

## Administrative Law

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# Administrative Decision Making

- Judicial review is in the courts, the courts are reviewing for legal error.
- Governments are held to account in many ways, not just the courts: commissions of inquiry, anti-corruption agencies, auditors, general ombudsman etc.
- Fundamental elements of lawful decision making by the executive:
  - *Legality* (a decision must be made under legal authority by an authorised person).
  - *Procedure* (Legislation might stipulate procedures to be followed when making a decision).
  - *Rationality* (the reasoning for a decision must conform to minimum legal standards).
  - *Accountability* (a decision maker is accountable for a decision and must notify a person of their right to review).

## Making administrative decisions

- (i) Interpret the legislation
- (ii) Find the facts
- (iii) Apply the law to the facts
- (iv) Come to a decision
- (v) Provide reasons? (Not every situation requires the decision maker to provide reasons, at common law, traditionally, it was reasonable to not have to provide reasons, but in modern legislation a lot of the time, if the answer is no you need to say why).

## Power to make a decision

- For modern governments most often determined by statute.
- Some prerogative power - rare cases
  - Eg. To declare war or make peace, pardon offenders (prerogative of mercy).
- Decision-making powers given to administrative agencies are often discretionary powers. These powers involve an element of judgement about the decision.
  - For instance, may grant an extension of time; determine whether an applicant is 'a fit and proper person,' determine whether disclosure would be 'in the public interest.'
- The essentials characteristic of a discretionary decision is that there will be alternatives which will be equally lawful.

## Reasons

- *Why give reasons to a decision?*
  - Better decisions
  - Transparency - important democratic principles
  - Fairness to persons affected by the decision - so that they can know whether they have grounds to seek review
  - Once a decision has been explained - person affected may accept it
- *Why not?*
  - Problem if reasons become formulaic
  - Increased costs and delays in decision making process
  - Lack of candour?
- *Common Law Position*
  - No duty at common law, or rule of procedural fairness, that requires decision maker to give reasons.
  - Duty may arise in special or exceptional circumstances (*Public Service Board NSW v Ormond*).
    - In this case, HC held there was no *right to reasons at common law*
  - Important not to confuse procedural fairness *before* decision is made and reasons provided *after* decision is made.
  - Courts leave it to the legislature to require reasons from administrative decision makers.
- Judicial review in the courts - they quash the decision (a new one can then be made), but the courts are not engaging in merits review, the best they could do would be to send it back.

# Statutory Appeals / Reviews on Questions of Law

## DISTINCTION BETWEEN FACT AND LAW

- Questions of fact are, in general, for the decision-makers who have been granted the power and discretion to determine a matter.
- Courts must not intrude into the merits of administrative decision-making - they can only examine whether a decision (whatever its merits) was lawfully made.
  - Courts ask: has there been an error of law?

## Error of Law

- When courts examine the process of decision making they consider:
  - Did the decision-maker have the power / authority to make the decision?
  - Did the decision-maker apply the relevant statutory criteria?
  - Did the decision-maker follow all processes he / she was required to follow before making the decision?
  - Getting these wrong ^ involve an error of law.
- Courts when undertaking judicial review function scrutinise administrative decisions, they must find an error of law to justify their intervention - it is not enough that they think the decision is wrong.
- The same applies when the matter reaches a court by means of a statutory appeal on 'question of law' again, the court will have to distinguish between questions of law and questions of fact. This will only apply if the legislation applies for a statutory appeal (eg. AAT Act under s 44, has statutory appeals under questions of law).
- Ultimate question of the court - is there an error of law.
- There are no clear rules for determine distinction between law and fact.

## Errors in Statutory Interpretation

- What about errors in statutory interpretation: Law or Fact?
- Where a statutory term carries a legal meaning - get it wrong and you make a legal error.
- BUT if you get the meaning of an ordinary english word wrong - then this may be an error of fact; so long as the meaning of that ordinary English word has no legal meaning.
  - Say you have a piece of legislation that talks about what a dog is and you get it wrong - question of fact.
- But questions of statutory construction are always going to be questions of law.
- Look at:
  - What sense is a word used in?
  - What does a word mean?
  - Does it have a technical legal meaning or is it just an ordinary english word?

## [Hope v Bathurst City Council \(1980\) 144 CLR 1](#)

- Hope owned land and agisted other people's horses and cattle (other people's livestock were on his land).
- City Council applied lower rates to rural land, but the council made a decision that this was not rural land and therefore the rate went up.
- Hope appealed this to the Land and Valuation Court.
- The Land and Valuation Court dismissed it, referring questions of law to the Supreme Court.
- Hope then further appealed to the High Court.
- Question in this instance, was, was there a question of law here, that the Supreme Court could deal with.
- For the purpose of the legislation, the phrase was 'carrying on the business of grazing.'
  - 'Business' had an ordinary or popular meaning (therefore question of fact)
    - BUT relating the word to the phrase was an exercise in construction and therefore law (p 10). Therefore, a question of law.
    - Question of law was therefore 'carrying on' a business - repetition, permanent character?
- Working out what the phrase meant was an exercise of construction and therefore a question of law.

### [Collector of Customs v Pozzolanic Enterprises Pty Ltd \(1933\) 43 FCR 280 at 287](#)

- Federal Court laid down 5 general principles to assist in process of determining when ascertaining meanings of words and phrases are questions of law or fact.
- (1) Whether a word is 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 established is a question of law;
- (5) The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.

HOWEVER:

### [Collector of Customs v Afga-Gevaert Ltd \(1996\) 186 CLR 389](#)

- **High Court doubted the distinction between points 1, 2 and 4 in *Pozzolanic*.**
- Distinction between the ordinary meaning of a word and the construction of a term in which that word is used - 'artificial, if not illusory' (397).
- 'notions of meaning and construction are interdependent' (397).
- Customs legislation could declare items to be free of customs duty.
- Afga imported photographic paper - collector of customs imposed duty.
- Whether or not a duty was imposed was dependant on the phrase 'silver dye bleach reversal process'
- AAT decided that the phrase had a technical meaning within the photographic trade and 'reversal' had ordinary meaning.
- Tribunal upheld the Customs decision. This was end of merits review.
- Appeal on question of law to the Federal Court
- Appeal to the High Court - Customs argued Federal Court did not have jurisdiction.
- High Court held - there was a question of law - composite phrase, determining this was a question of law, but in this case there was no error by Tribunal.

## **STATUTORY REVIEWS / APPEALS ON QUESTIONS OF LAW**

- In many ways, statutory reviews / appeals on questions of law are very similar to judicial review proceedings: it involves a court searching for legal error in the decision under review.
- An appeal from an administrative decision-maker to a court:
  - Despite the use of the term 'appeal', is an exercise of the courts *original*, not appellate, jurisdiction.
  - (as is judicial review).
- Source of jurisdiction is statute - scope and procedures established by the relevant statute.

## **CONCEPT OF JURISDICTION**

- Here, we have been looking at the jurisdiction of the courts to consider questions of law.
- Jurisdiction - the authority to decide.
- Go through a process of statutory construction to determine jurisdiction.

### [Osland v Secretary to Department of Justice \[No 2\] \(2010\) 241 CLR 320.](#)

- Heather Osland convicted of murder of her husband.
- Petitioned the Governor of Victoria - seeking pardon.
- Victorian AG issued a press release referring to various legal advice that he had received, advising him to reject the pardon.
- Osland sought access to the legal advice under FOI. -> This was Osland No 1.
- The Victorian Civil and Administrative Tribunal had a 'public interest override' - Tribunal granted access despite legal professional privilege exemption.
- High Court considered the jurisdiction and powers of the Victorian Court of Appeal - appeal on question of law (s 148 VCAT Act; but similar to s 44 of our SACAT). -> Osland No 2.

# Introduction to Judicial Review

- Structure for analysis of a judicial review problem (not necessarily exam answer structure):
  - **What is / are the decision/s?**
  - **Who is / are the decision maker/s?**
  - **What is the source of the power to make the decision/s?**
  - **Where can you seek review?**
    - Is statutory appeal on question of law available? If so, follow that process
    - But some statutory scheme's don't allow for that process, if not,
  - **Where can you seek judicial review?**
    - Is this a Commonwealth or State matter? Find this out by looking at who the decision maker was and what was their source of power?
      - If State:
        - SA Supreme Court - common law (as no specific judicial review legislation) - is it justiciable? Privative clause?
      - If Commonwealth:
        - is it a decision to which the *AD(JR) Act* applies?; or
        - *Judiciary Act s 39B or s 75(v) Constitution?* Is it justiciable? Privative clause?
  - **Who is seeking review?**
    - Do they have standing?
  - **What grounds of review will you argue?**
  - **What remedies will you seek?**

## POWER OF THE COURT TO UNDERTAKE JUDICIAL REVIEW

- Common law (derived from English Courts); the power to review the decisions of lower courts and also public authorities.
  - 'Prerogative writs' as remedies:
    - Certiorari
      - Quashes the legally flawed decision - leaving it up to the decision-maker to re-make the decision if they wish.
      - 3 traditional bases for Certiorari:
        - (i) Denial of procedural fairness (modern times, this is an example of the broader concept of jurisdictional error of law).
        - (ii) Jurisdictional error of law
        - (iii) Error of law on the face of the record
    - Prohibition
      - Granted to prevent or restrain the commission of a jurisdictional error
        - Essentially to restrain someone who's about to make a jurisdictional error.
    - Mandamus
      - Granted to compel / enforce the carrying out of a (statutory) duty
      - Frequently granted along with certiorari - decision is first quashed, and then order to be 'remade according to law'
      - NOTE: Cannot compel the *actual outcome* of a discretionary decision making process - can only compel that the process is lawful.
- Alongside these common law remedies, you also have Equitable Remedies:
  - An overlapping set of remedies.
  - Equitable (private law) remedies of declaration & injunction used in public law matters - to overcome common law technicalities associated with prerogative writs.
    - Declaration
      - No coercive effect - simply declares the rights / obligations of the parties.
    - Prohibitory Injunction
      - Similar in effect to prohibition.
    - Mandatory Injunction
      - Similar in effect to mandamus.
- Statutory - codified (eg the *AD(JR) Act*).
- Constitutional - entrenched.

## SOURCE OF STATE JURISDICTION FOR JUDICIAL REVIEW

- Common law only (no statutory codification of judicial review at State level (ie no AD(JR) equivalent in SA).
- Supreme Court invested with the jurisdiction originally from the UK Court of Kings Bench
  - *s 17 Supreme Court Act 1935 (SA)*
    - Grants orders in the nature of the prerogative writs as well as equitable remedies.
  - SA Supreme Court - Judicial review of SA Executive and lower courts
  - *Supreme Court Civil Rules 2006 (SA)*

## SOURCES OF COMMONWEALTH JURISDICTION FOR JUDICIAL REVIEW

- There are 3 options for Commonwealth level review:
  - 1) High Court original jurisdiction
    - *s 75(v)* of the Constitution
      - Constitutionally entrenched judicial review of decisions made by '*officers of the Commonwealth*'
        - HAS TO BE REVIEWING THE DECISION OF AN OFFICER OF THE COMMONWEALTH.
      - Original jurisdiction of the HC (not appellate jurisdiction)
      - Referred to as 'constitutional writs'
  - 2) *s39B Judiciary Act 1903 (Cth)* (grant of jurisdiction to Federal Court)
    - Replicates the High Court's original jurisdiction under *s 75(v)*
    - Confers that original jurisdiction upon the Federal Court
    - For practical reasons, you can't have the HC dealing with all the matters - so the same jurisdiction was granted to the Federal Court.
    - Essentially - despite its statutory basis - this replicates conditional jurisdiction.
    - *s 44 Judiciary Act 1903 (Cth)* states that the HC may remit matters commenced in HC's original jurisdiction to the Federal Court.
  - 3) Statutory - grant of judicial review jurisdiction to Federal Court and Federal Circuit Court under *Administrative Decisions (Judicial Review) Act 1977 (Cth)*
    - Basically a codification of the common law as it existed in the 1970s (with a few variations).
    - AD(JR):
      - Decisions (s 5)**
        - *s 5(1)* of the *AD(JR) Act* provides:
          - '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...'
      - 'decision to which this Act applies' turn to *s 3* for the interpretation:

*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:

- (c) a decision by the Governor-General; or
- (d) a decision included in any of the classes of decisions set out in Schedule 1.

- Importantly, it means a decision of administrative character; BUT NOT GG or something found in Schedule 1.
- So in accordance with s 5(1) and s 3 of the *AD(JR) Act*, it has to be a decision, of administrative character, made under an enactment.
- **What is a 'decision'?**
  - [\*Australian Broadcasting Tribunal v Bond \(1990\) 170 CLR 321\*](#)
    - Must be substantive, final, operative, determinative (p. 337). (this distinguishes it from conduct, which is dealt with under s 6).
    - A conclusion reached as a 'step along the way' not ordinarily a decision - unless the statute provided for the making of that finding (p. 337)
      - ie. if that 'step along the way' is something that the legislation *requires* you to make, then that in itself may be reviewable.
        - This idea is supported in s 3(3) of the *AD(JR)*.
      - Does not mean that 'steps along the way' that contribute to the ultimate decision are beyond review - they will be exposed during review of ultimate decision - a question of timing.
  - 'Decision' is also defined in s 3(2) of the Act:

(2) In this Act, a reference to the making of a decision includes a reference to:

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing;

- **What is 'administrative character'?**
  - Confining *AD(JR) Act* review to decisions of an administrative character excludes decisions of a legislative or judicial nature.
  - This percales the review of courts,
  - (eg regulations) NOT reviewable under the *AD(JR) Act* (it is reviewable under s 39B or 75(v)).
- **Made under enactment**
  - An exhaustive definition is provided in s 3; basically includes Commonwealth Acts and instruments.
  - Decisions made under state, ACT or NT legislation are generally outside the scope.
  - What does it mean to be made 'under' enactment?:
    - [\*Griffith University v Tang \(2005\) 221 CLR 99, 128\*](#)
      - Ms Tang was a PhD student at Griffith University; she was accused of academic dishonesty and excluded from the University. Ms Tang sought review of that decision.
      - HC held that the *Griffith University Act 1998* gave the University the powers needed to administer its affairs, but it did not follow that any administrative decision made in the exercise of those powers was a decision made under that enactment.
      - To be reviewable, the decision must derive from the enactment.

## JURISDICTIONAL ERROR

- Establishing jurisdictional error is a prerequisite to obtaining the common law prerogative writs.
- Australian High Court has been steadfast in maintaining the distinction between jurisdictional and non-jurisdictional errors of law.
- The remedies of prohibition (which prohibits an unlawful exercise of power) and mandamus (which compels an official to exercise powers he or she lawfully holds) are available for jurisdictional error.
  - Jurisdictional error is also one of the bases for certiorari (which also requires a breach of procedural fairness) and non-jurisdictional error of law on the face of the record.
- Generally, a jurisdictional error involves a mis-understanding of the nature, scope, or existence of a decision-maker's jurisdiction, but extends to an error made while exercising a power if that error leads to a decision-maker to exceed his or her authority.
- In AD(JR) review you don't have to worry about jurisdictional error. But if you have s 75(v) style review, you have to show jurisdictional error.
  
- Jurisdiction is the authority to decide. Jurisdictional error is therefore they did not have the authority to decide - they went beyond their jurisdiction.
- If the decision maker makes a jurisdictional error - the decision is invalid.
- A common law ground of review.
  
- **Jurisdictional Fact**
- Jurisdictional Fact: the courts will review errors of fact, if the question of fact leads to a jurisdictional error.
  - If jurisdictional power turns on the existence of a fact, and that fact doesn't exist, then they won't have jurisdictional power.
  - Where a finding of fact is classed as 'jurisdictional' a court WILL decide that question of fact for itself.
  - If you get a jurisdictional fact WRONG it will result in a jurisdictional error.
    - [Corporation of the City of Enfield v Development Assessment Commission \(2000\) 199 CLR 135](#)
      - Involved a proposal to establish a liquid waste treatment plant in the Enfield Council area. Not surprisingly there was considerable opposition from the surrounding community and the Council to the proposal.
      - There were questions whether it would be classified as a special or general industry. That classification was important because if a special industry, the Local Council had rights as part of the development assessment process and to subsequently pursue a merits review.
      - Whether the development was a 'non-complying' development was a question of jurisdictional fact.
      - Determining this question of fact will therefore be reviewable in judicial review.
- **Examples of Jurisdictional Error**
  - [Craig v South Australia \(1995\) 184 CLR 163](#)
    - Example of review of an inferior court.
    - Craig put forward examples of Jurisdictional error by Inferior Court:
      - Mistakenly asserts or denies the existence of jurisdiction
      - Misapprehends or disregards the nature or limits of its functions or powers
      - if, having civil jurisdiction only, it purported to hear and determine a criminal charge.
      - making an order beyond power - such as an order for specific performance when its powers were limited to awarding damages for breach
      - lack of an objectively required jurisdictional fact.
    - Tribunals and other administrative decision makers:
      - more likely error will be jurisdictional; such as:
        - Identify a wrong issues
        - Asking a wrong question
        - Ignore relevant material
        - Rely on irrelevant material
  - [Kirk v Industrial Court of New South Wales \(2010\) 239 CLR 531](#)
    - 'It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error' [71].

- *Craig* does not provide a rigid taxonomy of jurisdictional error - merely examples [73].
  - Citing *Craig*: Jurisdictional error 'if [inferior court] mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limbs of its function or powers in a case where it correctly recognises that jurisdiction does exist' [72].
  - Kirk just said that *Craig* didn't in any way make an exhaustive list of the types of things that could be jurisdictional error.
  - If dealing with common law or constitutional review; you need to establish jurisdictional error. They need to have misconceived the scope of their power.
- Error of law 'on the face of the record'**
- Along with jurisdictional error and breaches of procedural fairness, a non-jurisdictional error is a basis for certiorari if the error is apparent on the face of the record.
  - Allows review of any error of law (need not be jurisdictional)
  - IF it is 'on the face of the record' - what is this?
    - At Common law (*Craig* [16-17]) - 'the record' is interpreted very narrowly
      - only initiating documentation + the pleadings + the adjudication (decision).
      - does not include the *reasons* for the decision or the transcript.
  - This places limits on the scope of judicial review
  - Judicial review court can not scour the reasons for any error of law.
  - She sort of said this part wasn't important.

## LIMITS ON JUDICIAL REVIEW: JUSTICIABILITY

- Justiciability at common law.
  - Courts have jurisdiction to review all decisions, but some matters are simply not appropriate for judicial review.
  - Therefore, its a threshold question: Is the decision suitable for judicial review - in the opinion of the court?
  - Justiciability is a common law doctrine, developed by the courts.
  - Therefore needs to be considered when using common law jurisdiction, and constitutional jurisdiction (both s 75(v) and s 39B) - don't need to worry about it under AD(JR), AD(JR) has its own formula for working out whether something is reviewable.
- Traditionally, Courts would not review decisions made by 'high level' administrators eg Ministers, Crowns representative, cabinet.
  - Also - would not review decisions made in exercise of prerogative powers.
  - These automatic immunities no longer exist - but have been replaced by immunity based on the subject matter of the decision in question (ie no automatic exclusion based on who made the decision).
  - [\*Minister of Arts Heritage and Environment v Peko Wallsend\* \(1987\) 15 FCR 274](#)
    - Heritage listing of Kakadu National park
    - Held NON-justiciable
    - No 'in principle' immunity because decision was made by Cabinet - or because it was an exercise of the prerogative power.
    - BUT - a 'polycentric' decision - involving a wide range of interests eg. aboriginals, environmentalists, miners, economy etc.
    - This was a big politic decision with many dimensions; therefore it was non-justiciable.
    - Is thus a threshold question to determine if in common law or constitutional jurisdiction.

## LIMITS ON JUDICIAL REVIEW: STANDING

- In all judicial reviews there will be the questions of standing - someone with valid standing needs to bring the review.
- Who can seek judicial review?
- Standing, or *locus standi*, is the right to commence legal proceedings.
- To have standing in a matter, a person must possess a sufficient interest in the proceedings.
- Is the applicant a suitable person to challenge the decision in question?
- Standing:
  - Must be established by an applicant

- An individual who is directly affected by a decision will usually have no difficulty with standing. Examples include:
  - To suspend their licence,
  - To refuse their application for a permit,
  - To cancel their Centrelink payments
  - Basically if they're just affected.
- Standing tends to arise as an issue in a small number of cases, including:
  - cases initiated by a representative group that have an interest in the subject matter of a decision;
  - cases where commercial entities seek to challenge decisions that are favourable to their competitors;
  - cases where concerned citizens challenge a decision that does not affect their private rights but is of public interest.
- Attorney-General ALWAYS has standing to challenge any decision made in their jurisdiction - in the public interest (rare though).
- **Common law**
  - Different standing tests for different remedies
  - To seek remedies of certiorari and / or prohibition; test was a 'person aggrieved.'
  - To seek equitable remedies of declarations and injunctions - must have a 'special interest' in the matter;
    - **Special Interest Test:**
      - [Australian Conservation Foundation v Commonwealth \(1980\) 146 CLR 493](#)
        - ACF (environmental group) sought declaration and an injunction - on the basis that environmental impact statement procedures associated with a development had not been complied with.
        - Standing requires the P to have a 'special interest in the subject matter of the action;'
        - an ordinary member of the public, who only shares the same interest as everyone else, does not have standing;
        - a special interest is not a 'mere intellectual or emotional concern' (Gibbs J).
        - You basically need a person who has an interest above that of the general public.
- **AD(JR)**
  - Standing is that of person aggrieved.