

JUDICIAL REVIEW

Topic 8: Supervisory Jurisdictions

(1) Sources of Judicial Review – State Courts

- Judicial review of NSW public powers is an exercise of NSW judicial power, primarily within the supervisory jurisdiction of the Supreme Court
- Exercisable on two distinct bases:
 - (i) grant of prohibition, mandamus (need legal error to be jurisdictional error), and certiorari for jurisdictional error
 - (ii) grant of certiorari for error of law on the face of the record
- Commonwealth Constitution guarantees an entrenched minimum provision for judicial review of State powers:
 - *Commonwealth Constitution*, s 73(ii): entrenches each Supreme Court's inherent supervisory jurisdiction to grant prohibition, mandamus, and certiorari for jurisdictional error (*Kirk v Industrial Court*)
 - This means that any **privative clause** in statute (attempting to remove ability for review) will be ineffective to exclude a review for jurisdictional error (if it is non-jurisdictional, then privative clause will likely remain effective)
- *Supreme Court Act 1970* (NSW), ss 23, 65 and 69: affirms inherent jurisdiction

(a) Common Law Remedial Model

Touchstones for Review (in General)

- (i) 'Material legal error'
 - Material non-compliance with law that limits power or governs its exercise
 - *Refer to default legal norms for administrative action (topics 3-7)
- (ii) 'Touchstone' for review satisfied – the legal error is the kind required to obtain remedy from the Court
 - Category of material legal error that must be demonstrated to obtain particular remedies and/or to engage a particular review avenue, namely:
 - (a) legal error
 - (b) error of law 'on the face of the record'
 - (c) jurisdictional error

Judicial Review in Supreme Court (NSW) on Common Law Remedial Model

- Scope: certiorari, prohibition, and mandamus, orient towards decisions with a statutory or prerogative effect on subjects' rights
 - Certiorari and prohibition available to quash and restrain action authorised by statute or prerogative with 'a discernible or apparent legal effect upon rights' (*Hot Holdings v Creasy*)

- ‘Legal effect on rights’ applied quite liberally – present in: final and operative decision under statutory decision-making power to confer, revoke or alter individual rights, and a decision which a necessary step in the statutory process towards an exercise of power to confer, revoke or alter individual rights (*Hot Holdings; Chase Oyster Bar*)
 - Mandamus enforces a public duty which remains unperformed
 - [Admin law norms can also be enforced in equity (*Batemans Bay; Enfield*) and Supreme Courts have power to issue injunctions and declarations in proceedings for ‘prerogative’ remedies (*Ainsworth*)]
 - *Scope of equitable jurisdiction not covered in our course
- Touchstones for remedies:
 - Prohibition and mandamus only issue for jurisdictional error
 - Certiorari issued on two distinct bases:
 - (i) Certiorari with **retrospective effect** requires ‘jurisdictional error’
 - (ii) Certiorari with **prospective effect**, for ‘error of law on the face of the record’
- Touchstones for review:
 - **Legal Error**: material non-compliance with law that applies to the administrative decision-making
 - **Jurisdictional Error**: material non-compliance with law that conditions the valid exercise of decision-making power
 - **Error of Law on the Face of the Record**: material non-compliance with law that is evidence ‘on the face of the record’
- *Key points:
 - Judicial review of administrative action by application for prohibition, mandamus and certiorari focuses on jurisdictional error
 - Some material legal errors will be ‘unremediable’ by prohibition, mandamus or certiorari because they are neither jurisdictional error, nor apparent on the face of the record

(2) Sources of Judicial Review – Federal Courts

- Judicial review of Cth public powers is an exercise of Cth judicial power, primarily within five (non-exclusive) express grants of jurisdiction to federal courts:
 - *Commonwealth Constitution*, s 75(iii) and (v): confers jurisdiction on the HCA; entrenches the High Court’s jurisdiction to judicially review ‘the Commonwealth’ and ‘officers of the Commonwealth’ for jurisdictional error (*Plaintiff S157/2002*)
 - This means that any **privative clause** in statute (attempting to remove ability for review) will be ineffective to exclude a review for jurisdictional error (if it is non-jurisdictional, then privative clause will likely remain effective)
 - *Judiciary Act 1903* (Cth), ss 39B and 44: confers jurisdiction on the FCA

Main Sources of Review

- Common law remedial model:
 - (i) *Constitution* s 75 (iii): High Court (matters in which Cth is sued)
 - (ii) *Constitution* s 75 (v): High Court (mandamus, prohibition or injunction against ‘an officer of the Cth’)
 - (iii) *Judiciary Act* s 39B (1): Federal Court (mandamus, prohibition or injunction against ‘an officer of the Cth’)
 - (iv) *Judiciary Act* s 39B (1A)(c): Federal Court (matters arising under Cth legislation)
- Simplified Remedial Model:
 - (v) *ADJR Act*: Federal Court/Federal Circuit and Family Court (administrative decisions under Cth enactments)

(a) Common Law Remedial Model

- For High Court and Federal Court – similar to State Supreme Court jurisdiction (review on the common law remedial model)
- Different though due to extra jurisdictional elements in the Constitution – ‘officer of the Commonwealth’
- *Constitution* s 75 (iii) is ample to include judicial review on the common law remedial model where ‘the Commonwealth’ is the decision-maker
 - ‘The Commonwealth’ = totality of what is established as the Executive Govt in Ch II, and officers and agents acting, in substance, as part of that
- Remedies = prohibition, mandamus, injunction
 - *Certiorari is not mentioned – but is available as an ancillary to mandamus or prohibition (*Plaintiff S157/2002*)
- Named respondent = ‘officer of the Commonwealth’
 - Connotes appointment of an individual to a tenured office by the Cth, usually accepting a salary from the Cth (*R v Murray and Cormie*)
 - *Federal Court says that an incorporated government entity is not an officer of the Commonwealth
 - *HCA has not decided whether contractors are ‘officers of the Commonwealth’ (*Offshore Processing Case*)
- Requires a ‘matter arising under any laws made by Parliament other than ... a criminal matter’
- Extremely broad jurisdiction, extending to judicial review, where a Cth law is the source of: (i) the power to take the challenged action; or (ii) the rights or liabilities affected by the challenged action

(b) *Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)*

- Simplified review procedure – facilitates timely access to judicial review by providing for review of reports/recommendations and conduct for purpose of making a decision

Touchstone for a remedy under ADJR Act

- s 5: reaches all legal errors that may ground a remedy in judicial review at common law
- s 16: authorises Court to make orders equivalent to retrospective certiorari, prohibition, and/or mandamus on any s 5 ground

ADJR Act Provisions

- s 3 (2): reference to making a decision includes a reference to:
 - (a) making, suspending, revoking, or refusing to make an order, award or determination
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission
 - (c) issuing, suspending, revoking, or refusing to issue a licence, authority or other instrument
 - (d) imposing a condition or restriction
 - (e) making a declaration, demand or requirement
 - (f) retaining, or refusing, to deliver up, an article
 - (g) doing or refusing to do any other act or thing
- s 3 (3): where provision made by enactment for making of report/recommendation before a decision is made, the making of such a report/recommendation shall itself be deemed to be the making of a decision
- s 3 (5): ‘conduct engaged for the purpose of making a decision’ includes a reference to doing any act or thing preparatory to the making of the decision
- s 5 (1): a person who is aggrieved by a decision to which this Act applies may apply to FC for an order for review in respect of the decision on any one or more of the following grounds:
 - (a) breach of rules of natural justice occurred in connection with decision
 - (b) procedures required by law to be observed were not observed
 - (c) person who purported to make decision did not have jurisdiction
 - (d) decision not authorised by the enactment in pursuance of which it was purported to be made
 - (e) making of decision was improper exercise of power conferred by enactment
 - (f) decision involved an error of law (whether or not on face of record)
 - (g) decision was induced/affected by fraud
 - (h) no evidence or material to justify decision
 - (j) decision was otherwise contrary to law

- s 5 (2): paragraph (1)(e) above shall be construed as including reference to:
 - (a) taking irrelevant consideration into account
 - (b) failing to take relevant consideration into account
 - (c) exercise of power for purpose other than for which the power is conferred
 - (d) exercise of discretionary power in bad faith
 - (e) exercise of personal discretionary power at direction of another
 - (f) exercise of discretionary power in accordance with rule/policy, without regard to merits of particular case
 - (g) exercise of power so unreasonable
 - ...
- s 6: where person has engaged/engaging in/proposes to engage in conduct for purpose of making decision, a person who is aggrieved by the conduct may apply to FC for an order of review in respect of the conduct on s 5 grounds
- s 7: person affected by failure to make a required decision may apply to FC for review:
 - (1) unreasonable delay – applies when: (a) person has legal duty to make decision; (b) no law sets specific time limit for decision; (c) decision has not been made
 - (2) failure to meet a legal deadline – applies when: (a) person has legal duty to make decision; (b) law sets specific time frame; (c) decision not made within time frame

In ADJR Act jurisdiction?

- s 3 (1): ‘decision to which this act applies’ means a decision of an administrative character made, proposed to be made, or required to be made: (a) under an enactment
 - ‘enactment’ means: an Act, ordinance of a Territory, instruments made under an Act (e.g. regulations), etc.
- Includes: administrative decision made in exercise of statutory power, decision affects an individual’s legal rights/obligations through operation of the statute on the fact of the decision
 - E.g. decision under statute on an application for a license or permit to undertake an activity that is prohibited without a license
 - E.g. decision under statute to cancel a statutory license/permit
- Also includes: administrative decision made in exercise of a statutory power, that is a ‘step in a statutory process’ by which rights or liabilities are affected
 - E.g. statutory power to revoke broadcasting licence enlivened if a finding is made in statutory inquiry that licensee is ‘no longer fit’
 - E.g. statutory power to grant mining licence enlivened if warden recommends the grant after statutory assessment process

(i) 'a decision'

<i>Australian Broadcasting Tribunal v Bond</i> (1990)	
Facts	○ Inquiry by ABT under statute; found that certain licensee companies no longer fit and proper to hold licenses ○ B and licensee companies sought judicial review of 11 'decisions' and 7 acts of 'conduct' made by ABT in course of inquiry
Decision/Reasoning	HELD: (i) decision re B could <u>not</u> be reviewed under <i>ADJR Act</i> as was only a preliminary step in reasoning process; (ii) decision re companies <u>could</u> be reviewed under <i>ADJR Act</i> as decision was of substance and an 'essential preliminary established by the statute.' A 'decision' is: (i) a determination for which provision is made by or under statute; (ii) substantive, <u>not procedural</u>. Conduct is 'essentially procedural'... relating to 'the way in which the proceedings have been conducted.' The <i>ADJR Act</i> does <u>not</u> open the door to judicial review of all substantive determinations of law, policy, or fact.

(ii) 'of an administrative character'

<i>Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee</i> (2007)	
Facts	○ Decision taken by statutory committee to alter entry of particular medicine on the 'Poisons Standard' (a notifiable instrument listing therapeutic goods, where manner of listing determines which conduct in relation to the substance is lawful under <i>TGA</i>) ○ Consequence of decision was that substance in question could no longer be lawfully advertised directly to consumers
Decision/Reasoning	HELD: <u>not</u> reviewable under the <i>ADJR Act</i>. Established multi-factorial test to distinguish <u>legislative</u> and <u>administrative</u> decisions: (i) Decision to include/not include on schedule determined future lawfulness of conduct (ii) Decision applied to substance/medicine in general (not just R) (iii) Public consultation takes place (iv) Part of national system of controls (v) No merits review (vi) Not subject to executive variation/control

(iii) 'under an enactment'

- *Tang* criteria for whether a decision is made 'under an enactment':
 - (1) The decision is required or authorised by the enactment; and

- (2) The decision derives from the enactment a capacity to affect legal rights and obligations [means also satisfies requirements for certiorari and prohibition]
- *Tang* criteria is not satisfied if a decision:
 - (1) is not required/authorised by an enactment (e.g. exercise of polity's non-statutory executive power, or exercise of capacities of a private legal person)
 - (2) is required or authorised by an enactment and has an effect on rights, but that effect derives from general law operating on an exercise of capacities common to all legal persons
 - (3) is required or authorised by an enactment, but does not have a legal effect on rights

<i>Griffith University v Tang</i> (2005)	
Facts	○ Griffith University made decision under non-statutory policies to exclude PhD student from degree program ○ Issue: was decision an administrative decision 'under' G's founding statute?
Decision/Reasoning	HELD: <u>no</u> the decision was not made under enactment – although the decision was authorised by, it was not required under the act. Established two-part test for deciding whether decision is made 'under an enactment.'

<i>General Newspapers Pty Ltd v Telstra</i> (1993)	
Facts	○ T was govt owned enterprise (at the time) with statutory license to provide landline phone network ○ Enters contract for printing phonebooks without going to tender; disappointed prospective bidder seeks to review under <i>ADJR Act</i>
Decision/Reasoning	HELD: judicial review <u>not available</u> here. Act such as T's contract with printer company are 'taken under the general law applicable to the community' and are not 'acts which have statutory effect because of the provisions of a federal enactment.' *Common law judicial review remedies + <i>ADJR Act</i> will <u>not</u> apply to action that has legal effects from a 'private law' source. Reviewable decisions under statute are those which 'by virtue of the statute affects legal rights and/or obligations.'

<i>Fuller v Lawrence</i> [2024]	
Facts	○ Statute imposes supervision obligations on prisoners through 2-step process: (1) Supervision order issued by judge, which must require prisoner to comply with reasonable directions of corrective services officer; (2) direction issued by corrective services officer ○ Direction issued permitting L to have phone/video call, but no in person contact with daughter ○ Qld govt argued direction was <u>not the source of the legal effect</u> as direction flows from Court order, which give direction force/effect

Decision/ Reasoning	HELD: <i>Tang</i> criteria was satisfied: (i) only has legal efficacy if authorised by the Act; and (ii) if validly made, exposed L to new legal jeopardy under the Act (by adding to his obligations under the Supervision Order).
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<i>NEAT Domestic Trading Pty Limited v AWB Limited</i> (2003)	
Facts	○ Legislated ‘common desk’ marketing of Aus wheat exports ○ A holds a legislated export monopoly for wheat and statutory power to veto requests by individual traders for statutory permits to export directly from WEA, without going through A
Decision/ Reasoning	HELD: A’s decision has statutory effect, <u>however</u> , it was ‘neither necessary or appropriate’ to read it as impliedly authorised or required by statute.

(4) Appeals on a Question of Law

Legal norms enforced in judicial review can also be enforced in other types of proceedings:

- In appeals from tribunals to courts on questions of law (*Haritos v Commissioner of Taxation*)
- In a ‘collateral challenge’, where invalidity of official decision is raised as element in civil claim/defence against prosecution/enforcement action (*Shanahan v Scott*)
- In applications engaging superior Court’s jurisdiction in equity (*Enfield; Batemans Bay*)

<i>Haritos v Commissioner of Taxation</i> (2015)	
Facts	○ H conducted cleaning business; AAT re tax consequences of business payments – AAT did not accept H’s evidence ○ Expert witnesses called was given no weight by AAT because it said it was based on H’s evidence which they rejected ○ Appealed on question of law under <i>AAT Act</i>; FC judge said no error of law; H appealed
Decision/ Reasoning	HELD (FFC): was a problem with fact finding – the error of law was ‘the drawing of a conclusion about the nature or character of Mr Dalla Costa’s evidence that was irrational and not based on findings or inferences supported by logical grounds.’ [213]: ‘A conclusion that a decision involves a lack of reason or logic sufficient to amount to an error of law is not to be lightly drawn and not every lapse in logic is sufficient to constitute an error of law.’