

Grounds of Review

Part A: Conditions on Administrative Action

Ground 1 - Action was not Authorised by the Enabling Legislation

s 5(1)(d), *ADJR Act*: the decision was not authorised by the enactment

The main issue here is whether the delegated legislation goes beyond the scope of authority of the primary Act. If this ground of review is satisfied, whether this error is a jurisdictional error (go to jurisdictional error after).

1. Scenario 1 - Regulate and Restrain, NOT Prohibit:

- a. **Rule:** the power to regulate and restrain does not support prohibition: **Swan Hill**
 - i. **Application:** an entire but conditional prohibition (i.e. an activity is prohibited without a licence or permit) is a **prohibition: Swan Hill**
- b. **Exception:** the Court may imply a power to prohibit if the subject matter is evil or of a doubtful tendency: **Swan Hill**
 - i. **Test:** are there things that would cause a regulatory mindset to imply a prohibition? (e.g. infectious disease)
- c. **Swan Hill:**
 - i. **Facts:**
 1. **Primary Act:** allowed a council to make bylaws for 'regulating and restraining' the construction of buildings
 2. **DL:** a person could not construct unless they obtain approval
 - ii. **Ruling:** the bylaw was **ultra vires**

2. Scenario 2 - Outside the Field of Enabling Act:

- a. **Rule:** a DL cannot extend to a further field or supplement the scheme of the Primary Act: **Shanahan**
- b. **Shanahan v Scott:**
 - i. **Facts:**
 1. **Primary Act:** provided a system for the collective marketing of agricultural products in Vic and allowed council to make regulations that were 'necessary and expedient' to administer the Act
 2. **Delegated Legislation:** a person cannot place eggs in cold storage in Vic without the consent of the Board
 - ii. **Ruling:** the DL was **ultra vires**: the field of the Act was the collective marketing of Victorian eggs, but the Regulation attempted to control the use and marketing of eggs in Victoria
- c. **Foley v Paley**
 - i. **Facts:**
 1. **Primary Act:** allowed council to make bylaws for regulating activities in the mall that is, in the opinion of the Council, likely to affect the use or enjoyment of the mall
 2. **DL:** no person could distribute anything to passer-bys in the Mall, unless the Council gave permission
 - ii. **Majority Judgement:** distributing materials could create crowds, cause litter, interrupt pedestrian flow or disturb people using the Mall → **activities "likely to affect the use or enjoyment of the mall"** (Gibbs CJ)
 - iii. **Dissenting Judgement:** the bylaw placed a blanket ban that included "ordinary incidents of human intercourse" → **activities that clearly do not "affect the use or enjoyment of the mall"** (Brennan J)

3. Scenario 3 - Principle of Legality:

- a. **Rule:** Courts should not impute to the legislature an intention to interfere with fundamental rights: **Evans**
 - i. If Parliament intends to interfere with fundamental rights, it must express that intention by clear and unambiguous language
- b. **Evans v NSW:**
 - i. **Facts:**
 1. **Primary Act:** allowed the making of regulations 'necessary or convenient' for regulating the conduct of the public on WYD venues
 2. **DL:** authorised a person to stop conduct if it created a safety risk, caused annoyance or inconvenience, or obstructed WYD