdictional error
- Consequences of unlawful-decision making, remedies

INTRO

Judicial review is the supervisory function of the judiciary over decisions of inferior courts and the Executive. In accordance to the separation of powers doctrine, the courts have a role in maintaining the legality of Executive conduct.

_____ is seeking to challenge the Secretary's decision to _____. The decision was made on _____. The license has OR has not been suspended/renewed/conditions imposed. It appears _____ is looking to ensure that _____ (certiorari quashing/prohibition to prevent/mandamus requiring secretary to).

They are likely seeking _____ so that [PRACTICAL EFFECT].

Injunctive or declaratory relief may also be available.

_____ may also seek remedies under the ADJR Act, which would have the same effect.

In order to be eligible for the relief sought, _____ must show that the decision to _____ was erroneous on its legality, not merits (*Attorney General v Quin*). Thus, any relief granted must be in accordance with the _____ Act.

It is relevant to note that relief by mandamus requiring a certain decision could potentially infringe into the realm of merits review (*Green v Daniels*).

JUSTICIABILITY

In order for a court to be able to review a matter, it must be justiciable. The issue of whether _____ can be resolved according legal and objective criteria (statute?).

There is an actual matter. That is, the issue is a controversy that is real and immediately affects the rights/duties/liabilities of _____ (*McBain*).

Furthermore, the matter is not of a political nature (cf. *Peko-Wallsend*) and is not one that is best left to the Executive (national security, international relations – cf. *Council for Civil Services*).

The issue of _____ is likely a justiciable.

STANDING

To seek judicial review, be that through the common law or ADJR Act, _____ must satisfy the respective standing tests. The tests operate distinctly, but in interpreting the ADJR requirement, courts have referred to the 'special interest' test and related case law (*Right to Life Association; Argos*).

Common law

The common law requirement for standing is one where the party seeking review has a 'special interest' (*ACF; Alcoa*) in the matter. _____ must show that their interest amounts to more than mere emotional or intellectual concern, and that they are seeking to gain some advantage (*ACF*). The fact that the AMLIA was enacted for a class broader than _____ is of no consequence (*Bateman's Bay*), _____ is asserting its standing based on its economic interest (*Bateman's Bay*). Here, _____'s loss as a result of the decision to _____ is not merely speculator (cf. *Argos*). Nor is it remote, indirect or fanciful (*Right to Life Association*).

For corporations, standing is not automatically made out merely because its objects are relevant to the matter, nor merely because its members themselves may have standing (*ACF*).

ADJR Act

The requirement under the ADJR Act is that the party bringing the action is 'a person who is aggrieved' by a decision(s5)/conduct(s6)/failure to decide(s7). The definition for person aggrieved is found in section 3(4) as a person whose interests are adversely affected by the decision.

The relevant enactment may also provide that a party in certain situations meets the requirement of a person aggrieved under the ADJR Act.

_____ likely meets this definition and is able to pursue judicial review under the ADJR Act.

_____ has standing under the ADJR Act/common law/both and can pursue judicial review through that/those avenue(s).

JURISDICTION

_____ is seeking relief in the form of _____ against an officer of the Commonwealth (the Secretary).

Common law

s75(v) of the Constitution gives the HC original jurisdiction in the bringing of such a claim. Whilst certiorari is not included in the remedies available, but the HC has ancillary authority to grant certiorari, incidental to the effective use operation of a writ of prohibition or mandamus issued (*Aala*).

S75(v) is likely enlivened. There is a matter (*McBain*) as _____'s immediate rights are affected, as well as the duty of the Secretary; there is a listed remedy sought; and the remedy is sought against an officer of the Commonwealth as defined by the HC in *Plaintiff M68*.

S39B(1) of the Judiciary Act mirrors s75(v), and allows _____ to bring the same proceeding in to the FC (or FCC) in an exercise of its original jurisdiction.

S75(iii) of the Constitution and s39B(1A) of the Judiciary Act may also be options, whereby _____ would choose to sue the Commonwealth rather than the Secretary, in the HC or FC respectively.

ADJR Act

s8 gives the FC and FCC jurisdiction to hear and determine applications made under this Act. s5(1) provides that a person who is aggrieved by a decision to which this Act applies may apply to the aforementioned courts for an order of review in respect of the decision on a number of grounds.

_____ is a person aggrieved (see STANDING analysis above). _____ is seeking an order for an identified ground of review (see GROUNDS OF REVIEW analysis below). S3 requires that a decision to which this act must meet the following:

1. A decision (non-exhaustive list under s3(2) for the purposes of s3(1);
 - a. Final (last step in determining _____), substantive (allows/prohibits _____) and does not involve findings of fact (*ABT v Bond*);
2. Administrative in character – not defined in ADJR, generally administrative if not judicial or legislative (*Tang, Burns v ANU*);
3. Made or proposed to be made under enactment – Secretary has exercised his or her power under the AMLIA pursuant to section _____ in deciding to _____. This is a Commonwealth Act, meeting the definition of enactment under s3. Pursuant to *NEAT v AWB*, the decision is made 'under an enactment'.
 - a. The decision is required/authorised by the AMLIA pursuant to section _____.
 - b. It affects the legal rights of _____.

None of the exclusions for 'decision' under section s3(2) apply.

Section 6(1) provides for review of conduct of the Secretary, s7(1) provides for review on failure to make a decision.

The FC or FCC therefore has jurisdiction to review the decision made by the Secretary to _____, pursuant to s5(1) of the ADJR Act.

It is generally advisable to pursue a matter in the FC rather than the HC if both options are available due to costs and time considerations. The HC will typically only be chosen if the FC is not available, as its jurisdiction is constitutionally entrenched. Federal Court Rule 31.03 allows proceedings under ADJR Act and s 39B(1) to be brought simultaneously.

GROUNDINGS FOR REVIEW

In bringing proceedings under the ADJR Act, one of the grounds under s5(1) must be established in order for _____ to obtain the relief it seeks. Whilst there are some differences, there are also grounds at common law which mirror the ADJR grounds.

- Acting without authority
- Improper purpose
- Relevant/irrelevant considerations
- Delegation and agency
- Policy/dictation
- Procedural fairness
 - o Hearing rule
 - o Bias
- Jurisdictional facts
- Unreasonableness

Acting without authority

This ground arises if the Secretary has acted without express or implied authority in making his or her decision (s5(1)(d), ADJR Act).

Test is whether Secretary is expressly or impliedly required/permitted by AMLIA to make his/her decision.

Also look into whether the Secretary has failed to adhere to any procedural requirements under the AMLIA to determine if there is a ground of review under s5(1)(b) of the ADJR Act.

The court will examine the scope of the Secretary's powers and whether the decision was made within them. There may be an implied power to do things that are incidental or consequential to what is expressly authorised – powers which infringe on rights are less likely to be implied, would need to be express or strongly implied (*Coco v R*).

Implied powers can be those that are practically necessary (*ABC Developmental Learning Centres*).

Improper purpose

Assuming the Secretary has been given authority to act as he/she did, that authority can only be exercised for the purpose for which it was conferred (s5(1)(e); s5(2)(c), ADJR Act).

Statute will typically define the purpose to which a power can be exercised. The AMLIA states the Secretary can _____ for the purposes of _____.

If there are multiple purposes, some of which are authorised and others which are not, the question is whether the unauthorised purposes amount to the substantial purpose of the exercise of power (*Samerein Pty Ltd*). That is, whether the power have been exercised but for the unauthorised purposes. In such an examination, the court will look to whether processes that typically are carried out have been (*R v Toobey*).

Court may not grant relief, may limit Secretary's actions to the extent that it does not cross the threshold into becoming improper exercise of power.

Distinguish considerations/reasons from improper purpose → look at dominant purpose.

Relevant/irrelevant considerations

s5(2)(a) of the ADJR Act provides that improper exercise of power referred to under s5(1)(e) includes the taking account of irrelevant considerations, whilst s5(2)(b) provides that it also includes the failure to take into a relevant consideration.

This involves the determination of what the AMLIA envisaged as being relevant for the exercise of the particular power on an objective basis, potentially factoring in factual matters, policies and submissions.

This ground does not involve consideration of whether a matter was given adequate consideration or appropriate weight (*Peko-Wallsend*).

TEST for irrelevant – whether considerations are extraneous to considerations required by AMLIA. Even if the consideration is not expressly prohibited, the purpose of the Act, as well as the purpose of the section, could suggest that the consideration is irrelevant. If this is so, a ground of review under s5(1)(e) has been established.

Peko-Wallsend:

- Not every failure invalidates a decision (may be so insignificant that there is not material effect on decision).
- Ignorance of facts is no defence (absence from statement of reasons does not mean was not considered).
- Difference between requirement to include and consider.
- Can pick up, examine, then disregard so that it does not affect decision (look at statement of reasons, weight given).

Delegation/agency

S5(1)(c) of the ADJR Act is the ground relevant to challenging delegation – ‘a person who purported to make the decision did not have jurisdiction to make the decision’.

The AMLIA confers power upon the Secretary as the repository. Prima facie, it is unlawful for anybody else to exercise the relevant powers. However, s70 of the AMLIA provides that the Secretary may delegate all or any of his/her powers to an APS employee who hold or performs the duties of an SES Band 1 position, or equivalent or higher position within the Department. This section, if followed, rebuts the presumption requiring the repository to act personally. It is important to note that s70 stipulates the seniority a delegate must have; the delegate is unlikely to be allowed to delegate further (*Ron Pattenden*). The requirement is delegation in writing.

The Carltona principle operates in assuming the Secretary is too busy to exercise the many and varied statutory powers conferred upon him//her personally, and that, out of necessity, they must either delegate or act through an agent. Since the Secretary is in charge of the entire Department of Agriculture and Water, he/she does not any relevant connection to the decision.

- TEST → whether agents are required as matter of practical administrative necessity (*Peko-Wallsend*).

When a delegate is assigned, he/she acts in their own legal capacity (distinguished from agent).

Agent does not act under own legal capacity, rather in name of Secretary who has authorised agency. Where the relevant power is routine and non-discretionally, the implied authority to act through an agent is more readily implied. Where the power effects rights of individuals, it is less likely (*Peko-Wallsend*).

Policy

S5(2)(f) of the ADJR Act provides that an improper exercise of power under s5(1)(e) includes ‘an exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case’.

However, courts recognised that it is valid for government to develop and apply policy regarding the issues with which it must deal (*Plaintiff M64*). It is the manner and extent to which the Secretary relies upon policy in making his/her decision that may be subject to review.

- Unlawful policy: inconsistent with law that is applicable to decision, must accord with scope of relevant law/statute.
- Secretary must not follow policy inflexibly/slavishly, even where policy is lawful → consider merits and make decision on relevant facts and law.

The question is whether the Secretary has slavishly and/or inflexibly followed the policy (*Green v Daniels*) so that he has not considered the _____ on its merits and made a decision on the relevant facts and law. The policy is not inconsistent with the AMLIA, indeed, s9 requires of the AMLIA requires its consideration in making such decisions. Discretion is not fettered where the policy merely informs the decision (*Plaintiff M64*).

Dictation

S5(2)(e) of the ADJR Act provides that an improper exercise of power under s5(1)(e) includes ‘an exercise of a personal discretionary power at the direction or behest of another person’.

Procedural fairness

Failure to afford procedural fairness is a ground for review – s5(1)(a) ADJR Act: ‘a breach of the rules of natural justice occurred in connection with the making of the decision’ is grounds for review.

There is a duty to afford procedural fairness where a person’s rights or interests are affected (*Koia*). However, courts have accepted that legislation can exclude rules of procedural fairness from applying. This will typically be interpreted narrowly so as to apply only to matters which the provision actually deals with (*Saved*). In the absence of any express exclusion, it will be presumed that Parliament intends the principles of procedural fairness to apply (HC in *Saved*, adopted Brennan J’s broad view of rights and interests in *Koia*).