

# ULTRA VIRES

## **Decision not authorised (simple *ultra vires*)**

### ADJR Act provisions

S 5(1)(d) allows challenge to **decision** not authorised by statute

S 6(1)(d) allows same challenge in relation to **conduct** of decision maker

1. Identify relevant facts
2. Identify the relevant statutory provisions

3. Was the decision made beyond power?

Test: [Decision-maker] will have acted *ultra vires* if they have acted outside the scope of their statutory power.

- Administrative decision-makers cannot do anything not authorised by law (*Entick*)
- If decision-maker misconstrues the law, their decision will still be *ultra vires*
  - E.g. *Haneef*: Minister misinterpreted “association” too broadly, and had no basis to cancel Dr Haneef’s visa on that interpretation

## **Procedural *ultra vires***

### ADJR Act provisions

S 5(1)(b) allows challenge to **decision** on basis that procedures were not followed

S 6(1)(b) allows same challenge in relation to **conduct**

1. Identify decision-maker, decision, and statutory source of decision-making power
2. Identify procedures required in making that decision

### Space Activities Act

S 24: Procedure for varying, revoking, transferring Space Licence

S 33: Procedure for varying, revoking, transferring Launch Permit

3. Were those procedures observed?

4. Should the decision be invalidated?

Test: Was it the purpose of the legislation that a decision made in breach of the requirement should be invalid? (*PBS*)

- Purpose can be determined by considering:
  - the language of the relevant statutory provision;
    - Mandatory language (e.g. Minister shall; must) suggest Parls. intention was to invalidate (*PBS*)
  - the nature of the procedural requirement;
    - Obligations under international treaties are ‘goals’ rather than rules (*PBS*)
  - the subject matter of the decision;
  - the objects of the statute;
  - the consequences for the parties if the decision is invalid;
  - any public inconvenience resulting from a decision being invalid

## **Improper delegation**

### ADJR Act provisions

No express provision but:

SS 5(1)(c), (d), (j) could allow review in circumstances of improper delegation for **decisions**

SS 6(1)(c), (d), (j) could allow review for **conduct**

1. Identify principal repository
2. Identify who actually made the decision
3. Identify delegation provisions and any requirements for delegation
  - Where power non-delegable, some acts done by others can be treated as acts of the principal (*Re Reference*) (i.e. acting as an agent)
    - Extent to which principal can use agents depends on nature of the power (*Re Reference*)
  - Where power delegated, delegate acts in his own name – and cannot act as an agent of the principal (*Re Reference*)
    - Where statute expressly permits delegation of all principal's power, practical administrative necessity of agents disappears (*Re Reference*)
    - E.g. a delegate signing in the name of their principal acts as an agent, and thereby fails to exercise their delegated power properly (*Re Reference*)
  - Ministers may generally act through authorised department officers because of the practical administrative necessity of doing so (*O'Reilly*)

**S 104 SAA: Minister**, may, by **signed writing**, delegate to another person **any or all** of their powers under **SAA**, if Minister considers that the person is **suitably qualified to exercise** the powers concerned

#### Acts Interpretation Act

S 34AA: Delegation construed as including a power to delegate to any person holding office/performing duties of specified office or position, even if office/position does not come into existence until after delegation

S 34AB: Where act confers power to delegate a power

- (a) The delegation may be made either generally or as otherwise provided by the instrument of delegation;
- (b) The powers that may be delegated do **not** include that power to delegate;
- (c) A function or power so delegated, when performed or exercised by the delegate, shall be deemed to have been performed or exercised by the authority;
- (d) A delegation by the authority does not prevent the performance or exercise of a function or power by the authority; and
- (e) If the authority is not a person, section 34A applies as if it were.

S 34A: Where delegated power dependent on opinion, belief, or state of mind, power can be exercised by delegate on the delegates opinion, belief, or state of mind

#### Irrelevant considerations

##### ADJR Act provisions

S 5(1)(e) with s 5(2)(a) allows challenge to **decision** on basis that the decision maker took into account an irrelevant consideration in the exercise of their power

S 6(1)(e) with s 6(2)(a) allows **challenge** to conduct

1. Identify the irrelevant consideration
  - NB: Watch for discretionary considerations, decision-maker may consider but are not compelled to
2. Determine whether the consideration was actually irrelevant
  - Decision-maker must not allow themselves to be influenced by something extraneous and extra-judicial which ought not to have affected their decision (*Padfield*)
  - Decision-maker must only consider those things justice and common-sense demand (*Roberts*)

## **Relevant considerations**

### ADJR Act provisions

S 5(1)(e) with s 5(2)(b) allows challenge to **decision** on basis that the decision maker failed to consider a relevant consideration in the exercise of their power

S 6(1)(e) with s 6(2)(b) allows challenge to **conduct**

#### 1. Identify relevant considerations

- There must be an express or implied statutory duty to consider a matter for a decision-maker to be obliged to consider it (*Peko-Wallsend*)
- Material and salient facts are relevant considerations (*Peko-Wallsend* per Gibbs CJ)

### Space Activities Act

S 18: Relevant considerations for granting a Space Licence

S 25: Relevant considerations for suspending a Space Licence

S 26(3): Relevant considerations for granting a Launch Permit

S 34: Relevant considerations for suspending a Launch Permit

#### 2. Identify the failure to consider the relevant considerations

- NB: Not every failure is fatal; a relevant factor may be so insignificant that it could not have materially affected the decision
- 3. Has the decision-maker given 'proper, genuine, and realistic consideration'? (*Hindi*)
  - Simply stating "I have read/considered" does not necessarily show genuine and proper consideration (*Hindi*)
  - Not required that the decision-maker attaches a particular weight to relevant considerations, just that they are considered (*Hindi*)

## **Improper purpose & bad faith**

### ADJR Act provisions

S 5(1)(e) with S 5(2)(c) for **decisions** and S 6(1)(e) with s 6(2)(c) for **conduct** on the basis that the power was exercised for a purpose other than the **purpose** for which the power was granted

S 5(1)(e) with s 5(2)(d) for **decisions** and s 6(1)(e) with s 6(2)(d) for **conduct** on the basis that the power was exercised in **bad faith**

S 5(1)(g) and s 6(1)(g) allow decisions and conduct to be challenged on the basis that they are affected by **fraud**

#### 1. Identify the likely purpose of the decision

#### 2. Identify the statutory purpose for which the power can be exercised

#### 3. Was the purpose of the decision improper?

Test: A decision will be made for an improper purpose if it is made for a purpose other than that for which the power was conferred (*Toohey*).

- Even if something is done for a purpose that does directly coincide with purpose for which power was conferred, may still have a proper purpose IF it facilitates achieving of that purpose (*Samrein*)
- Improper purpose does not have to be sole purpose; sufficient that it played a substantial role
  - Apply 'but-for' test to the improper purpose (*Randwick*)

## **Unreasonableness**

Test: [Decision-maker] may have exercised their powers in a way so unreasonable that no reasonable decision-maker could have made it (*Wednesbury*).