

Intro to Judicial Review & Narrow Ultra vires

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Introduction to Judicial Review

Definitions

Prerogative powers

Powers of the Crown that are unique (e.g. ratifying treaties, issuing passports) and have not been eroded by legislation. S61 of the Constitution preserves the prerogative rights of the Crown.

The purpose of judicial review

Brennan J "Scientology case": JR is the means by which executive action is prevented from exceeding the power and functions assigned to the executive by the law and the **interests of the individual are protected**.

Core notion: whether an executive agency has contravened the law to a detriment of a person or corporation.

Relationship between ultra vires and jurisdictional error

Pretty much the same thing but different origins. Mainly for historic reasons (Professor Stan Hotop (6th edition, 1985, page 217) the two are traditionally defined as:

- **Ultra vires decisions**: Invalid exercise of power by **Ministers, government departments** and agencies and administrators / public servants:
- **Jurisdictional error**: invalid exercises of power by **quasi-judicial tribunals** (e.g. the AAT, VCAT etc)

..but in the UK there is no difference any more

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

Facts: Dealt with UK legislation that stated there could be *no judicial review* of decisions made.

Held: A clause preventing JR could not protect a decision which is a nullity, since it would be protecting a fraud.

Principles: there will always be situations where a decision is reviewable, regardless of legislative attempts to squash them, the courts have a prerogative power to intervene where there has been a jurisdictional error.

Broad Ultra vires

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Broad Ultra vires: abuse of power grounds

Happens when an administrative body embarks on a task that is within its (substantive) power but approaches the task in a way that renders its actions or decisions unlawful or ultra vires.

8 sub-categories:

1. Improper purpose / bad faith
2. Irrelevant considerations (“considerations grounds”)
3. (Wednesbury) Unreasonableness and irrationality
4. No evidence
5. Irrational fact-finding / “extended no evidence category”
6. Case of unauthorised sub-delegation
7. Application of a policy is inflexible
8. Decision maker acting under dictation, no discretion.

Improper purpose / bad faith

ADJR Sect 5 2(c) Applications for review of decisions / grounds for review

Can be innocent misunderstanding but not normally

Fraud and bad faith require a ‘guilty mind’ but improper purpose just means a purpose outside the scope of the statute. It may result from an entirely innocent misunderstanding of the enabling act, but **most of the of the improper purpose cases** (e.g. *Campbell; Toohey; Thompson*) are **also** expressed to be examples of **bad faith**.

Municipal Council of Sydney v Campbell [1925] AC 338

Summary: A case where the statute empowered the council to resume land for the purpose of remodelling or improving it. The council attempted to resume land, but not for the purpose of remodelling.

Held: Improper use of the power. Ultra vires.

Decisions must be made bona fide

Darryl Lee case

Summary: Commissioner knew the assessment he made were wrong, as a matter of fact.

Jurisdictional Error & Jurisdictional fact doctrine

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Jurisdictional Error

Definitions

Jurisdiction simply means the authority to decide

Abebe v Commonwealth (1999) 197 CLR 510 at 524 per Gleeson CJ and McHugh J.

An order of mandamus

Mandamus is a judicial remedy in the form of an order from a court to any government, subordinate court, corporation, or public authority, to **do some specific act** which that body is obliged under law to do.

Writ of certiorari

A **writ of certiorari** sets aside a decision made contrary to the **law**.

Writ of prohibition

A writ of prohibition **forbids a decision maker from commencing or continuing to perform an unlawful act.**

Jurisdictional error

An error in the exercise of the **“authority to decide”** may therefore be a jurisdictional error.

Houssain v Minister for Immigration v Border Protection [2018] HCA

34 At [23]-[24] per Kiefel CJ, Gageler and Keane JJ:

- “Jurisdiction” refers to the scope of the authority which a statute confers on a decision-maker to make a decision
- Jurisdiction carries certain preconditions and conditions on the exercise of powers, both express and implied in the governing statute
- A decision which sufficiently complies with those statutory requirements is a decision made within jurisdiction.
- A decision which does not *sufficiently comply* with those requirements is a decision made outside of jurisdiction (“a jurisdictional error”)
- The consequence of a conclusion that a decision is infected by jurisdictional error is that, at law, **the decision has never been made.**

Privatise Clauses

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Privatise Clauses

Definitions

A privative or ouster clause is a provision in legislation which attempts to reduce or even exclude the jurisdiction of superior courts to review decisions made under the legislation in question. Typically courts give such clauses fairly limited effect, arguably at least in part due to rule of law considerations (though some suggest that it is part of an ongoing tension or power struggle between the courts and Parliament).

Example of a typical privatise clause

"No decision of X Tribunal shall be challenged, reviewed or called into question in any court whatsoever on any ground whatsoever"

Historical development

The Hickman Principle

J in R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598

Hickman Principle used to apply, has been expanded on since.

The 'Hickman' 3 part test was/is that if:

- The tribunal's decision was a bona fide attempt to exercise its power;
- The decision relates to the subject matter of the legislation;
- The decision is reasonably capable of reference to the power given to the tribunal;

...then the privative clause will be regarded as successfully protecting any legal error from judicial review. Otherwise such errors will not be protected from review.

Modern approach to privatise clauses at **Federal Level**

IMPORTANT: Hickman superseded at a Fed level by Plaintiff S157

Plaintiff S157 of 2002 v Commonwealth (2003) 211 CLR 476.

- A decision affected by jurisdictional error is (since Plaintiff) **simply a nullity**;
- Therefore, not a 'decision' at all, for the purposes of a privative clause and;
- Therefore, it is not 'a decision' that is being challenged!

Natural Justice

Procedural fairness (a.k.a the hearing rule)

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Natural Justice

Procedural fairness a.k.a the “hearing rule”

History

Application of natural justice narrower

Prior to 1964, natural justice was only implied when the power was of a judicial or quasi-judicial nature and the rights pertained to property and where statutory powers were involved. This was overruled in 1964 (below).

When is it necessary to afford natural justice?

When applied to matters concerning individual rights

Ridge v Baldwin [1964] AC 40

The House of Lords decided that there was no requirement for a duty to act judicially before natural justice would be implied. The updated stance:

- Natural justice applied to powers of an administrative and judicial nature
- NJ applied in all instances where the administrator had a duty to determine an **individual's rights**

UK position adopted in Australia

The abolition of the old administrative/judicial power distinction for implication of natural justice was adopted in:

Australia in Durayappah v Fernando [1967]

Included matters involving non-proprietary interests

Banks v Transport Regulation Board (Vic) (1968)

Found a duty to provide procedural fairness even where the interest affected was not proprietary (a taxi licence).

Natural Justice

The rule against bias

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Natural Justice

The rule against bias

Definition

It requires that there be **no reasonable apprehension** on the part of a fair-minded person **that the decision-maker has prejudged** the matter for decision.

Pecuniary / Direct Interest

Decision maker has a pecuniary interest = bias rule infringed

Dimes v. Grand Junction Canal (1852) 3 HLC 759

The historical approach was that anyone that had a financial interest in an outcome was **automatically precluded** from being involved in the decision making. Australian approach is slightly different, in that small interests may not have this effect (see Ebner below).

Facts summary: Lord Chancellor of England owned shares in the defendant's canal company, which was seeking an injunction to restrain a property owner from barricading its canal where it ran across the owner's property.

Decision maker has a non-pecuniary direct interest

R v Bow Street Magistrate Metropolitan Stipendiary Magistrate; Ex parte

A decision will be set aside if only one (of many) decision maker has an interest

R v Hendon Rural District Council; Ex parte Chorley [1933] 2 KB 696

...unless a clear majority amongst the remaining decision makers

Attorney-General (Vic) v City of Knox [1979] VR 513

Summary: An Australian authority that a resolution passed by a council is **not invalidated by the fact that a councillor with a pecuniary interest has taken part in the discussion** and voted, provided **the resolution has a clear majority** in its favour when that councillor's vote is invalidated

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Standing

Private rights vs public rights

The history of standing has been one of **gradual extension or liberalisation of the scope for private individuals to enforce public interest rights**. There is an obvious tension here with the doctrine of separation of powers. Traditionally, as we will see, only the Attorney-General had standing to invoke the Royal prerogative and challenge the legality of a government decision, unless a person's private rights were affected. The trend by courts, both in England and Australia, towards liberalisation of standing rules certainly enhances government accountability, **but may also undermine legitimate and necessary executive powers**.

In judicial review at general law, where a prerogative remedy is sought, issues of standing may be inextricably linked with issues relating to the availability of the remedy. However, with the enactment of the ADJR Act, in which the test of standing appears distinct from the question of relief, tests of standing have tended to develop as a body of principles separate from those relating to remedies. These principles are concerned with the issue of access to the court. However, in *Bateman's Bay*, as we shall see, the High Court seems to be heralding a move towards **increasing emphasis on the discretion whether to grant a remedy**, and a **reduced emphasis on technical rules of standing** to regulate the 'floodgates' of access to judicial review.

Standing when a prerogative remedy is sought

The rules surrounding standing to seek prerogative relief (and indeed the rules generally surrounding prerogative writs) have been made progressively more flexible by the High Court, though it still maintains that there are some differences between the rules for prerogative relief and those applicable to equitable remedies.

Prohibition

A party to the original (e.g. tribunal or inferior court) proceedings: **has standing**

A stranger to proceedings: has standing only at the discretion of the court.

Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Ltd (2000) 200 CLR:

Remedies

Under ADJR

ADJR now statutorily allows for orders for all remedies

ADJR Act section 16

“Order of review” provisions in the ADJR allows orders for prerogative writs and equitable remedies. Formalities stripped out, single ‘all-embracing’ remedy.

Not completely unrestricted

Minister for Immigration & Ethnic Affairs v Conyngham (The Platters Case) (1986) 68 ALR 441

Sheppard J: “Wide though the provisions of section 16 of the Act are, they do not in my opinion authorise the making of a declaration unless what is being declared is a right in the true sense of the word.”

...but very wide discretion

Park Oh Ho v Minister for Immigration & Ethnic Affairs (1989) 167 CLR 637

Held: parties who had established that their immigration detention was unlawful were entitled not only to an order which set aside the initial detention order (thus entitling them to be released), but also to an order positively declaring the period of detention they had already served as unlawful (thus potentially grounding a claim for damages for wrongful imprisonment).

Discretion to refuse relief is very broad

Lamb v Moss (1983) 49 ALR 533

Prerogative writs

Differences at a Cth and State Level

At a Cth level: a prerogative / Constitutional writ is issued formally under the constitution and according to the original jurisdiction of the HCA. You would be seeking the writs at application.

At a state level is issued more informally in the “nature of (e.g.) certiorari.”

Order 56 of the NT Supreme Court Rules

E.g. “orders in the nature of prerogative writs” (similar section in most other jurisdictions)

Certiorari and Prohibition

Certiorari wipes the slate clean

Removes the official record and quashes the original decision **as if it had never been made. Therefore, it has some retrospective effect.**

Prohibition stops the action

Prevents the decision maker (and anyone else relying on the original decision) from doing something illegal or continuing an unlawful course of action that they have already commenced.

When is certiorari available?

- The principle relief for jurisdictional error.
- **Available for any jurisdictional error.**
- If you can identify jurisdictional error, certiorari is available.

Available against the crown itself

FAI Insurances Ltd V Winneke (1982)

When the decision maker is Vice Regal (as it was in Winneke), the AG would be named as defendant.

Available against any decision of a Minister

E.g. Minister of Immigration

Available only if decision maker is exercising public power

The decision maker must be exercising public and not private power. Club cases.

Usually something in statute is public power. In the other hand, where a government body is acting an entity under contract, certiorari is not available.

Certiorari available only when decision affects rights

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

Mandamus

Definition

An order to the decision maker to perform their duty in compliance with law.

Widely available

Re Media, Entertainment and Arts Alliance; Ex Parte Hoyts Corporation

Principles: Used to be formalities for obtaining orders for mandamus, not really applicable anymore. Whether or not a decision maker has denied or refused to make a decision is not a formal requirement. Both a decision and a failure to make a decision can attract mandamus. You can point to either the decision, or the failure to make a decision and seek mandamus.

Available against all “commonwealth officers”

Constitution s75V & s39B Judiciary Act (Federal Court)

Available against Commonwealth officers, including federal judges, magistrates, royal commissioners, ministers and public servants and “all officers of the Commonwealth”

Re Refugee Review Tribunal; Ex parte Aala (2000) 75 ALJR 52.

...but can't compel the decision maker to a certain decision

Mandamus can't direct the decision maker to make the decision in a particular way. In a practical sense, this leaves a lot of discretion in the hands of the decision maker to make the decision “wrongly” again.

...except in some limited cases

Commissioner of State Revenue (Victoria) v Royal Insurance Aus Ltd (1994) 182 CLR 51

Facts: Circumstances in which the stamp duty was payable was discretionary, but by construing the statute in its context, the court was prepared to effectively order the decision maker to make the decision in a certain way. There was no permissible reason that could be identified that would prevent the issue of the refund. So obvious that the discretion must be exercised, decision maker cannot simply assert discretion legally???

Held: The court may actually be satisfied that the decision maker is under a duty to exercise a discretion in a certain way.

Mandamus available to compel a judge to hear a matter

Re Polites; Ex Parte Hoyts Corporation Ltd (1991) 173 CLR 78

Facts: Judge compelled to hear a matter where he had mistakenly disqualified himself.

The effect of mandamus

Order to do a *positive act*. If negative effect needed, use prohibition or injunction.