

## Table of Contents

<b>Delegated Legislation.....</b>	<b>3</b>
Separation of Powers.....	3
<i>Legislation Act 2003 (Cth)</i> .....	3
<i>Subordinate Legislation Act 1989 (NSW)</i> .....	3
Procedural Requirements.....	4
Judicial Review .....	5
Grounds of Judicial Review.....	5
<b>Judicial Review.....</b>	<b>10</b>
Stages of Judicial Review.....	10
Jurisdiction.....	10
Common Law Jurisdiction (High Court) .....	10
Jurisdiction (Federal Court) .....	12
Jurisdiction (New South Wales) – State Courts.....	13
Jurisdiction – ADJR Act.....	13
<b>Standing.....</b>	<b>18</b>
“Decision” Definition.....	18
Standing Rules.....	18
ADJR v Common Law.....	19
Examples of ‘special interest’ .....	19
ACF and Public Interest Groups.....	19
ACF Implications.....	19
<b>Remedies.....</b>	<b>21</b>
Certiorari.....	21
Prohibition .....	22
Mandamus .....	22
Habeus Corpus .....	23
Injunction.....	23
Declaration.....	23
Constitutional Remedies.....	23
ADJR Remedies.....	24
Discretion.....	24
<b>Errors of Law.....</b>	<b>26</b>
Law/Fact Distinction.....	26
Errors of Law.....	27
Jurisdictional Fact.....	28
Jurisdictional Error.....	28
<b>Grounds of Review: Procedural fairness.....</b>	<b>30</b>
The Hearing Rule.....	30
The Rule Against Bias.....	32
<b>Grounds of Review – Consideration.....</b>	<b>35</b>
Consideration Grounds.....	35
Test for Relevant Consideration.....	35
Test for Irrelevant Consideration.....	37
<b>Other Grounds of Review.....</b>	<b>38</b>
Acting for an Unauthorised “Improper” Purpose.....	38
Bad Faith.....	39
Fraud.....	39
Procedural Error.....	40
Unauthorised Delegation.....	40

Acting Under Dictation.....	41
Inflexible Policies.....	42
No Evidence Rule.....	43
Uncertainty.....	44
Unreasonableness.....	44
Irrationality.....	44
<b>Restricting Judicial Review - Privative Clauses.....</b>	<b>46</b>
Constitutional Foundations of Judicial Review.....	46
Historical Position.....	47
Current Position: Federal.....	47
Current Position: State.....	48

## Standing

### **Administrative Decisions Judicial Review Act 1977 (Cth): Section 5 - Applications for review of decisions**

(1) A person who is aggrieved **by a decision to which this Act applies** that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds: ...

- “Person aggrieved” is the ADJR test for standing (identical to CL test, find person who is aggrieved when looking at standing).
- Focus should always be what is the decision that the ADM made? Identify as the decision that is adverse to the client’s interests (e.g visa cancelled, license not renewed). JR therefore is called in to fix this and s 5 tends to be the focus.

### **“Decision”**

‘Making a decision’ is defined in the Act to include the following Actions:

### **Administrative Decisions Judicial Review Act 1977 (Cth): Section 3 - Interpretation**

(1) In this Act, a reference to the making of a decision includes a reference to:

- (a) Making, suspending, revoking or refusing to make an order, award or determination
- (b) Giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission
- (c) Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument
- (d) Imposing a condition or restriction
- (e) Making a declaration, demand or requirement
- (f) Retaining, or refusing to deliver up, an article; or
- (g) Doing or refusing to do any other act or thing; and a reference to a failure to make a decision shall be construed accordingly.

### ***Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321***

- What a ‘decision’ is, or when one has been made, was considered by HC. ABT was considering whether to revoke or suspend broadcast licenses held by companies that were effectively controlled by Bond through his shareholdings
- B sought review of various findings and rulings by the ABT. A significant issue was whether the findings and rulings were ‘decisions’ for the purposes of ADJR.
- Mason CJ emphasised it is important on policy grounds to confine JR to final decisions.
- ADJR extends the concept of decision (s 3(3)).
- **Section 3(3) ADJR:** Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed...a decision.

## **Standing Rules**

### ***Australian Conservation Foundation v Commonwealth (‘ACF v Cth’) (1980)***

- Proposal to set up resort in central Qld. ACF claimed they had standing because they had a well known environmental interest.
- ‘An **ordinary member of the public** who has no interest other than as a member of the public in upholding the law, has **no standing** to sue to prevent violation of a **public right** or to enforce the performance of a public duty. A private citizen who has **no special interest** is incapable of bring proceedings for that purpose.

### Exception: 'Special Interest',

#### **Edwards v Santos:**

Involved group of Aborigines negotiating in relation to land over which they had native title claim, but Heydon J appeared to place more emphasis on the commercial nature of the plaintiffs' rights as opposed to their native title right.

- A private or financial interest.
- Not 'a mere intellectual or emotional concern'

#### **ADJR v Common Law**

- ADJR has adopted a 'person aggrieved' test (s 6, 7). If a person wishes to be joined as a party in proceedings commenced by no other, the test is 'a person interested' in the relevant decision, conduct or failure to make a decision (s 12(1)).

#### **Examples of 'special interest'**

- *Right to Life* – interest to refuse trials of abortion drug - **NO** standing – must not be merely an intellectual or emotional
- *Shop Distributive* – unions interested in allowing Sunday trading – **YES** because it had such a large membership it was a legal interest (any change in trading hours changed terms and conditions of their employment)
- *Onus v Alcoa* – Indigenous group wanted to prevent construction of land containing relics of which group was a custodian – **YES**; not private or financial but something more than just emotional or intellectual
- *Batemans Bay* – private company conducting funeral benefits fund wanted to prevent statutory authority from setting up similar fund **YES**; business/financial interest

#### **ACF and Public Interest Groups**

Despite outcome of *ACF*, environmental and public interest groups may have standing. To show a 'special interest', courts have emphasised factors such as:

- Prior involvement in the particular matter
- Group recognised or funded by government
- Whether group represents a significant strand of public opinion
- Expertise of the organisation (*Northcoast* (1994)).

#### **ACF Implications**

- To establish standing in JR cases, applicants must establish their relationship to the decision being challenged (matter that is determined with reference to the particular circumstances of the case, the specific statutory scheme and the characteristics of the applicant).
- **Standing becomes an issue when others beyond those directly affected seek to commence or be joined in proceedings:** A person may have a commercial or cultural interest may wish to challenge a decision for more altruistic reasons. These are public interest cases involving environmental activists, community, cultural groups.

#### ***Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998)**

- Test of whether party has sufficient material interest in subject matter of action is to be construed as an enabling, not a restrictive, procedural stipulation.
- **McHugh J:** Special interests of P was that the allegedly unlawful activities affected them financially and to an extent that exceeded the injury to any other individual.
- Standing was conferred because commercial interests were affected

### ***North Coast Environmental Council Inc v Minister for Resources (1994)***

- Court held Council had standing as a person aggrieved to request a statement of reasons under s 13 ADJR in respect of a Min's decision to grant a license to a company to export woodchips.
- Sets out factors which may be important when determining whether environmental organisation should be granted standing and has a special interest.
- **Sackville J:** Community organisation did have standing, North Coast had a closeness of relationship to subject matter.
- Special interest and aggrieved person are applied more flexibly and are not confined to the protection of private rights or legal interests. Progressive widening of the law of standing.

### **Standing Summary**

- **S 5-6 ADJR:** Applications for review of 'decisions' and 'conduct' by 'person who is aggrieved'
- **S 3(4):** 'Person aggrieved' includes 'person whose interests are (or would be) adversely affected by the decision etc'
- What is the meaning of 'a person aggrieved'? Cane and McDonald: 'To all intents and purposes this has been applied consistently with the "special interest" test at common law'.

## Remedies

### Common Law Remedies

#### Certiorari (JE and Non-JE)

- Available as a quashing order: i.e. it deprives a decision of legal effect, analogous to when a court reverses a decision on appeal.
- *R v Electricity Commissioner (1924)*:
  - 'Whenever any *body of persons having legal authority* to determine questions *affecting rights of subjects*, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench division exercised in these writs'.
    - Decision must be by a 'body of persons against whom it will lie'
    - Must be some legal effect ('affecting the rights of subjects')
- Operates retrospectively and prospectively, depending on JE
  - To quash a decision to make it **retrospectively invalid**, there must be a jurisdictional error that infects the decision
  - To quash a decision to make it **prospectively unlawful**, no need for JE, but the non-JE must be 'on the face of the record'
- **Certiorari** can be used in two broad situations;
  - Where the decision under challenge is the **ultimate decision** in the DM process, and the question is whether that ultimate decision sufficiently 'affects rights' in a legal sense (see ***Ainsworth***).
  - Where the ultimate decision to be made undoubtedly affects legal rights, but the question is whether a decision made at a preliminary or recommendatory stage of the DM process sufficiently 'determines' or is connected with that decision. (***see Hot Holdings***).

#### ***Ainsworth v Criminal Justice Commission (1992)***

##### Facts

- The commission had submitted a report to a parliamentary committee, advising that the Ainsworth group of companies not be permitted to participate in the gaming machine industry in Queensland.
- The High Court held that the commission, in issuing a report that damaged the business reputation of the companies, had failed to observe the requirements of natural justice.

##### Issue

- Was the report a decision?

##### Decision

- Certiorari was refused on the basis that **the report had no legal effect**, instead the court made a *declaration* that there had been a breach of natural justice.
- For certiorari to apply there must be a decision and a report is not a decision.

### **Hot Holdings v Creasy (1996)**

#### Facts

- The Minister had a statutory discretion to grant or refuse an application for an exploration licence or a mining lease.
- Before making a decision, the minister was to receive a report from the mining warden, containing a recommendation.
- An issue to be addressed in the warden's report was, in the event that there were multiple applications, which application had 'priority' by reason of being the first to lodge an application. If the warden was satisfied that two or more applications were made 'at the same time', a ballot was to be held by the warden to decide who had priority.
- Eight applications were lodged within 51 seconds of each other and the warden decided to hold a ballot.
- Before the ballot was held and the report prepared, one of the applicants commenced proceedings seeking certiorari to quash the decision of the warden to hold a ballot.

#### Issue

- Could certiorari be granted?

#### Decision

- **"For certiorari to issue it must be possible to identify a decision which has a discernible or apparent legal effect upon rights."**
- In this case the report had a discernible legal effect, so certiorari could be used.

Note: This is the only writ that is available for non-jurisdictional errors. So, Certiorari can issue for BOTH Jurisdictional Error and non- Jurisdictional Error.

### **Prohibition (JE)**

- Prohibition is a constitutional writ available under section 75(iii) of the *Constitution*, section 39B of the *Judiciary Act* and section 16(1)(d) of the ADJR Act. It may only be used for jurisdictional error or a breach of natural justice.
- Used to prevent admin acts or decision (prohibition). Restrains a body from exceeding its powers. Makes it invalid.
- Same classic statement: *R v Electricity Commissioner* (1920). But, **two major differences** from certiorari:
  - No prohibition available for a non- jurisdictional error: i.e. 'ordinary' (merit/fact) error made by an administrative decision maker. So, there is no need to consider 'the face of the record'.
  - No real need to show the decision was one which 'affects the rights'

### **Mandamus (JE)**

- Used to compel an administrative decision maker to exercise power or jurisdiction or perform a **duty** of a public nature where a failure to do so has occurred.
- Administrative decision maker's **duty** must be something:
  - If actually done was justiciable (i.e. open to JR); **Other Grounds of Review**

## Other Grounds of Review

### Acting for an Unauthorised “Improper” Purpose

An improper exercise of power (ss 5(1)(e), ss 6(1)(e) ADJR) includes exercising a power other than that for which it was made (s5(2)(c), s 6(2)(c) ADJR) The common law test is the same (*Brownwells*).

**s 5(1)(e) ADJR** : that the making of the decision was an **improper exercise of the power** conferred by the enactment in pursuance of which it was purported to be made.

Plus... ‘an improper exercise of the power’ includes:

**s 5(2)(c) ADJR**: an exercise of a power for a purpose other than a purpose for which the power is conferred.

### Two Step Test:

1. For what purpose was the power lawfully authorised under the Act?
  - The purpose can be express or implied, and there may be multiple purposes.
  - Task: Statutory interpretation: aim/intention of statute?
    - **Express purposes**
      - ★ Express purposes are those stated in the statute. Broader the purpose in Act, harder a decision is to challenge on ground of improper purpose.
      - ★ ***Municipal Council of Sydney v Campbell* (1925)** - Act authorised land resumption power for development not profit.
    - **Implied purposes**
      - ★ If no express purpose, courts look to aims/objects of statute to determine authorised purpose by implication.
      - ★ ***Schlieske v Minister for Immigration and Ethnic Affairs* (1988)** Deportation power couldn’t be used for disguised extradition.
2. For what purpose was the power actually exercised?
  - Matter of evidence.
  - Courts will draw inferences from other docs or surrounding circumstances (*Schlieske*)
  - **R v Toohey; Ex parte Northern Land Council** - Power to set town boundaries was used to derail land claims. It established the “**but for**” test for instances where there are multiple purposes.
  - But for the improper purpose, would the power still have been exercised? (*Thompson v Randwick Municipal Council*).

### Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board (1982)

- A NSW Act allowed for the Board to purchase any land which it may require for the purposes of the Act, this including the ‘provision of offices’. The Board wanted to acquire Samrein’s land in a JV with GIO Insurance.
- Samrein led evidence that a less imposing building was possible to be built without imposing on his land.