

# **Administrative Law**

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## Problem question structure

*Read the question closely to see what it is asking – make sure to only address what the question is asking you to, and keep in mind who you're advising*

### ADJR Act jurisdiction

1. Jurisdiction – s 3 (decision, administrative character, under an enactment)
2. Standing – 'person aggrieved'
3. Grounds of review – ss 5&6
4. Remedies – s 16

### Commonwealth constitutional or state common law jurisdiction

1. Jurisdiction – 'officer of the commonwealth'
2. Identify remedies – which one is being sought? (state what this will require in terms of jurisdictional or non-jurisdictional error)
3. Standing
4. Grounds of review + jurisdictional error – common law grounds of review + *Project Blue Sky* analysis for jurisdictional error
  - 1<sup>st</sup> step – which grounds of review?
  - 2<sup>nd</sup> step – does the error constitute a JE?
  - If not, is it on the face of the record? (State jurisdiction only)
5. Final statement on remedies – which remedies are likely to be awarded

# Judicial Review

## Introduction to judicial review

### What is judicial review?

- Judicial review reviews actions/decisions on the basis of legality
  - The basic role of JR is to determine legality of a decision
- 'Ultra vires' (beyond law) is the jurisdiction of JR
- JR was initially judge-made common law → judges gave themselves the power of JR
  - One way of justifying this power is the limited scope of JR (limited to the legality of an exercise of power). IE – judges may only decide if a decision was ultra vires or intra vires.

### What can JR remedies achieve?

- Historically JR developed due to prerogative writs as a remedy (prerogative writs allowed power/authority to be limited by order of the crown)
  - eg: writ of certiorari – decision is quashed (nullified), writ of mandamus – requires public official to exercise their power in accordance with law.
- Traditional administrative law remedy is to have decision quashed + remade according to law
  - Judicial review does not substitute the original decision in the same way as an appeal – because the authority to make that particular administrative decision has been given to that body not the courts.

## Context of contemporary JR and AL

### Contemporary JR exists in the context of privatisation:

- Privatisation is the move away from the welfare state/administrative state and towards a market-based system.
- The welfare state developed optimistically – with the idea that the government could and should solve a number of societal problems (this idea was popular in the mid 20<sup>th</sup> century, post-depression)
- 70s + 80s marks the start of a move towards privatisation.
- Why was there a move towards privatisation:
  - Government debts
  - Acknowledgement that government may not be the most efficient system
  - 'regulatory capture' – unnecessarily limiting businesses.
- Examples of privatisation:
  - Selling of government services (eg, power, banks, telecommunications, water) to private operators. It isn't as clear how accountability mechanisms will apply to these services.
  - Contracting out government services. Adds an extra layer between the government and the consumer/customer. Can AL apply to actions of a company that is contracted to provide certain government services?
  - Despite this privatisation, the state still currently does a lot.

Issue: which decision-making functions should be regulated by public law?

- This is historically contingent based on which functions government should be carrying out.
- There is debate/argument about what are or should be public functions – as a result there is an issue of who should decide if something is a public administrative function.

The definition of administrative law as between governors and governed tends to allow AL to apply to 'private' institutions carrying out 'public' functions (depending on how those public functions are defined).

### ***Datafin* and a functional approach to defining AL**

- *Datafin* does not represent the law of Australia (the applicability of this case in Australia will be looked at later).

What does it mean to observe that *Datafin* is about the availability of the common law courts' supervisory jurisdiction?

- Supervisory jurisdiction has limited scope (this is linked to the idea of JR as a last resort)
- 'Supervisory jurisdiction' – can be given by common law, by statute or by constitution. This jurisdiction is distinct from appeals jurisdiction.

Facts of *Datafin*

- Takeover Panel, a 'remarkable' institution for a number of reasons:
  - A regulator – but the Panel wrote its own code, applied that code and adjudicated disputes on whether the code had been breached (as well as having some enforcement mechanisms)
  - The Panel was wholly 'private' → it exercised neither statutory nor prerogative power (and therefore, did not exercise public power). Also not a government department, and not established by statute.
  - However, the powers of the panel did not arise under private law (eg, contract) as there was no contract.
  - The Panel has de facto power – as opposed to having actual legal power.
    - Due to sanctions that the panel could apply and because, under statute, sanctions could be applied by a statutory decision maker if a breach was found by the panel
    - The court also pointed out that the government was aware of and allowed the job of the panel to continue.
- The court stated that there is nothing inherently wrong with self regulation → the fact that the Panel is a self-regulating body was not a problem for the court.

Legal issues in the case

- Key question of the case:
  - Did the court have jurisdiction → IE, did the court have power to apply JR to decisions of the Panel?
- Approach of the court in answering this question:
  - Found that JR may only apply to public functions, therefore the function of the panel must be addressed – was the Panel performing a public function?

- However, some decision makers are excluded from JR jurisdiction – despite performing a public function – for power based on contract (therefore, the approach is mostly functional, but with this exception)
- Key point of the case:
  - Mere fact that a court has JR jurisdiction in relation to a non-government body doesn't mean the full rules of JR will apply → different rules/arguments will apply in relation to different bodies.
- 'Practical issue': assuming the decision was reviewable (IE – under the court's jurisdiction) could a remedy be issued?
  - Despite finding that the court had jurisdiction, no remedy was issued.

Functional approach/test of public function:

- If the body/institution in question didn't perform this function would the government step in?
- Is this body or regulator 'plugged in' to a wider government system of statutory regulation?

The Panel in *Datafin* met both these requirements. This approach differs from an institutional approach, as the institutional approach looks at the institutional position the decision maker holds.

### **Approach to Administrative Law under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (ADJR)**

Purpose of ADJR:

- Make process of JR easier + more available
- Partially codifying JR (eg, ss5 & 6, setting out grounds of legality review)
- *Datafin* provided much more general grounds for review → in this way the ADJR makes grounds of review clearer (which can be helpful for administrators, giving clear guidelines)
- ADJR does not 'codify' in the sense of preventing further development of common law
- ADJR assumes/clarified state/federal jurisdictional bases for JR
- ADJR makes the process of applying for JR clearer → there is no need to apply for a particular remedy (as with the types of prerogative writs in the UK common law)
- Gives right to reasons, under s13. This is important because some ground for review cannot be made out unless reasons for decision are known.

What actions/decisions can be reviewed under ADJR?

- Administrative decisions made under an enactment.
  - Section 5 refers to 'decisions to which this act applies'
  - That term is defined in section 3 as including an 'administrative decision' made 'under an enactment'.

Could actions of a non-government decision maker be reviewed under ADJR?

- Yes → if operating with statutory power
- The Panel in *Datafin* would not be reviewable under ADJR.

Is the applicant entitled to a remedy under ADJR if the grounds of review are made out?