

Admin Full Notes

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NOTE:

M67: when decision-maker has no statutory obligation to give reasons but reasons are provided, don't over-scrutinise those reasons

1. Preconditions

1.1 Jurisdiction

ADJR jurisdiction generally preferred because:

1. Must provide statement of reasons
2. No requirement to establish jurisdictional error
3. Any error is remediable

BUT Governor-General falls outside of ambit of *ADJR*

Constitution: HCA

s 75(v): mandamus, prohibition or injunction {or certiorari as ancillary} are sought against an 'officer of the Commonwealth'

- 'Officer of the Commonwealth'
 - Includes persons holding Executive office under ch II (*M68*), and judicial and non-judicial officers under ch III (*M68*)
 - Does not include bodies corporate or certain contractors

BUT generally to the Federal Courts unless the matter:

- Is of major public importance;
- Involves Constitutional interpretation; or
- Invites the HCA to depart from its own precedent

s 75(iii): if Cth, or a person suing or being sued on behalf of Cth is party

- Includes Cth officers (*M68 Gageler J*)

Judiciary Act: Federal Court of Australia, Federal Circuit Court and Family Court of Australia

s 39B(1): Federal Court has concurrent jurisdiction with HCA on s 75(v) matters

s 44: Federal Circuit Court and Family Court of Australia can issue writs on matters within their jurisdiction

ADJR Act: Federal Court of Australia

s 5: a decision of an administrative character under an enactment

- Decision includes:
 - Conduct for the purpose of making a decision (s 6; s 3(5))
 - Failure to make a decision (s 7)
- Decision excludes:
 - Decisions made by Governor-General (s 3(1)(c))
 - Schedule 1: areas immune from *ADJR*
- Administrative character excludes:
 - Delegated legislation
 - Legislative or judicial decisions
- Under an enactment excludes:

- Prerogative decisions
- Non-statutory decisions

s 11: 28 days within date of decision or date of receiving the statement of reasons

1.2 Justiciability

There must be a matter: a 'real and immediate' controversy regarding a right, duty or liability (Hayne J *McBain*)

- This must be more than a theoretical interest in the subject matter (Hayne J *McBain*)

Justiciability is determined by the nature of the power exercised, and not its source (*Peko-Wallsend*)

Non-justiciable matters: national security, treaty-making, mercy, Ministerial appointments, Cabinet decisions with complex policy considerations (*Peko-Wallsend*)

Justiciable matters: exercises of prerogative powers (common law powers derived from the Queen and inherited by the Commonwealth) that are likely to affect one individual rather than public in general (*Peko-Wallsend*)

1.3 Standing

Introduction

Standing concerns who can gain access to courts' judicial review mechanisms, rationale:

- Not anyone can challenge governmental decisions
 - 'an ordinary member of public (has) no general right to invoke the aid of the civil courts to enforce public law rights or duties' (McHugh J in *Bateman's Bay* [275])
 - 'Courts exist to protect the legal rights of individuals, not to ensure that individuals or public officials obey the law'
- Practicality: not flood courts
- Serious consequences of available remedies for judicial review

Onus on applicant to make out standing

General law (*Judiciary Act* s 39B or *Constitution* s 75(v))

No unified common law rule for standing

The test instead **follows the remedy** and looks to the purpose of the Act (ACF)

Remedy	Rules	Notes
Certiorari and prohibition	Sufficient effect on a legal right or interest, including personal and business reputations (<i>Ainsworth</i>)	<u>Test for all remedies are converging, just use special interest test for these remedies</u>
Mandamus	Person to whom the unperformed duty is owed	

Injunction and declaration	'Special interest' <ul style="list-style-type: none"> • More than a mere emotional or intellectual concern (ACF) • 'likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or debts for costs, if his action fails' (Gibbs CJ ACF 530) • Rule varies depending on 'the nature and subject matter of the litigation will dictate what amounts to a special interest' (Gaudron, Gummow and Kirby JJ <i>Bateman's Bay</i> [265]) 	<i>Onus</i> : Indigenous community does have special interest in decision concerning relics that are of special cultural and spiritual significance to them
		<i>Bateman's Bay</i> : Aboriginal Community Benefit Fund does have special interest in a Council collecting \$ for funeral funds, in competition with the Benefit Fund
		ACF: Australian Conservation Foundation does not have special interest in creation of tourist resort <ul style="list-style-type: none"> • Purpose of the Act: ensure administrative authorities take into account matters affecting environment • ^ Does not imply that private citizens have the right to enforce those administrative purposes or procedures

Exception: AG can intervene in public law matter as a representative of the public or grant a fiat (*McBain*)

ADJR Act

s 5(1): 'A person who is aggrieved by a decision to which this Act applies'

- s 3(4)(a)(i): 'a reference to a person aggrieved by a decision includes a reference... to a person whose interests are adversely affected by the decision'

Satisfies test	Does not satisfy test
Applicant suffers more or differently to ordinary members of public (<i>Right to Life</i>)	Mere intellectual, philosophical or emotional concern (<i>Right to Life</i>)
Harm to economic interests: 'not insignificant loss of profitability' (<i>Argos</i> [40])	Increased competition that <i>might</i> affect profitability (<i>Argos</i>)

Need not have a legal, financial or proprietary interest in the subject matter of the proceeding (*Right to Life*)

Always look to the purpose of the Act to assess standing (*Argos*; *Right to Life*)

- Concern of the empowering Act must coincide with claimant's concern (*Right to Life*)
- Not made out in *RtL* because the Act was concerned about safety and availability of therapeutic goods, and *RtL* was concerned about abortion

1.4 Remedies

Remedies are discretionary (*Aala*)

Certiorari: quash legal effect or consequence of decision (*Ainsworth*)

- *ADJR Act* s 16(1)(a)

Mandamus: compel decision-maker to perform their duty according to law

- DOES NOT COMPEL decision-maker to decide in a particular way
- *ADJR Act* s 16(1)(b)

Prohibition: stop decision-maker from acting outside of jurisdiction

- *ADJR Act* s 16(1)(d)

Declaration: state pre-existing rights of parties non-coercively

- *ADJR Act* s 16(1)(c)

Injunction: stop someone acting illegally in purported reliance on a valid decision

- *ADJR Act* s 16(1)(d)

2. Jurisdictional Error

2.1 Definition

Jurisdictional error refers to 'a failure to comply with one or more statutory preconditions or conditions to [an exercise of power] an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute' (Kiefel CJ, Gageler and Keane JJ *Hossain* [24])

Jurisdictional error incorporates threshold of materiality (Kiefel CJ, Gageler and Keane JJ *Hossain* [29])

2.2 Consequence

Decision infected by jurisdictional error is a decision in fact but not in law (Kiefel CJ, Gageler and Keane JJ *Hossain* [24])

- 'A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.' (Gaudron and Gummow JJ *Bhardwaj* 130-1)

If a decision is infected by jurisdictional error: HCA and Federal Courts cannot issue writs of mandamus, prohibition or certiorari ancillary to other writs under s 75(v) *Constitution* or s 39B(1) *Judiciary Act*

- BUT can still issue injunction, declaration and certiorari for non-jurisdictional error on the face of the record
 - Face of the record: document that initiates proceedings and grounds the tribunal's jurisdiction, pleadings, adjudication and reasons referred to in the formal order (*Craig*)
- *ADJR Act* does not require jurisdictional error to issue writs

Invalidity or unlawfulness

- Finding jurisdictional error has legal consequence that administrative action is **invalid**
 - This means decision is of no legal effect
 - Therefore, the decision maker's duty to make the decision remains unperformed (Gaudron and Gummow JJ *Bhardwaj*)
- Finding non- jurisdictional error has legal consequence that administrative action was **not invalid**
 - This means the law was broken but it was just not broken in a way that raises to the standard of jurisdictional error

2.3 Is there a breach of jurisdictional (pre) condition?

Case	Finding	Reasoning
<i>Project Blue Sky</i>	Not jurisdictional error	's 160 regulates the exercise of functions already conferred on the Australian Broadcasting Authority rather than imposes essential preliminaries to the exercise of its functions strongly indicates that it was not a purpose of the Act that a breach of s 160 was intended to invalidate any act done in breach of that section'

2.4 Approach

Statutory construction: is my complaint in relation to something Parliament would have intended to be jurisdictional, that the court would also find to be jurisdictional?

1. Is there a breach of/failure to comply with a **jurisdictional** (pre)condition to the exercise of the relevant statutory power?
 - Question of law determined via statutory construction (Kiefel CJ, Gageler and Keane JJ *Hossain* [27])
 - 'An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition.' (McHugh, Gummow, Kirby and Hayne JJ *Project Blue Sky* [91])
2. Was the breach material to the decision, in that '**compliance could realistically have resulted in a different decision**'? (Bell, Gageler and Keane JJ *SZMTA* [45])
 - Question of fact determined through reasonable conjecture (*MZAPC*)
 - Breach is material if it deprives applicant of a successful outcome (Bell, Gageler and Keane JJ *SZMTA* [2])
 - Onus on applicant (Kiefel CJ, Gageler, Keane and Gleeson JJ *MZAPC* [3]; Bell, Gageler and Keane JJ *SZMTA* [46])
 - **MAYBE** respect for **dignity of individual** means **denial of procedural fairness** would amount to jurisdictional error even if it does not meet threshold of materiality (Nettle and Gordon JJ *SZMTA* [40])
 - **MAYBE** if decision-maker is required to base a decision **on a single specified criterion and gets it wrong**, should amount to jurisdictional error (Nettle and Gordon JJ *SZMTA* [40])

3. Procedural Fairness

3.1 Introduction

Denial of procedural fairness is a common law ground and a ground under s 5(1)(a) *ADJR*:

- ‘a breach of the rules of natural justice occurred in connection with the making of the decision’

Two ways in which a decision-maker can deny procedural fairness:

1. Denial of fair hearing; and
2. Bias.

Only certain statutes give rise to a duty to afford procedural fairness -> address this threshold issue before proceeding with analysis (Mason J *Kioa*)

3.2 Threshold

Was the decision-maker bound to afford procedural fairness in the form of a fair hearing to the applicant?

A presumption that there is a duty to afford procedural fairness arises when a decision affects an individual's rights or interests in a direct and immediate way (Mason J *Kioa* [584])

- Rights: liberty, status, preservation of livelihood, reputation, proprietary rights

‘If a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large’ (Brennan J *Kioa* [619])

If the power can ‘destroy or prejudice a person's rights or interests’, presumption of procedural fairness arises (Majority in *Saeed* [258])

Can that presumption of a duty to afford procedural fairness be rebutted?

High bar, principle of legality, focus on text itself rather than extrinsic materials, only extrinsic to resolve ambiguity (Majority in *Saeed* [271])

If there is ‘a strong manifestation of contrary statutory intention’, the presumption of procedural fairness is rebutted (Mason J *Kioa* [585])

If there are ‘plain words of necessary intendment’ (Majority in *Saeed* [259] quoting Mason CJ, Deane and McHugh JJ in *Annetts v McCann*)

The fact that a statute lays down *some* requirements of procedural fairness does not indicate an intention to exclude the obligation (Majority in *Saeed* [259])

3.3 Fair hearing

What is the content of the duty to afford procedural fairness?

‘What is required to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made?’ (Kiefel, Bell and Keane JJ in *WZARH* [30])

The content of what affording fair hearing entails **depends on the circumstances of the case**

- ‘chameleon-like’ (Brennan J *Kioa* [614])
- Range from full-blown trial to nothingness (Brennan J *Kioa* [615] quoting Johnson)

What affording fair hearing may require:

- Opportunity to address a critical issue or factor on which the decision is likely to turn (Mason J *Kioa* [588])
- Opportunity to deal with adverse information that is ‘credible, relevant and significant’ to the decision made (Brennan J *Kioa* [629])
- Opportunity to be notified of an altered review process, to give input to how the process should proceed, and to have an oral hearing (Kiefel, Bell and Keane JJ in *WZARH*)
- Opportunity to be notified of an altered review process, to request an oral hearing and to supplement written submissions (Gageler and Gordon JJ *WZARH*)
- Opportunity to be notified of a fact that has altered the procedural context within which the Tribunal’s review is to be conducted (*SZMTA*)

Has the duty been breached?

Whether duty has been breached depends on the legal framework within which the decision is to be made (Nettle and Gordon JJ *SZMTA* [74])

Case	Content of duty	Breach?	Reasoning
<i>Kioa</i>	<u>Mason J</u> : afford applicant opportunity to address a critical issue or factor on which the decision is likely to turn [588] <u>Brennan J</u> : afford applicant opportunity to deal with any adverse information that is credible, relevant and significant to the decision that is made [629]	Breach of fair hearing rule	<u>Mason J</u> : Department of Immigration relied on personal information pertaining to K in deciding his deportation. However, did not bring that information to K’s attention despite the fact that the information was highly prejudicial and determinative. K did not have an opportunity to respond [588]
<i>Saeed</i>	<u>Majority</u> : afford applicant opportunity to deal with any adverse information that is credible, relevant and significant to the decision that is made [261]	Breach of fair hearing rule	<u>Majority</u> : Minister did not inform S of information relevant to the refusal of her visa (that they had contacted the restaurant in Pakistan and found out she did not work there)
<i>WZARH</i>	<u>Kiefel, Bell and Keane JJ</u> : inform applicant of change in reviewers, afford applicant opportunity to be heard on how process should	Breach of fair hearing rule	<u>Kiefel, Bell and Keane JJ</u> : W was not informed of change in reviewers, not heard on how the process should proceed, and did

	<p>proceed, second reviewer duty to hold oral hearing with W rather than just relying on written notes of first reviewer (EAL, importance of demeanour, genuine confusion or deliberately misleading) [40]-[45]</p> <p><u>Gageler and Gordon JJ</u>: notify applicant of change in procedure, afford applicant opportunity to supplement previous written submissions, afford applicant ability to request oral interview [67]</p>		<p>not have a chance to be heard orally by second reviewer [40]-[45]</p>
SZMTA	<p><u>Bell, Gageler and Keane JJ</u>: inform applicant if Secretary of the Department of Immigration certifies a particular document and notifies the AAT of this, only then can applicant give evidence and present arguments based on the notification [29]-[31]</p> <p><u>Nettle and Gordon JJ</u>: disclose fact of notification to the applicant [115]</p>	<p>Breach of fair hearing rule</p>	<p><u>Bell, Gageler and Keane JJ</u>: Since procedural fairness required disclosure of fact of notification, the lack of disclosure here constituted a breach of the obligation of procedural fairness [38]</p> <p><u>Nettle and Gordon JJ</u>: 'Non-disclosure of the fact of the notification constitutes a breach of the Tribunal's implied obligation of procedural fairness' [117]</p>

3.4 Bias

Examples of bias:

- Pre-judgment by the decision-maker
 - Where decision-maker has already expressed a view before reviewing evidence
- Family or personal relationships of the decision-maker
 - Where family may favour one outcome of the decision
- Financial interests of the decision-maker
- Proprietary interests of the decision-maker
- Political affiliations of the decision-maker

Is there actual bias?

Subjective: proof on the balance of probabilities that the decision-maker's mind was closed

- 'The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion' (Gleeson CJ and Gummow J *Jia* [531])

- A biased mind 'is one so committed to a conclusion already formed as to be incapable of alteration' (Gleeson CJ and Gummow J *Jia* [532])
- ^ high standard

Identity of decision-maker matters

- "Consider the Minister's conduct in the light of the fact that he was 'an elected official, accountable to the public and the Parliament and entitled to be forthright and open about the administration of his portfolio which ... is a matter of continuing public interest and debate'" (Gleeson CJ and Gummow J *Jia* [533] quoting French J)

Is there apprehended bias?

Objective: fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial or open mind to the decision

- FMLO aware of decision, statutory context, and other facts relevant to the assessment of apprehended bias

Cannot hold Minister to standard of judicial impartiality

- Minister can be drawn into public or Parliamentary debate about decisions he makes under statutory duty (Gleeson CJ and Gummow J *Jia* [539])
- 'The Minister was obliged to give genuine consideration to the issues raised by ss 501 and 502, and to bring to bear on those issues a mind that was open to persuasion. He was not additionally required to avoid conducting himself in such a way as would expose a judge to a charge of apprehended bias.' (Gleeson CJ and Gummow J *Jia* [540])

Kirby J dissent in *Jia*:

- Minister not exempt from procedural fairness because of his political role [549]
- Radio and letter: 'neither of these was pitched at a level of generality. Neither was expressed in terms of public policy or political philosophy alone. Each contained specific references to Mr Jia personally. Each dealt with the particularities of his case and the decision that was available to the Minister, in effect, to have the last say.' [551]
- Therefore, there was apprehended bias

4. Acting without Legal Authority

4.1 Intro

Acting without legal authority is a common law ground and *ADJR* s 5(1)(d):

- 'the decision was not authorized by the enactment in pursuance of which it was purported to be made'

It concerns a decision-maker purportedly exercising a power that they did not possess

4.2 Approach

1. What is the scope of the power granted by the statute?

- Statutory interpretation