

TOPIC 5A: ACTING BEYOND POWER

ACTING BEYOND POWER: decision maker had no power to begin with

1. Administrative action beyond scope

ADJR Act s 5/6(1)(d): a person may seek judicial review of a decision/conduct re decision on the ground that the 'decision was not authorised by the enactment in pursuance of which it was purported to be made'

1.1 Look at Parl intention

Issue arises when DM granted power to **regulate** seeks to **prohibit** all/part of particular activity

- presumption that by-laws shouldn't be construed to restrict individual liberties: **Foley**
 - **eg.** restricting distribution of anything to any bystander without council permission only applied to large volumes of fliers to bystanders/strangers; didn't prohibit giving something to someone they know
- if exercise of power contingent on **opinion of a body** that a particular state of affairs exists, the opinion must be a reasonable opinion: **Foley**

2. Breach of essential procedural condition

ADJR Act s 5/6(1)(b): judicial review may be sought of a decision/conduct re decision 'on the ground that procedures that were required by law to be observed in connection with the making of the decision were not observed'

2.1 Did Parl intend Act in breach render decision invalid: PBS

- **Ask:** did Parliament intend an Act in breach of provision render the decision invalid: **PBS**
 - **Note:** if procedure not followed, not necessarily invalid: **PBS**
- **Test:** determine intention by looking at: **PBS**
 - (1) Language of the statute (mandatory/voluntary)
 - (2) Scope, subject matter of statute
 - (3) Practical consequences of breach

2.2 Examples in PBS

- **Examples:** why didn't legislation in **PBS** intend an activity done in breach to be invalid?
 - **Language of s 160:** suggests decision valid even if inconsistent with international obligations (didn't say 'in order to be valid... must be consistent with...')
 - **Other obligations in s 160:** states ABA must perform functions in matter consistent with other general govt policies (no precise rule-like quality)
 - **Nature of international agreements:** usually vague, non-obligatory language (goals to be achieved), couldn't have intended breach of international obligation = invalid
 - **# of international agreement AUS is party to:** 900 at the time, parl couldn't have assumed ABA had in-depth knowledge of all of AUS treaty obligations

3. Decision maker not empowered (delegation)

ADJR Act s 5/6(1)(c): judicial review may be sought of a decision/conduct re decision where 'the person who purported to make the decision **did not have jurisdiction to make the decision**'

3.1 Power of delegation in the Act

3.1.1 Who is legal decision maker

- Where power of delegation in the Act, legal DM is the delegate: **O'Reilly**
 - Delegate is their agent: **O'Reilly**
 - In this case, **Carltona's** alter-ego rule does not apply: **Re Reference**

3.1.2 When is decision valid

- If statute doesn't require power to be exercised personally by designated person, delegation valid: **O'Reilly**
- Use of agent to perform non-discretionary admin tasks is valid: **O'Reilly**

3.1.3 Who must sign

- Decision valid if delegate exercises power/sign with own name: **Re Reference**
 - If exercise power under delegator's name, effectively repudiates the delegation: **Re Reference**

3.2 Power of delegation not in the Act

3.2.1 Who is legal decision maker

- Where power of delegation not in the Act, legal DM is the delegator: **Carltona**
 - Delegate is merely their alter-ego: **Carltona**
 - Delegator retains DM power: **Carltona**

3.2.2 Who must sign

- Delegate must exercise power under delegator's name: **Re Reference**

3.2.3 Practical administrative necessity: **Carltona**

- Authorisation valid if practical administrative necessity to do so
- Depends on whether Act requires power to be exercised personally by designated person
 - Ascertained from nature of power & circumstances of case
 - Look at whether delegate is sufficiently senior/authorised/expert for Parl to have intended someone of their level to exercise the power: **O'Reilly**

3.3 Statutory provisions: apply if right of appeal

- **Acts Interpretation Act: s 34AB(1)(c):** when power has been conferred by legislation on person A & it's delegated, legal decision maker remains person A
 - the delegator/minister is the legal decision maker
- applies only in regard to powers that give a **right of appeal**; (eg. if statute says decisions of a minister can be appealed, even if delegate made decision, minister is ultimately legal decision maker under **s 34AB(1)(c)**)

Note: So, P's actions despite repudiating the delegation, *may* be saved by **s 34AB(1)(c)**

TOPIC 5B: ABUSE OF POWER

ABUSE OF POWER: decision maker had power to begin with, but makes a mistake along the way

1. Relevant & irrelevant considerations

If a decision maker, takes into account an irrelevant consideration, or fails to take into account a relevant consideration, the decision will be amenable to review

ADJR s 5/6(1)(e): a person aggrieved by a decision/conduct re decision may apply to review a decision on ground that the making of the decision was an *improper exercise of the power* conferred by the enactment

sub-s (2): 'improper exercise of power'

(a) taking an **irrelevant consideration** into account

(b) failing to take a **relevant consideration** into account

Note: before writing, define what is an irrelevant/relevant consideration *according to the legislation*

- **eg.** irrelevant consideration: a consideration that, according to the legislation, DM **must not** take into account
- **eg.** relevant consideration: a consideration that, according to the legislation, DM **must** take into account

1.1 How to ID relevant & irrelevant considerations

(1) express statutory provisions

(2) subject matter, scope and purpose of relevant Act: **Peko**

1.1.1 Materially affected by decision

- **Ask:** is the decision materially affected: **Peko**
 - the decision doesn't have to lead to a reverse outcome in absence of consideration: **Peko**
 - ground not made out if consideration so insignificant it couldn't have materially affected decision: **Peko**
- **Test:** For it to be a relevant consideration, has to be the case that if the DM didn't rely on it, the *substantive result would've been different* on the balance of probabilities: **Peko**
 - in **Peko**, TP comments were a relevant consideration because:
 - By requiring ALC comment on TP detriment, showed grant could adversely affect TP
 - By providing means where minister could assess TP detriment, parl showed concern of not overlooking TP interests that may outweigh fairness of granting claim

1.1.2 Social justice

- council had wrongly considered 'eccentric principles of socialistic philanthropy' by paying higher wages to women for social justice: **Roberts v Hopwood**
- a body with a duty to admin funds owes a duty to do it in a businesslike matter with reasonable care/skill/causation/regard to interests of contributors: **Roberts v Hopwood**

1.2 When is a relevant consideration taken into account?

- Court **doesn't require** the DM to attach a particular weight to consideration: **Hini**
- Court **does require** a DM give "proper, genuine and realistic consideration" to a relevant consideration, and how much weight to attach to it: **Hini**

2. Improper purpose & bad faith

A decision is made for an improper purpose if they make their decision for a purpose which isn't a purpose for which the statutory power was conferred (**note**: so irrelevant if morally improper purpose)

2.1 Improper purpose

s 5/6(1)(e): a person aggrieved by a decision/conduct re decision may apply to review a decision on ground that the making of the decision was an improper exercise of the power conferred by the enactment

(2)(c): 'improper exercise of power' = exercise of power for a **purpose other than a purpose for which the power is conferred**

2.1.1 How to ID purpose

- Statute may say expressly (objects clause); or
- May be inferred from the subject-matter and scope of legislation: **R v Toohey**
 - In **Toohey**, powers to allow native title claims over unalienated Crown land were for purposes of town planning; DM alienating the Crown land to defeat title claim was improper
 - Obiter: if defeating title claim was a step towards achieving primary & legitimate planning purpose, decision not invalid: **Toohey**

2.1.2 Broad purpose

Plaintiff M79

- **Facts**: minister empowered to grant TSHV to a person in detention if **in public interest to do so**
- Minister granted TSHV to a person who hadn't applied; precluded them from seeking longer visa
- **Held**: not improper to grant TSHV to preclude applicant from seeking longer visa as minister believed it to be in **public interest** to limit their time in AUS; this was consistent with purpose of the Act

2.1.3 Multiple purposes

Test: decision invalidated only if invalid purpose is '**substantial purpose**': **Samrein**

Ask: would decision have been made **but-for** that improper purpose: **Thompson**

- **Eg.** in **Samrein**, statute gave Board responsibility to provide offices for their department; this was done, but providing space for another dpt & creating shopping area wasn't improper purpose as it created revenue to help Board service its loans to provide space for own dpt

2.2 Bad faith

- **s 5/6(1)(g)**: the decision was induced or affected by fraud
- **s 5/6(1)(e)**: the making of the decision was an *improper exercise of power*
 - **sub-s (2)(d)**: 'improper exercise of power' = exercise of discretionary power in bad faith

3. Unreasonable

3.1 ADJR

s 5/6(1)(e): a person aggrieved by a decision/conduct re decision may apply to review a decision on ground that the making of the decision was an **improper exercise of the power** conferred by the enactment

- **Sub-s (2)(g):** 'improper exercise of power' = an exercise of power is so **unreasonable** that no reasonable person could have so exercised the power

3.2 *Wednesbury* unreasonableness

A decision invalid if the decision so unreasonable that no reasonable DM could have made it: ***Wednesbury***

- Whether fair outcome irrelevant; only relevant whether it was lawful: ***Wednesbury***
- granting licence subject to condition that no-one <15 could be admitted wasn't unreasonable: ***Wednesbury***

Problems with *Wednesbury* unreasonableness

- **Examination of merits:** court must assess merits in finding decision was unreasonable
- **Incoherent & circular test:** courts guided by intuition; makes it difficult for parties to know whether a claim is likely to be successful & judges likely to make inconsistent decisions

3.2.1 Courts are moving away from *Wednesbury*

Minister for Immigration v Li: moved away from the unreasonableness test in ***Wednesbury***

Decisions can be unreasonable if they are

- (1) Partial & unequal in their operation as between different classes;
- (2) Manifestly unjust;
- (3) Disclose bad faith;
- (4) Involve such oppressive or gratuitous interference with the rights of those subject of them as could find no justification in the minds of reasonable people