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JURISDICTION

Decisions

State decisions

___ can bring an action in the NSW Supreme Court as the decision to ___ made under (Act/legislation) is under State jurisdiction.

Supreme Court review may be sought pursuant to [s 69\(1\) Supreme Court Act](#). Considering the decision is made by ___ who clearly constitutes an officer for the state executive and a writ be it mandamus/injunction/certiorari would be suitable for the current matter.

Commonwealth decisions

___ can bring an action in either the Federal Court or the High Court for the decision to ___ was made under (Act/legislation) which is under Commonwealth jurisdiction.

High Court

- Can go directly here if merits review wasn't sought initially for D, [Migration Act](#) says no jurisdiction for FC if no MR.

Constitutional review may be sought under [s 75\(v\) Constitution](#) in the HC to review JE with respect to granting remedies such as writ of mandamus/prohibition/injunction. Considering the decision is ___ it is clearly a 'matter' that impacts ___ (rights/abilities, etc) (*McBain*), while the decision was made by ___ who is an officer of the Commonwealth.

Federal Court

___ can commence proceedings in the FC through either [s 39B Judiciary Act](#) or the [ADJR Act](#). The [s 39B](#) test is identical to the one considered for constitutional review and hence, ___ is highly likely to have an avenue to (either the HC or) the FC.

___ may argue in the alternative with the ADJR Act which has more complexity. ___ (DM) made a decision ([s 3\(2\)\(e\) ADJR Act](#)) to ___ which is clearly final and operative (*Bond*). Moreover, the decision is of an 'administrative character' as it was made via the application of ___ (Act/legislation) specifically to ___ (Respondent's) matter. This is distinguishable from a judicial or legislative decision to establish a general rule (*Roche*; *Toohey*). The decision is made under an enactment as (Act/legislation + provision) provides authority to ___ (DM) to ___ (power undertaken + approve/deny application) (*Griffith*). Moreover, it is not a decision precluded under [schedule 1 ADJR Act](#).

Considering the HC can remit matters to the FC under [s 44\(2A\) Judiciary Act](#), ___ (respondent) is advised that initially applying to the FC is the better decision. This will also protect the potential to appeal to the HC. As such, it is likely that both avenues to bring an action to the FC are established for which ___ (respondent) should argue both in the alternative.

STATUTORY RESTRICTIONS

Privative clauses

General principle: statutory provision which purports to exclude the power or jurisdiction of courts to hear and determine JR proceedings, to grant the JR remedies, or otherwise to 'call in question' ADs.

- Statutory provision which asserts that the legality of a decision or action cannot be reviewed by courts.

A privative clause cannot effectively prevent review for JE, although what exactly constitutes a JE remains primarily a question of statutory construction (*Plaintiff S157*; *Kirk v Industrial Court of NSW*).

A privative clause cannot remove the constitutionally protected supervisory role of the HC and state SCs to review JE (*Plaintiff S157*).

- So, if a JE is identified, it is likely that a privative clause will be read down (*Plaintiff S157*; *Kirk*) and left with a limited role to play – it will be irrelevant.
- So, if a decision has a JE, it will be judicially reviewable even if there is a privative clause, otherwise it

GROUNDNS – ACTING WITHOUT POWER

Misconceiving scope of power

General principle: when a DM purports to make a decision that is of a different kind than the decision they are given the power to make.

Can be argued under either [s 5\(1\)\(d\)](#) – not authorised – or [s 5\(1\)\(f\)](#) – error of law.

DM will misconceive the nature or scope of their power if the statute confers the power to do one thing and the DM (usually due to error in construction) does something different, purporting to rely on that power.

- **Swan Hill Corporation v Bradbury**: HC held that the power to regulate and restrain the erection of the building is not the same as the power to prohibit the erection of buildings altogether.

Established upon statutory interpretation.

- **Haneef**: in relation to character test in [Migration Act. s 501\(6\)\(b\)](#) empowered Minister to cancel a visa if the holder of the visa has an association with someone... whom Minister reasonably suspected had been involved in criminal conduct.
 - ◆ Minister construed the word 'associated' meaning an association of any kind.
 - ◆ Court held that on its true construction, it referred only to associations that were 'such as to have some bearing upon the person's character'.
- **Norrie**: concerned with the interpretation of the word 'sex' as Norrie had undergone a sex operation. Went to register their gender as 'non-specified' with the NSW registrar in which they wouldn't because they interpreted sex to be binary of either male or female.
 - ◆ HC held that the registrar had the power to register the sex of the person but not inquire into the truth or the information, especially when asked to make a moral, social or medical judgement.
 - ◆ Held that the registrar had the power to register Norrie as a 'non-specified' sex.

DM may misconceive the nature and scope of their power by 'asking the wrong question'.

- Can occur when statute requires the application of a test, but DMs apply the wrong test.
- **McGillin v Commissioner of Taxation**: DM asked whether the business activities pre and post 2008 are of a similar kind.
 - ◆ HC held that this was an incorrect question – question should have been 'were they a part of the same business activity?'

Procedural Error

General principle: a failure to follow a set of procedures intended by parliament may invalidate a decision.

- Eg: may be required to give notice of a hearing 28 days in advance.

Failure to comply with statutory provisions – ground of review at CL and under [s 5\(1\)\(b\) ADJR Act](#).

3 elements to establish:

1) Is there a procedural requirement in the legislation?

- Statutes conferring powers often contain specific procedural requirements.
 - ◆ Eg: [Adoption Act](#) – assessment of a person's suitability required to be an adoptive parent.
- **Tickner v Chapman**: Minister required to publish a report and notice in local newspaper with sufficient information so that – members of the public should have an effective opportunity to make a contribution to the DMing process.

2) Has the DM failed to comply with this requirement?

- **Tickner v Chapman**: FC held the description of the location was not specific enough to satisfy the procedural requirements.

3) Is it a purpose of the statute that failure to comply with the requirement should result in the invalidity of the decision? Is it a condition of making a valid decision that the procedural requirements be complied with?

- Sometimes there will be express legislation regarding non-compliance.
- If not express, must go to statutory construction. Can look to:
 - ◆ Wording of the statutory requirement: softer statutory language (that a DM 'should' rather

Hearing Rule

General principle: requires government DMs to give a fair hearing to affected persons prior to making a decision.

- A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with adverse information that is 'credible, relevant and significant to the decision to be made' (McHugh J in *Miah*).

There may be practical injustice where the person affected by a decision has lost a chance to advance their case.

- In many circumstances, a breach of practical injustice amounts to a breach of the hearing rule (*SZSSJ*).

s 5(1)(a) ADJR Act: that a breach of the rules of natural justice occurred in connection with the making of the decision.

Factors which comprise the content of the hearing rule:

- Statutory context
- Circumstances of the case and subject matter that is being dealt with (*Russell v Duke of Norfolk*).
- Consequences of the decision
- Nature of the DM
- Urgency
- Efficiency

Often the statute sets out clear procedures for the hearing rule to operate along with the CL requirements.

CL requirements:

- Notice
 - ◆ At a minimum, a person affected by a decision is usually entitled to be informed that the decision is under consideration before it is made.
 - ◆ *SZSSJ*: HC stated that rule 'requires a person whose interest is apt to be affected to be put on notice'.
 - ◆ Forms of notice not limited to writing and can be delivered verbally.
- Disclosure
 - ◆ Obligation of the DM to disclose certain information and material to the person seeking decision.
 - ◆ *Kioa*: Brennan J described the type and scope of material needed to be disclosed as 'information that is credible, relevant and significant to the decision that is made'.
 - ◆ *Veal*: question of whether 'credible, relevant and significant' is not based on outcome, but depends on context of a decision, and is determined prior to outcome.
- Opportunity to present a case in response
 - ◆ Person affected by a decision is endowed with the right to answer the case against them.
 - ◆ *Li*: 'a reasonable opportunity to present an applicant's case... will extend to the opportunity to obtain evidence of the necessary fact'.

Bias Rule

General principle: requires that the DM be and appear to be impartial.

Can be either:

- 1) Actual bias; or
- 2) Apprehended bias

1. Actual bias

General principle: DM has a state of mind so committed to a conclusion already formed as to be incapable of alteration, regardless of evidence or arguments that may be presented.

- High threshold.

Test: affected party must show that DM actually held the relevant state of mind.

- Subjective.
- *Sun v Minister for Immigration and Ethnic Affairs*: held that the tribunal's decision had been tainted by actual bias since tribunal member drew 'extremely adverse conclusions' on the 'flimsiest ground'.

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REMEDIES

Prerogative writs

General principle: remedies in the nature of the old prerogative writs.

Courts may refuse to grant a remedy where:

- Applicant has failed to take advantage of other available avenues of review (eg merits review) (*NSW Breeding and Racing Stables*; *Aala*);
- Applicant has misled or deceived the court in some way (*Aala*);
- A more convenient and satisfactory remedy exists (*Ex parte Ozone Theatres*);
- Applicant has acted in bad faith (*SZQBN*); or
- The grant of the remedy would be futile (*Aala*).

Prohibition

General principle: prevents DM exercising a power which would be invalid.

Can be granted by: HC, FC, SC.

Granted for JE.

Test: necessary for an applicant to show that the DM has asserted a jurisdiction which they do not have.

- Eg: where a court or tribunal lists for hearing a matter in respect of which the applicant contends the court or tribunal has no jurisdiction.

Aala: applicant contended that decision by RRT to refuse a protection visa was affected by JE because the tribunal had denied him PF.

- HC agreed and granted a prohibition to prevent the Minister acting on the invalid decision of the tribunal.
- Court also has discretion to refuse relief with prohibition where necessary.

Mandamus

General principle: compels the DM to exercise jurisdiction according to law, where there has been a refusal or failure, and where there was a duty to do so.

Can be granted by HC, FC, SC.

Granted for JE.

Test: necessary that the DM was under a duty to act and did not (either by refusal or misunderstanding).

- In the absence of statutory language to the contrary, a grant of jurisdiction ordinarily carries with it a duty to exercise (*Public Service Association of SA v Industrial Relations Commission*).

Toohey: HC issued a mandamus to the Aboriginal Land Commissioner directing him to deal with the land claim in accordance with the law.

Certiorari

General principle: quashes the decision so that it no longer has legal effect. Does not allow for the substitution of an order or decision.

Can be granted by: HC (ancillary [s 75\(v\)](#)), FC (ancillary [s 39B](#)), SC.

- Not included in the constitutional writs, so has to be granted where other PW are sought.

Granted for JE and non JE.

Test: necessary that the decision being challenged would, if valid, have legal effect.

Ainsworth: report made to Qld Parliament by Criminal Justice Commission was critical of the conduct of the Ainsworth group – did not give Ainsworth group a right to be heard before the report was delivered.