

Admin Law

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JUDICIAL REVIEW

Quicker Introduction

If Q opens with both Merits and JR

- 'X' will be able to challenge the decision in both Merits Review and Judicial Review.

Decision + Jurisdiction

- 1) 'X' wants to challenge the decision made by 'Y minister' under 's***'. The decision affected her right to 'ABC'.
 - **Multiple decisions:** 'May also seek to impugn preliminary declaration under s6'
 - Was there any **delegation** that was authorized?
 - Was there a right (eg for a citizen to obtain a passport) with a **corresponding duty** (for the minister to issue a passport)
- 2) Justiciability

If its not international relations, cabinet or national security, then:

WRITE:

 - The decision very likely to be justiciable as it primarily involves domestic action that has a direct and immediate effect on the legal rights of 'X' (*McBain*).
 - While the Aim of the HWA is to give effect to the Basel Convention – s3(2), It can be distinguished from (*Peko*) as it does not primarily involve complex questions of international policy and cabinet deliberation.
 - i. If there is an issue/may not be justiciable, go to justiciability section 1

Justiciability

- Only raise this issue if it appears to be relevant on the facts.

What is justiciability?

- A justiciable matter is one that is appropriate for judicial determination and hence open to judicial review.

What is required?

- A decision must alter an **immediate right, duty or liability** or be effected from the courts determination (*McBain*; *CCSU*)
- there must be a legal **remedy** available for the court to order, otherwise rights/duties cannot be effected from the courts determination (*McBain*)
- Justiciability does not depend on whether the origin of a power is statutory or derives from the prerogative: *CSCU*; *Peko-Wallsend*.
- Must **not be one of the excluded decisions below:**

Non Justiciable Matters

- **Matters of national security**
 - Considerations of national security are the exclusive responsibility of the executive government. Therefore, that such matters are not justiciable: *CSCU*.

2. Jurisdiction

Federal Court

There are two options for 'X' to review the decision in the federal court:

ADJR Act

- 1) Jurisdiction is conferred to both the *FCA s 8(1)* and the *FCC s 8(2) ADJR*, who can hear a person who is aggrieved by a 'decision to which this Act applies' for a determination of *JR- s5 ADJR*
- 2) **s5 ADJR - Decision** is defined under s3(1) ADJR involving 3 components:
 - a. **'Decision'**: either a substantive decision in a process as required by the act, or a decision that is final and operative (*Bond*)
 - b. **'of Administrative character'**: Not judicial or legislative in character (*Tang*)
 - i. *Note*: if a decision applies **generally to a class of people** or rights (eg a zoning plan for use of an area of land) it may be considered quasi-legislative
 - c. **'Made under an enactment'**: The decision must be required by the Act, and must alter or affect legal rights as a result (*Tang*)
 - * the making of a report or recommendation is deemed as a decision - s3(3)
- 3) **s6 ADJR - Conduct** Application for review of **Conduct** relating to a decision can also be brought under *s6 ADJR*, and has the same analysis of a 'decision to which the act applies' as discussed.
 - a. Examples of conduct – *s3(5)ADJR*
 - i. the access and use of Janes land to investigate waist site
 - ii. Entry and search of places for the requirements of the act - *s46 HWA*
 - iii. taking of evidence
 - iv. holding an investigation
 - v. any act preparatory to a decision
- 4) **s7 ADJR - failure to make a decision** where there was a duty to make the decision
 - a. within an express time frame – *s7(2) ADJR*
 - b. with no specified timeframe, but there has been unreasonable delay – *s7(1) ADJR*
- 5) **Not Excluded**: The decision is not of an exempt class under schedule 1, s19(1), a criminal justice process s9A or a decision by the GG.
- 6) 'X' must be seeking one of the identified remedies in s16 ADJR Act
- 7) **CONCLUSION**: Jurisdiction under ADJR will be available to 'X'

Judiciary Act

- 1) **s39B(1)** – The FC also has jurisdiction in any matter where 3 criteria are met:
 - 1) Matter**: a controversy about a real and immediate duty, right or liability which can be resolved by the courts, not a hypothetical issue (*Hayne J in McBain*)

4. Grounds

>>> **WRITE:** There are a number of ground listed under s5 of the ADJR and developed from common law on which 'X' could seek to impugn the Ministers Decision under 's***'.

- 2014 Exam Order of Grounds:
 - PF hearing rule
 - Relevant consideration – their comments, or safety concerns?
 - Delegation / Unauthorised decision maker

- **USE QUESTION HEADINGS: Is the declaration invalid?**

Acting without legal Authority / Beyond Power

s 5(1)(d).

Arises where the decision-maker has acted beyond power.

- **Common law ground**
- **ADJR:** Decision not authorised by Act: s 5(1)(d).
 - *Maybe*, procedures required in the making of the decision not observed: s 5(1)(b);
- **Eg:** *Power to use listening device does not include incidental right to access property to install them. (Coco v R)*
 - *Powers which infringe on rights are less likely to be incidental to an express power*

Requirements for proving the ground

- Primarily a matter of statutory interpretation to consider the scope and limits of the power conferred (*ABC Learning*)
- The court in *ABC Learning* used a number of statutory interpretation techniques to construe the scope of the power:
 - **Structure of Statute:** Officer may do any of the things permitted while exercising the right to enter. Suggests that (f) right to request documents is similarly limited to use while at premises
 - **Interpretive Aids:**
 - *Heading:* 'Powers of Entry' infers restricted to premises
 - *Explanatory Memorandum:* notes that s36 'gives powers of entry and inspection'. Entry rather than investigation suggests limited to premises
 - *Second Reading Speech:* 'questioning/investigating people who are on site'.
 - **Other Sections:** s41 requires production of identity card 'for the inspection by the occupier of the premises'. Not compatible with questioning by mail/phone.
 - **Principle of Legality:** Clear & Unambiguous Language is needed to encroach on common law rights and freedoms (*Evans v NSW*), such as to create broad powers to interrogate. Particularly since failure to follow these directions involves and *offence/penalties*
- Thus, Did the decision-maker make a decision outside the limits of the power?

Under the HWA – did an officer Act beyond power in their search?

- **Structure** of the statute requires that that the inspector 'enter or board a searchable place' and 'exercise the powers set out in s48(1). Entry of the searchable place must proceed exercise of the powers conferred.
- **S44(1)** requires production of an identity card before inspector is entitled to exercise powers under the act – JF
- **Principle of Legality:** Clear & Unambiguous Language is needed to encroach on common law rights and freedoms (*Evans v NSW*), such as to create broad powers to interrogate – s48(1)(d)(i). However, here unlike in (*ABC Learning*), *contravention is not a criminal offence*.
- **Headings** such as 'Entry and search of searchable places' – s46 HWA

5. Remedies & Jurisdictional Error

Jurisdictional Error

Are unlawful decisions invalid?

- A decision may be unlawful but not invalid: (e.g. *PBS; Futuris*).
- It is the legislative intention to invalidate, evinced by statutory construction of the whole act, which will determine the effect of an error on a decision. (*PBS*)
- H1: The operation of a no invalidity clause at s31(3) HWA is thus of note, as it indicates an intention for Parliament to invalidate other errors not covered by the clause.
- **MID CONCLUSION:** *the decision here is not merely administrative (state the effect it has), is not aspirational and is unlikely to cause public inconvenience. Thus there are no grounds evincing an intention otherwise than a breach resulting in invalidity. (PSB)*
 - *OR: Errors of an **administrative** nature or regulating powers already conferred strongly indicate breach would not result in invalidity (PBS)*

Does the decision result in JE?

- Jurisdictional errors involve a decision-maker exceeding the limits of their power. (*Craig; Kirk*)
 - The **distinction** is not recognized under the **ADJR act**, however the general law writs of mandamus, prohibition and certiorari require a JE in order to issue under s75 and s39B.
 - JE is not to be considered as **a rigid taxonomy**, and it is necessary to look at the decision in light of the statute and taking into account the nature of the error and the context (*Kirk*)
- **CONCLUDE:** If made out, it is likely that all ground discussed will result in JE.
 - **Examples of JE**
 - *Misinterpreting the terms of a statute*
 - *Ignoring relevant material*
 - *Taking into account irrelevant material*
 - *Acting without lawful authority/did not have power to act (ABC Learning)*
 - *Acting for an improper purpose*
 - *Errors as to jurisdictional fact*
 - **Examples of NJE**
 - *Perhaps a procedural error e.g. not using the correct form*
 - *Not following a prescribed time limit*

- **If further analysis needed:**
 - 1) Errors that merely involve the **administration or regulate functions already conferred**, rather than the conferring of power, strongly indicates that breach was not intended to result in invalidity (*PBS*)
 - **2) Aspirational/Guidance:** if not every obligation has a 'rule like quality' that can easily be applied and complied with. Eg 900 international agreements – indicates guidance and not invalidity (*PBS*)
 - **3) Public Inconvenience:** Unlikely that invalidity is intended if it will result in public inconvenience. If it is likely the authority would breach its obligations (eg 900 international agreements) and would result in uncertainty (*PBS*).
- (*Bhardwaj*): ruled that as the original decision constituted jurisdictional error and was invalid, **no decision had been made at all**, and the Tribunal was required to make the 2nd decision!
 - NOTE the FCA warned that this cannot be taken as a universal proposition that JE will lead to no consequence at all. Rather, it is somewhat confined to the facts (*Jadwan*)