Workshop 6 Content
Lecture 4 - The Grounds of Legality Review

Extended forms of ultra vires: illegality, unreasonableness and breach of human rights (See also Workshop 6 notes)

'Improper exercise of power' - s 5(1)(e)

S 5(1)(e) ADJR Act:

(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 and Family Court of Australia (Division 2) for an order of review in respect of the decision on any one or more of the following grounds:

…. (e) 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;*

^^ provision is understood in light of the grounds stipulated in:

S 5(2) ADJR Act:

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an ***irrelevant consideration*** *into account in the exercise of a power;*

(b) ***failing to take a relevant consideration*** *into account in the exercise of a power;*

(c) an exercise of a power ***for a purpose other than a purpose*** *for which the power is conferred;*

….

(g) an exercise of a power that is ***so unreasonable*** *that no reasonable person could have so exercised the power;*

…

Unreasonableness - s 5(2)(g)

"...an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

- The unreasonableness ground of legality review has prompted concerns in Australia of the risk
- Unreasonableness ground has prompted concerns; if not limited, courts may rely on ground when they simply disagree with the decision of the decision-maker whose decision is being reviewed and engage in merits review
- The ground has therefore been limited to cases of serious irrationality, illogicality or capriciousness

"Wednesbury Unreasonableness"

Associated Provincial Picture Houses v Wednesbury Corporation

The Cinematographic Act 1909 enabled relevant local authorities to grant licences subject to 'such conditions as the authority thinks fit to impose' and WC saw fit to grant a licence to the plaintiffs subject to condition that children under 15 should not be admitted to Sunday performances (with or without an adult)

Held: The court held this was **not an abuse of power, it was** not ***unreasonable*** and so **the condition was valid**. The court decided that it had no power to issue a **writ of certiorari** to quash the decision of the defendant simply because the court disagreed with it.

The courts can only interfere with an act of executive authority if it be shown the authority has contravened the law; those who assert the authority has contravened the law must establish that proposition. Whenever it is alleged the local authority has contravened the law, the court must not substitute itself for that authority - discretion entrusted by Parliament to a body such as local authority here can only be challenged by the courts in a strictly limited sense.

Principles governing judicial review grounds and the limited role of the courts:

Below has been codified in s 5(1)(e) and s 5(2)

a. The exercise of such a discretion must be a 'real' exercise; if the statute expressly or impliedly states some matter the authority (exercising the discretion) must have regard to, then in exercising the discretion it must have regard to those matters
b. Conversely, if nature of the subject matter and general interpretation of the Act make clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters
c. If the ^^ rules are not obeyed, the decision-maker may 'truly be said' to be acting 'unreasonably'...there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Unreasonableness will be obvious in some cases (red hair teacher example) and in other cases it will arise from 'taking into consideration extraneous matters'. It is so unreasonable that it might be described as being done in bad faith; and, in fact, all these things run into one another

SO:

- Courts can intervene where a decision by a Minister or government body 'is so unreasonable that no reasonable authority could ever have come to it', a definition frequently critiqued as circular. Lord Diplock in Council of Civil Service Unions (1985) described the unreasonableness as *'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'*
- Australian courts have seemed reluctant to either reject Wednesbury reasonableness because of this uncertainty or to expand its application.

- The Wednesbury test has a close affinity with notions of 'irrationality' (Lord Diplock in CCSU v Minister for the Civil Service) and 'illogicality'
- These formulations are attempts to avoid the circularity in Lord Greene's definition
- As French CJ observed in *Minister for Immigration v Li* "lawfulness, fairness and rationality…lie at the heart of administrative justice'.

‘Improper purpose’ - s 5(2)(c)

“...An exercise of a statutory power other than for a purpose for which the power is conferred”

- Where statutory purposes are not disclosed, the courts will identify and imply lawful purposes from the title, structure and text of the Act and may have regard to relevant extrinsic materials if necessary

Schlieske v Minister for Immigration

On how powers are defined with reference to implied statutory purposes:

1. The *Migration Act* is a law with respect to immigration and emigration, enacted pursuant to s 51(xxvii) of the Constitution. Its purposes are therefore immigration control purposes - managing who enters, remains in, and is removed from Australia. Deportation under s 18 is one mechanism for achieving those purposes.
2. The aiding of foreign powers to bring fugitives to justice is not one of the purposes of the act. That function is assigned to a *distinct constitutional head of power* (the external affairs power) and a *distinct legislative mechanism* (the extradition legislation). The court reasoned that because Parliament had specifically provided a separate framework for surrendering fugitives to foreign states, it must be taken to have intended that *Migration Act* powers not be used to achieve that objective.

Accordingly, the implied purpose of the deportation power was immigration control. An exercise of that power animated by a desire to deliver an individual into the hands of a foreign government was *ultra vires* because it pursued a purpose extraneous to what the Act, by implication, authorised.’**Although Schileseke was eventually returned to Germany the desired substantive outcome was realised by a different process.**

R v Toohey; ex parte Northern Land Council

- Aboriginal people claimed traditional ownership over Cox Peninsula (NT) - a large, undeveloped rural area near Darwin - under the Land Rights Act. The claim could only proceed if the land was "unalienated Crown land", which excluded "land in a town”.
- The NT Administrator made regulations declaring a massive 4,350 km² area (including Cox Peninsula) to be "treated as a town" for planning purposes.
- This was absurd on the facts - Cox Peninsula was bush, accessible mainly by sea, with almost no permanent residents. Darwin itself was only 142 km².
- The land became "land in a town”; Aboriginal Land Commissioner (Toohey J) accepted the regulations were valid and dismissed the claim.
- The NLC sought certiorari to quash the Commissioner's decision and mandamus to compel him to hear the claim.

Three main questions arose:

1. Whether the regulations were invalid on their face as being beyond the planning power in s 165 of the Planning Act.
2. Whether, assuming the regulations were facially valid, the courts could nonetheless inquire into the actual purpose motivating the Administrator in making them.
3. A subsidiary constitutional question: whether the Administrator was the representative of the Crown in the Territory, and whether that status (if established) immunised the regulation-making power from purposive review.

Held: HC held that mandamus should go.

- The courts can examine the exercise of a statutory power granted to the Crown or its representative to determine whether it was exercised within the scope and for the purposes for which it was granted - there is no special Crown immunity from purposive review.
- Reg 5 was arguably valid on its face (there was a power to specify areas as towns), but it was open to the NLC to challenge the regulation on the ground that it was in fact made for an unauthorised purpose - namely, defeating the Aboriginal land claim rather than for any planning purpose.
- The Commissioner had wrongly refused to inquire into this question of purpose, and had therefore failed to exercise his jurisdiction lawfully. Mandamus was the appropriate remedy.
- Murphy J dissented on the ground that because the regulation was legislative in character, it could not be invalidated on the ground of improper purpose - judicial power, in his view, did not extend to invalidating delegated legislation for misuse.

Gibbs CJ [186]-[192]:

- The power conferred by s 165 of the Planning Act, read together with the definition of "town" in s 4(1), was conferred only for planning purposes - "using that expression widely to include such matters as subdivision and development."
- This was not stated expressly in the Act but was implied from its structure and subject matter.
- Critically, his Honour held it was "**incontestable**" that the power was **not intended to be used to defeat Aboriginal traditional land claims**. That was simply not a planning purpose.
- Gibbs CJ acknowledged there was substantial prior authority suggesting that the motives of the Crown in Council in making regulations could not be examined - particularly *Victorian Stevedoring v Dignan* (1931) and *Australian Communist Party v Commonwealth* (1951). However, he subjected those authorities to critical analysis and concluded they did not compellingly establish an absolute immunity, and that this Court was free to decide the question afresh.
- **It seems fundamental to the rule of law that the Crown has no more power than any subordinate official to enlarge by its own act the scope of a power conferred on it by Parliament.** If a statutory power is conferred for one purpose, exercising it for another is not a lawful exercise of that power - regardless of whether the decision-maker is a subordinate official or the Crown itself.

'Irrelevant Considerations/ Failure to Take into Account Relevant Considerations' - s 5(2)(a)(b)

Related to 'Improper exercise of power' (s 5(1)(e));

- *A decision may be unlawful where irrelevant matters are taken into account or failure to take into account relevant considerations in the exercise of a power*
- Generally, **a decision will be invalid where an irrelevant consideration has been taken into account by a decision-maker,** unless the reviewing court determines that the consideration is insignificant
- This entails (1) court ascertaining what matters were weighed up by d-maker before taking action and (2) determining whether any of the matters taken into account were irrelevant

Murphyores v Commonwealth

- Plaintiffs held mini leases over parts of Fraser Island/K'Gari sought permission to export mineral concentrates
- Minister for Minerals and Energy announced that before deciding to grant export approval, inquiry into effect of sand mining would be held under Environment Protection Act 1974
- Plaintiffs argued (inter alia) it was unlawful for the MInister to consider the environmental aspects of mining on the island because it was an irrelevant (or extraneous) consideration vis-a-vis a decision to permit the export of concentrates
  Held: HC disagreed.
- To determine whether a consideration is relevant or irrelevant, courts examine **the express terms of the power**-conferring legislation.
- Where the legislation (governing the d-maker's powers) contains **no express limitations what decision-makers may have regard to**, and there is no evidence of bad faith, the decision-maker is **free to consider matters consistent with the general subject matter and purpose of the Act.**
- Environmental effects of an activity authorised under an Act may be a relevant consideration for a Minister making decisions under that Act, even where environmental considerations are not expressly mentioned.

Minister for Aboriginal Affairs v Peko-Wallsend

- Mining companies (Peko-Wallsend) spent years exploring the Alligator Rivers region of the NT and discovered a massive uranium deposit - Ranger 68, worth ~$280 million - sitting in an area called the Barote block.
- Aboriginal claimants applied for a land grant over part of the Barote block under the Land Rights Act. The Aboriginal Land Commissioner held an inquiry and recommended granting 10% of the Barote block to a Land Trust.
- The entire Ranger 68 deposit sat within that 10%. The Commissioner didn't know this because Peko's own witness told him (misleadingly) the deposit was "in the centre" of the broader block, not specifically within the recommended area.
- After the Commissioner's report was published, Peko wrote to successive Ministers correcting the record - Ranger 68 is wholly within the area recommended for grant, not spread across the broader block.
- Two Ministers acknowledged this. Then a third Minister (Holding) came in, was handed only a vague departmental summary saying there was "potential detriment to Peko-EZ," and **approved the grant without ever knowing about Peko's corrective submissions.**
- Peko sought judicial review arguing the Minister had failed to take a relevant consideration into account.

Two questions:

1. Was the Minister bound to consider the corrective submissions Peko made to his predecessors, or was he only required to consider the Commissioner's report?
2. If yes, should relief be refused on discretionary grounds because Peko had partly caused the problem by not telling the Commissioner the truth in the first place?

Held: Appeal dismissed. The Minister's recommendation was void. On the first question, the whole Court agreed the decision was **unlawful**, though on slightly different reasoning. On the second (discretion), the Full Federal Court's refusal to deny relief was upheld - Peko's conduct was careless rather than deliberately fraudulent.

How to identify mandatory relevant considerations (Mason J)

Mason J set out the governing framework in four propositions that remain the leading statement of principle on the relevant considerations ground:

1. The ground only succeeds if the decision-maker failed to consider something they were **bound to consider** - not merely something they could have considered.
2. What a decision-maker is bound to consider is determined by statutory construction - from the express terms of the Act, or implied from its subject-matter, scope and purpose. Where the statute is silent, the court asks whether an obligation to consider the matter is necessarily implied by the statutory context.
3. Not every omitted consideration justifies setting aside the decision - the omitted factor must have been capable of **materially affecting the outcome**. Trivial or insignificant omissions don't ground review.
4. Courts must stay within their supervisory role. It is **not the court's function to substitute its own view** - only to police the outer limits of the discretion. Questions of weight are for the decision-maker, not the court.

Applying those principles to the facts

1. On the first question, Mason J held the Minister was bound to consider the Commissioner's detriment comments under s 50(3) - that was expressly implied by the statutory scheme, since the whole point of requiring the Commissioner to comment on detriment was to draw it to the Minister's attention. Because the Commissioner was not entitled to weigh detriment himself in deciding whether to recommend a grant (Meneling Station), the Minister was the only forum in which detriment could be weighed. A finding that he wasn't required to consider it would effectively deny affected parties any opportunity to have detriment taken into account at all.
2. On the second question) whether the Minister was also bound to consider the corrective submissions Peko sent after the report) Mason J said **yes**. Once detriment is a mandatory consideration, the Minister must consider it on the basis of the most accurate and current information in his possession. It would be absurd to require a Minister to proceed on a factually false basis