

Topics 10 – 13 (Weeks 11 & 12)

1. The ‘essential’ meaning of jurisdictional error.

A term of conclusion (tells us what question to ask rather than the answer): There has been a material breach of a condition on the valid exercise of power: *Wei* at [23]; *Hossain* at [23-4]

The consequence of jurisdictional error = ‘nullity’ (jurisdictional error -> invalidity -> nullity)

‘Nullity’ in turn means that the decision lacks some if not all of the legal status a valid decision has. To be more precise:

- a. parliament cannot validly exclude judicial review of the decision: *Plaintiff S157/2002; Kirk*
- b. the decision does not have the force and effect that the statute gives to decisions authorised by the statute – the statute does not ‘operate on the fact of the decision’ in the way it would ‘operate on the fact of’ a valid decision: *Bhardwaj* at [46]; *Hossain* at [23-4].
- c. The ‘null’ decision may retain some other vitality or status in law – various practical questions can arise, and must be answered by a process of statutory interpretation – e.g. can the decision-maker reopen a ‘null’ decision?; is the ‘null’ decision able to found an application for merits review or an appeal? *Bhardwaj* illustrates this area where a practical question about the status of an invalid decision is determined through a process of statutory interpretation. The joint reasons use ‘logic and legal principle’ to tilt the statutory interpretation exercise towards a finding that the null decision can be reopened (can be the basis of an appeal or an application for a merits review), but it is clear they don’t merely implement a theory that nullity is ‘absolute’.

Hossain v Minister for Immigration and Border Protection [2018] HCA 34 (p 212) also note that an immaterial error is not a jurisdictional error

- The error was more favourable to the visa applicant than the correct interpretation of the statute.
- Jurisdictional error incorporates a threshold of materiality. An error is immaterial if complying with the legal norm could have made no difference – i.e. the materiality threshold is met if the applicant has been deprived of the possibility of a different outcome.

2. Practical effects of the non/jurisdictional error distinction in a judicial review:

a. Privative legislation has limited impact on review for jurisdictional error.

‘Privative’ legislation = limits the courts’ authority to review administrative action:

- (a) Ouster clauses – *Plaintiff S157/2002* and *Kirk*.
- (b) Any law that has the legal or practical operation of denying a court the ability to enforce legal limits on administrator’s powers – eg: time-limits on proceedings for judicial review – *Boadrudza*. A radical secrecy provision – *Graham*.

If there is a privative clause, you want to deal from the outset with how this clause will operate and how it will affect the outcome. Privative clauses cannot validly exclude review for jurisdictional error. The extent to which they can limit review for jurisdictional error is limited.

E.g. (ouster provisions which state that the decision is final and cannot be reviewed but will only affect those decisions affected by non-jurisdictional errors) A privative clause decision: (a) is final and conclusive; and (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. ‘**Privative clause decision**’ means ‘a decision made, proposed to be made or required to be made under this Act’.

Plaintiff S157/2002 defines entrenched review at **Commonwealth** level by reference to:

- A. the HCA’s jurisdiction to issue s 75(v) relief for jurisdictional error against an officer of the Commonwealth: at [98]: ‘the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an Officer of the Commonwealth cannot be removed.’ At [103]: ‘s 75(v) introduces ...an irremovable jurisdiction to issue [the s 75(v) remedies] to an Officer of the Commonwealth. At [104]: s 75(v) ‘is a means of assuring to all people affected that an Officer of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them’.

- B. the constitutional separation of Commonwealth judicial power. at [98]: ‘Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction’.

Kirk describes entrenched review in the **States** by reference to that part of the inherent supervisory jurisdiction derived from Kings/Queens Bench that is a ‘defining characteristic’ of a ‘Supreme Court of a State’ (in Constitution, s 73): at [98]: ‘The supervisory role exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus)’ for jurisdictional error only. At [100]: ‘Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.’

Accordingly, the effect of these two cases are as follows:

- *The Migration Act* privative clause could not validly operate to remove the High Court’s ability to review for denial of procedural fairness – *Plaintiff S157/2002* at [83], [106].
- *The Industrial Relations Act* privative clause could not validly operate to remove the Supreme Court’s jurisdiction to review for jurisdictional errors of law by the Industrial Relations Court – *Kirk* at [105].

Bodruddaza: The High Court held that an inflexible time-limit on judicial review was invalid in its application to the entrenched review jurisdiction. The way that it was drafted meant that it could not be read down with no ability for the court to extend. To test the validity of the time limit of entrenched review, ask if the law’s practical effect is consistent with the place of s75(v) in the constitutional structure. **Not every time limit for entrenched review will be invalid.**

Graham: The HCA held that a provision which denied the courts’ power to compel production of certain information was invalid in its application to entrenched judicial review. Operated so that the Minister could not be compelled to divulge information that relevant to a decision to cancel a visa on character grounds.

Touchstone applied by the HCA – at [48]: Does the law, in its practical operation, deny a court exercising entrenched jurisdiction the ability to enforce the legislated limits on an officer’s power? This is a question of ‘substance and therefore of degree’.

Application to the provision:

- at [54-9]: The provision removes any basis for the court to draw inferences adverse to the Minister, in reviewing the decision objectively e.g. applying the ‘no evidence’ ground; assessing whether the opinion that enlivens the power was reasonably formed; assessing whether the discretion was exercised reasonably.
- at [64]: A ‘substantive curtailment of the capacity of a court exercising jurisdiction under or derived from s 75(v) ... to discern and declare whether or not legal limits of powers conferred on the Minister by the Act have been observed’.
- at [65]: ‘it strikes at the very heart of the review for which s 75(v) provides’

Probuild: The limits on legislative power to oust or restrict review do not apply to (non-entrenched) review for non-jurisdictional error (which means non entrenched review can be ousted by Parliament).

TOPIC 13 READINGS:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 (Commonwealth precedent)

Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531 (State precedent)

Bodruddaza v Minister for Immigration & Multicultural Affairs (2007) 228 CLR 651

Graham v Minister for Immigration and Border Protection [2017] HCA 33

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 351 ALR 225

- b. **Remedies for non- jurisdictional error are limited in review on common law remedial model**
(include this at the end of your analysis). Remedies for non-jurisdictional errors are weaker.

Jurisdictional error = any and all remedies.

Non-jurisdictional error of law:

... on the face of the record = prospective certiorari

... not on face of the record = equitable relief may be available.

The distinction between jurisdictional and non-jurisdictional error has a bearing on the remedies that are available in judicial review on the common law remedial model.

Recall Topic 3 overview of jurisdictions and introduction to the difference between common law and ADJR Act remedial model. NB - this does not apply to the ADJR Act, which has a simplified remedial model: widest possible grounds of review, extending to 'error of law, whether or not on the face of the record'. s 5(1)(f)) all the orders for review are available if any of the grounds are established - s 16. (In the situation where you are confident to use the ADJR Act, there is no need to discuss the below remedies other than mentioning s 16).

Jurisdictional Error

Prohibition – restrains a public law actor from exceeding jurisdiction.

Mandamus – compels a public law actor to perform a public duty that remains unperformed in fact or in law.

Jurisdictional Error

OR Error of Law on the Face of the Record (argue this if you do not have a jurisdictional error to argue)

Certiorari – quashes the decision, deprives it of all legal effects.

Can be retrospective (i.e. the decision never had any effect, from the date it was purportedly made) or prospective (i.e. ceases to have any legal effect from the date of the court order).

On the common law definition, '**the record**' does not include the reasons for a decision:

'The record' comprises the formal decision or order; the application or other document that initiated the matter before the decision-maker; in the case of an adjudicative body – pleadings or similar filed in the proceedings. Reasons can be included at common law if the decision-maker deliberately formally incorporates them into the record.

Authority: *Craig v South Australia* (1995); non-committal obiter maintaining this position in Kirk at [85]; Probuild at [61].

Supreme Court Act 1970 (NSW) s 69(4) (*includes the reason statement whereas the common law definition does not include it*)

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

Craig v State of South Australia (1995) 184 CLR 163 "on the record"

- The qualification should be understood as referring only to so much of the reasons or transcript of proceedings as is referred to in the formal order in a way which brings about its incorporation as an integral part of that order and "the record". If, for example, the formal order incorporates undertakings given by a party "as set out in" a particular designated document or is said to be made "in terms of proposed orders set out in the reasons for judgment", the order and the record will incorporate only those parts of the particular document or the reasons for judgment which set out, qualify or otherwise affect the content of those undertakings or proposed orders. Conversely, a merely introductory or incidental reference will not suffice to incorporate, in either the formal order or the record, reasons given for making the formal order which do not in fact constitute part of it. Thus, for example, an introductory remark such as the phrase "for the reasons given" or the word "accordingly" will not, of itself, have the effect of incorporating the whole or any part of the reasons for decision in either the formal order or "the record".

Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480 workers compensation/injury case involving opinions of a Medical Board

- The *Wingfoot* case's significance is that the High Court confirmed that non-compliance with a statutory duty to provide reasons would be recognised as an error of law on the face of the record and therefore provide the basis for the remedy of certiorari.
- [26] Error of law on the face of the record constitutes a separate and distinct basis on which the Supreme Court can make an order in the nature of certiorari. That basis for the Supreme Court making an order in the nature of certiorari is not entrenched by the Commonwealth Constitution; its application can be excluded by statute. Where it is not excluded, however, it applies independently of jurisdictional error.