

# CONTENTS

## JUDICIAL REVIEW

<b>ELEMENTS TO BE SATISFIED</b> .....	<b>4</b>
1. OUTLINE DECISION .....	4
2. JURISDICTION .....	4
Federal Court Jurisdiction – ADJR Act.....	6
Preliminary Issues.....	6
Decision .....	7
Administrative character .....	8
Made under an enactment.....	8
Constitutional scheme: s75(v) <i>Constitution</i> and s39B <i>Judiciary Act</i> .....	10
Preliminary issues.....	10
Matter .....	11
officer of the Cth.....	11
Constitutional Scheme s75(iii) <i>Constitution</i> .....	11
Constitutional Scheme s 39B(1A)(c) of the <i>Judiciary Act</i> .....	11
Common law - STATE COURTS .....	11
Constitutional significance of state judicial review .....	11
review of public decisions .....	12
Justiciability.....	13
Delegated Legislation .....	13
3. STANDING .....	14
Categories as to who is seeking standing .....	14
Attorney-General's fiat (representation) .....	17
Connection between standing, justiciability and matter .....	17
Summary of standing.....	17
4. GROUNDS OF REVIEW .....	18
PROCEDURAL FAIRNESS: Fair hearing RULE.....	18
Threshold question .....	18
Content question.....	21
Legitimate expectations .....	22
Statutory exclusion.....	23
Procedural fairness: RULE AGAINST BIAS.....	23
Preliminary issues.....	23
Defences .....	24
Public comments by a minister.....	24
Holding shares in a company .....	25

Continuing relationship with a particular issue .....	25
Breach of common law rules .....	26
Breach of statutory procedures.....	26
Procedural Fairness: Obligations to make inquiries .....	28
Procedural Fairness: Duty to give reasons .....	28
Reasoning process: relevant/irrelevant considerations.....	29
relevant cases.....	29
Irrelevant considerations.....	31
Relevant considerations.....	31
REMEDIES .....	32
Reasoning process: Improper purpose .....	32
Reasoning process: Inflexible application of policy .....	33
Is the policy lawful?.....	33
Was it applied inflexibly? .....	33
Reasoning process: acting under dictation .....	35
Did the legislation require the DM to exercise discretion?.....	35
Was the decision of [x] overwhelmed by the views of [Y]?.....	35
Reasoning process: unlawful delegation/agency .....	36
administrative assistance.....	36
Agency .....	36
Decisional ground: Jurisdictional error of law.....	37
Distinguishing between errors of fact and errors of law.....	37
Stages of decision-making.....	37
Types of jurisdictional fact .....	38
No evidence ground of review .....	41
Decisional ground: unreasonableness .....	42
Human rights norms.....	46
5. JURISDICTIONAL ERROR .....	46
List of jurisdictional errors .....	46
Who is the decision maker? INFERIOR COURT or SUPERIOR COURT .....	47
Broad or narrow concept of JE? .....	48
Statutory interpretation.....	48
Error on the face of the record.....	50
6. STATUTORY RESTRICTIONS TO JUDICIAL REVIEW.....	50
Entrenched minimum provision of judicial review.....	50
Privative clauses.....	50
Do privative clauses apply? .....	50
Federal privative clauses .....	51

State privative clauses .....	52
Not all privative clauses are invalid.....	53
No invalidity clauses .....	53
No consideration clause.....	55
Time-limit clauses .....	55
Clauses restricting access to information .....	56
7. REMEDIES .....	57
For each jurisdiction .....	57
ADJR Act .....	57
CONSTITUTION/JUDICIARY ACT.....	58
CERTIORARI .....	58
Prohibition.....	59
Mandamus.....	59
Declarations.....	59
Injunctions.....	59
Discretion to refuse a remedy.....	60
the consequences of invalidity and JE .....	60

#### TRIBUNAL AND MERITS REVIEW

1. JURISDICTION.....	61
CAN REVIEW .....	61
CANNOT REVIEW.....	62
Appeals from tribunal decisions.....	62
2. STANDING .....	63
3. PROCEDURE .....	63
4. GROUNDS OF REVIEW/PURPOSE.....	63
5. POWERS OF THE AAT.....	64
6. SHOULD AAT APPLY GOVERNMENT POLICY? .....	66
7. REMEDIES .....	68

#### INTERNAL REVIEW

AUTHORISED BY STATUTE .....	68
CAN A DM DECIDE TO RECONSIDER THEIR DECISION IF THERE HAS BEEN AN ERROR? .....	68
FURTHER ACTION .....	69

#### OMBUDSMAN

STANDING.....	69
JURISDICTION .....	69
GROUNDS .....	69
HOW COMPLAINTS ARE HANDLED? .....	70

REMEDIES.....	70
FREEDOM OF INFORMATION LEGISLATION	
Scope of FOI Act.....	70
Is it information?.....	71
Does the person have access to information?.....	71
is the information exempt or is it conditionally exempt? .....	72
Exempt.....	72
Public interest conditional exemptions.....	72
Can the agency otherwise refuse the request? .....	73
Review of the decision .....	73
Case law examples .....	73

# ADMINISTRATIVE LAW: PROBLEM QUESTION NOTES

## JUDICIAL REVIEW

### ELEMENTS TO BE SATISFIED

- 1) Judicial Review Jurisdiction and Justiciability
  - ⇒ Does the court have jurisdiction to review the decision?
- 2) Standing
  - ⇒ Is the person appropriate to bring the case?
  - ⇒ Person has to have been aggrieved by the decision
- 3) Legal error – Ground of review (GOR)
  - ⇒ What legal error has been made with regard to the decision?
  - ⇒ One of the s 5(1) or s 6(1) GORs must be present in the action
- 4) Available remedy
  - ⇒ What remedies are available to the plaintiff under the Act?

### 1. OUTLINE DECISION

The decision in question is [decision X] and [person Y] may wish to seek review of the decision.

### 2. JURISDICTION

COURT	SOURCE OF POWER / JURISDICTION FOR JR	LIMITATIONS/ REMEDIES AVAILABLE

### *Kirk v Industrial Court (NSW)*

#### **Facts:**

- The case is concerned with the IR Act which gave the NSW Industrial Court power to hear and determine criminal charges for offences under NSW OH&S laws.
- Mr Kirk and his company were convicted of such charges in the NSW Industrial Court –

#### **Issue:**

- Revisits *Craig* to clarify the meaning and application of the concept of jurisdictional error in the context of judicial review of inferior courts and administrative tribunals.

#### **Overall:**

- The two principle grounds for grant of relief in the nature of certiorari are usually described as 'error of law on the face of the record' and 'jurisdictional error'
- The critical issue in determining whether or not to apply a narrower or broader conception of jurisdictional error is one of 'function and purpose, not nomenclature'.
- Key issue for the identification of a jurisdictional error will be an assessment of the gravity or seriousness of the error → done through the process of statutory interpretation

#### **Held:**

- The errors of construction of s 15 of the OH&S Act – can be identified as a jurisdictional error due to the Industrial Court misapprehending the limits of its functions and powers.
- Certiorari would lie in this case for jurisdictional error in both of the respects identified

- Factors from *Project Blue Sky*:
  - Gravity or seriousness of the matter (if grave error, likely will be JE)
  - Language of statute (mandatory language => JE)
  - Nature of obligation breached (substantive cf procedural => JE; rule-like cf amorphous => JE)
  - Consequences of finding invalidity (public inconvenience => no JE)

### *Project Blue Sky Inc v Australian Broadcasting Authority (1998)*

#### **Facts:**

- Broadcasting authority had to ensure a certain amount of Australian programs/content were being shown
- There was a treaty in place with New Zealand whereby NZ gets the benefit equally in regards to these programs
- Under s 160(d) *Broadcasting Services Act 1992* (Cth) – Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country
- ABA breached this section of the statute

#### **Issue:**

- Are content requirements invalid, or was it unlawful?

#### **Held:**

- Construe provisions so that it is consistent with the language and purpose of all the provisions of the statute
- To determine if there is a breach, look at parliament's intentions
- Courts are not here to cause inconvenience
- Declaration of act's breach
  - Not an error of large that it should invalidate everything done before