

1. ADJRA – Historical Background

- a. **Grounds of review developed in the context of common law and equitable remedies**
 - Prerogative writs of certiorari, prohibition & mandamus
 - Declarations and injunctions
 - Remedies available to review ex of leg, admin & jud power (subj to exceptions)
- b. **Problems with common law remedies**
 - Plagued by technical difficulties which made it diff for ppl to seek review of ex of govt power
- c. **ADJRA – 3 major changes (12)**
 1. Simplified Application Procedures: s 5, 6, 7
 2. Codified common law grounds of review (codified grounds broader than CL equiv: error of law & no evidence grounds)
 3. Created Stat Right to reasons (contrast CL general position): no entitlement to reasons
- d. **ADJRA – three basic points (13)**
 1. Focus on legality, not merits review
 2. Allows review of certain govt decisions: decision making by Cth pub servants exercising govt power (*NB: does not apply to exercise of state govt power under State legislation)
 3. Federal Court undertakes review
- e. **Review Avenues – 3 possibilities**
(Stat remedies: Relationship with other modes of review)
*leaves judicial review options in place
 1. Review under ADJRA
 2. Review under Traditional (jud) remedies:
 - Obtain Preg writs s39B by Fed Court
 - Obtain Const writs of prohibition & mandamus s 75(v) by HC
 - Equitable relief dec & inj (Fed & HC)
 3. Combined: ADJRA + traditional remedies (most sensible)
- f. **Right to reasons (s13)**
 - Provided applicants can fit themselves with terms of s13: entitlement to legally enforceable rights to reasons & acc of material upon which dec was based

2. Queensland JRA

- a. **JRA – 3 basic points (same basic features as ADJRA)**
 1. Simplified procedures for seeking jud review: s 20, 21, 22
 2. Codified traditional ground of review (Part 3)
 3. Right to reasons of govt decisions (Part 4)
- b. **JRA – 3 additional pts**
 1. Only on grounds of legality
 2. Review of state govt power
 3. Supreme Court undertakes review

3. Difference bet ADJRA & JRA (traditional CL & equi remedies)

- ADJRA: leaves remedies in place
- JRA: draws them into Part 5 of Act

4. Review avenues – 4 possibilities (Relationship with other remedies)

1. Part 3 JRA (review)
2. Part 5 (traditional remedies)
3. Combined
4. Traditional equitable remedies (SC general power to issue dec/ injunc relief)

5. **Preconditions** for Obtaining Review under Statutes | (22)

Operation of judicial review under ADJRA / JRA Parts 3 And 4

a. Operation of the JRA Parts 3 And 4

b. **S20: Deals with DECISIONS**

1. Aggrieved – not just any person
2. decision to which act applies

c. **S21: Deals with CONDUCT**

- Allows review of conduct
- Not just any conduct: Conduct (actual/ proposed) engaged in for purpose of making decision to which act applies

d. **S22: Deals with FAILURES TO DECIDE**

1. Duty to make decision
2. Failed to make that decision
- Person who's aggrieved by failure may apply for stat order of review

6. "decision to which the Act applies" (common phrase from S20, 21, 22)

* if cant find decision, no review under Part 3

a. **s 4 definition (identical to ADJRA): *ELEMENTS**

- ✓ Decision
- ✓ of an Administrative character made..
- ✓ (a) Under an enactment **or**
- ✓ (b) Under a non-statutory scheme or program
(made by an officer or employee of, the State or a State authority or local government authority) involving funds.. (i) out of amounts appropriated by Parliament; or (ii) from a tax, charge, fee or levy authorised by or under an enactment.
- NB: elements interrelated: not to be construed in isolation

b. "Decision" and "Conduct" (24)

i. **s 5 (identical to ADJRA): 'decisions' include: (scope)**

- making orders, awards or determinations;
- giving certificates, directions, consents or permissions;
- issuing licences, authorities or instruments;
- imposing conditions or restrictions;
- making declarations, demands or requirements;
- retaining or refusing to deliver up an article

ii. **S6: 'decisions' also includes**

- making of report or recommendation

iii. **ABT v Bond (1990) (HCA)**- dealt with meaning of 'decision' in ADJRA (25)

- Critical Ques: whether Tribunal's *decision* that Bond not a fit and proper person was a 'decision' for purposes of ADJRA
- In view of HC majority: step was neither a 'decision' nor was it 'conduct' → unreviewable
- In HC: Sir Anthony Mason considered term 'decision' at length and attempted to distinguish 'decision' from 'conduct'
- **5 Steps in Sir Anthony Mason's approach:**

1. 'Decision' not limited to final decision disposing of controversy bet parties. 3 observations:

- ADJRA is a remedial statute
- Did not refer to 'final' decisions
- Traditional remedies extend beyond ult decisions

2. Despite above, 'decisions' had to be limited. Reasons:

- **s 5 JRA** (ADJRA equiv): decision must be something which has 'the character or quality of finality' → needed to be: determination of an application, enquiry or dispute (determination effectively solving actual substantive issue)
- **s 6 JRA**: allowed reports & recs to be classed as 'dec' (effectively expanded meaning of word) → qualified charac of 'finality'

- **s 8 JRA**: 'conduct' fleshed out- things preparatory to making decision, cannot themselves be decision. If general interpretation given to 'decisions', fed equiv of s 8 would not have been necessary

3. Scope of 'decision' raised competition bet 2 policy considerations (balance)

- Policy pushing for *widening* of 'decision' → allow for widest possible review of exercises of govt power – ROL consideration: allow ppl to challenge govt decisions
- Policy *reading down* 'decision' → protecting 'efficient administration of govt' – if 'decision' not linked to quality of finality, too liberal, allow applicants to use JR to challenge decision making process to incessantly, will lead to fragmentation and frustration of processes of admin (govt) decision making & risk efficiency of admin processes.

*admin law strives to achieve balance in considerations

4. TEST FOR 'DECISION': Mason CJ offered definition of word 'Decision' (31)

- To be a reviewable decision:
 1. Provision must be made for a decision '**by or under**' an enactment (statute)
 - Enactment has to expressly provide for part decision
 - But NB: s4(b) in Qld- allow for non-stat scheme & programmes), so decisions for purposes of 4(b) cant be one provided for under an enactment bc there's no enactment
 2. Decision normally needs to have some **element of finality** ('final or operative and determinative) – 1 exception is where s 6 JRA applies
 3. Intermediate determination will be a decision only if it is provided for in a statute in a sense of being **expressly provided for/ impliedly required** (not simply authorized) (*Hutchins*)
 - Finding has to be implicitly required by enactment to be 'decision' for purposes of the act
 4. To be a decision, **determination needs to be substantive**, not procedural
 - Substantive = resolution of a substantive issue
 - Conduct s 8: procedural action → Reviewable
 - Final Decisions: review substantive → Reviewable
 - Reasoning process: substantive determinations (procedural, no substantive issue) → Unreviewable!
 - o UNLESS: (exception) enactment provided for the making of finding/ ruling on that pt
 - o HC in Bond trying to insulate from review: Substantive steps in the reasoning process (policy reason: fragmentation of govt decision making)

5. Scope of "Conduct":

- Contrast 'decision' under ADJRA with 'conduct' which is reviewable under Act
 - ✓ Decision: must be substantive, final & operative
 - ✓ Conduct: relates to sth which is procedural, not substantive → Challenge to conduct = attack on proceedings engaged in before making of the decision (action taken)

** HC approach attempts to ensure that intermediate substantive determinations with NO statutory foundations are NEITHER 'decisions' NOR 'conduct' for purposes of ADJRA review

7. Application Of Bond (*cases hard to reconcile) (33)

- Harris v Bryce (1993)** – Commencement of investigation. Determination to investigate not final/ operative/ determinative of any issue. Not sufficiently substantive (did not determine any person's rights). Held not to be a "decision". NB: Held that notwithstanding Bond, s 39B relief (CL remedies) potentially available.
- Re Excel Finance Corporation Ltd (1993)** - Commencement of investigation (similar to *Harris*). Decision to allow investigation to proceed considered substantive enough to qualify as a decision. Held to be a 'decision' reviewable under ADJRA.

c. Redland Shire Council (1997)

- Thomas J: Administrators (deciding whether to grant application) includes both tribunals & standard public servants (non-adversarial type decision makers).
- Thomas J notes difficulty in 'directly transposing' *Bond* Criteria to 'decisions' of a body that performs 'non-adjudicative functions':
- *Bond* is well adapted to dealing with tribunal processes (adversarial type proceedings), not well adapted to admin decision making of non-adversarial character
- *Nonetheless, required to apply *Bond* approach to ALL situations

d. Griffith University v Tang (2005)

- Toohey & Gaudron JJ in *Bond* rejected the 'substantive' requirement
- Gummow, Callinan & Heydon JJ (joint judgement): raises possibility that there can be 'decision' or the purposes of the ADJRA in cases where enactment only *implicitly* authorises the making of the decision → 'necessary implication' sufficient.
- If possibility accepted, undermines Mason CJ's approach in *Bond*

8. Concluding Remarks On Bond

- Underlying rationale: to avoid situation of applicants being able to fragment & frustrate govt decision making process using ADJRA
- Scope of 'decision' impacts on right to reasons under Part 4 JRA – 'decision' too liberal, constant application to reasons
- HC in *Bond* opted for a very technical approach in identifying 'decisions' & 'conduct'
- Traditional remedies (in part: dec & prerog writ of prohibition) not restrained by this technical approach

9. Discretion to Dismiss proceedings

- Fed Court: general discretion to dismiss proceedings where review application is premature (there's an abuse of process: where above is likely)
- Qld JRA: discretion to dismiss enshrined in s 14 → designed to deal with mischief in *Bond*
- Approach in *Bond* controls:
 - ✓ ADJRA
 - ✓ JRA Part 3
- Doesn't control:
 - ✓ S 39B Judiciary Act – prerogative writs in Qld/ order & nature of writs/ dec & injunctions
- BUT: Discretion does
 - * Federally: Inherent discretion, In Qld: s 14.

Week 8: "Administrative Character"

1. 5 Preliminary Points About Phrase (37)

1. Phrase **maintains trichotomy** bet legislative, executive (or administrative) and judicial acts & decisions (*Resort Management Services v Noosa Shire Council*) → only decisions that are of admin character are reviewable under the ADJRA
 2. Courts have generally sought to **avoid giving phrase narrow/ technical construction**. ADJRA & JRA are remedial, should be given wide construction & application (*Evans v Friemann*).
- 2 factors which impel broad construction:
- 1) Decision must be of an admin character, not subject matter of decision: Type of reasoning in commercial decisions- notwithstanding they are commercial type decisions, decisions made is part of administration of some statutory arrangement → hence of an admin character
 - 2) Administration does not involve isolated act, it's a process.

3. **Character** of the **decision** relevant, not generally the character of decision maker
 - QCAT held to be a court in *Owen v Menzies*: QCAT able to make decisions of an administrative character → potentially reviewable under Part 3 JRA
 - But: Type of decision maker not completely irrelevant to characterisation (*Hamblin v Duffy*) eg If it's superior court rather than tribunal, generally court treats everything that superior court does as judicial
4. "Decision of an administrative character" **cannot be construed in isolation** from other sections of JRA
 - Fed Court in *Evans v Friemann* recognised that ADJRA equiv of s 5 JRA would be relevant to interpreting scope of s 4(a): decisions set out in s 5 (week 7) can be characterised as 'administrative' *sections interact!
5. It's **impossible to set out all encompassing definitions** of legislative, judicial and administrative power (*Hamblin* per Lockhart J) – have to rely on case law & theory in terms of SOP

2. The "Tests" (Characterisation of Decisions in *Hamblin v Duffy* per Lockhart J) (41)

Decisions of:

- **Legislative** character: involve acts which create/ change law ie general legal rules for the community → not reviewable under ADJRA, potentially via declaratory relief
- **Administrative**: involve application of law in part instances → reviewable under ADJRA
- **Judicial**: involve the binding determination of facts & law in application of general legal rules → not reviewable under ADJRA, potentially via writs
 - Criticism of definition being overly simplistic: 'transmission belt theory'- Overly simplistic. Executive had the job of implementing legislation + formulation of executive policy (both high level policy & day to day)

3. 2 Strategies/ Rules of Thumb In Dealing With Characterisation Problems (41)

1. **By-laws/ regulation** (exercise in making subordinate legislation) **normally decisions of legislative character, not reviewable**
 - NB *Tooheys* exception: Notwithstanding use of term 'by-law', nature of decision held to be decision of a 'administrative character'. On closer scrutiny: case involved application of general rules to part circ. → reviewable under ADJR
2. **If decision has actually changed law, then it will be legislative**
 - If creation of thing you're characterising changes the law in some way, best indication: legislative → not reviewable (*Blewett*)
 - If doesn't change the law/ preliminary step to change in law: administrative → reviewable

4. Borderline Admin / Legislative Decisions (Applying Rule of Thumbs) (41)

• Indicative Factors of Administrative character:

- a. *Queensland Medical Laboratory v Blewett* (1988)
 - Minister's decision to adopt new schedule of med fees had effect of changing law → Held legislative → Not reviewable under ADJRA.
 - Gummow J: had Minister, instead of endorsing new schedule to the Act, decided not to change the schedule, decision would have been administrative *NB: fine distinctions!
- b. **Resort Management Services Ltd v Noosa Shire Council* (1995)
 - Steps preparatory to change in law will often be administrative.
 - To propose a change to plan was part of process of administering plan.
 - Law didn't change with taking of that step.
 - To actually change plan would involve leg power.
- c. *Aerolineas Argentinas v Federal Airports Corporation* (1995) / (1997)
 - Decision to impose charge looked legislative (general nature), but held to be administrative.

- Basis: degree of executive oversight indicative of decision being of admin character (per Beazley J)- subject to executive oversight under *Prices Surveillance Act*
- On Appeal: Different approach of Fed Court: Purpose of decision was cost recovery – seen as process of administering corp's commercial operation under statute → Decision of administrative character

• Indicative Factors of Legislative character:

d. *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001)

Factors (Full Court of Fed Court):

- ✓ The decision in question determined the content of a general rule;
- ✓ The decision was subject to parliamentary control – if parl has supervisory role, indicative of dec of leg character (NB reverse! *Aerolineas* per Beazley J: executive oversight → admin character)
- ✓ The decision was not subject to executive variation or control; and
- ✓ There was an absence of merits review in respect of the decision.

e. *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007)

Factors (per Branson K)

- ✓ If decision determines future lawfulness of conduct → indicative of decision of a leg character
- ✓ If public consultation was an impt element in process leading to decision → leg character.
- ✓ If dec was an impt part of a national system of control → (establishment of poisons register in this case) → legislative character → not reviewable.

• 3 final pts of Admin/ Leg boundary:

1. ADJRA & JRA Part 3 only allows you to review decisions of an administrative character
 - Can't review decisions of a legislative character
2. Relevance of policy and political issues?
 - *Resort Management Services*: (per Qld CoA) just because decision involved determination, implementation or application of policy/ was influenced by political considerations, did **not** mean that decision must be legislative → Features commonly associated with decision by exe govt which are 'quintessentially' administrative in character
3. Qld Supreme Court pt out that there is a line of authority which treats Prison administration decisions as unreviewable
 - SC appears to have created distinction between decisions of an administrative character & "managerial" decisions about prisoners – managerial decisions non-administrative

5. Borderline Admin / Judicial Decisions (46)

• 'Duty to proceed judicially' can be of administrative character (rules of NJ)

- Administrative tribunals normally have a duty to proceed judicially. Does this mean decisions must be characterized as judicial? NO.
- NB: Diff bet 'duty to proceed judicially' & 'judicial power' (*Hamblin v Duffy*)
- Not phrase to identify body exercising jud power – used to refer to bodies subj to rules of natural justice & procedural fairness

• Features of Judicial Power (not reviewable)

Capacity to:

- Conclusively determine facts & law in a dispute between two interests
- Decide that there has been a breach of the criminal law and to impose a criminal penalty