ADMIN EXAMINABLE TOPICS

Topic 9: Delegated Legislation
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What is delegated legislation?

Laws made by the Executive (and sometimes Judicial) branch, after Parliament delegates to them their law-making powers.

Delegated legislation = Subordinate legislation = Legislative Instruments

There are hundreds of types:

For example:
- Regulation = made by Ministers
- By-laws = made by Councils
- Court Rules = made by courts
- Ordinances = made by eg. Territories (old term)
- Plans of Management = made by eg. fisheries

Basic rules for del leg can be found in…

Subordinate Legislation Act 1989 (NSW)
Legislative Instruments Act 2003 (Cth)

Section 5 – *Legislative Instruments Act 2003* (Cth)

(1) … a legislative instrument is an instrument in writing:
   (a) that is of a legislative character; and
   (b) that is or was made in the exercise of a power delegated by the Parliament.

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
   (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
   (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right

Meaning of ‘Legislative Character’

- Full Federal Court in *Minister for Industry and Commerce v Tooheys*: ‘the distinction [between delegated legislation and administrative decisions] is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases’

- e.g migration act = general rules minister has power to reject refugees visa act of administration is specific application of law to specific person e.g. Sharon from Tuscany wants to get refugee visa status
Why does delegated legislation exist?

**Expediency**
(quick to make and change)

**Specialist**
(can go into detail by the govt body that specialise in the area)

“[T]he history of delegated legislation ... reflects the **tension between the needs of those who govern and the just expectations of those who are governed**. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a **speedy and flexible mode of law-making**. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realisation by the imposition and enforcement of appropriate controls upon the power of subordinate legislators...”


- you should only pass legislation that is constitutional
- **parent legislation** = legislation that empowers someone in the executive branch to make delegated legislation e.g fisheries act = parent act s 17 we empower minister to determine jail time for catching endangered species
- **delegated legislation** = minister will use delegated law making power to pass regulations. Because they are made under the parent act they have all the power and force of the parent act. It is legislation.
- **administrative decisions** – being made that affect our lives. e.g merits review AAT e.g you caught yellow trout goes against endangered species regulations therefore im suspending your fishing license

So, if I don’t like a decision made under Del Leg, I can attack it several ways. Eg:

- The Parent Act is unconstitutional!
• The Del Leg is outside what’s allowed by the Parent Act!
• The Decision itself is faulty!

**Constitution + parent act**

• Parl can delegate HUGE areas of law-making power to Exec.
• So, it is hard to find a Parent Act unconstitutional.
• This made clear in *Dignan* (1931) HC.

*Meakes v dignan (1931) HC*

**FACTS:** Transport Workers Act 1928 gave GG (ie. Cabinet) broad powers to make any regs he wants on transport workers. Labor Govt couldn’t get bill through that stated that union wharfies must be prioritised over non-union ones, so used the reg-making powers to make this law. Was this circumvention of the Senate constitutional (dodgy didn’t go through parliament)?

**HELD:** Yes. As long as it fits within a constitutional “head of power”, it can be delegated to Exec. This fit within the trade and commerce power. HC suggested, however, that you can’t delegate an ENTIRE head of power over to the Exec e.g GG can make regulations on anything to do with trade and commerce, anything less is constitutional.

**2 ways of challenging delegated legislation:**

1. It wasn’t implemented properly (certain things you have to do)
2. The delegated legislation that was passed was beyond the scope of the Parent Act

**1. Implementation:**

• Exec must abide by proper process for making Del Leg.
• This involves:
  a) Public Consultation
  b) Publication
  c) Parliamentary Review
  d) Sunsetting

**a) Public consultation:**

• For some types of Del Leg, Exec is obliged to consult with public before writing a law and passing it: NSW Act, s5; Cth Act, s17.

• Generally, however, if this not done, it will not invalidate the final Del Leg.

**b) Publication:**

• Once Del Leg is made, it must be made available to the public.
• In the past it had to be published in a “Gazette”.

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Now it may be “announced to the public” by being placed online: Cth Act, ss20.29; NSW’s Interpretation Act 1987, s23.

If Cth Del Leg is not registered online it is unenforceable: ss31.32.

Not clear what position of this is in NSW.

Golden-brown v hunt (1979) actsc

FACTS: Del Leg (ordinance) quickly passed to allow police to forcibly remove protesters at the first Aboriginal Tent Embassy. Police moved in mere minutes after “notification” placed in Gazette.

ISSUE: it wasn’t published public wasn’t consulted

HELD: The notice provided was not clear and did not give info on where one could find the actual Del Leg. However, this did not invalidate the Del Leg, for it was just a technicality. ACT Govt ended up passing retrospective laws to protect police to cover all their bases.

NOTE: This is a famous case, but modern legislative changes suggest this no longer good precedent.

c) Parliamentary review

- TABLING: Del Leg must be laid before both Houses of Parl.
- SCRUTINY: Once tabled, Del Leg will be scrutinised to see if it is in line with Parent Act to see they are empowered by it. Usually done in Upper House Committee.
- DISALLOWANCE: Upon scrutiny, MP may move that it is disallowed. If motion accepted, it is disallowed.
- If tabling etc not done, Del Leg is rendered ineffective: eg. Cth Act, s38.

d) Sun-set Clauses –

Delegated legislation is automatically repealed after 10 years (in Cth: s5) or 5 years (in NSW: s10) and then must be remade: Cth Act, s50.

Del leg must be within Scope of parent act

Del Leg must be reasonably proportionate, appropriate and necessary to purposive Act: SA v Tanner (1989) HC.

Sa v tanner (1989) HC- issue of degree

FACTS: SA’s Waterworks Act 1932 allowed Governor to make regs for “regulating, controlling or prohibiting” land use to reduce water pollution in certain zone. Govt used power to make regs prohibiting construction of piggeries, zoos and feedlots. Mr/s Tanner wanted to build aviary (classified as a “zoo”).

ISSUE Was this ban on all animal habitats excessive and beyond scope of Parent Act?
HELD: No. Gov’s regs are within scope because they are “reasonably proportionate”. (they do affect water pollution) The language of SA Act was broad, and thus it was open to the Gov to do such excessive things in this broad power.

*Vanstone v Clark* (2005) *FC*

**FACTS:** Under *ATSIC Act*, Minister can suspend ATSIC Commissioner for ‘misbehaviour’ (s40) and make del leg (“determinations”) on what type of stuff counts as “misbehaviour”. Min made determination (cl5(1)(k)) saying “misbehaviour includes conviction for prisonable offence – even if not sent to prison”. Mr Clark was convicted and fined (but not sent to prison) for “obstructing police” during pub dispute – and was suspended from ATSIC. Clark challenged Del Leg.

HELD: cl 5(1)(k) not reasonably proportionate, and thus invalid. Looked at phrasing of the Parent Act intended for “misbehaviour” to mean serious stuff. This type of charge is relatively minor. Too broad to say anything “prisonable”.

*Shanahan v Scott* (1957) *HC* – ‘necessary or expedient’

**FACTS:** *Marketing of Primary Products Acts* (Vic) authorised Governor to make regs that are ‘necessary or expedient’ (very restrictive) for creating an “Egg Board”: s43(1). Gov made reg saying “eggs can’t be placed in cold storage without Board’s consent” to screw NSW eggs being sold in Victoria.

HELD: This reg is beyond scope of Parent Act. It was not “necessary or expedient” to do this. This was to add some extra purpose to the Act of protecting Victorian farmers, which is beyond the scope. “necessary or expedient” is a phrase of limitation.

“If a power enabled the making of regulations ‘providing for all…purposes….necessary or expedient for the administration of the Act’ then the regulations must be confined to complementing the legislative plan, not to supplementing or extending it.”

- *Shanahan v Scott* (1957) *HC*

*Paull v munday* (1976) *HC* – the end don’t always justify the means

**FACTS:** *Health Act* gave Governor power to make regs “for or with respect to … prohibiting … the emission of air impurities from fuel burning equipment” . Gov made Reg 7 prohibiting the lighting or burning of open fires without approval.

HELD: Reg was invalid. Gov could not make ANY reg that lead to clean air, only those dealing with fuel burning equipment. The ends don’t justify the means.

*Swan Hill Shire v Bradbury* (1937) *HC* – the power to regulate something is not the power to prohibit it completely

**FACTS:** The Local Govt Act 1915 (Vic) s 198(1)(a): local council could make by-laws “regulating and restraining the erection and construction of buildings”. Council made a bylaw prohibiting the erection of *any* building except with council’s approval.
HELD: By-law was invalid. Power to make laws *regulating* subject matter does not extend to *prohibiting it all together!* Even the phrase “restrain” does not allow you to “forbid”. The object of the Act was not to make building an exceptional privilege bestowed by the Council.

*Foley v Padley (1984) HC*

**FACTS:** Parent Act allowed Ccl to make by-laws *regulating, controlling or prohibiting* any activity in Rundle Street Mall that was in the opinion of the council likely to affect the “use or enjoyment of the mall”. Ccl made by-law forbidding anyone from distributing *anything* in the Mall.

**HELD:** This was valid. While this by-law might touch on items that don’t hurt people’s enjoyment of Mall, it was still reasonably targeted at stuff likely to affect “use or enjoyment”.

*King Gee Clothing v Cth (1945) HC* – ‘uncertainty as to what deleg law is’

**FACT:** Parent Act allowed Prices Commissioner to make del leg setting a maximum price for an item sold in Australia. The Commissioner set the maximum price using a convoluted formula with various undefined concepts.

**HELD:** Del Leg is invalid. PC failed to use power in a way that lived up to basic objective standards. This was the ground of “uncertainty” and it’s very rare.

*Minister for Primary Industries v Austral Fisheries (1993) FC* ‘unreasonableness’ = amounts to error of law = illegal

**FACTS:** Del Leg (a fisheries management plan) was based on statistical mistake.

**HELD:** This del leg is invalid. This is because it was capricious and irrational. They talked about it in the context of “unreasonableness”. This is a ground of review you will learn about in JR. Normally, however, “grounds of review” are not used to invalidate Del Leg, but this was an exceptional case.

**DECISIONS**

- If Del Leg is valid, and one wishes to challenge the administrative decision made under it, it is treated like any administrative decision made under regular legislation.

- That is, it can be subject to merits review (eg. at the AAT) or judicial review (at the courts – which you will begin learning about next lecture!)

So! If I’m unhappy with a decision made under del leg, I could…

- Argue the decision is invalid!
  - (in MR or JR).
- Argue the Del Leg is invalid!
• either due to a technicality (eg. tabling) or “beyond the scope of Parent Act”

• **Argue the Parent Act is invalid!**
  o Because unconstitutional (very hard! Remember Dignan!)
TOPIC 10: JUDICIAL REVIEW MAP

Steps:

1. Where is the administrative decision maker? Is it a Clth or state (NSW) matter? Look to the Act under which the decision has been made

   a) If Clth:

      ⇒ Act could determine whether you get judicial or merits review (may exclude one)

      ⇒ merits review – got to AAT Act

      ⇒ judicial review: 3 options

         1) ADJR Act – common law legislation
         2) S 39B judiciary Act – common law judicial review avenue
         3) s 75 Constitution - common law judicial review

   b) If NSW - cant go to federal court of Australia or federal ombudsman (may exclude one) – prob wont be in exam

      ⇒ Act could determine whether you get judicial or merits review

      ⇒ Have choice of merits review or judicial review

         o Merits review = nsw civil & administrative tribunal

         o Judicial review = to take common law judicial review route
Common Law:

1. HC
   a. S 75 Clth Constitution
   b. S 39B Judiciary Act

2. Federal Court: s 39B Judiciary Act

3. NSW Supreme Court: s 23 SCA (NSW) – not our main focus
JUDICIAL REVIEW? WHAT IS IT

- judicial review (‘JR’) is a fundamental aspect of the rule of law, is meant to uphold the principle of legality, and is a key mechanism of Dicey’s understanding of Separation of Powers.

- JR is about how Courts can supervise the boundaries of an administrator’s legal powers. However, in the process of supervising, Courts cannot exercise those executive powers. It marks the limit of administrative power.

- Therefore, JR is concerned with the lawfulness of decisions made by the executive, not whether their decisions are wise and fair. (ie legality/merits distinction)

Stages of Judicial review:

To successfully bring a JR application:

1. Court must have jurisdiction to conduct JR
2. Court must accept issues are justiciable – can they be thinking about it
3. Applicant must have standing
4. Court must have power to grant a remedy
5. There must be a ground of review – is there a way to review it? e.g was the decision made because of irrelevant considerations, or were there relevant considerations that should have been considered?
6. Legislature must not have validly excluded the court’s review jurisdiction (i.e. privative clauses – (which validly excludes any kind of review)
**JURISDICTION**

**What is it?**

- Jurisdictional questions are central to Admin law. They relate to:
  - the scope of a decision maker’s power to decide; and
  - the scope and authority of court(s) to interfere with those decisions

**Jurisdiction and judicial review:**

- A court can only hear a matter if it has jurisdiction to do so.
- What authority and scope is given to different courts to review the decisions of an Administrative Decision Maker (ADM)?

We need to understand the different ways in which the judicial review jurisdiction of the High Court, Federal Court and NSW Supreme Court operate.

**So we will be focusing on what’s highlighted** (common law for the time being):

<table>
<thead>
<tr>
<th>If you’re in the Cth</th>
<th>CL &amp; ADJR Jurisdiction</th>
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<tr>
<td>If you’re in NSW</td>
<td>Common Law Jurisdiction</td>
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1. Jurisdiction:
   a. Clth - HC - s 75 Clth constitution (common law)
   b. Clth - Federal Court:
      1. Common law jurisdiction from s 39B of the Judiciary Act 1903 (Cth)
      2. Statutory jurisdiction under the ADJR Act
      3. Federal Circuit Court - ADJR Act
   c. State:
      1. CL judicial review – s 23C SC Act 1970 (NSW)
      2. NSW civil & administrative tribunal
1. **Cth Jurisdiction (High Court) s 75(v) Commonwealth constitution**

The Constitution specifically vests authority and jurisdiction in the High Court to exercise judicial review via S75 (v):

- **CONFERS** judicial review jurisdiction on HCA as part of its original jurisdiction (HC has appellate & original jurisdiction can sue Cth directly first instance)

- **REMEDIES**: gives power to HCA to issue *injunctions*, and writs *mandamus* and prohibition
  
  - Section 75(iii)CC less significant for judicial review in practice, but remains relevant (and of growing importance)

**s 75 CC: In all matters:**

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; - e.g if minister
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) *in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;*

the High Court *shall* have original jurisdiction. = our focus
Cases:

*Whybrow’s case 1910*: s 75(v) was of critical importance in ensuring that the HC’s ability to supervise all public officials. It was central to the rule of law and entrenches judicial power to protect people from unlawful official action where the illegality involves the violation of constitution or otherwise.

*Tramway case 1914*: s 75(v) operates to confer to the HC with original jurisdiction which statute cannot directly limit. Parliament can’t stop HC’s power. Most HC power can be altered by statute. It confers 3 remedies which being grounded in constitution can only be lifted by referendum.

3 key elements to s75(v)CC

S75(v) ‘In all matters: …. in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction.

1. ‘matter’
2. Writs/remedy present?
3. Against ‘officer the Cth’?

1. ‘Matter’

Per below cases: *Re McBain; Ex part Australian Catholic Bishops Conference (2002) HCA*

- ‘matter’ is more than a legal proceeding
- Reminds then that because matter must involve a controversy. A person must have more than a theoretical interests in its resolutions: must be of immediate direct effect upon them (so standing and matter intertwined) – rights, duties and liabilities)
- Must be an immediate right, duty or liability to be established by the Court’s determination
  - (the conference had none of this)
  - the conference had theoretical interests in resolution of the case
- Hypothetical questions do not give rise to a matter
- Federal judicial power has as a core duty to be exercised to ‘quell’ matters

*Re McBain; Ex part Australian Catholic Bishops Conference (2002) HCA 16, per HayneJ:*

•
Facts: federal court of Australia considered inconsistency of legislation. The legislation in question was the Infertility Treatment Act 1995 (Vic) – state leg. And at Clth level s 22 of the Sex Discrimination Act

federal court of Australia decision: held that the Vic provision was invalid because it was inconsistent with the Sex Discrimination Act. The Victorian Act limited fertility treatment to women who were in relationships with a man.

Dr Mcbain wanted to provide fertility treatments to a single woman – prevented by Vic legislation

FCA – struck out victorian legislation for inconsistency with s 22 of the sex discrimination Act

The Australian Catholic Bishops conference tried to object, they weren’t apart of the case, they went to HCA under guise of amicus curiae = here as friend of court. Amicus curiae cannot appeal a decision, so the conference tried to seek judicial review, they argued that the HCA had original jurisdiction because it was a “matter” they sought a fiat by GG

HCA: Does the HC have jurisdiction to hear this? HC said no, this did not give rise to a “matter”. CJ Gleeson, the starting point is the nature of the matter, people who are not parties to litigation do not have a claim to quash that decision, there is no justiciable issue between Dr Mcbain and the conference. Was about controversy.

2. HC’s original jurisdiction (writs)

• High Court has original jurisdiction under the Constitution, which derives from common law. As we know, historically, JR was a CL matter.

• Writs form part of the common law authority vested in the Crown. They are a form of pleading asking a court for a particular remedy. More specifically, writs are a form of prerogative review and remedy for unauthorised actions.

• The basic functions of these remedies is to:

  o ‘quash’ (ie deprive of legal effect) to make decision invalid (writ of certiorari) –jurisdictional error (after the fact)

  o prevent illegal acts or decisions (prohibition)

  o require performance of a duty by an Administrative decision maker they are required to do under statute (mandamus)

Writs & remedies:
The writs did not operate as responses to grounds for review. They were like a formula that required certain ingredients that would (or would not) enable a Court to grant a remedy.

The way remedies operated therefore created the jurisdiction for courts to exercise judicial review

**Limits: S75(v)CC, Remedies & JE**

- Remedies focus: there is no direct mention of grounds for review in S75 (v).
- Look to CL did the Original decision maker act under any power at all?:
  1. The action is unconstitutional or
  2. because it is not authorised by statute or general law
- Access to the remedies- and therefore HC’s jurisdiction- is dependent on fulfilment of the technical requirements of writs
- Certiorari not mentioned in s 75 (v) although injunctions (a non prerogative writ) are.
- All writs mentioned in 75 (v) need a certain kind of error to be present before the remedy can be invoked. These errors are called *jurisdictional errors* (week 6).
  - JE = the administrative decision maker has made an error in its own jurisdiction = fatal error

3. ‘Officer of the Cth’

- When drafted in 1901, the executive government was small. s 75(v) determines jurisdiction of HC institutionally- in terms of the ‘officers of the Commonwealth’ rather than its function, which limits its operation
- *Whybrow’s case* – officer of clth applies to all Clth officers both judicial and non-judicial e.g minister, departmental employee
- *Examples R v Murray & Cormey ex parte Clth 1916*: officers of Clth include Justice Isaac:

  The expression officer of the clth has a real meaning that the person referred to is individual appointed by Clth and therefore constitution takes his clth official position as in itself a sufficient element to attract the original jurisdiction of HC.
  - public servants
  - community members appointed to statutory committee
Today, is a govt owned corporations, even if performing a ‘public’ function, open to review under 75 (v)CC? ie privatisation limit?

- if privatised it could be beyond review
- if purely govt owned could be an officer of cth

See NEAT v AWB (In Australia, no JR). Cf: R v Panel on Take-Overs and Mergers, ex parte Datafin (In UK, JR possible). See C&M ch 2.5.1 – 2.5.21. Issue: Functions v’s source/structure.

Neat v AWB – look to the source of that body’s power is it a public law source? Was this body created by statute? Is it a statutory body if so it is regulated by administrative law BUT if body was incorporated/registered with ASIC either a PTY or LTD etc then it is regulated by corporate law. Whether the body has monopoly or appears to perform public functions is irrelevant. It only matters how the body was created.

The majority of the HC demonstrated a distinct unwillingness to extend public law remedies to private bodies.

Facts:

- Respondents were AWB Ltd and its wholly owned subsidiary AWB International Ltd (AWBI)

- AWB Ltd had originally been established in 1939 as a government body to regulate the wheat market and operate a single desk – that is operate as the only exporter of wheat in Australia – until it was privatized in 1999 when it became a company limited by shares

- There were 2 classes of shares in AWB – A class shares had voting rights and controlled by the board and were only issued to wheat growers, B class shares were freely traded on the ASX
• s 57 Wheat Marketing Act 1989 (Cth) provided that a person with the exception of AWBI could not export wheat unless the wheat export authority – a statutory authority had given its written consent to that export

• Before giving consent the wheat board authority must consult with AWBI and must not give a bulk export consent without the prior approval in writing of AWBI

• NEAT was a domestic and international grain trader who had applied on a number occasions for the consent of the wheat export authority for the bulk of export drum wheat to Italy and Morocco

• the consent had been withheld because AWBI declined to give its approval

• NEAT challenged refusal under ADJR Act

Held: Joint majority of McHugh, Hayne and Callinan JJ:

• They described the scheme as giving AWBI a private corporating a role in a scheme of public regulation which presented the question as to ‘whether public law remedies may be granted against private bodies

• Court held No on 3 grounds:
  1. the structure of s 37 and the roles which the 1989 Act gave to the 2 principal actors – the authority and AWBI
  2. ‘private’ character of AWBI as a company incorporated under companies legislation for the pursuit of the objectives stated in its constituent document here maximising returns to those who sold wheat through pool arrangements
  3. it is not possible to impose public law obligations of AWBI while at the same time accommodating pursuit of its private interests

• Kirby J dissented – p 61 of textbook

Datafin U.K: To determine whether an entity is public or private you ask does the entity do something that looks like a public function? If yes, it is a public actor therefore it should be regulate by judicial review

Facts

• The Panel of Take-Overs and Mergers is private body which regulates the acquisition and mergers industry within the City of London; it cannot be ‘opted-out’ of.
• Datafin made a complaint that one company had breached the Panel’s code of conduct
• The panel refused to take action
**Issue** Could a judicial review claim be made against a private body?

**Decision**

- Yes, although the claim itself failed as there were no grounds upon which to quash the decision
- Private bodies which effectively performed public law functions are amenable to judicial review

The *Datafin* test recognises that some private entities operate in a public law context, rendering judicial review appropriate. The *Datafin* test considers both the source and nature of the power being exercised. Judicial review is attracted where the private body exercises public law functions or the exercise of power has public law consequences. It remains undecided whether the *Datafin* principles form part of Australian law.
2. Cth - Jurisdiction (Federal Court) Judiciary Act

Federal court:

- Federal Court was set up by *Federal Court Act 1976 (Cth).*

- Today, Federal Court has two sources of JR jurisdiction:
  1. ADJR Act
  2. Judiciary Act

- Why go to federal court? It’s cheaper and the federal court is also empowered to deal with ADJR. It can run CL jurisdiction and ADJR arguments alongside.

39B Original jurisdiction of Federal Court of Australia

Scope of original jurisdiction

(1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or
(c) **arising under any laws made by the Parliament**, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

*Note: Paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia.*

**Explanation:**

- **s39B(1) and (1A) to the Judiciary Act**, which gives identical original jurisdiction to the FC as enjoyed by the HC (ie as we will see in *Evans v NSW*).
- **NB: s44(1) of the Judiciary Act** means HC can also remit matters to the FC
- **O31.01 of the Federal Court Rules 2011 (Cth):** can however combine S39B and ADJR applications
- **NOTE:** Federal Circuit Court has same ADJR jurisdiction as Federal Court, does not have the Federal Courts Judiciary Act jurisdiction
- **You can also challenge decisions of GG which ADJR can’t**
- **s 39B(1A) – supplements federal court’s constitutional writ of jurisdiction by adding jurisdiction for any non-criminal matters arising under federal legislation**

**s39B(1A)(c) Judiciary Act**

- **FC has JR jurisdiction in all matters ‘arising under any laws made by the parliament.’**
- **This is important because:**
  - plugs gaps under the ADJR re non-statutory executive powers
  - **can review legality of delegated legislation** (not reviewable under the ADJR, as we shall see shortly)
    - It vests in the federal court the entirety of jurisdiction which s 75(v) confers on HC *deputy commissioner taxation v Richard walter* but it also gives the court more – the power to challenge delegated legislation (regulations)
  - does not matter whether the ADM is ‘an officer of the Cth’ (that limit is on s 75 (v) only HC)

This matters for delegated legislation:
s39B(1) JA

general judicial review of administrative decisions (under Acts & DL)

BUT NOT POSSIBLE to challenge DL validity directly under s 39B(1) or s 75(v) because they deal with writs.

s39B(1A)(c) JA:

avenue to challenge validity of DL directly

Constitutional Judicial review? Modern trend (irrelevant)

- In 1990s, Parliament tried to curb the JR powers of the FC (in context of migration). Yet, s 75 (v) remained unscathed, so HC was flooded with migration cases

- While the FC jurisdiction now restored (and Migration Act amended), an important result:

  **HCA has ‘rebadged’ the s 75(v) remedies:** no longer ‘common law’ avenue through prerogative writs: now ‘constitutional writs’ and ‘constitutional injunction’, [Refugee Review Tribunal; Ex Parte Aala [2000] 204 CLR 82

- Another key broadening of JR jurisdiction is s 75 (iii)

- HC has been prepared to hear JR application under this section (as opposed to s 75(v)), and grant remedy although no jurisdictional error was shown (ie requirement for s75(v)).

- The core case is *Project Blue Sky*, and one of the core reasons was the way the court read ‘The Commonwealth’ under s 75 (iii) to include government owned corporations (avoiding limits of ‘officer’ in s 75(v)).

- ‘Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this court of its Constitutional jurisdiction to enforce the law so enacted’ - Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-3
**Summary: ADJR Jurisdiction** - follow this process

- **Section 8:** FC and FCC only have ADJR jurisdiction, but in what circumstances?

- Applications can be brought to review in circumstances where:
  - ‘a decision to which this Act applies’ (s 5);  
  - proposed and actual conduct engaged in for the purpose of making ‘a decision to which this Act applies’ (s 6), and  
  - a failure to make a ‘decision to which this Act applies’ (s 7).

- **Section 5 – 7** tells us: ‘decision to which this Act applies’, which is defined in section 3(1) as:
  - A decision (see Bond)  
  - Of administrative character (See Aerolinas)  
  - Made under an enactment (see Griffith Uni v Tang)

- Then turn to cases to interpret these three elements of section 3(1). If criteria met, ADJR jurisdiction present.
Section 8 Administrative Decisions Judicial review Act 1977 (ADJR)

8 Jurisdiction of Federal Court and Federal Circuit Court

(1) The Federal Court has jurisdiction to hear and determine applications made to the Federal Court under this Act.

(2) The Federal Circuit Court has jurisdiction to hear and determine applications made to the Federal Circuit Court under this Act.

Question: But when (and in what circumstances) do these courts have jurisdiction? s 8 just broadly grants it

Section 5 ADJR ‘Decisions’

5 Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds: ….

Explanation: Standing is granted to a person who is aggrieved by a decision to which this act applies

Section 6: ‘Conduct’

6 Applications for review of conduct related to making of decisions

(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the conduct on any one or more of the following grounds: ….

Explanation: Standing is given to a person who is aggrieved by the conduct (conduct leading up to decision or after or proposes to conduct (covers past, present & future)

Section 7 ADJR ‘Failure to make a decision’

7 Applications in respect of failures to make decisions – where an administrative decision maker were supposed to make a decision

(1) Where:

(a) a person has a duty to make a decision to which this Act applies;

(b) there is no law that prescribes a period within which the person is required to make that decision; and

(c) the person has failed to make that decision;
standing = a person who is aggrieved by the failure of the first-mentioned person to make the decision (e.g. council worker on development application) may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

Section 3 ADJR ‘A decision’

3 Interpretation

(1) In this Act, unless the contrary intention appears: …

_**decision to which this Act applies**_ means a _**decision**_ of an _**administrative character**_ made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

(a) _**under an enactment**_ referred to in paragraph (a), (b), (c) or (d) of the definition of _**enactment**_; or

(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of _**enactment**_;

**other than: (these are excluded)**

(c) a decision by the _**Governor-General**_; or

(d) a decision included in any of the classes of decisions set out in _**Schedule 1**_.

s 3(1) ADJR Test for jurisdiction

- So, the ADJR Act test for jurisdiction requires there be a ‘decision to which this Act applies’, which is defined in s3(1) as requiring:
  - A decision
  - Of an administrative character
  - Made under an enactment (further defined in s3(1))

- Note: some other decisions are explicitly excluded in Schedule 1, and decisions of the GG.

**How have courts interpreted these provisions?**

The High Court in _Griffith v Tang_ warn against treating these as discrete requirements (ie read ADJR Act as a whole)

BUT each element has nevertheless involved important thinking about our key theme of separation of powers

S 3 (1) : Important Exemptions
1. Decisions made by Governor General exempt from JR under ADJR

2. Decisions listed under Schedule 1 of the ADJRA are also exempt. You need to look at these, but note they include certain decisions made in areas like tax assessment, criminal process, migration, security and defence

3. Important to note: if the decisions in question falls under exemptions, s 75(v)/s 39B jurisdictions remain open

1. What is a decision?

*Australian Broadcasting Tribunal v Bond* (2.4.8C) – facts below

1. A decision must be the **final or operative decision** which is determinative of the issue for consideration (it ends the controversy)

   - *Except:* if the statute expressly provides for an interim decision then this intermediate decision is also a ‘decision under an enactment’ and can also be a reviewable decision under the ADJR Act.

   *Australian Broadcasting Tribunal v Bond* – decision v conduct

   - the premier of queensland sued channel 9 for slander, channel 9 at the time was headed by Bond
   - the out of court settlement was large and it was suggested that Bond and channel 9 used the settlement to curry favour with the premier. Bond denied that he did this and then he admitted it on his own tv show
   - Issue: Australian Broadcasting tribunal launched an enquiry as to whether it should amend, vary or abolish Bond’s channel 9 tv licence
   - decision on facts: ABT publically issued a statement that Bond was not a fit and proper person to hold a broadcasting licence – a requirement of broadcasting at the time
   - But while ABT made statement it didn’t make a decision about suspending, varying or revoking his licence, they just determined one part of criteria –failed fit, proper test
   - Bond challenged this determination on facts and sought judicial review wanted it quashed.
   - In that case J Mason gave a leading judgment and said that in order for a decision to be a decision it needs to be a final and operative decision about changing, varying/abolishing a licence. Your legal rights need to be affected. His legal rights weren’t affected yet,
(there was no revocation of licence). Or it needs to be a substantive determination.

- It was found that the decision that Bonds was challenging was a preliminary finding of the facts

- However – an exception had been noted that where the statute actually provides for interim decisions to be made then it’s fine to challenge the decision

2. Or A decision must be a **substantive determination**.

   - Ie a ‘decision’ does not include ‘conduct engaged in for the purpose of making a decision’ under the ADJR Act s 6. ‘Conduct’ was read as the procedures along the way, the conduct of proceedings, not intermediate conclusions reached in the course of making a final substantive decision.

   **Edelsten v Health Insurance Commission** – elucidates what a decision is v conduct:

   - Dr Edelsten had been exploiting the medicare system by overservicing clients. He was reviewed by the health insurance commission and this review of a medical practitioner had several required stages

     1. the doctors themselves within the health insurance commission needed to do an investigation and prepare a report

     2. the report needed to go to the health insurance commission and the committee under it which makes its own report and makes a recommendation to minister

     3. minister would decide whether to restrict doctor Edelsten’s medical practice and ultimately whether to deregister him

   - Dr Edelsten intervened in process at step 2. He tried to seek review of the report when the committee had made a finding against him and had made a recommendation to minister to restrict his practicing licence

   - Held: Under the statute reviewing the decision at this point was not possible, it wasn’t a final or operative decision or substantive decision until the committee reported to the minister. Inbuilt process is still part of conduct leading up to final and operative decision.

     o Preliminary investigations and reports were not reviewable under the ADJR Act even though they were envisaged by statute.
Report only reviewable if it is a ‘condition precedent to the making of a reviewable decision’

So, ‘decision’ in section 5 read narrowly… Why? Because of section 6 – the conduct leading up to the decision, the conduct concerning and the conduct caused by the decision

‘Decision’ v ‘conduct’

So the HC in *Bond* read the scope of ‘decisions’ narrowly because of section 6 issue of ‘conduct’…

- ‘Conduct’ said to be ‘an essentially procedural ‘ concept which focuses on actual conduct of proceedings and NOT on ‘intermediate conclusions reached en route to final substantive decisions.’

- “It would be strange if conduct were to extend generally to unreviewable decisions which are in themselves no more than steps in the deliberative process and reasoning”

2. ‘Administrative character’

- Not defined in the ADJR Act.
- A question of what in fact it is that administrators do: how is it definable and distinct from Legislative decision making? Or judicial decision making?
- Consideration of key cases in *Griffith v Tang*, at 122. Gummow, Callinan and Heydon JJ: ‘of administrative character’: excludes decision of ‘legislative’ or ‘judicial’ character

*minister for immigration and commerce v Toohey* – CJ Bowen said that the distinction between legislative and administrative acts is referred to in many cases, the distinction is essentially between the creation and formulation of new rules of law having general application and the application of those rules to a case

- Main distinction is between administrative acts and legislative acts
  - Legislative: creation of a general rule of conduct without reference to particular case
  - Administrative: application of general rule to a particular case
- Administrative character is NOT legislative character.
- Factors tending to show an instrument is legislative in character:
  - Creates new rules of general application


- Has binding legal effect
- Has to be publicly notified in gazette
- Made after wide consultation
- Incorporates or has regard to wide policy considerations
- Cant be varied or amended by executive
- Can only be reviewed by parliament

**eg - Federal Airports Corporation v Aerolinas Argentinas** (1997) 76 FCR 582

- Federal Airports Corp was a government corporation
- Had power to make a ‘determination of the charge payable’ by airlines
- It made the determination to change the landing fees that would apply generally to all airlines (federal airports corporation)

**Question** = was whether the decision to make this general charge payable – was it legislative or administrative in character?

- it was making a decision about fees (administrative) but as a general rule not to a specific aircraft

**Held:** look at factors. *Must weigh general v specific* Does this new rule:

- Creates new rules of general application – yes
- Has binding legal effect - yes
- Has to be publicly notified in gazette – probably not
- Made after wide consultation – probably not
- Incorporates or has regard to wide policy considerations – probably not
- Cant be varied or amended by executive – yes (potentially administrative)
- Can only be reviewed by parliament – yes

This decision fell right on the borderline, the courts held that it was of administrative characters, that the federal airports corporation was doing their job and applying a fee. Also the corporation was a government corporation setting fees was part of the corporation’s business so as a result was considered to be of ‘administrative character’.

**in exam if you find that it is legislative character also consider administrative**

3. ‘under an enactment’

Section 3(1) defines ‘enactment’

*enactment* means:

(a) an Act, other than (excluding):

...
(b) an *Ordinance* of a Territory other than …; or
(c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than …; or
(ca) …; or
(cb) …; or
(d) …; and,
for the purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment.

- ‘Enactment’ is defined, but what amounts to ‘under an enactment’?
- Decision-maker’s power comes from a legislative source, ie statute (or regulations)
- Statute must give the decision-maker power to make the decision (not just create the decision-making body)

there was a Griffith university Act created Griffith university which gave it the power to delegated administrative decisions to various committees

The granting of PhD’s was given to the university directly by the act as a power and to the university counsel for higher education awards

Tang was thrown out of PhD program for academic misconduct.

**Issue:** Was the decision to exclude her made ‘under an enactment’ (under queensland equivalent of ADJR)?

**HC Held:** The decision to expel Tang was in very broad terms authorised by the Act but the decision itself did not affect legal rights or obligations under the Act it affected other rights and obligations. Ultimately, it was not a decision under enactment, thus no jurisdiction.

**To be made under an enactment:**

- the decision must be *expressly or implied required or authorised by the enactment*; and
- The decision itself must *confer, alter or otherwise affect legal rights or obligations*.

Full section:

enactment means:

(a) an Act, other than:

(i) the Commonwealth Places (Application of Laws) Act 1970; or
(ii) the Northern Territory (Self-Government) Act 1978; or

(iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or

(b) an Ordinance of a Territory other than the Australian Capital Territory or the Northern Territory; or

(c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A; or

(ca) an Act of a State, the Australian Capital Territory or the Northern Territory, or a part of such an Act, described in Schedule 3; or

(cb) an instrument (including rules, regulations or by-laws) made under an Act or part of an Act covered by paragraph (ca); or

any other law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act;

and, for the purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment.

**Concluding jurisdiction:**

- High Court - Original jurisdiction under the Constitution (s75(v)CC) (derives from common law)

- Federal Court has: deal with both in an exam
  - Common law jurisdiction from s 39B of the Judiciary Act 1903 (Cth)
  - Statutory jurisdiction under the ADJR Act

- Federal Circuit Court - ADJR Act

- NSW Supreme Court
  - Common Law jurisdiction from ss23, 69 Supreme Court Act 1970 (NSW)

**ADJR & CL Jurisdiction?**

- In NSW, there is only CL judicial review, but federally there are both CL and ADJR avenues for accessing judicial review.

- How do these avenues relate? In other words, what is the effect of ADJR on Common law/constitutional avenues?
• Common law (ie prerogative writs) remain open to access JR from HC (via section 75(v)CC) and FC (via s39B JA).

• **Statutory scheme therefore coexists with S 75**: both avenues are available, BUT check limits/thresholds questions of each before jurisdiction can be invoked

• **REMEMBER**: different avenues, different forms of application..

Reminder: Privatisation issue

• Is there jurisdiction for judicial review of non-government bodies?

• Unlikely to be common law jurisdiction in High Court or Federal Court
  
  o (although there is the UK – see Datafin 2.5.8C)
  
  o ADJR Act – High Court held there was no decision in *NEAT Domestic Trading v AWB* 2.5.12C
  
  o more it gets privatized more beyond administrative review

Jurisdiction – state courts

- State Supreme Courts
  - Common law jurisdiction as superior courts of record
    - *s 23 Supreme Court Act 1970 (NSW)*: the court ‘shall have jurisdiction which may be necessary for the administration of justice’
    - *s 69 Supreme Court Act 1970 (NSW)*: Proceedings in lieu of writs.
      - Some states have an equivalent to ADJR Act but NSW doesn’t
      - NSW therefore has **common law** judicial review
  - Note: High Court also has appellate jurisdiction – can hear appeals from state Supreme Courts (on JR of state government acts/decisions) and Federal Court (on JR of federal government)

- At NSW level we don’t need an officer of the Clth
Section 23 SCA 1970 (NSW)

23 Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

Section 69 SC Act 1970 (NSW)

69 Proceedings in lieu of writs

(1) Where formerly:

(a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
(b) ....
then, after the commencement of this Act:
(c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
(d) shall not issue any such writ, and
(e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
(f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) ....

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.
NEXT STEP (after figured out jurisdiction)- **Impediments to Jurisdiction:**

**Threshold issues:**

Are there any impediments to invoking federal judicial review jurisdiction?

1. **merits/legality distinction** (a separation of powers question)
2. **justiciability** (can the courts exercise JR in all cases)?
3. Standing
4. Remedies (in detail later)

1. **Merits/Legality: Separation of powers**
   
   • SOP doctrine.

   • As JR conferred under s 75(v) in Ch III CC, the question before courts can only be about the **lawfulness** of exec decisions and actions. This excludes questions and grounds based on **merit** (see *Green v Daniels*)

   • ie legality/merits distinction…

   ‘The Courts above all other institutions of government- have a duty to uphold and apply the law which recognises the autonomy of the three branches of government within their respective spheres of competence and which recognises the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by other branches of government’

   - Brennan J in *Attorneys-General (NSW) v Quin (1990)* 170 CLR 1

2. **Justiciability:**

   • jurisdiction = whether courts have authority to speak the law

   • Justiciability - should courts have the power to speak the law?

   • Justiciability is about the appropriateness of a question for judicial resolution: ‘the suitability for, or amenability to, judicial review of particular administrative decision or class of decisions’ (Chris Finn) –

   • Classic examples of non-justiciable areas:

     o **prerogative power** (non-statutory executive power)

     o **national security policy, defence**
– e.g decision to go to war

– *Council of Civil Service Unions v Minister for the Civil Service* (CCSU) [CB 2.3.8C]

– *Minister for Arts, Heritage and Environment v Peko Wallsend* [CB 2.3.9C]

– *Hicks v Ruddock and Others* [2007] FCA 299 [CB 2.3.16C]

• Justiciability is a concept that forecloses the exercise of jurisdiction.

• For more, see pages 394 – 401 textbook

3. Standing  pgs 402-417

We have 2 types of standing:

1. ADJR
2. CL

**Standing: function & purpose?**

• **Standing (locus standi)** in public law is about understanding there are tests to determine who can gain access to courts’ judicial review jurisdiction, and secure powerful remedies against administrative decision makers

• Standing rules at both common law & ADJR, although little practical difference today (*Right to Life*) [1005_ 56 FCR 50]

**Standing: ADJR v’s CL?**

• We need to consider this question at common law, and under the ADJRA, although in practice there is little difference today in approach (*Right to Life*)

• We also need to consider whether court’s are moving toward a less restrictive position, and ask what that may reflect or suggest about public law values in a time dominated by ‘the regulatory state’

• Excellent example: *Environment East Gippsland Inc v Vic Forests* [2010] VSC 335 [1]-[18]. This case gives a good summary of the leading cases and principles

This case involved Environment East Gippsland (EEG), an incorporated association, seeking an interlocutory injunction restraining VicForests from carrying out logging operations in State forest on Brown Mountain in East Gippsland.
The area of forest designated for logging was a major habitat for native fauna, in particular the endangered Long-Footed Potoroo and Sooty Owl. EEG asserted that such logging was unlawful given the environmental obligations upon VicForests to protect native fauna. EEG argued that such obligations were provided by a number of statutory provisions affecting the operations of VicForests, particularly those contained in the Sustainable Forests (Timber) Act 2004 (Vic) (SFTA) and the Flora and Fauna Guarantee Act 1988 (Vic) (FFGA), the Code of Practice for Timber Production 2007 (the Code), the East Gippsland Forest Management Plan (the Plan), and action statements concerning individual species (action statements) promulgated by the Department of Sustainability and Environment (DSE) and the FFGA itself.

HC Held:

‘The plaintiff must demonstrate that there is a serious question to be tried. It must prove, prima facie, a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending trial. In the context of this case it must show that it has a putative legal or equitable right in respect of which final relief is sought’.

Forrest J held that the EEG had standing to bring the claim, affirming the following matters as relevant to determining of the standing of an environmental organisation to bring a claim before the court (as held by the Federal Court in North Coast Environment Council Inc v Minister for Resources) (at paras 64 to 71):

EEG had to ‘demonstrate a ‘special interest’ in the subject matter of the action. A ‘mere intellectual or emotional concern’ for the preservation of the environment (was) not enough to constitute such an interest. The asserted interest must go beyond that of members of the public in upholding the law and must involve more than genuinely held convictions’.

Possible non-compliance with the Administrative Procedures, the Environment Protection Act (with the possible exception of s 10), or the Administrative Procedures is not enough of itself to confer standing on an environmental organisation.

The fact an environmental organisation makes ‘comments on an EIS produced pursuant to directions given under the Administrative Procedures does not of itself confer standing (on that organisation) to challenge or complain of a decision resulting from the environmental assessment process’.

An organisation does not ‘demonstrate a special interest in the environment sufficient to establish standing simply by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment’.
Standing under ADJR s 3(4) - MAIN STEPS

• Remember section 5-6 ADJR: applications for review of ‘decisions’ and ‘conduct’ by ‘person who is aggrieved’

• **Section 3(4):** ‘person aggrieved’ *includes* ‘person whose interests are (or would be) adversely affected by the decision etc’

• **Cane and McDonald note:** ‘to all intents and purposes this has been applied consistently with the “special interest” test at common law’ – thus can use same cases below (CL)

• See, eg: *Bateman’s Bay; Northcoast; Right to Life.*

**Standing (CL): Summary**

• Issue of standing at common law depends to some extent on remedy

• Generally, require ‘special interest in the subject matter of the action’ (*ACF v Cth* (1980) 146 CLR 493)

• Test reformulated in the foundation case of *ACF*

• Attorney General automatically has standing

**Foundation Case: ACF v Cth (1980) – MAIN CASE**

**Facts:** ACF sued clth to seek declarations and injunctions and challenge decisions concerning the proposal to put a tourist resort in central Queensland. The ACF claimed standing as it had a reputation in environmental matters (challenged environmental protection decision)

**Held:** Does the ACF have standing concerning government decisions regarding a private enterprise of a tourist resort?

HC held that ACF does not have standing. It merely had an intellectual or emotional concern. A private or financial interest is needed

**General Rule:**

- ‘It is quite clear that an ordinary member of the public who has no interest other than as a member of the public in upholding the law, has no standing to sue to prevent violation of a public right or to enforce the performance of a public duty. … A private citizen who has no special interest is incapable of bring proceedings for that purpose, unless, of course, he is permitted by statute to do so.’
Exception = ‘special interest’. What is a ‘special interest’? (A private citizen with a special interest)

1. A **private or financial interest**

2. **Not ‘a mere intellectual or emotional concern’**

   - Did ACF have a special interest? Why/why not?

**Examples of ‘special interest’?**

Yes

- Union’s interest in decision to permit Sunday trading would affect terms and conditions of employment of all its members: *Shop Distributive*

- Members of indigenous group that belonged to the area preventing construction on land containing relics of which group was custodian, had greater interest over and above public: *Onus v Alcoa (1981)*

- 2 rival funeral benefit funds. Private company that conducted a funeral benefit fund interest in preventing a statutory authority from setting up a similar and competitive fund: *Batemans Bay (1998)*

No

- interest of Right to Life Association in govt decision to refuse to cease trials of abortion drug: *Right to Life Association*

**ACF & Public interest groups?**

- Despite the outcome of *ACF*, environmental & public interest groups may have standing.

- To show a ‘special interest’, courts have emphasised factors such as: (see *Northcoast* (1994) 55 FCR 492)
  
  - prior involvement in the particular matter?
  - group recognized or funded by government?
  - whether group represents a significant strand of public opinion?
  - expertise of the organization?

**After ACF – Implications?**

- Court seems to be moving to a more open standing: construe as an enabling rather than a restrictive requirement

- But courts continue to check against the statute: if feel the interests are not within the ‘zone’ of the legislation, standing denied (e.g: *Right to Life*) – case was about
drugs not about right to life – e.g if case was about children having right to life then yes but it was a step removed

- Remember – there is a degree of judicial discretion involved (see *Onus v Alcoa*)

**Next time:**

- Next, we move onto remedies of judicial review.
- We then start thinking about grounds of judicial review, starting with the basic error of law
We must consider the consequences of breaching an administrative law norm, known as ‘ground review’

judicial review process: Court determining whether decision/action has been done legally

- Court must have jurisdiction to conduct JR
- Court must accept issues are justiciable
- Applicant must have standing
- * Court must have power to grant a remedy
- There must be a ground of review
- Legislature must not have validly excluded the court’s review jurisdiction

Consequences of a breach:

Assume the following:

- jurisdiction, standing etc. have been met.
- the body of the argument, that is, the ADM has made an ‘error of law’ in their decision-making (this is known as a ‘ground’ of JR) has also been made out.
Consequences if an error of law has been made:

At common law, three possible outcomes for errors of law:

1) **no remedy (valid)** = If action taken without proper legal authority: invalid. (e.g. no visa, you’re deported, the decision you’ve claimed is defective is still valid)

2) **retrospective invalidation (invalid)** = If a court decides that a decision is void, it means it was invalid *ab initio* (from the beginning) - also known as retrospective invalidity.

   ⇒ Jurisdictional errors - e.g. migration officer taken away your visa doesn’t meet requirements, if 12 mths later goes to HC/Fed court = says court did something wrong e.g. failed to give hearing, considered irrelevant things, = void ab initio (must prove jurisdictional error to make decision completely invalid)

3) **prospective unlawfulness (voidable) (unlawful)** = (have option make it illegal only moving forward) Unlawful (also known as ‘voidable’ decisions) used for decisions infected by a non-JE subject to C (ie error of law on the face of the record).

   ⇒ Non-jurisdictional error e.g for 2 years this person’s visa cancellation happened, but it is not lawful from this day forward

*Project Blue Sky* draws on this idea (and the JE v non-JE distinction) and extends it.

*Project Blue Sky* (1998) 194 CLR 355

Must look to statute and see whether statute says that any disagreement means invalidity? Then consider the consequences (chose not to apply 3 consequences above no invalidity declaration of right to sue if breach not amended)

• The HC considered whether parliament intended that a failure to follow statutory procedure would result in invalidity

• A range of matters will be considered in determining whether it was a purpose of the legislature that acts done in breach of a statute be invalid a court will refer to:

   o the language of the statute,
   o its subject matter, and
   o its objects

***BUT if jurisdictional error – court wont have discretion – it will be void***
Facts:

- broadcasting regulator that set local content standards in Australia. It was alleged that these local content standards set by the local regulator breached Australia’s treaty obligations with NZ

- alleged NZ was denied equal access and treatment by Australian regulators (we had signed a free trade agreement with NZ to allow them access to our media markets)

- HC agreed that the standard did breach the Act it was beyond the purpose of the Act, but it wasn’t jurisdictional error (won’t quash standard from beginning). HC issued a declaration - gave the wronged party the ability to apply for an injunction to stop future enforcement of standard if regulator didn’t amend standard

Very important case for two reasons:

1) for the primacy of interpreting effect of a decision in breach of a statutory requirement, statutory interpretation using **purposive approach** is central and imperative. (read leg in line with purpose)

2) for **using that approach** to decide what **effect a remedy will have** if given by the court

  o ie: if there is a ruling that a decision is infected by JE, will it be *invalid ab initio*, or unlawful, meaning that it is punishable but still has effect? (esp if 3P relied on decision outside bounds of case)

Note – HC disapproved of mandatory cf: directory provisions: ‘The classification is the end of the inquiry, not the beginning’

- HC used trichotomy of retrospective invalidity, prospective unlawfulness or validity (no remedy). (didn’t apply any of 3 remedies above)

  ‘**An Act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with that condition**’

- HC held - the breach of the statute did not make the decision invalid but was nonetheless unlawful.

- **An implication** is that the HC is recognising that in specific cases of statutory breach, prospective unlawfulness is appropriate as a remedial consequence, and this new category of errors does not need the old ‘error of law on face of the record’ idea that had been necessary for that remedy (ie non JE, and for certiorari only).
• Thus must look to statute and see whether statute says that any disagreement means invalidity? Then consider the consequences

**Minister for Immigration v Bhardwaj (2002) 209 CLR 597**

Following *Project Blue Sky*, in *Minister for Immigration v Bhardwaj (2002) 209 CLR 597*, Gaudron and Gummow JJ set out an important general principle:

‘A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all’:

This becomes important when we consider ‘privative clauses’.
**Remedies**

** CL we start with remedies ADJR we end with them

- Public cf: private remedies? private remedies relate to an individual, public law remedies while they may have been sparked by an individual case they have govt policy and public ramifications

- Court only has power to grant a remedy if **there has been an error of law**

- Two related questions of **jurisdiction** must asl:
  
  1. Has there been an **error of law** that triggers the courts jurisdiction?
  
  2. Will the Court go outside its own jurisdiction by granting these remedies?

**What are the remedies?**

1) **Prerogative (constitutional writs)**

   a. Certiorari – to quash an unlawful decision (once a decision has been made)

   b. Mandamus – to order an official to exercise a power he or she lawfully holds or show cause why not

   c. Prohibition – to prohibit an unlawful exercise of power (granted earlier on in decision making process to prevent decision maker from making a jurisdictional error)

2) **Equitable**

   d. Declaration -

   e. Injunction

   f. Other (less common) remedies include Quo Warranto and Habeas Corpus

     i. *habeas corpus* – to demand the release of a prisoner from unlawful detention

     ii. *Quo Warranto* – to demand that an official show the source of the authority he claims to have

**Choosing appropriate combination:**

1. person affected by decision never wanted it to be made in 1st place e.g imposed penalty – certiorari

   o *tickner v chapman* – a decision to grant heritage protection over the site of a bridge and the report that decision was based upon was quashed.
However, minister received a new application for heritage protection and process started all over again

2. if person seeking decision to be quashed may also seek mandamus – requiring the decision to be remade e.g a person may seek an order preventing action from being taken in reliance on the unlawful decision

**Discretion not to grant a remedy** – in some circumstances a court will exercise its discretion and decline to grant a remedy

- or if applicant has mislead or deceived the court in some way, where the applicant has acted in bad faith, where there has been delay, waiver or acquiescence on the part of the person affected by the decision or where the grant of a remedy would be futile
Different jurisdictional avenues

Different avenues and different histories for remedies:

A. Common law (‘prerogative writs’)
B. S75(v) CC (‘constitutional writs’)
C. ADJR, s 16.

A. COMMON LAW REMEDIES

1. Prerogative Writs (CL)

Basic functions: (need a writ to go to court)

- The prerogative writs were like a formula that had certain ingredients present on the facts of the matter that would (or would not) enable a Court to grant a remedy (see, eg, Ainsworth)
- ‘quash’ (i.e. deprive of legal effect) invalid OR unlawful decisions, by a body ‘exercising legal authority’ (ie lower courts - expanding to tribunals and others ADMs) (certiorari)
- prevent illegal admin acts or decisions (prohibition)
- compel/require performance of a duty by an ADM (mandamus)
- injunction = stop/compel (mandatory or prohibitive injunction) – equitable remedy
- declaration = non binding declaration – equitable remedy

BUT There is always a discretion to refuse to grant a remedy…

A. Certiorari (‘C’)

- Available as a quashing order: i.e. it deprives a decision of legal effect, analogous to when a court reverses a decision on appeal.
- It is remedy that is concerned with a decision once it has been made: the decision maker has completed his task and there is no relief to be gained from seeking an order prohibiting them from making a jurisdictional error
  - mostly applies with regard to jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud, and error of law on the face of the record Craig v SA
• it is not included amongst the list of constitutional writs in s 75(v) of the
constitution but it is available as an ancillary remedy to those listed-
mandamus and prohibition, and also in the exercise of the jurisdiction
conferred by s 75(iii)

• It will not be granted when the decision or action being challenged has no
legal effect ainsworth v criminal justice commission

Requirements of Certiorari:

Classic statement in R v Electricity Commissioner (1924):

‘Whenever any body of persons having legal authority to determine questions
affecting rights of subjects, and having the duty to act judicially, act in excess
of their legal authority they are subject to the controlling jurisdiction of the
King’s Bench division exercised in these writs’.

1) Decision must be by a ‘body of persons against whom it will lie’ – body that
is a public authority e.g minister, departmental member

2) Must be some legal effect (‘affecting the rights of subjects’) – (interim action
does not change rights, duties or responsibilities then no certiorari)

• Operates retrospectively and prospectively, depending on Jurisdictional
error (thus both JE and non-JE it’s only one for non JE)

  o To quash a decision to make it retrospectively invalid, there must be a
jurisdictional error that infects the decision

  o To quash a decision to make it prospectively unlawful, no need for JE,
but the non-JE must be ‘on the face of the record’ – from this moment
forth is illegal (Craig v SA (1995)

• Important : only writ that is available for non-jurisdictional errors. So, C can
issue for BOTH JE and non-JE.

So 2 C applies in 2 broad situations:

a) Challenging final decision = Where the decision under challenge is the
ultimate decision in the DM process (final decision), and the question is
whether that ultimate decision sufficiently ‘affects rights’ in a legal sense (see
Ainsworth)

b) Challenging preliminary decision = Where the ultimate decision to be made
undoubtedly affects legal rights, but the question is whether a decision made at
a preliminary or recommendatory stage of the DM process sufficiently
‘determines’ or is connected with that decision. (see Hot Holdings)

[Note also: ADJRA s 3 only a decision can be quashed, if using that Act: so
per ABT v Bond: an erroneous and non material finding of fact would not be a
grounds review under the ADJRA, and thus would not attract the remedies incl C at s 16 ]

Remember: no difference under ADJRA

Scope of Certiorari?

• C issues for:
  o JE
  o Breach of PF
  o Fraud, &
  o ‘error of law on the face of the record’

• Record? Does not include reasons/transcript (Craig).

• So, C is the exception in that it can issue for both JE and non-JE.

B. Prohibition (P)

• Used to prevent admin acts or decision (prohibition). Restrains a body from exceeding its powers. Makes decision invalid.

• Unlike C, it is granted earlier on in decision making process to prevent decision maker from making a jurisdictional error (doesn’t apply for non-JE merit/fact error)

• Like C, same classic statement: R v Electricity Commissioner (1920). Most principles that apply to C also apply to P: R v Wright ; Aala

  1) need public body
  2) but no need to show decisions was one which ‘affects the rights’

C. Mandamus (‘M’) 

• A refusal or failure to exercise jurisdiction when there is a duty to do so can be remedies by mandamus

• It is used to compel an ADM to exercise power or jurisdiction or perform a duty of a public nature where a failure to do so has occurred. (Must look to act to see if ADM must do something they haven’t done – word ‘must’)

• If ADM has discretion and not duty such as ‘may’ can’t compel them to do it

• TEST? ADM’s duty must be something:
  ▪ If actually done was justiciable (i.e. open to Judicial review);
  ▪ Must be obviously not done (unperformed); and
  ▪ Must be of a public nature
Central issue is nature of public duties: which ones can be compelled? Problem: some are obligations (duties) others are discretionary…

2. **Equitable Remedies**

- Unlike common law prerogative remedies, the declarations and injunctions are not constrained by the concept of jurisdictional error and offer potential remedies for non-jurisdictional errors of law
- They are generally available to get around the technical limits of the prerogative writs. *Bateman’s Bay.*
- an applicant may apply for both common law and equitable remedies in one action.
- If prerogative writs are refused person seeking judicial review may nevertheless obtain injunction or declaration
  - e.g *Ainsworth v criminal justice commission* – certiorari wasn’t available because decision didn’t affect legal rights – court granted declaration
  - *Offshore Processing case* – mandamus was unavailable because the Minister was under no duty to make a decision – declaration granted by court

**D. Injunctions (‘I’)**

- Injunctions can either be used to prohibit or compel (like P and M). It requires a person to take action, or refrain from taking action
- **But unlike P and M may be issued even in cases of non-JE.** Can get interim injunctions
- To obtain an injunction:
  1. You must have a legal right and
  2. there must be an infringement of that right
  3. the public interest to get involved must be sufficient to grant you that injunction
  4. it’s determined on balance of convenience
  5. if situation continues to operate there will be some kind of public detriment suffered
- **Other advantages?**
  - Granted in interim (ie *M70*) or permanent form;
  - coercive remedy;
  - issue against variety of bodies, including officers of the Cth;
  - can be used by the A-G to prevent interference in public rights
E. Declarations (‘D’)

- Declarations are known as ‘shadow’ remedies: i.e. they allow a court to declare that a decision can be quashed or compelled; that as a yet unmade decision would exceed jurisdiction (i.e. injunction with prohibition).

- A declaration is a remedy that makes the ADM state the rights and obligations of the parties (e.g. to sue, non-binding but persuasive)

- **Non coercive** - technically speaking they change nothing…. (Cf: others remedies coercive – if breached, lead to contempt of court.)

- when a court issues a declaration it is making a statement regarding the rights of the parties or the application of the law. A declaration has no binding force and is not a corrective remedy. However, it is anticipated that government agencies will comply: it is inconceivable that a government would not comply with the order of a court *National Trust of Australia (NT) v Minister for lands, planning and environment* 1997

- **Requirements:**
  - person seeking relief must have a ‘real interest’ and relief will not be granted if question is ‘purely hypothetical’ – if relief is claimed in relation to circumstances that have not occurred and might never happen or if the court’s declarations will produce no foreseeable consequences for the parties *ainsworth v criminal justice commission*

- **examples:**
  - in reporting adversely to the appellants in its report on gaming machine concerns and regulations, the respondent failed to observe the requirements of procedural unfairness *ainsworth v criminal justice commission*
  - he found that the Minister’s declaration of Malaysia as a suitable country to which to send asylum seekers was affected by an error of law and declared: ‘that the declarations by the statute as a declared country under subsection … was made without power and is invalid’ *Plaintiff M70/2011 v Minister for Immigration and Citizenship*

**Value?**

- HC has resisted limiting their availability, but some general discretionary factors:
  - Available against most bodies: no requirement that respondent is under a duty to act judicially.
- Not usually available for declaring hypothetical issues: must be a ‘matter’ (see Dyson; Electricity Supply Association of Australia)

**F. Habeus Corpus (‘H’)**

- Right to be free from wrongful restraints upon their liberty. Writ directed to the person responsible for the detention of another requiring they bring that person to court

- For *habeus corpus* to issue, there must be:
  - Unlawful detention
  - Detention attributable to the detainor
  - Detainee must have a legal right to be released
  - Historically important, but for recent examples, see *Vadarlis; Hicks v Ruddock*

**B. CONSTITUTIONAL REMEDIES (s 75v)**

- S 75 confers JR jurisdiction on HC through the power to issue remedies as part of its original jurisdiction

  *in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;*

- Certiorari missing, and it’s the only one that issues for non-Jurisdictional error.

- **Concept of Jurisdictional error, therefore, embedded constitutionally…**
  (certiorari for non JE isn’t included)

- Note:
  - C not expressly mentioned in 75(v) [auxiliary: it has been read in to exist there *Aala*]. Remember: Certiorari is a special case, applies non-JE if on face of the record: *Craig*

  - Limits on prerogative writs (only for JE) NOT the case for Equitable remedies

  - Remedies also available under s 75 (iii), but jurisprudentially complex: *Project Blue Sky* – is unproven

- HC has ‘rebadged’ s 75(v) remedies: no longer ‘common law’ avenue through prerogative writs: now ‘constitutional writs’ and ‘constitutional injunction’
  *Refugee Review Tribunal; Ex Parte Aala* [2000] 204 CLR 82

- So, remedies significant – this is how JR is constitutionally protected (via remedies)
• Due to the constitutional writs, as we see next time, **jurisdictional error** becomes the entry point for the HC’s constitutional oversight jurisdiction.

### C. ADJR REMEDIES

• Judicial review at common law procedurally complex, including (and especially) remedies.

• ADJR introduced & ‘smoothed’ out technicalities of remedies. No longer linked to standing, but still courts must apply general common law principles on standing (remedies are at end, they are not threshold issue they are at outcome)

• **Section 16** is where you find a codification of the available remedies. *Their definitions are the same as CL remedies above*
  
  - S 16 (1) (a): quashing- certiorari (Note the court can choose the date from which the quashing order will be made)
  - S 16 (1) (b): mandatory
  - S 16 (1) (c) declaration
  - S 16 (1) (d) prohibition/injunction
  - **NOTE no order for damages: as at CL only available if private law issue of action as per 16 (discretionary)**

• sub-section (1) – provides remedies that are available for review of decisions under s 5;
• sub-section (2) – provides remedies available for review of conduct under s 6;
• sub-section (3) – provides remedies available for review of a failure to make a decision

### s 16: Differences?

• Under ADJR first question is not whether a particular remedy is available (which is the first question at common law) but **whether one of the specified grounds of review has been established** (as per s3, then s 5 and 6 of the ADJR); and whether a party has standing

• If it HAS, the court has full discretion to make any combination of orders it likes.

• Still (like CL) discretionary; and Court can refuse to make an order for a remedy

• no need to make out any ‘ingredients’ re JE, non JE, face on record etc (ie s 5 (1) (f))
The main issue under ADJRA is whether or not procedures required by law in connection with making a decision have been observed.

s 16 full:

Powers of the Federal Court and the Federal Circuit Court in respect of applications for order of review

(1) On an application for an order of review in respect of a decision, the Federal Court or the Federal Circuit Court may, in its discretion, make all or any of the following orders:

(a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;

(b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;

(c) an order declaring the rights of the parties in respect of any matter to which the decision relates;

(d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

(2) On an application for an order of review in respect of conduct that has been, is being, or is proposed to be, engaged in for the purpose of the making of a decision, the Federal Court or the Federal Circuit Court may, in its discretion, make either or both of the following orders:

(a) an order declaring the rights of the parties in respect of any matter to which the conduct relates;

(b) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

(3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Federal Court or the Federal Circuit Court may, in its discretion, make all or any of the following orders:

(a) an order directing the making of the decision;

(b) an order declaring the rights of the parties in relation to the making of the decision;

(c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.
(4) The Federal Court or the Federal Circuit Court may at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section.
TOPIC 14 INTRO: ERRORS OF LAW

Court determining whether decision/action has been done legally

- Court must have jurisdiction to conduct JR
- Court must accept issues are justiciable
- Applicant must have standing
- Court must have power to grant a remedy
- *There must be a ground of review* – what we’re up to
- Legislature must not have validly excluded the court’s review jurisdiction

**Grounds of judicial review:** (can argue more than one)

- Once it has been established JR is available (i.e., threshold issues satisfied (jurisdiction, justiciability, standing, remedies), next issue is ‘grounds of review’.
- This is the **substantive** issue of JR. Ask: **What has gone wrong?**

  *More specifically, ask: what error of law has occurred in the original decision?** **THIS IS THE CENTRAL QUESTION.** Later, we add detail as to the **type of error of law that has occurred.**

- Different grounds of review, including procedural, reasoning and decisional grounds.
- The grounds of review are listed in ADJR, ss 5 & 6.

**s 5(1) ADJR**

but with ADJR do not need to prove jurisdictional error in order to obtain a remedy only need to make out one of grounds listed in s 5, 6 or 7 if relevant

5 Applications for review of decisions

(5) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds

(a) that a **breach of the rules of natural justice** occurred in connection with the making of the decision;
(b) that **procedures** that were required by law to be observed in connection with the making of the decision were **not observed**;
(c) that the person who purported to make the decision did not have jurisdiction to make the decision;
(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
(g) that the decision was induced or affected by fraud;
(h) that there was no evidence or other material to justify the making of the decision;
(i) that the decision was otherwise contrary to law.

Categorising grounds of review:

Many different grounds of review, and different ways of categorising, including:

(1) Procedural grounds – something has gone wrong in procedure (decision making) that Act said could be followed

(2) Reasoning grounds – there is something wrong with the way the decision maker reasoned e.g bias

(3) Decisional grounds

Over-arching concepts:

• Before the detail of grounds, and the ‘list’ in section 5 ADJR, we need to understand the overarching concepts of:
  o Errors of law
  o Jurisdictional errors
  o Non-jurisdictional errors

Key distinctions:

• Merits / legality Eg: Green v Daniels

• Law / fact

• Jurisdictional error / non-jurisdictional error

Law/fact distinction:

• If a fact is predicated on a question of law, and if the DM has breached that law or misapplied it in some way, it must be reviewable by courts: the decision maker must be kept accountable.

• BUT if it is just a general fact, the court should not have authority to exercise review of the DM’s decision, because no question of law arises

• Problem: how unravel the ‘fact/law distinction’? Below Collectors case
- Questions of law fall within the scope of judicial review, questions of fact do not
- At common law? Through concept of jurisdictional error
- At statutory level? Through ADJR:
  - ss 5(1)(f); 6(1)(f): ‘error of law’
  - ss 5(1)(j); 6(1)(j): ‘otherwise contrary to law’

Distinction easy to state, BUT much more difficult to explain:

- Note - Exception to rule: jurisdictional fact
- Run through 5 principles below

**Collector of Customs v Agfa-Gevaert** (‘996) 186 CLR 389

Facts:

- Customs Act - there was a commercial tariff order that provided exemptions for certain goods from an import duty it included goods that were silver, dye, bleach reversal process
- Agfa was a photographic paper company – it seemed to fall within terms of exemption.
- At AAT – Agfa’s photographic phrase does not fall within key phrase, “silver, dye bleach reversal process” they also determined its definition, “silver dye bleach” had trade meaning, reversal process had ordinary meaning. Applied legal distinction to phrase.
- HC – issue: Did AAT make an error of law or an error of fact in interpreting this key phrase, and applying it to Agfa’s photographic material – could they get involved?
- court held that was an error. There were 2 questions:
  1) Question of fact: is this type of photographic material of a certain type?
  2) Question of law: what does that type mean?

Issue: Did this involve ‘question of law’? ‘Pozzolanic’ principles applied:
Run through these 5 principles

1) Whether a word of phrase in a statute is to be **given its ordinary meaning or some technical or other meaning** is a question of law.

2) The **ordinary meaning of a word or its non-legal technical meaning** is a question of fact.
3) The **meaning of a technical legal term** is a question of law.

4) The **effect or construction** of a term whose meaning or interpretation is (judicially) established is a question of law.

5) **Whether facts fall within the provision of a statute** is generally a question of law (*Hope v Bathurst*).

- HC argued that meaning and construction go hand in hand: ‘it is not as if one precedes the other’
- If you’re using statutory construction principles you’re making a question of law
- In general: attempt to distil the authorities into general propositions that are capable of being applied to other scenarios, and their authorities, but all roads lead back to the statute and its interpretation…

**Principle of legality**

- Principle of legality requires sources of legal authority for lawful administrative decision making
  - legislative powers – DM lacked power - look to the statute
  - prerogative powers? *Eg, Clough v Leahy, Ruddock v Vadarlis*
- If there is a lack of legal authority, it will be an unlawful decision (*Entrick v Carrington* (1765)- foundational case; *A v Hayden (No 2)* (1984) 156 CLR 532)
  - secretary of state issued Mr Carrington a series of other people including the police a search warrant to enter Mr Entick’s house to seize papers that allegedly included seditious writing (against crown)
  - secretary of state wasn’t acting under any law to issue search warrant he simply issued it
  - could they actually search his house? (His items were seized and his work was published)
  - Mr Entick brought an action in trespass – they didn’t have a search warrant issued by a lawful authority
  - **Issue:** was the search warrant issued by the minister’s authority, was it simply enough to have power as an elected official?
- held: secretary of state had no lawful authority to issue a search warrant as result there was no legal right for the police to come in

- there was no piece of legislation that allowed secretary of state to issue a search warrant under those circumstances

- a source of lawful authority is needed, an error of law is needed to trigger judicial review court needs a legal basis to step in the AAT secretary of state

• Principle of legality is manifest in ADJR:
  
  o decision not authorised – s 5(1)(d)
  o no jurisdiction – s 5(1)(c)
  o error of law – s 5(1)(f)

• Note, the counter-principle to the principle of legality is the presumption of regularity:
  
  o Latin maxim: *omnia praesumuntur rite et solemniter esse acta*, which translates as: ‘all acts are presumed to have been done right and regularly’ (see, eg *Royal British Bank v Turquand* (1856) 6 E&B 327)

**Grounds:**

1) Errors of law
2) Jurisdictional fact
3) Jurisdictional error
**Ground 1) ERRORS OF LAW**

**it is a ground of review – need an error of law to trigger judicial review for CL**

Error of law is ‘treacherous’ and can mean:

- Any breach of an administrative law norm to justify a remedy can trigger judicial review
  
  o This is the general way we refer to ‘grounds’ as constituting errors of law (ie not errors of fact)

- A discrete ground of review under the ADJR, s5(1)(f)

- Clearly applies to the writ of certiorari for non-jurisdictional errors at common law, ie: an error of law on the face of the record

**Below:**

1) Error of Law- Clth and federal
2) Error of law – State
3) Error of Law – ADJR (only step 1 of clth/federal)
1. Error of law: Common law/ CLTH & FEDERAL LEVEL

- More specifically, as a SPECIFIC GROUND OF REVIEW
- The CL and ADJR tests for error of law are DIFFERENT
  (with ADJR only need to prove step one of common law requirements)

Common Law requirements:

- At common law, there must be an error of law on the face of the record
- Two steps:
  
  **STEP 1:** Is there an error of law?
  
  o Key issue: law/fact distinction (above)

  **STEP 2:** If yes is the error on the face of the record?
  
  o Key issue: what is the record?

  *Craig v South Australia* (1995) 184 CLR 163 (facts below)

  record means:
  - documents initiating proceedings
  - pleadings
  - Order itself

  record of inferior courts does not include transcripts, exhibits or reasons for decision

  Note: this test relates to the remedy of certiorari.
  So, does this include reasons??

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**Craig v South Australia**

- Craig was charged by SA district court with a variety of criminal offences including larceny and he appeared before J Russell without a lawyer
- Before J Russell he applied for an order to stay the proceedings until he could obtain legal representation, he based his claim on *dietrich v the queen* – everyone has right to legal rep
- J Russell agreed and concluded that Craig couldn’t receive a fair trial unless he obtained lawyer, so he vacated hearing date (temp postponed)
• legal aid turned him down, crown prosecutor was the asked to pay for craig’s lawyer (refused)

• court continued to refuse to hear matter – wouldn’t proceed him through courts

• judge could vacate hearing date or stay proceedings – in order to do this need formal court order. But J Russell didn’t do that, he wrote a note by order of stay of proceedings

• HC issue: was J Russell’s note sufficient to stay proceedings? SA court wanted to quash stay of proceedings.

• HC Held: But could certiorari be issued could J Russell’s decision be quashed?

• 2 principles:

(1) an error of law on face of record – means that you can physically see the error of law on record of case.

⇒ J Russell wrote his order on the file but not formal record

⇒ Does his writing occur on face of record? NO

(2) At CL record has a narrow meaning and refers only to formal court documents: documents initiating proceedings – pleadings or the order itself

• Therefore, J Russell’s decision to stay proceedings due to lack of representation was deemed as part of overall reasoning not part of formal record, therefore HC cant quash the decision – no record, therefore no error of law on face of record. Also, J Russell’s initial note couldn’t stay proceedings, craig’s prosecution was ongoing
2. STATE LEVEL - Error of law (CL) – NSW (includes the reasons)

In NSW, see section 69 of the SC Act 1970 modifies the CL rule re: ‘record’:
Section 69 ‘Proceedings in lieu of writs

(1) …
(2) …
(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a *writ of certiorari* includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an *error of law that appears on the face of the record* of the proceedings.
(4) For the purposes of subsection (3), the *face of the record includes the reasons* expressed by the court or tribunal for its ultimate determination.

* don’t require formal document as under clth/federal – just needs to be on a record

3. ADJR - Error of law

- ADJR modifies the CL rule too.
- s5(1)(f) - that the decision involved an error of law, whether or not the error appears on the record of the decision
  - explanation: if the decision involves an error of law it is a decision for ADJR whether or not the error of law appears on the record
  - Major change: No requirement for the ‘record’. As a result, under ADJR there is no concept of the idea of an error being ‘unremediable’ (cf: common law position)
Ground 2: Jurisdictional Fact – a particular type of jurisdictional error

- It’s its own ground of review

- A jurisdictional fact refers to situations where a DM’s power is conditioned on the existence of a particular fact, such that the making of a valid decision depends upon the existence of the fact.

- It’s an error of jurisdiction – about what ADM is actually allowed to do
  
  - e.g. *Evans v NSW* – there was a world youth day act, that set up a world youth day authority which had power to do things relating to world youth day. Issue: if WYDA issues authority on day that is not WYD then that is beyond their authority = jurisdictional fact. The WYD’s power is conditioned on existence of a particular fact, it’s conditioned on fact that it should be WYD today

- Issues:
  - Who decides whether a JF satisfied?
  - When can a JF be determined?

- See *City of Enfield v DAC* (2000) 199 CLR 135
Ground 3: Jurisdictional error

Jurisdictional questions relate to:

- scope of a decision makers power to decide; and
- scope & authority of courts to interfere with those decisions.

Courts constantly refer to:

1) source of authority for ADM to act (ie – statute); and e.g WYDA
2) their own limits of authority (ie - is this an error of law?)

What is a Jurisdictional error?

- Jurisdictional error is notoriously difficult to define.
- But, most simply, JE carries (at least) two distinct meanings in Australian administrative law.

1) At its most basic, JE is simply an error in jurisdiction

2) Since Anisminic, however, JE is also an ‘umbrella term’ that captures not only the ground of JE, but also other ‘grounds’ of judical review, including PF, improper purpose, considerations etc...

- decisions made outside powers only and not within - ‘There is a JE if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks the power to do. By contrast, incorrectly deciding something which the DM is authorised to decide is an error within jurisdiction…the former kind of error concerns departures from limits upon the exercise of power. The latter does not.’ (Craig v SA)
- power to use $5,000 fine, issues $10,000

- What constitutes a JE at CL, and what amounts to a ground under the ADJR are fundamentally the same (see for example s 5 (1) (c)).

1. ADJR

- It is an itemised ground of review under ADJR (s 5(1)c; s 6(1)c)
- s 5(1)c: applications for review of decisions:

‘that the person who purported to make the decision did not have jurisdiction to make the decision
• s 6(1)(c): applications of review of conduct relating to making of decisions:

‘that the person who has engaged, is engaging, or proposes to engage, in the conduct does not have jurisdiction to make the proposed decision’

2. **CL& Constitutional judicial review grounds:**

• s 75(v) and s 39B

• *As a ground to give rise to the common law/constitutional remedies, which also defines scope of HC jurisdiction under s 75(v)*

• jurisdictional error captures = the decision maker has gone beyond the limits of his or her power. It can arise from either a positive act or a refusal or failure to act. Has the decision maker acted upon:

1) a power that the decision maker does not have? OR

2) gone beyond the power that is granted to them?

   e.g customs officer purported to act under powers that are granted only to police officers or if an officer with powers limited to a particular region purported to extend those powers throughout Australia

3) Refuse to do something within power?

   o e.g local council officer might refuse to consider a development application on mistaken belief it isn’t their responsibility

4) **Constructive failure to exercise jurisdiction**

   o if a decision maker misconstrues the relevant legislation and misunderstands the nature of the jurisdiction that he is to exercise

   o if misconstructions leads to DM to apply wrong test, misconceive its duty, or misunderstand the nature of the opinion which it is to form, then a decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised

**Apply this process for both:**

(1) Can X exercise power?

   • Simple ultra vires / JE – beyond X’s power?

(2) Once X has power, has it been exercised correctly?
• Broad ultra vires / no equivalent (unless C exception)

• With the England *Anisminic* ‘broadening’, as set out in *Craig v SA*, comprises other grounds too (ie PF; irrelevancy etc):

  "... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.

  ▪ It may have given its decision in bad faith. It may have made a decision which it had no power to make.

  ▪ It may have failed in the course of the inquiry to comply with the requirements of natural justice.

  ▪ It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it.

  ▪ It may have refused to take into account something which it was required to take into account.

  ▪ Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.

**Also look at whether dealing with inferior court of Administrative decision:**

*Craig v SA (1995)*

• Note – *Kirk* tells us that *Craig* still stands, but *Craig* is not the final word…. That is, *Kirk* tells us that the CL may well still move

1. **JE for INFERIOR COURTS:**

   o JE does **NOT** include *Anisminic* broadening (ie simple UV- will only look if inside or outside jurisdiction)

   o Misconstrues its statute (or otherwise mistaken as to existence of jurisdiction) and

   o ‘thereby misconceives the nature of the function which it is performing or the extent of its powers’

2. **JE for TRIBUNALS (and other Administrative DM’s):**

   o Broader approach to JE appropriate - JE includes *Anisminic* broadening (ie grounds of review more generally all listed in s 5 of ADJR)

   o Jurisdiction will be exceeded where the decision is affected by ‘an error of law which causes it to’:
- identify wrong issue
- ask wrong question
- relevant/irrelevant matter
- erroneous finding or mistaken conclusion

*Craig: JE & Certiorari*

Scope of Certiorari?

- C issues for:
  - JE
  - Breach of PF
  - Fraud, &
  - ‘error of law on the face of the record’

- Record? Does not include reasons/transcript (*Craig*).

- So, C is the exception in that it can issue for both JE and non-JE.
TOPIC 15: Grounds of Judicial Review: Procedural Fairness

• We introduce another ground of review known as ‘procedural fairness’

• This includes two rules:
  1) Fair Hearing Rule
  2) Rule against Bias

• This is the MOST significant ground of JR.

Introduction:

• Once it has been established JR is available (ie threshold issues satisfied), next issue is ‘grounds of review’.

• This is the substantive issue of JR. Ask: what error of law has occurred? What has gone wrong?

• Different grounds of review, including procedural, reasoning and decisional grounds.

• The grounds of review are listed in ADJR, ss 5 & 6 – they mirror what’s in cl grounds

Categorising grounds of review:

• Many different grounds of review, and different ways of categorising, including:

  (1) Procedural grounds

  This includes Procedural fairness (now) and procedural error (later)

  (2) Reasoning grounds

  (3) Decisional grounds
PROCEDURAL FAIRNESS: (a procedural ground of judicial review)

- Procedural fairness as a ground of review: two main rules.
- Was the procedure along the way unfair? (not outcome)

(1) Hearing Rule: the right to be heard. 3 Questions:

- **Threshold question**: when does procedural fairness apply? (sometime its implied)

- **Exclusion question**: has the legislature showed an intention to exclude the obligation to observe the requirements of procedural fairness?
  - look for a privative clause

- What does the duty to accord procedural fairness mean in context? What is the ‘content’ of the Hearing Rule?
  - what do you have to do to ensure that there has been a fair hearing?

(2) Bias Rule: the decision maker shouldn’t be bias

- Actual or apprehended bias

Note terminology: ‘procedural fairness’ = ‘natural justice’

- **Natural justice**: means simply the minimum standard of fairness to be applied in the adjudication of a dispute. The rules of Natural Justice are principles developed to ensure that fair decision making procedure is followed by the decision maker

Core principles of natural justice and procedural fairness:

*it’s about process of being heard was fair and not about whether the outcome was just

1. **Hearing rule**: If a person’s interests will be adversely affected by a decision maker, the DM is required to give them an opportunity to be heard.
   - CL maxim: audi alteram partem.

2. **Bias rule**: A DM is required to be disinterested or unbiased in the matter to be decided.
   - CL maxim: nemo debet esse iudex in propria sua causae.
• Natural justice is assumed to be implicit in judicial decision-making: but what about administrative decision making – are they required to give a fair hearing and be un bias like judges?

... and procedural fairness:

• Common law principles implied in relation to statutory and prerogative powers to ensure the probity of the decision-making procedure of courts and administrators.

• NOTE: The term is used interchangeably with `natural justice': Kioa v West

• ADJR makes provision for PF principles in its grounds.

• The ground of PF is identical at both ADJR and common law: Kioa (Mason J)

• This means that a breach of Procedural fairness is ‘sufficient to entitle the prosecutor to relief under s 75 (v)’: [Miah, (2001) 206 CLR 57]: i.e. is a jurisdictional error]

• In general: PF grounds are therefore justiciable

**Procedural fairness & ADJR (is same as CL Kioa)**

**Section 5 Applications for review of decisions**

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

• breach of rules of NJ = breach of procedural fairness, this relates to decision and conduct also (s 6)

**Section 6 Applications for review of conduct related to making of decisions**

(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the conduct on any one or more of the following grounds:

(a) that a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct;
Threshold question of procedural fairness: (this applies for CL & ADJR)

Summary (explained more below)

(1) Hearing Rule:

1. **Threshold question**: when does procedural fairness apply?

2. **Exclusion question**: has the legislature showed an intention to exclude the obligation to observe the requirements?
   - Go through cases of *Miah* & *Saeed*- HC strongly resists any decision to exclude PF

3. What does the duty to accord procedural fairness mean in context? What is the ‘content’ of the Hearing Rule?

*Kioa v West*: Recap

General rule – when does PF apply?

- ‘The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect **rights, interests and legitimate expectations**, subject only to the clear manifestation of a **contrary statutory intention**’ (Mason J in *Kioa*)

- **but … what does this mean?**
  - ‘To ascertain what must be done to comply with the principles of natural justice in a particular case, the **starting point must be the statute** creating the power’ (Brennan J in *Kioa*)

- **The crucial question** then, in most cases, is not **whether** the principles of NJ apply, **BUT** what does the duty to act fairly require in the circumstances of the particular case (Mason J in *Kioa*)

Has PF been excluded?
1. Does Procedural Fairness apply? (hearing rule)

- **Threshold question:** When does it apply?

- Traditionally, **hearing rule (PF)** is about whether ‘**rights and interests**’ of a person had been compromised by a failure to be heard on matters adverse to them.

- Extended from judicial decision makers to apply to administrative decision makers *Schmidt [1969]*

- If, as a requirement of the hearing, an applicant’s ‘**rights, interests or legitimate expectations**’ were affected adversely, then PF breached (and therefore ground of JR)

  - So question to ask is, has the applicant’s rights, interests or legitimate expectations been adversely affected by the decision?

    - we have interest in driver’s licence
    - property rights over land = legal right

** we have a gap where hearing rule and bias rule don’t apply = concept of legitimate expectations

  e.g of legitimate expectations renewing licence, DM cancels licence, adversely affects licence, in between licence expiring and getting a new one

**LE before *Kioa v West***

- A **legitimate expectation** (‘LE’) exists where a person seeks renewal of some benefit (eg a license) in circumstances where no right to success exists, but they have ‘more than a hope of success’ (*FAI Insurance* (1981) 151 CLR 42)

- Rejection of application (denial of hope) cf: cancellation/refusal to renew existing entitlement (see *FAI; Haoucher*)

- A LE can be an expectation that it is reasonable that a right or liberty will be interfered with in the reaching of a decision made by a ADM; *FAI* – normally applies when something has expired

- If LE, PF applies, giving the person a right to be heard.

- It doesn’t compel an original DM to act in so far as it gives right to entitlement to be heard

  **Facts *FAI***:

    - FAI Insurance had a business licence for a period of time and it renewed regularly. Without that licence FAI couldn’t be an insurer
o FAI had licence renewed without question a few times
o But there was a concern raised that FAI Insurance lacked a regulatory capital requirement (that they didn’t have enough money in bank in case a lot of insurance claims came through and they needed to approve them which was a requirement of having that licence.

o As a result their licence wasn’t renewed – not cancellation of licence just failure to renew licence by regulator
o did procedural fairness even though there was no clear right or interest?

o HC held: legitimate expectation: is a situation where procedural fairness would apply. It is to find as a reasonable expectation that a right or liberty will be interfered with in the making of a decision. It’s a reasonable expectation that they have a right to be heard to renew licence

o FAI didn’t have right to licence or interest because licence had expired/wasn’t renewed

_Kioa v West_ (1985) 159 CLR 550 – LEADING CASE IN PF – must look at – reshaped test

• **General rule:** ‘The law has now developed to a point where it may be accepted that there a DM has common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention’ (Mason J).

• **Explanation:** knocks out 1st question states that procedural fairness always applies, as DM has “common law duty to act fairly”

It’s not up to applicant to prove their right, interest or legitimate expectation, the shift puts onus on dept of immigration to show that they accorded procedural fairness and heard his arguments and acted fairly. They had to prove that they weren’t just making a character judgment against Jason

• The source for determining the existence of a right to procedural fairness, and thus whether it is a ground for review if breached, is to be found in the construction of the statute. This includes reading to see whether it has been expressly excluded (look to whether privative clause exists) (Brennan J)

_Facts of Kioa_

• man called Jason came from Tonga to Australia with wife on student visa, they were both on temporary permits, but had newborn daughter in Australia and daughter was therefore Australian citizen by birth
• Jason overstayed his student visa and there was a lapse in time before he applied for an extension not as a student but as a tourist

• before tourist visa application was fully heard, Jason moved to Victoria and found work without visa
• at time there was a massive cyclone in Tonga, Jason said he was saving money to support family members in Tonga

• his application for a tourist visa was refused, he was required to leave Australia with family

• he refused, issue was recommended to minister delegate to make a deportation order, order was made

• before he was deported Jason invoked s 13 ADJR – right to receive and request reasons, wanted reasons for decision of his deportation. They were given

• Jason went to federal court to seek federal review of deportation orders

• Federal court and full federal court dismissed it, went to HC

• **HC Held:** that reasons for deporting Jason were highly prejudicial. Held:

  1) procedural fairness always applies (it hasn’t been excluded, but it has been breached)

  2) highly prejudicial comment of minister’s delegate who recommended to minister that Jason be deported: had Jason been genuine in his application for a visa to stay then he wouldn’t let his initial student visa lapse or change his address and states without contacting immigration dept). His concern with other illegal Tongan refugees seeking to circumvent Australia’s immigration law must be a source of concern’

  3) J Mason - What does the duty to act fairly/procedural fairness require in the circumstances? In this case, the two paragraphs are that these are allegations of character and there was no right to be heard based on these character allegations. It’s not up to applicant to prove their right, interest or legitimate expectation, the shift puts onus on dept of immigration to show that they accorded procedural fairness and heard his arguments and acted fairly. They had to prove that they weren’t just making a character judgment against Jason

  In the circumstances the Tongan citizens were entitled, in keeping with ordinary rules of procedural fairness, to be heard before the making of the deportation orders against them so that they might deal with matters prejudicial to them that had been put to the Minister's delegate.

**LE: Kioa & beyond**
• The protection given on the basis of a legitimate expectation is procedural only – it is NOT substantive.

• A legitimate expectation does not compel a decision-maker to act in a particular way, except insofar as it gives rise to an entitlement to procedural fairness, in relation to the circumstances of the case.

• After *Kioa*? - 1st category
  
  o 2nd category - *Minister for Immigration etc v Teoh* (1995) 183 CLR 273
    
    - A deportation order was made against Teoh based on criminal conviction for possession of heroine
    - Teoh had several children, immigration review tribunal considered impact of deportation on his children, however process was challenged in HC
    
    - HC Held by majority: that there was a breach of procedural fairness, because the immigration review tribunal failed to invite Teoh to make a submission on whether or not a deportation order should be made regarding the international convention of the rights of the child
    
    - it was held that Teoh didn’t have a right or interest but he had a legitimate expectation that if an administrative DM was going to depart from an international norm like the convention of the rights of the child, then he would have an opportunity to respond before DM departed from the rule
    
    - However, Teoh hadn’t even heard of convention lawyer did – then how could he have a legitimate expectation that he would have a right to argue under it? knowledge was imputed of the convention onto Teoh- he was given constructive knowledge
    
    - Teoh has procedural right to be heard about why the review tribunal should comply with rather than depart from convention – just procedural right to be heard
    
    - it marks high water mark of legitimate expectations (2nd category)

Proper facts:

*Minister's delegate relying on considerations other than those specified in United Nations Convention — Where Convention ratified by Australia — Obligation on delegate to afford party opportunity to argue against proceedings being conducted in disregard of Convention*

The United Nations Convention on the Rights of the Child was ratified by the Commonwealth Executive in 1990 and entered into force for Australia on 16 January 1991. Article 3(1) provided: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of
law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

While the application of a foreign national for a permanent entry permit into Australia was pending, he was convicted in Australia of drug offences and sentenced to imprisonment. On 2 January 1991 his application was refused on the ground that his conviction showed that he did not meet the policy requirement that applicants for residential status be of good character. A panel considered his application for a review of the decision, and in July 1991 recommended to the Minister that the application be rejected. The panel noted that the applicant's wife and young children, who were in Australia, faced a bleak future and would be deprived of a possible breadwinner if resident status were denied, but concluded that these compassionate grounds were not compelling enough to justify waiver of the character requirement in view of the applicant's criminal record. The Minister accepted the panel's recommendation and made an order for his deportation. Held: (by Mason CJ, Deane, Toohey and Gaudron JJ, McHugh J dissenting)

1. Ratification of the Convention gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interest of the applicant's children as a primary consideration.

2. The Minister had not treated the best interests of the children as a primary consideration, and the applicant had been denied procedural fairness in that he had not been afforded the opportunity to present a case against a decision inconsistent with the legitimate expectation. Per Mason CJ, Deane, Toohey and Gaudron JJ — Although a Convention ratified by Australia does not become part of Australian law unless its provisions have been validly incorporated into municipal law by statute, the ratification was an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers would act conformably with the Convention. It is not necessary that a person seeking to set up such a legitimate expectation be aware of the Convention or personally entertain the expectation. It is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

o 3rd category - Ex parte Lam

- Mr Lam has no right to stay in country – no right or interest but he had a legitimate expectation that the dept wrote him saying they would contact the carer of his children and comply with rights of convention to child

- did he have that legitimate expectation?
HC said no and read down teoh to its factual circumstances Teoh the leg expectation only applied to rights of child

CJ Gleeson held: there was no breach of procedural fairness. Procedural Fairness is to avoid a practical injustice. There was no injustice by not writing to carer. Legitimate expectations can only be argued with regard to international conventions of right of child

Before the respondent minister considered whether to cancel the applicant's visa, the department wrote to the applicant advising that it would be contacting the person who cared for his children in order to assess the effects of his deportation on them. The department did not contact the carer and the minister relied on the information in the applicant's submission and the annexures, including a letter from the carer, in deciding to cancel the applicant's visa. In the High Court, the applicant sought certiorari and prohibition to quash that decision, claiming failure to accord procedural fairness because he had a legitimate expectation that was created by the letter to him, and that expectation had not been fulfilled. Held: (dismissing the application)

CJ Gleeson held: there was no breach of procedural fairness. Procedural Fairness is to avoid a practical injustice. There was no injustice by not writing to carer. Legitimate expectations can only be argued with regard to international conventions of right of child

1) by McHugh and Gummow JJ) The concern is with the fairness of the procedure adopted rather than the fairness of the outcome.

2) by Gleeson CJ) Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation. The concern of the law is to avoid practical injustice. As no practical injustice had been revealed, it was not shown that there was procedural unfairness.

3) by Callinan J) It was fatal to the applicant's claim that he was unable to demonstrate that there was any material that he could have put before the respondent that was either not already in the respondent's hands, or that might have influenced the respondent to decide his case differently.

4) by Hayne J, Gleeson CJ concurring) Even if the department's letter engendered some relevant legitimate expectation, departure from it gave no ground for relief because neither the expectation nor departure from it affected the course which the applicant pursued.

2. Has procedural fairness been excluded? (exclusion question of pf)

Exclusions of procedural fairness: Construction of the statute
• Remember, there are three questions to consider for the hearing rule (PF). The first question is when does PF apply? If it does apply, the second question is, then, is it excluded?

• Legislation can explicitly exclude the rights of procedural fairness.

• However, courts generally require express words, evincing a ‘clear manifestation’ of the intention to exclude procedural fairness in the statute: *Kioa v West*

• Discussed and tested in *Ex parte Miah* (2001) 206 CLR 57- clear manifestation:

  o ‘plain words of necessary intendment’ – insufficient to have ‘indirect references, uncertain inferences or equivocal considerations’ (per Mason J)

  o ‘(N)o inflexible rule that the presence of a right of appeal or review excludes natural justice’

  o *Ex parte Miah* subsequently considered in *Saeed*

  Facts of *Miah*:

  - case regarding migration act there was an code of procedures in act dealing with applications for refugees status

  - the code excluded procedural fairness so that the execute doesn’t have a duty to act fairly had own procedural fairness watered down hearing & bias rule

  - HC: said need plain words of necessary intendment: fact statutory procedure wasn’t plain or intentional, the express exclusion of some procedures within code didn’t mean all rules of procedural fairness were included

  - there might be a statutory right to exclude procedural fairness BUT if there were situations where an applicant’s life or liberty was put at risk by DM then it will be highly unlikely no matter how blunt the wording may be the legislature meant to exclude procedural fairness

  *Saeed*

  - parliament tried even harder to exclude procedural fairness in case of refugee applications after *Miah*

  - they made intention to exclude PF unequivocal

  - Issue: does this validly exclude Saeed who wasn’t given an opportunity to rebut presumptions regarding the DM’s decision to deny her visa?

  - there were links to Tongan community, department of immigration made inflammatory comments they made allegations based on her character
- **HC Held:** the principles of PF are found in CL and in statutory powers of ADJR if administrative DM reaches a decision without fulfilling the conditions of PF then the decision isn’t valid. What PF requires is unique in each case. Must read statute first, see if parliament intended to exclude PF, the presumption to exclude PF is that parliament presumed not to overthrow the law unless it is irresistibly clear.

- PF always applies and cannot be excluded, parliament must be irresistibly clear (parliament could never intend to overthrow CL & ADJR)

**3. What does the duty to accord procedural fairness mean in context? What is the ‘content’ of the Hearing Rule?**

*arguing occurs here*

- **Fair procedures are appropriate and adapted to a particular case:** *Kioa v West* (Mason J).

- In each situation consider:
  - Statutory framework (exclude PF? *Miah, Saeed*)
  - Circumstances concerning individual decision to be made
  - Subject matter of the decision (more seriousness, more likely content and duty of hearing rule is more onerous)
  - Nature of the inquiry
  - Rules of the tribunal that govern what hearing rule and duty might be
  - After considering the specifics, consider the cases…

Generally, three minimum requirements of Hearing Rule (if not provided the breach of fair hearing rule):

**(1) Prior notice**

- Simply notice that is **prior** to the decision and **adequate** in the circumstances *Kioa v West* (normally notice in writing, prior enough so person can respond accordingly and prepare their case, can do research for counter argument)

**(2) Disclosure**

- Specificity of complaint in **sufficient particularity** to enable the person affected to know the case they have to meet.

- if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case that is made against him *Candar v Government of Malaya* (1962)

- A defendant is to be entirely appraised not only of the legal nature of the offence but also of the particular act, matter or thing, alleged as the foundation of the charge *Johnson v Miller*
• In *Kioa v West* – Mr Kioa who was found working illegally in Vic (student visa expired, was seeking approval of tourist visa), Mr Kioa did not have sufficient disclosure of any of the minister delegate’s reasons. He had a legal interest in his reputation not to be defamed. Because of the inflammatory information before the DM made the decision, the suggestions of character and failed to give him prior notice and that a decision was being made based on these inflammatory issues, there was a failure of the hearing rule

  o involved breach of prior notice and disclosure (he didn’t have disclosure of specific reasons of decision being made against him) and the opportunity to be heard (was never heard)

(3) **Opportunity to be heard**

• Written submissions or oral hearing?

• Does the defendant have right to Legal representation? Cross-examination? Right to a lawyer may be excluded by statute

**Core content element:**

• where a DM has information or allegations that are credible, relevant and significant the applicant has an opportunity to respond to those allegations before the decision is made *kioa v west*

• Whether it is credible, relevant and significant must be determine prior and not after a decision is made. If it looks like any adverse information could be cred, rel and sig to applicant then it must be disclosed *before* ultimate decision reached *Applicant VEAL*

• *Applicant VEAL*

  o the refugee review tribunal received a letter from dept of immigration making allegations against applicant

  o Applicant was Eritrean national who sought a protection visa but refugee review tribunal didn’t tell applicant about the inflammatory letter from dept of immigration making allegations against applicant

  o the letter made allegation that applicant had killed a prominent political figure in Eritrea, an assassin, author of letter wasn’t in dept of immigration - was someone who had written to dept and had asked for letter to be treated confidentially (it wasn’t passed onto applicant)

  o No notice or information about what is in letter = no disclosure of sufficient particularity But they did refuse protection visa: in refusing it they didn’t give any weight to the letter anyway

  o issue: has refugee review’s tribunal failure to advise the applicant of letter or substance of letter, was it a breach of rules of procedural fairness?
o held: J Brennan – in ordinary case where no case of confidentiality arises the applicant should be given the opportunity to look at matters credible, relevant and significant to the decision.

o Depending on its source the letter is credible, relevant and significant – perhaps not credible. If fulfils all criteria then tribunal needed to disclose it to applicant

o Whether it is credible, relevant and significant must be determine prior and not after a decision is made. If it looks like any adverse information could be cred, rel and sig to applicant then it must be disclosed before ultimate decision reached.

o HC unanimously held that there was a failure to disclose the content of letter to applicant before reaching a decision which was a breach of procedural fairness. Veal only needed to know content and not who wrote it

Legitimate expectations shift: From threshold to content

• As we discovered last time, the role of LE in determining whether or not PF applies has declined over time.
• In Lam, the HC criticised the use of LE in Teoh (and significantly read the case down). Yet, Lam kept open the possibility that LE may affect the content of PF.
• But, they added, the mere fact a LE is disappointed will not amount to a breach of the hearing rule if no ‘unfairness’ or ‘practical injustice’ is occasioned.
• In Lam, the dept’s failure to keep its promise did not breach the hearing rule because the failure did not deprive the applicant of any opportunity to advance his case (there was no unfairness or prac unfairness that they didn’t contact nanny in that case)

Content - summary of cases

• Ground can be made out if the way the decision was made can be shown to adversely affect ‘rights, interests and legitimate expectations’ : Kioa

• Rights
  o to be notified of possibility of an adverse decision: e.g. Teoh
  o to have adverse material disclosed, or at least notice it will be disclosed: e.g. Kioa, Miah, VEAL
  o to make submissions in response: e.g. Kioa, Miah, VEAL, Teoh

• Interests
  o Kioa: esp discussion of licenses (per Brennan J)
- **Legitimate Expectation** (behaviour or undertakings that may give rise to LE)
  - Regular practice: *CCSU v Minister for Civil Service*.
  - Nature of the application: *FAI* (ie licenses)
  - Ministerial Policy or political decision: *Haoucher*
  - Ratification of international treaty: *Teoh; Lam*.

- Factors which affect the operation of the presumption that ADMs make decisions in a way that is procedurally fair:
  - Construction of the statute – *Annetts v McCann; Kioa; Miah; Tanos; CCSU v Minister for Civil Service*.
  - The decision-making framework
    - Investigations: *Ainsworth*.
    - Rights of appeal: *Twist; Marine Hull; Miah*.
    - Appeals may ‘cure’ first instance defect: *Calvin v Carr*.
  - Policy and Political Decisions – *SA v O'Shea*.

**Outcome?**

- **Caution**: Right to an unbiased fair hearing is not the same as getting the outcome you want (and may think is fair). It’s PROCEDURAL fairness, not ‘content’ fairness….

- If there is a breach of a PF requirement, person ordinarily entitled to relief.

- Generally, not necessary to show that the breach had a material impact on the decision, or that a different decision might have been reached. Rather, a person is entitled to relief UNLESS the court is satisfied that the breach would have had no bearing on the outcome (ie reversal).

- Note – ‘practical injustice’ of *Lam*.

- Consequences of breach? JE…. (see *Aala*, coming weeks)
BIAS RULE (rules against bias):

- An ADM is required to be disinterested or unbiased in the matter to be decided (ie *non dbet esse judex in propria causa*)
- Two types: actual & apprehended bias
- Unclear whether *Kioa* threshold issue applies to bias rule. Yet it is clear that like the hearing rule, the bias rule can be excluded by statute.

1. actual bias
2. apprehended bias
3. different DM’s
4. Exceptions to bias rule
5. Consequences of breach bias rule

1. Actual bias?

- **Actual bias** is a “pre-existing state of mind which disables the decision-maker from undertaking, or renders him unwilling to undertake ... any proper evaluation of the materials before him or her which are relevant to the decision to be made” (*Jia*, French J).

- Actual bias is established only where the DM can be shown to have a closed mind and was not open to persuasion

- Seldom encountered & rarely argued- subjective hard to prove

- **In exam say:** we don’t have enough facts as to decision maker’s closed mind we can’t see it on the facts- apprehended bias is easier to prove

2. Apprehended bias?

- Apprehended/apparent/ostensible bias…

- Justice should not only be done, but should be seen to be done.

- Apprehension of bias arises where ‘a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’ (*Ebner*)

  - did DM act in any way to suggest they weren’t impartial?
  - Objective test – “FMO”? ‘reasonable bystander’?

- Most recent HC statement on principles and application of the test for apprehended bias in *BATS Ltd v Laurie* (2011).

  - Note - apprehended bias by a judge not ADM, but principles re: apprehended bias the same.
• What will differ in each case is how the Court construes the obligations of the particular decision maker (according to their institutional and political functions) and what that infers for the apprehension of bias by a ‘fair minded observer’

  ▪ Note previous case law HC applies in BATS, including Livesey (1983), Ebner (2000); Laws v ABT (1990).

Test for apprehended bias:

_BATS Ltd v Laurie (2011) 242 CLR 283:_

• ‘Because the rule is concerned with the appearance of bias, and not the actuality of bias, it is perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned… It is a recognition of human nature’

• What matters therefore is whether a ‘fair minded lay observer might reasonably apprehend that [a DM] might not bring an impartial or unprejudiced mind to the resolution of the question…to be decided.’

Facts:

  o Mr L was smoker for 30 years and instituted an action against BATS under dusts and diseases act with claim for negligence, but he died in 2006
  o 2007 widow continued proceedings and appeared before Justice Curtis

  o He was also looking at a 2002 prior case with BATS which involved the death of an employee by asbestos and lung cancer he made orders against it BATS in relation to discovery where it argued that it couldn’t disclose information on basis that it was covered by legal professional privilege. J Curtis rejected its claims and said there was a dishonest concealment by BATS under legal professional privilege communication in fraud. BATS was abusing process of privilege and wasn’t being honest in discovery process.

  o Current case – BATS argued that J Curtis was bias from previous case – alleged apprehended bias, he doesn’t like them even though findings may have been correct. BATS wanted to disqualify J Curtis on ground of bias. J Curtis refused application based on bias

  o Held: BATS took it to NSW CA who dismissed it and it went to HC. It held that there was apprehended bias and that J Curtis couldn’t hear matter. Held bias because of public’s perception. A fair minded lay observer might reasonably apprehend that the court might not move its mind on one case of fraud.
Because the rule is concerned with the appearance of bias, and not the actuality of bias, it is the perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned… It is a recognition of human nature’

What matters therefore is whether a ‘fair minded lay observer might reasonably apprehend that [a DM] might not bring an impartial or unprejudiced mind to the resolution of the question…to be decided.’

**Apprehended bias test: summary**

- So … ‘whether an informed and fair-minded lay observer might reasonably apprehend’ that the ADM ‘might not bring an impartial mind’ to the decision to be made.’ (*BATS v Laurie*)

- The question to ask then is: ‘one of possibility (real and remote) not probability’ (*Ebner*) – is it possible that there was apprehended bias?

- How determine reasonable apprehension of bias in a situation?
  - First, it requires the **identification** of what is said might lead a judge (or juror) (or decision-maker) to decide a case other than on its legal and factual merits.

  - The second step is no less important. There must be an **articulation of the logical connection** between the matter and the (bias) feared deviation from the course of deciding the case on its merits. (*Ebner* per Gleeson CJ, McHugh, Gummow & Hayne JJ)

  - ‘What it takes for a fair minded observer to conclude that a matter has been prejudged needs to be considered in the context of the statute under which a decision is made, an inquiry which includes reference to the general nature of the decision making processes, and the identity of the decision maker’ (*Jia*)

**Circumstances of bias ….?**

**Direct or indirect interest**

- Pecuniary interests? (financial interest)
  - a pecuniary interest is relevant only insofar as it indicates actual bias or gives rise to a reasonable apprehension of bias: *Ebner; Hot Holdings.*

  - But if a decision makers holds ‘a not insubstantial direct, pecuniary or proprietary interest in the outcome of litigation’ this will ‘ordinarily result in disqualification’ (*Ebner*)
Conduct and statements

• had judge made derogatory or insulting statements before? (*Vakuata v Kelly*)

Association, relationship

• personal connections or contacts with interested persons (*Hot Holdings*)

• Prior involvement with matter being determined (*Angliss*)

Extraneous information – anything else?

3. Issue - Different decision-makers

• Application of bias rule varies according to decision-maker:
  o It would be wrong to apply standards of ‘judicial detachment’ to a minister who occupies a political office and who is accountable to the parliament and the electorate (*Jia*)
  o So, different standards for different DM’s.
  o Core questions relate to the nature of the decision maker, and what they may know, or what may be interpreted to them as a ‘fair’

4. Exceptions to the Bias Rule

There are exceptions to the rule against bias:

(1) Exclusion
  o eg statutory modification e.g private clause

(2) Waiver
  o expressly or by implication (*Vakuata*)
  o ie failure of applicant to object to bias

(3) Necessity
  o No other DM who can make the decision; or
  o All other DM’s are similarly biased (*Laws*)

5. Consequences of breach of bias/PF?

What are the consequences of breaching the rule against bias?

• If breach is **prior to decision**, person cannot participate in the decision (judge must recuse themselves)
• After decision? Decision invalid = void ab initio

• Why? Breach of PF = JE..(again, coming soon
TOPIC 17: GROUNDS OF JUDICIAL REVIEW: CONSIDERATION & PURPOSE (PART I)

Structure:

- Today we turn our attention to specific grounds of judicial review, by introducing several discrete grounds:
  
  o **Consideration grounds** (ie relevancy grounds)
  
  o **Unauthorised Purpose**

- These are some of the most common grounds of JR. They both relate to the control of decision-makers choice, and are two of the major ‘reasoning process’ grounds of JR

- If time, we briefly raise two further related grounds:
  
  o Bad faith
  
  o Fraud


Where we are at on chart:

<table>
<thead>
<tr>
<th>Court determining whether decision/action has been done legally</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Threshold issues:</strong></td>
</tr>
<tr>
<td>o Court must have jurisdiction to conduct JR</td>
</tr>
<tr>
<td>o Court must accept issues are justiciable</td>
</tr>
<tr>
<td>o Applicant must have standing</td>
</tr>
<tr>
<td>o Court must have power to grant a remedy</td>
</tr>
</tbody>
</table>

**Major issue:**
- There must be a ground of review

**Final issue:**
- Legislature must not have validly excluded the court’s review jurisdiction
S 5(1) ADJR – Grounds listed [see s6(1) - conduct and 7(1) – failure to make a decision also]

5 Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
(c) that the person who purported to make the decision did not have jurisdiction to make the decision;
(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
(g) that the decision was induced or affected by fraud;
(h) that there was no evidence or other material to justify the making of the decision;
(i) that the decision was otherwise contrary to law.

Errors of law & Jurisdictional error are listed: CL plus, see ss5(1)(c),(d) & (f) ADJR

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(j) that the decision was otherwise contrary to law.

**GROUNDS OF JUDICIAL REVIEW**

- Once it has been established JR is available (ie threshold issues satisfied), next issue is ‘grounds of review’.

- This is the substantive issue of Judicial review. Ask: what error of law has occurred? What has gone wrong with original Dm?

- Helpfully, grounds of review are listed in ADJR, ss 5 & 6

- BUT Remember: Both CL and ADJR – they may or may not be the same: Check for each ground.

**Categorising grounds of review**

Many different grounds of review, and different ways of categorising, including:

1. Procedural grounds
2. Decisional grounds
3. Reasoning grounds

**Grounds: Classification?**

Grounds can be classified in some more or less helpful ways:

1. **Procedural grounds:**
   - Focus on DM’s conduct
   - e.g Procedural fairness (fair hearing, bias), procedural error.

2. **Reasoning grounds (or reasoning process grounds):**
   - Focus on DM’s reasoning process (ie – the control of administrative choice)
• Eg – **consideration grounds, improper purpose**, inflexible application of policy, acting under dictation (only listening to superior), unauthorised delegation (delegating decision down when not allowed to)

3. **Decisional grounds:**

• Focus on content of the decision reached (or relate to decision itself).

• Eg – jurisdictional error, error of law, errors of fact, jurisdictional fact.

For more detail on this classification, see chapter 5 Cane and McDonald, *Principles of Administrative Law (2012)* [A good second text]

**REASONING GROUNDS:**

• These grounds generally focus on the ADM’s reasoning process

• That is, these grounds of JR are concerned with the control of administrative choice

• Today, we look at two major grounds:

  1) Considerations grounds
     a) relevant consideration,
     b) irrelevant considerations

      ⇒ Both involve a three-step process of questioning.
      ⇒ Both require advanced skills of statutory interpretation.

  2) Unauthorised purpose
1) CONSIDERATION GROUNDS

(If helpful, classified as a ‘reasoning’ ground or ‘reasoning process’ ground)

Relevancy or ‘considerations’ grounds

• Decision may be invalid because decision-maker:

  (1) Failed to take account of a relevant consideration

  (2) Took account of an irrelevant consideration

    that the statute asked them to take/not take into account

• *Kioa v West* – irrelevant consideration was who the Kioa was hanging around with instead of whether his visa application should be denied

• relevant consideration = mandatory consideration not optional that DM needed to consider …

• irrelevant = prohibited by Act - says so in statute

• Most frequently used grounds of judicial review.

• Note: Two companion grounds (relevant considerations & irrelevant considerations) are related, but constitute separate grounds.

• Be careful: relevant/irrelevant binary potentially misleading. What about ‘permissible’ considerations?

Ss 5(1)(e) & 5(2)(a) & (b) ADJR— read these sections together

5 Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

b) (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

c) that the person who purported to make the decision did not have jurisdiction to make the decision;

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f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
g) that the decision was induced or affected by fraud;
h) that there was no evidence or other material to justify the making of the decision;
i) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(i) any other exercise of a power in a way that constitutes abuse of the power.
ELEMENTS TO PROVE

Consideration grounds: CL & ADJR

Same test for relevancy grounds at both CL and ADJR. CL test enshrined in section 5(1)(e) of the ADJR:

- **Section 5(1)(e)**: ‘that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made’

  - the DM misinterpreted the statute which constitute an improper exercise of power

- Further, **section 5(2)** says that the reference in s 5(1)(e) to an improper exercise of a power includes:
  
  o **S 5(2)(a)** taking an IRRELEVANT consideration into account in the exercise of a power;

  o **S 5(2)(b)** failing to take a RELEVANT consideration into account in the exercise of a power.

- See section 6(1)(e) and 6(2) for conduct leading to a decision

Ask 3 questions…

- The tests for both ‘relevant considerations’ and ‘irrelevant considerations’ involve a very similar three step process.

When addressing relevancy grounds, ask:

1. What did the DM consider?

2. What was the status of the consideration? Was it **required** by statute to consider what they did etc?

3. Was the consideration significant?

   - (was it a failure to take into consideration a relevant or irrelevant consideration – did it affect outcome of decision?)

These three questions are reflected in both tests.
Relevant considerations? (s 5(1)(e), s5(2)(b))

- A decision will be invalid if the DM failed to take into account a relevant consideration.

- But… what is a ‘relevant consideration’?

- DM must have failed to take into account a consideration which the DM was required to consider under the Act, either expressly or impliedly.

- Approach to interpreting and applying this test (3 steps):

  1. The decision-maker failed to take account of a consideration.

  2. This consideration was a matter that, expressly or impliedly, the decision-maker must consider under the Act

     - if impliedly could argue purposive approach via project blue sky

  3. The matter was significant for the decision; it materially affected the decision (actually changed the outcome- make sure to argue)

STEP 1 – Failure to consider

DM failed to take into account a relevant consideration.

- Arises in two situations:

  1) DM didn’t take it into account at all

  2) Gave it insufficient weight (cf: merits review?)

- Consider the following two cases Tickner and Min for Immigration v SZJSS at end

What amounts to ‘consideration’?

- Problem: Does referring to a summary document discharge an obligation to consider relevant matters? Or is it a failure to take account of a relevant consideration?

- See Tickner v Chapman (1995)

  o M’s decision invalid because, inter alia, failed to consider a relevant consideration (despite reading summary)

  o Relevant Act required M to consider report and submissions but M had not done this, and had therefore not engaged in an active intellectual process in relation to material he was obliged to consider.
• **Question:** Is *Tickner v Chapman* an example of situation 1 (no account) or situation 2 (insufficient weight)?

A decision may be set aside if a DM fails to give adequate weight to a relevant factor, if this is required by statute:

• **Khan v Minister for Immigration and Ethnic Affairs** (1987) (FCA)
  
  o DM required to give ‘proper, genuine and realistic consideration’ to the merits of the case was standard by which DM’s were to give weight to matters they had to consider

• **But see now Minister for Immigration v SZJSS** (2010) (HCA)

  o Cited *Khan* and it’s ‘litmus test’ of ‘proper, genuine and realistic consideration’
  o RRT had not erred in giving a piece of evidence ‘no weight’
  o Weight to be accorded to evidence was entirely a matter of the merits of the application
  o In this instance, it did not amount to a failure to consider a relevant matter

• Is there a duty to inquire to ascertain relevant matters? NO – only what’s in front of them

    
    ▪ DM has no duty to make an inquiry to ascertain relevant matters
    ▪ Here: the DM (tribunal) wasn’t even required to read the whole file to find out what matters were relevant

  o No - it seems there is no duty on DM’s to make an inquiry to ascertain relevant matters.

**Cases:**

• *Tickner v Chapman (1995) (FCFC)* –

  - Land dispute, there was an Act the Aboriginal and Torres Strait Island Protection Act (Cth). Under it the minister for Aboriginal Affairs (Tickner) had power to make declarations to preserve Aboriginal heritage sites for various reasons including against development

  - Act required minister to appoint a reporter to invite representations from interested people. Reporter needed to make report public and it would contain all of the submissions. He was then required to present it to the minister who would then make a declaration.
- The minister under the Act was only required to review the report to deal with public submissions. = relevant consideration in red

- Tickner tried to make a decision regarding the construction of the Hindmarsh island bridge.

- Question was could the bridge be built on Hindmarsh island as it might be built on Aboriginal land.

- A tribe of women were unable to disclose why the land was sacred because it was secret women business

- Tickner appointed a female reporter who wrote a report, it was sent to him, he reviewed some of the submissions.

- Attached to the report was an envelope entitled “secret women’s business”, the ministerial advisor read contents of it and reported back to minister. Tickner didn’t read it was trying to be respectful.

- It was held at Full FC that the minister’s declaration prohibiting construction of the bridge was invalid. While the minister can receive support from staff and doesn’t need to read every word of every document, the Act in this case made it clear that there are serious matters of public involvement. Because of this the minister needed to not only read the report and the submissions. As a result the minister failed to engage in an active, intellectual process in relation to the material that he was obliged to consider. The court was not prepared to read into leg an implied exception that the minister wasn’t required to read matters that couldn’t be disclosed due to Aboriginal law. There was a failure of a relevant consideration (all public submissions) also this was determinative submission – it did materially affect the decisions, pertained what land was being used for.

- Min for Immigration v SZJSS (2010) (HCA) – when a minister has given insufficient weight

  - Applicants from Nepal seeking asylum one of male applicants claimed that he feared persecution in Nepal because he was a teacher, he was forced by rebels to attend training camps, he also produced a series of letters corroborating this testimony

  - he applied to refugee review tribunal in 2008 who rejected his claim, it concluded that the conditions in Nepal had changed and applicant would no longer be in danger from rebels. They gave no weight to letters on basis that circumstances in Nepal had changed

  - Applicant went to FC: was held that the review tribunal erred by not giving the letters any weight. Once they had considered letters could say conditions in Nepal have changed. Tribunal couldn’t ignore highly probative evidence confirming the factual basis of the applicant’s fear of persecution in his home country.
HC: unanimous decision (contradicted FC): the weight to be accorded to evidence is entirely a matter for the DM (the tribunal) whether or not the letters were corroborative of the applicant’s application is a question of fact on which reasonable minds might differ. There was no failure to take into account a relevant consideration where a DM has broad decision making powers. This involved an error of fact and not an error of law. Whether they considered letters of not wouldn’t change outcome

Minister for Immigration and Multicultural and Indigenous Affairs; ex parte S134/2002

- wife sought asylum, claiming she was refugee fearing persecution in Afghanistan, the RRT said that the applicant was from Pakistan therefore not a refugee
- Husband came on different boat was a refugee in Australia, was believed he was from Afghanistan
- If the wife had known of this information she might have used it to bolster her argument that she too was from Afghanistan
- There was a file note on her file before the RRT that said this woman’s husband has been granted refugee status as Afghani but the tribunal members didn’t read file note
- issue: what’s the status of this information? She didn’t raise issue, did RRT have active duty to inquire? (to read own file)
- held: there was no duty to inquire (because it wasn’t submitted in formal evidence it was deemed not to be part of submissions/arguments was just a file note)

STEP 2: Consideration was one that Dm was Required to consider by Act

The consideration was a one that the decision-maker was REQUIRED to consider under the Act

- The consideration was one DM MUST consider under the Act - not just a consideration DM may consider.
- Question: Did the Act express or impliedly require this consideration to be taken into account?
- This is (and always will be) an issue of statutory interpretation
- Express provision in statute? Just look for provision in statute is there a consideration that DM is directed to consider? Or is the Act permissive about this?
• **Implication** in statute?
  
  o Courts draw inferences from the language of the statute, the nature of the function being exercised and sometimes human rights implications.
  
  o Eg - if there is a discretion, are there any implied limits on this power?
  
  o Common examples include implied requirements to consider the protection of human rights, promotion of public interest or protection of national interest

**Explicit requirement?** – DM must determine what is relevant

• A decision is only invalid if DM has not taken into account matters the DM is bound to consider under the statutory framework.

• **Sean Investments Pty Ltd v Mackellar** (1981) (FCA)

  o DM need not consider everything an applicant suggests is relevant, and could not be criticised for failing to consider every little matter which the affected party had raised (it’s up to DM).

**Implicit requirement?**

• In the absence of an explicit requirement, there may be an **implicit** requirement to consider certain matters. This implication arises from the subject matter, the scope and the purpose of the Act.

• **Problem**: How do we determine whether the Act creates an obligation on the decision-maker to consider a matter or just permits them to consider a matter?

• Where Act grants discretion to make a decision in broad terms, the matters which must be considered are fairly unconfined.

• **Minster for Aboriginal Affairs v Peko-Wallsend Ltd** (1986) (HC)

  o Minister had power to grant a land claim. PW made submissions to M about detriment this would cause to their mining. A new Minister took over, considered some (not all) of PW’s submissions, and granted land claim.

  o Court held - It was **implied**, in the Act, that the Minister was **bound** to consider all submissions about detriment which may be caused by the land claim. The new Minister hadn’t done this. His declaration was invalid.

**Minster for Aboriginal Affairs v Peko-Wallsend Ltd**

- federal minister for aboriginal affairs had power to grant land claim based on aboriginal connection to land within NT under the Aboriginal Land Rights Act NT (1976)
- Peko had a mining license subject to an aboriginal land claim

- Statutory context: The land first needed to be assessed by aboriginal land commissioner, who would then make recommendations to the minister, the minister would then make a decision to grant/not grant land claim

- commissioner asked for ‘all who may have interests in the land to comment’

- Peko make a comment and submissions. He had an exploration license and he said there might be uranium on small part of the land but led commissioner to believe that only a minor part of mining would be affected by land claim (said they only had exploration license instead of mining license)

- commissioner advised minister to accept land claim on basis that there would be no undue detriment to other people (including the mining)

- peko came back after commissioner report and argued there would be a massive detriment to his commercial interests now that land claim has been granted – argued mining license

- new minister came into election - only knew about original report but at that point Peko had only been granted an exploration licence and not a mining license

- HC – was minister bound to consider the later representation of Peko to the commissioner as part of their duty to consider relevant information

- Act said ‘we grant the DM a discretion’ = factors minister can consider are fairly broad. There is an implied limitation as it is a land claim. Act requires minister to take account detriment of other parties (because of legislative scheme) Minister had constructive knowledge of Peko’s additional submissions as they were the most updated knowledge. Failing to take it into account was failure to take into account a relevant consideration rendering the decision flawed

**STEP 3 – Significant for the decision?**

The matter was significant for the decision

- **Question**: Did this consideration (which DM was required to consider but did not take into account) materially affect the decision?

- Was it significant enough to amount to invalidity? question of fact open to argue

- **Challenge**: Walking fine line between JR & MR…

- **See Min for Aboriginal Affairs v Peko Wallsend**
**Irrelevant considerations? (s 5(2)(a))**

- A decision will be invalid if the DM made an error of taking into account irrelevant considerations.

- Companion ground to failure to take into account relevant considerations.

- Approach to interpreting and applying this test (3 steps):
  1. The decision-maker took account of a consideration.
  2. This consideration was a matter that the decision-maker was prohibited from considering under the Act
  3. The matter was significant for the decision; it materially affected the decision.

**STEP 1 - The DM considered a matter**

- What amounts to ‘consideration’?

  - Burchett J – DM may pick up a red herring, turn it over and examine it and then put it down without ‘considering’ it.
  - So, DM may look at a matter without considering it.
  - In other words, just because a DM browses through some irrelevant material does not mean the decision will be invalid.
  - Something more is needed than a mere glance for ‘consideration’. Need engagement with consideration.

**STEP 2 - This was a matter the DM was PROHIBITED from consideration under the Act.**

This is an issue of statutory interpretation, but two principles assist:

1. Who is the DM?
   - Different DM’s may account for different matters

2. DM’s usually prohibited from considering personal or whimsical matters (cf: public purpose)
   - *Roberts v Hopwood* (1925 HL) [9.3.16C]: such as ‘eccentric principles of socialistic philanthropy’
STEP 3- The matter was significant for the decision; it materially affected the decision.

• Just say yes this irrelevant consideration materially affected decision, (the same decision wouldn’t have been made had the irrelevant consideration not been considered)

• Did this consideration materially affect the decision?

• Courts should avoid attempting to second-guess whether same decision would have been made…. Min for Aboriginal Affairs v Peko Wallsend
2) UNAUTHORISED OR ‘IMPROPER’ PURPOSE

(If helpful, classified as a ‘reasoning process’ ground)

Acting for an Unauthorised Purpose

- A statutory power can only be exercised for an authorised purpose:
  - Brownwells v Ironmongers Wages Board (1950) (HC); Schielske v Min for Imm (1988) (HC).

- This CL rule is codified in ADJR:
  - s 5(1)(e): that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made
    - Plus… ’an improper exercise of the power’ includes:
  - s 5(2)(c): an exercise of a power for a purpose other than a purpose for which the power is conferred

There are two steps:

- Step 1: For what purpose was the power lawfully authorised under the Act?
- Step 2: For what purpose was the power actually exercised?

STEP 1: Authorised purpose?

Step 1: For what purpose can the power be lawfully authorised under the Act?

- The purpose can be express or implied, and there may be multiple purposes.
- Task: Statutory interpretation: aim/intention of statute?
- Express purpose or implied?

Express purposes

- Express purposes are those stated in the statute. Broader the purpose in Act, harder a decision is to challenge on ground of improper purpose.
- Municipal Council of Sydney v Campbell (1925) (PC) [9.2.9C] - Act authorised land resumption power for development not profit
  - Sydney council was empowered under the Act to compulsorily acquire land in order to remodel and improve area
- Council passed resolution to resume land in order to extend Martin Place to include land owned by Campbell.
- Judge at 1st instance held that council hoped to acquire land so that its value would increase to offset other costs of council works.
- Privy Council: struck down council’s decision to acquire land, on the basis that the actual purpose of decision was not in conformity with the actual purpose of exercising that power. The council was given the power to acquire land but that does not extend to making a profit (acquiring land was to pay off other council debts) as such it was a breach of ground of authorized purpose. The decision was invalid.

**Implied purposes**

- If no express purpose, courts look to aims/objects of statute to determine authorised purpose by implication.


  - S faced criminal charges in Germany, Aust govt tried to extradite him to Germany to face charges it was alleged that S was a Nazi war criminal. Extradition failed.
  - Minister for immigration tried to deport him. It is an entirely different power from extradition.
  - Was the deportation order validly made? Was there an authorized purpose v actual purpose?
  - There was explicit purpose for what deportation is for, act didn’t say this is why we deport people.
  - Full FC: the deportation power was used for the purposes of disguised extradition and therefore it was wrong, must use extradition powers. It implied purpose in Migration Act, if you’re going to deport it is only because they have lost their right to stay in Australia = only authorized purpose for deporting someone.

**STEP 2: Actual purpose?**

*For what purpose was the power actually exercised?*

- How do you know the actual purpose for the decision? Matter of evidence.
- Problem: Collective decisions?
  - See *IW v City of Perth* (1997) (HC)

**Multiple purposes?**

- If there are multiple purposes, is the decision valid if one of the many purposes for the decision was unauthorised?
• Test…?

• See *R v Toohey; Ex p Northern Land Council* (1981) (HC) [9.2.10C]
  
  o Would the decision have been made if it wasn’t for that improper purpose? (but-for)

• See also *Samrein v Metropolitan Water Board* (1982) (HC) [9.2.13C]
  
  o Where an unauthorised purpose is one among several, decision will be invalidated only if that purpose is a ‘substantial purpose’.

*R v Toohey; Ex p Northern Land Council* facts:

- involved Planning Act 1979 NT gave administrative power to pass a regulation setting the town boundaries,

- the land under the aboriginal land rights protection act aboriginals can make land claims but not over a town

- under the planning Act the administrator in anticipating land claims extended the town boundaries of Darwin so much that it tripled its size, became geographical size of London

- HC held: there is an implicit purpose under planning Act: you can change a town’s boundaries for town planning purposes (e.g extending boundaries), improper purpose was to stop aboriginal land claims. The decision wouldn’t have been made but for improper purpose (extension of boundaries made to prevent aboriginal land claims). It didn’t matter how many legitimate purposes. Look at dominant and substantial purpose of decision
**BAD FAITH**

(If helpful, classified as a ‘reasoning’ ground)

- This is common law *mala fides*. DM exercises a power in a way that is corrupt or dishonest or fraudulent.

- ADJR
  - **S5(1)(e)** – ‘improper exercise of a power’
  - … includes a reference to:
    - **S 5(2)(d)**: an exercise of a discretionary power in bad faith

- Overlaps with improper purpose, but requires a reprehensible intention.

- No comprehensive definition of reprehensible intention, but can involve any of these factors: see *SBBS v Min for Imm* (2002) (FC) [14.3.45]
  1. Involves personal fault of the DM
  2. Allegation should not be lightly made and must be clearly proved
  3. Not possible to comprehensively define bad faith
  4. Dishonesty is crucial
  5. Bad faith is rare and extreme
  6. Mere error or irrationality doesn’t indicate bad faith – **bad faith is far more than poor decision-making**
  7. Errors of law or fact and illogicality won’t demonstrate bad faith without a showing of **capriciousness**
  8. Court to draw an inference of bad faith from the decision-making process and reasons given for the decision
  9. Not necessary to show DM knew decision was wrong. May be sufficient to demonstrate DM was reckless in exercising the power.

**FRAUD**

(If helpful, classified as a ‘reasoning’ ground)

- CL & ADJR tests are the same

- **ADJR s 5(1)(g)**: decision was induced or affected by fraud

- Need actual fraud, not ‘real possibility’ or ‘real suspicion’ of fraud; *Wati v Min for Imm* (1997) (HC)

- This ground may arise because of fraud of the decision-maker. More frequently used where decision affected by fraud/dishonesty of a third party.

- **SZFDE v Min for Imm** (2008) (HC) [14.3.42]
Advisor to refugee applicants fraudulently claimed to be a solicitor and migration agent but had been struck off both rolls.

He advised his clients not to go to court for a hearing on their application for refugee status. Refugee review tribunal found against them.

Held: solicitor had committed a fraud on the clients and on the Tribunal.

Tribunal’s decision rejecting the applicants’ claims was void.
TOPIC 18: GROUNDS OF DELEGATION, DICTATION & POLICY

Today, we continue with grounds of review, including more grounds which control DM choice but more specifically relate to the identity of the DM:

- Procedural error (ch 14)
- Rule against delegation (chpt 14)
- Acting under dictation (ch 15)
- Inflexible policies (ch 15)

These grounds are covered in chapter 14 & chapter 15 (pages 559 – 584).

The remaining grounds will be addressed either today, or in all likelihood, next lecture:

- No evidence(ch 15)
- Uncertainty (ch 15)
- Unreasonableness (ch 15)
- Irrationality (ch 15)

Grounds can be classified in some more or less helpful ways:

- **Procedural grounds:**
  - Focus on DM’s conduct
  - Eg - Procedural fairness (fair hearing, bias), procedural error.

- **Reasoning grounds (or reasoning process grounds):**
  - Focus on DM’s reasoning process (ie – the control of administrative choice)
  - Eg – consideration grounds, improper purpose, *inflexible application of policy, acting under dictation, unauthorised delegation*

- **Decisional grounds:**
  - Focus on content of the decision reached (or relate to decision itself).
  - Eg – jurisdictional error, error of law, errors of fact, jurisdictional fact.
Applications for review of decisions – s 5(1) gateway provision must be read alongside s 5(2)

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds

a. that a breach of the rules of natural justice occurred in connection with the making of the decision;
b. that procedures that were required by law to be observed in connection with the making of the decision were not observed;
c. that the person who purported to make the decision did not have jurisdiction to make the decision;
d. that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
e. that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
f. that the decision involved an error of law, whether or not the error appears on the record of the decision;
g. that the decision was induced or affected by fraud;
h. that there was no evidence or other material to justify the making of the decision;
j. that the decision was otherwise contrary to law. = catch all clause

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;
(b) failing to take a relevant consideration into account in the exercise of a power;
(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
(d) an exercise of a discretionary power in bad faith:
* (e) an exercise of a personal discretionary power at the direction or behest of another person;
* (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
(j) any other exercise of a power in a way that constitutes abuse of the power.
1) PROCEDURAL ERROR – a procedural ground

- Failing to comply with statutory procedures in a statute is a ground of review under CL & ADJR.

- Section 5(1)(b) ADJR: ’that procedures that were required by law to be observed in connection with the making of the decision were not observed’

- ADJR test wider than CL test, as the ADJR test includes procedure ‘in connection with’ decision, which has a wider meaning than the CL test (Our Town FM v ABT (No 1)
  - CL: procedures not observed
  - ADJR ‘in connection with’

- Rationale? If Parliament intended a set of procedures to be followed (by writing them into a statute), a failure to follow those procedures may invalidate the decision.
  - you can have failure to give notice under procedural fairness and also failure to give notice under procedural error if the statute requires it

How to determine

Three step process (statutory interpretation):

1) Is there a procedural requirement in the legislation?
   - Look to statute (will give statute)
   - Policy will not suffice (it’s not law)

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

3) Does a failure to comply with the statute INVALIDATE the decision?
   - is this failure to comply so serious that it should invalidate the decision?
   - what was parliament’s intention?
   - e.g failure = insufficient notice but it was eventually given 24 hrs instead of 48 hrs = depends on severity of outcome for applicant (may not invalidate some notice is better than none at all)

Cases ➔Argue both then pick the one that suits you better !!

Tickner v Chapman

- FACTS: Tickner was trying to respect aboriginal cultural law didn’t read Public consultation report because it was about secret women’s business because it was against aboriginal law. The procedure was a public consultation report made by reporter, the secret women’s business was in an envelope,
Tickner didn’t read it (where the aboriginal women were conducting there business). When making declaration that the hindmarsh island couldn’t be made there was some detail about why he made that declaration.

• **HC HELD**: Notice of the area of declaration not sufficiently precise to satisfy the procedural requirement (legislation required quite specific details in the notice), and therefore a procedural error that invalidated decision.

*Project Blue Sky* (not every breach of PE leads to invalidity) – purposive approach

**HC HELD** – While there was a breach of a procedural requirement, this did not invalidate the decision because the **nature of the obligation** and the potential for public inconvenience meant while a breach, not sufficient to invalidate the decision.

- Was there a procedural requirement? Yes
- ADM complied – No
- Does the failure to comply with the statute invalidate the decision – NO
- Must look to Purpose of legislation and what parliament intended by the processes. Did parliament intend absolute invalidity if failure to follow these processes occurred? Look at nature of obligation, legislative context of the consequences.
- The consequences of invalidity were deemed so massive – public inconvenience – tv would stop parliament could never had intended that non compliance would lead to invalidity
2) UNAUTHORISED DELEGATION (‘reasoning process’ ground)

The rule against delegation:

- You can’t actually delegate anything – they have to exercise the power themselves.

- Common law rule of delegatus no potest deleger. The person invested with statutory power must exercise the power personally, and cannot delegate their power to others.
  
  - involves statutory construction did the statute say that the minister or servant had to make the decision?

- ADJR? Not specifically mentioned, but see:
  
  o s 5(1)(c): ‘the person who purported to make the decision did not have jurisdiction to make the decision’
  
  o s5(1)(d): the decision was not authorised by the enactment in pursuance of which it was purported to be made

- NB: Principal, delegate, agent, administrative assistant.

Exception

- Problem – unrealistic to expect certain DM (like Ministers) to give personal attention to all statutory functions.
  
  o therefore the rule against delegation is a rebuttable presumption

- Rebuttable presumption = allows delegation

Sean Investments (1981) (HC)


FACTS: Appointed a reporter who was collecting the public submission and summarizing them. The minister didn’t read the original submissions. He had delegated his power to the reporter and that delegation was not allowed under the act

HELD: the minister’s decision was therefore invalid. The Act was very clear regarding – serious matters of public policy and involvement and because of this and the legislation’s intention meant he had to personally read the submissions

Carltona Principle – how you rebut unauthorised delegation

- Rule against delegation is a statutory presumption, but can be rebutted.
An exception to the rule against delegation is when a DM may act through an agent for ‘administrative necessity’ - the ‘Carltona principle’:

- **Carltona Ltd v Commissioners of Works** (UK) (1943) [8.5.4] –

  - M’s functions were so many and broad that no Minister could ever personally attend to them. Court held that the legislation **implicitly** allowed for the Minister’s administrative functions to be delegated to an officer in his department (ie an agent).

You can normally delegate unless the leg explicitly says so or the nature of it is huge or one off decision shouldn’t be delegated. **Tickner v Chapman** (1995).

E.g. if something is done a lot and little public impact then can be delegated

In Australia, ‘Carltona’ principle interpreted broadly so it is not limited to Minister or DM directly accountable to Parliament, **O’Reilly v Cmsr State Bank Victoria** (1983) (HC)

This suggests the ‘administrative necessity’ argument may be sufficient to justify the implication that parliament could not have intended a DM to exercise all of their powers personally

To determine when this exception applies, look at the **nature, scope and purpose** of the decision-making power in the Act.

  - e.g immigration act is given personal power to give orders regarding visas, deportation orders etc

**Minister of Aboriginal Affairs v Peko-Wallsend Ltd** (1986) (HC) [9.4.11C]

  - Mining claim in NT where minister didn’t have updated from Peko – wallsend. Peko argued minister had delegated decision down to officer in dept. Minister didn’t look beyond original submissions.

    - Mason J (restated C principle) said that the Caltona principle sometimes suggests that a minister’s functions are so broad that the legislation must implicitly allow delegation. **If the DM power is extremely important** it might suggest that parliament intended the power to be exercised by principal personally. **If power is very broad and arises in a multitude of cases** administrative necessity suggests parliament intended the power to be exercised by other people within the department and not the minister

    - Here, parliament surely intended that these particular functions had to be exercised by the Minister personally. The Minister’s decision about the land claim was central to the Act, it has important consequences for Aborigines and also miners who may suffer detriment.’
But in any event HC held that Minister did make decision himself – he didn’t delegate down at all, he just asked for input and so there was no need to trigger this principle because the minister had made the decision himself.
3) ACTING UNDER DICTATION (‘reasoning process’ ground)

- VERY DIFFICULT TO PROVE
- Essentially it is DM unfairly giving up too much of their authority
- When this is triggered: When there is more than one decision making character involved– more than one person trying to make the decision
- Decision-maker must turn their own mind to the decision and cannot act at someone else’s behest
- ADJR s 5(1)(e): “the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made”
- … and one example of that is s 5(2)(e): “an exercise of a personal discretionary power at the direction or behest of another person”
- Often this arises in the form of political pressure by a Minister on a decision-maker

Factors to consider when determining this ground

*Bread Manufacturers of NSW v Evans* (1981) (HC) [11.3.5C]

**FACTS:** Association of bread manufacturer challenged an order made by the price commission. The price commission set the max price of bread – there were a statutory scheme set up by the price commission and it had a process, it would hear proposals about price increases and once heard it would make an order fixing the price.

The minister had power to disallow the price commission’s orders. Here, price commissioner asked the minister what the max price for bread is. The association argued that the price commissioner made their order at behest of minister (didn’t hear proposals as to price just asked minister)

**HELD:** CJ Gibbs there is a difference between a DM that acts under the dictation of a minister and a DM who just considers the views of a minister. Merely considering the views of a minister will not render the decision invalid. A decision will only be rendered invalid where a DM considers a minister’s views when they are not meant to

- Here, no evidence that members of the Commission had forsaken their independence.

**Factors to consider:**
- The particular statutory function
- The nature of the question to be decided,
• The character of the original decision-maker
• The statutory provisions and what they say about the relationship between the decision-maker and the responsible Minister
• does the statute indicate whether the decision-maker has to give absolute regard to the Minister or whether they can ignore the Minister?
• Is there anything implicitly in the statute about this?

Examples

**R v Anderson; ex parte IPEC-Air Pty Ltd** (1965) (HC)

**FACTS:** The Director-General of Civil Aviation had power under the *Customs (Prohibited Imports) Regulations* to give permission to import aircraft. The regs were silent as to the matters the D-G could consider. D-G refused IPEC permission, citing the government’s two airline policy.

**HELD:** the decision was valid, the D-G hadn’t acted under dictation. The D-G was right to carry out the lawful directives of the Minister and give conclusive weight to government policy. This was *implicitly allowed in the Act.*

• Does it prohibit influence – no then may be allowed.

• Cf: *Ansett Transport Industries v Commonwealth* (1977) (HC) – whether minister should be able to influence outcomes where decision was highly political
4) INFLEXIBLE POLICIES (‘reasoning process’ ground)

* overlaps with irrelevant considerations

**what happens when DM only look at policy acts like its law (the DM is illegally fettering there own decisions, decision will be invalid)

Policy? What do we mean by policies?

- Policies are usually implemented by the public service to help administer law but they aren't law and not delegated legislation.

- What is the role and status of policies? Do they have the same force as legislation? No

- Are they directive or can they only be used as guidance? Guidance

Inflexible Policies: Rules

Slightly different between CL and ADJR

- **Common law rule:** when someone is exercising a discretionary power under a statute, there must be no fetters placed on the factors they can properly consider.

- **ADJR rule:** improper exercise of power ground in s 5(1)(e) and s 5(2)(f): “an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case”.

ELEMENTS

To make out this ground you must show:

1) The decision-maker exercised a discretionary power AND

   - Look for the word ‘May’ or ‘can’ something discretionary

2) In exercising the discretion, the decision-maker acted in accordance with some rule or policy AND

   a) In so acting in accordance with the rule or policy, the decision-maker failed to give due accord to the merits of the circumstances of that case or the legal criteria, and/ OR

      o Only looked at policy- not at leg and rejected

   b) The rule or policy was contrary to law.

      o EASIER TO PROVE – policy changes the law
**ADJR – IS POLICY ILLEGAL?**

**KEY CASE - *Green v Daniels***

*** If a policy is to be taken into account it cannot be unlawful, departments can take some guidance from policies, but they cannot be so inflexible and you must first start with statute. In this case policy tried to act extra factor this was illegal. If policy deletes criteria that is just as bad, and would also trigger failure to consider relevant consideration. If policy alters the law and interprets it in way law is unclear to begin with = this is a grey area, policy can’t constrain decision but can give guidance. If DM given wide discretion less likely to constrain (if policy says cant exercise discretion on Tuesdays = inflexible policy that fetters discretion)

**FACTS:** green was a school leaver who applied for unemployment benefits under s 107 of the SSA. (leg below)

Section 107 of the Social Security Act provided that a person who:

(a) has attained the age of sixteen years but, being a male, has not attained the age of sixty-five years or, being a female, has not attained the age of sixty years;

(b) is residing in Australia on the date on which he lodges his claim for a benefit and

(i) has been continuously so resident for a period of not less than twelve months immediately preceding that date; or

(ii) satisfies the Director-General that he is likely to remain permanently in Australia; and

(c) satisfies the Director-General that he –

(i) is unemployed and that his unemployment is not due to his being a direct participant in a strike;

(ii) is capable of undertaking, and is willing to undertake, work which, in the opinion of the Director-General, is suitable to be undertaken by that person; and

(iii) has taken reasonable steps to obtain such work, shall be qualified to receive an unemployment benefit”

**Facts:**

- Departmental officer declined her application for unemployment benefits because it was departmental policy that school leavers don’t qualify for benefits until the beginning of the next school year. Exists to stop students from getting dole over 3 months summer holidays then go back to school.

- Her application was denied until the next school year if she started the next school year Karen could get unemployment benefits
• she challenged decision. s 107 (c) policy itself is contrary to law. You don’t see except over summer holidays because school leaver …

Held:

• The decision was invalid. All the decision-maker here did was apply an inflexible rule which prevented Green from being considered for unemployment benefits until school commenced. This was an inflexible application of government policy which didn’t consider the statutory requirements or Green’s circumstances.
• Further, policy will be unlawful when it substitutes itself for the legislation or is inconsistent with the scope or objects of the Act.
• See also *Drake v Minister for Immigration and Ethnic Affairs* (1979) (FCAFC)

**COMMON LAW - ILLEGALLY FETTERING DISCRETION**

focuses on DM fettering their discretion:

*Minister for Immigration v Tagle* (1983) (FCAFC) [11.2.13C]

• **FACTS:** Tagle had overstayed her visa and was eligible to be deported. Departmental officer had discretionary power to deport her under migration. She made submissions to the officer that she should stay based on her family ties in Australia. The officer decided that she was a prohibited immigrant and her submissions didn’t alter that fact so she should be deported.

• **HELD:** the decision was invalid because the officer hadn’t considered the merits of case (her circumstances), officer didn’t look at anything beyond the fact she was an illegal immigrant. The Act had given the decision-maker a discretion to deport Tagle and the decision-maker hadn’t exercised this discretion by refusing to consider Tagle’s personal circumstances.

**POLICY UNDER OTHER GROUNDS**

*Minister for Immigration v Gray* (1994) (FCAFC) [11.2.26C]

• An Act may imply that a policy must guide the decision-making. If the Act requires the decision-maker to consider the policy then that policy may be a relevant matter that the decision-maker is bound to consider under the relevancy ground.
  • If the act actually says that the DM must consider the policy and they don’t and then this may fulfil the ground of failing to consider a relevant consideration – relevancy ground

*Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) (AAT)
Brennan J: The AAT should apply a lawful government policy unless there are good reasons not to. So failure to do so might be challenged under the grounds of ‘decision not authorised’ or ‘failure to consider a relevant consideration’.

- Must consider the law first- not

**FINAL GROUNDS:**

These are hard to prove

A. No evidence
B. Unreasonableness
C. Irrationality
D. Uncertainty
E. Abuse of power

**Reminder:**

S 5(1) ADJR [s6(1) too]

5 Applications for review of decisions

(1)* (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

S5(2) ADJR [s6(2) too]

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;
(b) failing to take a relevant consideration into account in the exercise of a power;
(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
(d) an exercise of a discretionary power in bad faith;
(e) an exercise of a personal discretionary power at the direction or behest of another person;
(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
(j) any other exercise of a power in a way that constitutes abuse of the power.

S 5(3) ADJR

(2) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no
Evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

A. EVIDENCE RULE ‘a procedural ground’

* Important - CL & ADJR ‘no evidence’ rule are different

Common Law – evidence rule:

- No evidence rule at common law: a decision made under statute will be invalid if there is a lack or absence of evidence to satisfy an essential statutory element. However, if there is some evidence (even if questionable whether it is adequate or sufficient), the decision will not be invalid R v Melbourne Stevedoring (1953); Mason CJ in ABT v Bond

- test: Whether there was an absence of any foundation in fact for the fulfilment of the conditions upon which point in law the existence of the power depends. Essentially need to have zero evidence insufficient evidence doesn’t apply R v Melbourne Stevedoring

ADJR – section 5

- if partially satisfied evidence that’s enough

Section 5 (1) (h) that there was no evidence or other material to justify the making of the decision;

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) explanation: something needs to be established in order for that person to make a decision and there was no evidence or other material which could reasonably satisfy the DM, that this had occurred

OR

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

- fact is precondition to making decision

Issue: How does s 5(3) relate to s 5(1)(h)?

- Necessary but not sufficient or articulate the content? (Rajamanikkam (2002))
facts:
  o Dr R applied to refugee review tribunal for a protection visa
  o the RRT listed 8 factors including 2 which clearly referred to facts where there was no evidence – on this basis they refused his visa
  o Dr R appealed this JR
  o HC issue: how do you relate s 5(3) with s 5(1)(h)?

- Gleeson CJ & Callinan J - the relationship was necessary but not sufficient to satisfy the test, that s 5(3)(a) and s 5(3)(b) are cumulative and both need to be satisfied for the ADJR rule

- Gaudron & Gummow JJ – expansive – could satisfy either or 5(3)(a) or 5(3)(b)

- Kirby J – ‘difficult to read’

• Curragh
  o FFC – supports cumulative approach

B) UNCERTAINTY ‘a decisional ground’

uncertainty test:

• Common law rule: decisions and regulations made under an Act require a degree of clarity of expression and form so that their meaning is reasonably precise

• ADJR, ss 5(1)(e) and 5(2)(h): “an exercise of a power in such a way that the result of the exercise of the power is uncertain”

• Mainly relates to delegated legislation (rules, regulations etc made by the executive pursuant to a statute)

uncertainty example:

King Gee Clothing v Cth (1945) (HC) [8.6.8C]

• Regulations granted power to a Prices Commissioner to make an order setting a maximum price for an item sold in Australia. The Commissioner set the maximum price using a convoluted formula with various undefined concepts.

• The HC held this order invalid for failing to fix a standard referring to objective standards.
C. UNREASONABLENESS  ‘A decisional ground’

*Wednesbury Unreasonableness*

- Common law and ADJR, a further ‘improper exercise of power’ under s5(1)(e).

- ADJR, s 5(1)(e) and s 5(2)(g): “an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power”.

- Associated Provincial Picture Houses Ltd v *Wednesbury Corporation* (1948) (UK) [14.2.1]
  - A local authority had a discretionary power to issue cinema licenses on such grounds as it thought fit. It issued a license on the condition that no children under the age of 15 were to attend Sunday screenings.
  - Held: the test for unreasonableness was: a decision should be struck down if it was so unreasonable that no reasonable authority could ever have made it. Issue must be overwhelmingly unreasonable
  - court can only intervene if it’s a question of legality and not merits. Unreasonableness arises when discretion is exercised is so absurd that it was never intended by that grant of power
  - The facts here didn’t come anywhere near that threshold.

D. IRRATIONALITY?  ‘A decisional ground’

Irrationality and Serious Illogicality?

Mason CJ in *Bond*:

- At common law in Australia ‘want of logic is not synonymous with error of law. So long as there is some basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place’ (at 356)

- *Re Minister for Imm; Ex p Applicant S20/2002* (2003) (HC) [14.2.11C]
  - McHugh and Gummow JJ held: the unreasonableness ground could only be used to challenge a decision when a decision-maker had unreasonably exercised a discretion.
  - Here, the decision not to grant a visa wasn’t the exercise of a discretion. Instead, the decision-maker had to grant a visa if satisfied that certain circumstances existed. (So this was a fact-finding power.)
The unreasonableness ground couldn’t be used to challenge unreasonable fact-finding, only an unreasonable exercise of discretion.

If the decision had been ‘irrational, illogical and not based upon findings or inferences of fact supported by logical grounds’ the decision might be invalid.

New ground??

Some have said that this pointed to a new ground, ‘irrationality’. Others argue they seemed to be pointing to an implied term in the statute, ie like an implication that the satisfaction of certain elements must be rational.

Obiter anyway because 4-1 the HCA held that there was no irrationality in this decision in any event

- Judgment is ‘riven with ambiguity’: Cane and McDonald, p 155
- ‘No-one could pretend that S20 is an easy read’: Aronson, Dyer and Groves, p 268.
- Federal Court finds S20 a difficult case from which to extract a clear statement of principle.

Facts:
- applicant challenged decision to refuse his refugee visa
- he argued that the Refugee review tribunal handled his evidence in an illogical way, was irrational that his evidence was discounted that no other DM would have made that decision
- applicant claimed he was tortured
- RRT held it lacked credibility evidence was implausibility, discounted evidence of airforce pilot, dentist and doctor all whom said he had bodily injuries consistent with having been beaten
- HC: decision not to grant visa wasn’t discretion was fact finding power. So irrationality could be used only with regard to fact-finding. If decision had been irrational and not based upon findings/inferences of facts supported by logical grounds then the decision might be invalid.

MIAC v SZMDS (2010) facts below

- Decision may be invalidated if no rational or logical decision-maker could arrive at the decision on the same evidence.
- Exceptional circumstances only - requires much more than a lapse in logic.
- Crennan and Bell JJ: a decision will be invalid where it "is one at which no rational or logical decision-maker could arrive on the same evidence". That may occur where, for example:
only one conclusion is open on the evidence and the decision-maker does not come to that conclusion

if the decision "was simply not open on the evidence"

"if there is no logical connection between the evidence and the inferences and conclusions drawn by the decision-maker".

Minds will differ on what is enough to reach this bar. In fact, Gummow and Kiefel JJ would have quashed the decision on the basis that the Tribunal had made "a critical finding by inference not supported on logical grounds". Heydon, Crennan and Bell JJ held that the Tribunal’s reasoning process was rationally open to it.

facts:

asylum seeker from Pakistan claimed he was gay and would be persecuted for it if he returned to Pakistan
He went to Pakistan for 3 weeks with family before coming to Australia
refugee review tribunal – he was lying he went to Pakistan wasn’t tortured
held: was irrational because tribunal had assumed 3 weeks he was in Pakistan that it could be found out that he was gay
court held: was logical for court to make inference, it wasn’t illogical enough

E. ABUSE OF POWER ‘A decisional ground’

• almost impossible to establish * DON’T ARGUE IN EXAM

• S 5(2)(j) of ADJR: “any other exercise of a power in a way that constitutes abuse of the power”.

• A final catch-all? Yes, but difficult to establish.

• See Sunshine Coast Broadcasters v Duncan (1988)

Multiple Grounds? Final thoughts

• Potentially new grounds? S5(1)(j) and 5(2)(j) allows for identification of new grounds: not yet used (e.g irrationality)

• Issue: Overlap between grounds?

  o Eg: unauthorised purpose and bad faith (just add intention)
  o Eg: considerations grounds and unauthorised purpose (e.g Peko Wallsend, Tickner v Chapman)

• In practice, how many to use? argue 3-4 grounds
TOPIC 19: RESTRICTING JUDICIAL REVIEW: PRIVATIVE CLAUSES

Structure:

• **limits to judicial review**, and how **privative clauses** can exclude or restrict judicial review.

• We focus especially on **section 75(v) CC** and its role in protecting judicial review in Australia by providing the **constitutional foundations for JR**.

• The relationship between section 75(v) and privative clauses requires us to revisit – and complicate – **jurisdictional error**…

Summary:

• According to *Plaintiff S157*, the HC cannot be deprived of its jurisdiction to grant relief under s 75(v) CC. A PC cannot restrict judicial review of jurisdictional errors committed by ADM’s.

• According to *Kirk*, a State privative clause cannot restrict judicial review of jurisdictional errors committed by ADM’s.

• With the court effectively reading PC’s down to a point of ineffectualness re: JE, will PC’s remain?

• As should be clear, PC’s are a battle-ground between legislature and judiciary. In this context, S157 is a political compromise (uphold validity, read down efficacy).

• However, thinking more broadly, as a matter of institutional design, can PC’s be understood as directing review to other locations (ie merits review), hence still serving a useful purpose?
PRIVATIVE CLAUSES

What is a privative clause?

A privative clause is a provision in a statute that aims to prevent or restrict judicial review of administrative or other action, even if that action is flawed or illegal.

- ‘ouster clauses’
- Various forms, but target court’s jurisdiction to engage in judicial review
- Some more ‘successful’ than others
- All Admin DM are final

Reasons for Caution around PC?

Undermines:
- fundamental duty of courts to ensure public power is exercised according to law
- separation of powers
- right of individual to enforce their legal rights in court
- human rights protections

Increases:
- government power without any check or accountability measure
- parliamentary sovereignty at expense of rule of law

Rationales for PC:

- Frees up government to make policy choices free from judicial scrutiny.
- Reduces:
  - high volume of court challenges
  - incentive to mount challenge in order to delay
  - cost of administration of justice
- Enhances:
  - certainty of administrative decisions
  - parliamentary sovereignty

Different forms:

- PC come in different forms, including clauses:
  - Seeking to make orders, decisions or other determinations final
  - Forbidding courts from granting traditional JR remedies, such as certiorari, prohibition or mandamus
  - Stating JR lies only on stipulated grounds
• Note, PC’s generally worded very emphatically!

**Example 1: MIGRATION ACT 1958 (Cth), section 474**

**474. Decisions under Act are final**

(1) A privative clause decision:

(c) is final and conclusive; and

(d) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(e) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

**Example 2: Industrial Relations Act 1996 (NSW), s 179**

**179. Finality of decisions**

(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.

**Judicial treatment of PC’s?**

• Courts have taken a very restrictive (and highly creative) interpretation of privative clauses.

• However, most powerful judicial resource for interpreting PC’s is the Cth Constitution (‘CC’).

• The **Cth Constitution** has been interpreted as providing for an ‘**entrenched minimum provision of judicial review**’ that must be respected by both Cth and State Parliaments.

**FEDERAL - Constitutional Foundations of Judicial Review s 75(v)**

**CC**

**S75(v) Cth Constitution**

**75 Original jurisdiction of High Court**

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;
(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

If PC, how to interpret s 75(v)

- If read literally, any statutory attempt to prevent the issue of these named remedies would be rendered invalid.
- Yet, PC’s interpreted creatively as consistent with CC (despite their terms) to preserve their validity.

S75(v): Entrenched minimum provision

- HC emphasise s 75(v) preserves an entrenched minimum provision of JR jurisdiction to ensure officers of Cth neither exceed nor neglect ‘any jurisdiction which the law confers on them’; Plaintiff S157/2002 v Cth (2003) 211 CLR 476

- Current position: Parliament cannot deprive HC of its original jurisdiction to issue the constitutional remedies on the basis of a jurisdictional error.


MIGRATION ACT 1958 (Cth), section 474

474. Decisions under Act are final

(1) A privative clause decision:
   (a) is final and conclusive; and
   
   (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
   
   (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section: privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of discretion or not), other than a decision referred to in subsection (4) or (5)

Leading authority. Central issue: How interpret PC in s 474 Migration Act?

Two approaches taken by HC: statutory & constitutional, both leading to same result.

(1) Statutory interpretation: Construction of s474 of the MA?
• Section 474 only operated to restrict review of ‘privative clause decisions’.

• ‘Privative clause decisions’ were certain decisions ‘made under the Act’.

• A decision affected by jurisdictional error (including breaches of natural justice and procedural fairness) was really no decision at all, or can’t be characterised as a decision ‘made under’ the Act, and can’t be a ‘privative clause decision’.

(2) Constitutional validity of s474?

• Must read down s474 to conform with Ch 3 of CC and s 75(v).

• An administrative authority with limited jurisdiction (ie a non-judicial body) cannot conclusively determine the limits of its own jurisdiction.

• If parliament could prevent the courts from reviewing a decision made in jurisdictional error that would allow an ADM to conclusively determine the scope of their own jurisdiction.

• Therefore, a decision made in jurisdictional error cannot be insulated from review by the HC.

Conclusions:

• In S157, HC held a decision infected by jurisdictional error cannot be insulated from judicial review by a privative clause.
  
  o Why? Because a jurisdictionally flawed decision – ie one with a JE - is ‘regarded, in law, as no decision at all’ (per Bhardwaj)

  o Further, if a PC did protect JE, then it would generate a conflict with s75(v) and therefore render the PC constitutionally invalid. However, properly interpreted, the PC did not purport to oust from review cases where ‘decisions’ were infected by JE, therefore, no constitutional problem as the constitutional writs of mandamus and prohibition are only available for JE.

• As the alleged breach in S157 was a breach of Procedural fairness – a well established category of JE – the PC did not protect the challenged decision from review.

• The HC’s analysis in S157 saved the PC from constitutional validity, but, in effect, also deprived the PC of any meaningful role.

‘Because, as this Court has held, the constitutional writs of prohibition and mandamus are available only for jurisdictional error and because s 474 of the Act does not protect decisions involving jurisdictional error, s 474 does not, in that regard conflict with s75(v) of the Constitution and, thus, is valid in its application to the proceedings which the plaintiff would initiate. The plaintiff asserts jurisdictional error by reason of
a denial to him of procedural fairness and thus s 474, whilst valid, does not upon its true construction protect the decision of which the plaintiff complains. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a "privative clause decision" within s 474(2) of the Act.'

*Plaintiff S157* per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at para 83.

**After S157? Implications for PC?**

- Each privative clause must be construed individually.
- S157 gives much more significance to the ground of jurisdictional error.
- Jurisdictional error as a ‘ground’ of judicial review will survive even a broad PC.
- So what does jurisdictional error involve? Let’s revisit its two main meanings.

It is important to emphasise that the difference in understanding what has been decided about privative clauses is **real and substantive**; it is not some verbal or logical quibble. *Plaintiff S157* per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at para 98.

The reservation to this Court by the … is a means of **assuring to all people affected that officers of the Commonwealth obey the law** and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places **significant barriers in the way of legislative attempts** (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to **maintain the federal compact** by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an **authoritative decision-maker**. Under the Constitution … the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review. *Plaintiff S157* per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at para 104.

**Reviewing Jurisdictional error s 75(v) CC:**

Modern statement:

- ‘There is a JE if the decision maker makes a decision **outside** the limits of the functions and powers conferred on him or her, or does something which he or she **lacks** the power to do. By contrast, incorrectly deciding something which the DM is authorised to decide is an **error within jurisdiction** (e.g error on facts) …the former kind of error concerns departures from limits upon the exercise of power. The latter does not.’ *(Craig v SA)*

- *Anisminic* broadening, quoted in *Craig*. Then *Kirk*...
JE has multiple meanings:

- Jurisdictional error is notoriously difficult to define.
- But, most simply, JE carries (at least) two distinct meanings in Australian administrative law.

(1) At its most basic, JE is simply an error in jurisdiction

(2) Since Anisminic, however, JE is also an ‘umbrella term’ that captures not only the ground of JE, but also other ‘grounds’ of judicial review, including PF, improper purpose, considerations etc...

**STATE – current position – kirk**

State constitutional protection?

- Issue… no s75(v)CC equivalent at the State level.
- **Orthodox position:**
  - Rebuttable presumption that legislatures do not intend to deprive the citizen of access to the courts

- **New position** - orthodox position rejected by HC in Kirk v Industrial Court of NSW (2010) 239 CLR 531.
  - The effect of Kirk is there is now also an ‘entrenched minimum provision of JR’ at state level, although, as we will see, for slightly different reasons than at the Cth level.

**Harmonisation of State/Cth**

- Kirk led to the current position of a harmonisation of State and federal approaches to the interpretation of privative clauses.
- But, as we see from Plaintiff S157 and Kirk, for very different reasons…

**PC in state legislation?**

- Traditional position is that, unlike the position at the Cth, PC could exclude JR in state jurisdictions with a well-drafted PC.
- The orthodox position sometimes hidden within confusing formulations, such as in Darling Casino Ltd v NSW Casino Control Authority (1997) 143 ALR 55, Gaudron and Gummow JJ:
“A privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the Hickman principle.”

- This traditional position changed dramatically with Kirk.

**Leading authority: Kirk**

In *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, relevant PC was section 179 of the *Industrial Relations Act 1996 (NSW)*:

**Section 179 Finality of decisions**

(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.

HC reasoned the CC entrenches JR at the state level in the following manner

- Chapter III of CC - especially s73(ii)CC which provides the HC shall have appellate jurisdiction from ‘the Supreme Court of any State’ - requires the continuing existence of a judicial institution which answers this description.

- Legislature could not deprive such an institution of its constitutional character

- Authority to ensure ADM’s stayed within the limits of their jurisdiction (ie review for JE) was an essential and defining characteristic of such an institution

- So, in *Kirk*, HC applied the reasoning from *S157* and held that state legislation cannot deprive a State SC of its jurisdiction to review administrative decisions on the basis that an ADM has made a JE.

- HC read down section 179 since a State Parliament cannot completely remove the power of a State Supreme Court to issue writs of certiorari in cases of jurisdictional error.

- Distinction between JE and non-JE errors marks the limits of state legislative powers to exclude JR, which means that the effect of *Kirk* is there is also an ‘entrenched minimum provision of JR’ at the state level.

**OTHER LIMITS TO JUDICIAL REVIEW:**

- There are other ways, apart from traditional PC we have been considering, to restrict the courts JR jurisdiction, including:
  - No-invalidity clauses
  - No-consideration clauses
  - Time-limit clauses

- These may start to take on more significance post-*S157* and post-*Kirk*