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General Overview

PQ Focus: "Plaintiff X wishes to seek judicial review. Advise Plaintiff X."

1. Which Court has Jurisdiction?

- A. Commonwealth or State Court?
- B. Which avenue of review will you pursue in the relevant Cth or State Court? (Appeal on a question of law; ADJR Act (if federal court); original/inherent prerogative writ jurisdiction)
- C. NB: If the decision maker is a private body, is their decision justiciable? I.e. will the relevant court even be able to exercise judicial review jurisdiction over that decision? Consider both **public contracts** and **private institutions**.

2. Does the applicant have standing?

A. Consider whether the applicant has standing:

- i. Are the plaintiff's *private rights* affected?
- ii. If not, can you show that you have a *special interest* in the subject matter of the action that entitles you to bring a claim? Note the increasingly expansive approach taken to who has a 'special interest'.
- iii. Alternatively, under the ADJR Act: a person who is aggrieved by a decision under a Commonwealth enactment. But the ADJR Act won't apply if it falls under a statutory exception.

B. Can the applicant access judicial review in some other capacity?

- i. Intervention, or;
- ii. Friend of the Court

3. Are any rules or regulations that the administrator followed reviewable?

A. Test:

- Interpret the relevant Statute conferring the power to make regulations;
- Interpret the relevant regulation's scope and legal effect;
- Determine whether the regulation is within the ambit of the legislative power.

B. Guidelines for determining point (iii):

- a. The regulations must complement, not supplement (i.e. extend) the enabling Act (*Shanahan v Scott*)
- b. The statutory power to 'regulate and restrain' does not extend to the power to prohibit something altogether or to prohibit it subject to certain conditions (*Swan Hill v Bradbury*)
- c. If there *is* a statutory power to prohibit certain activities using regulations, can only prohibit activities of the prescribed kind (*Foley v Padley*)

- d. Without express words of the parliament permitting otherwise in the statute, any regulations that abrogate fundamental common law rights are ultra vires (*Evans v NSW*)
- e. A regulation will be invalid if its empowering Act prescribes a means to an end, and a regulation adopts a different means to that end (*Paull v Munday*)
- f. Regulations can't just state some purpose; must prescribe the means to that end (*Pataky*)
- g. The test for whether a regulation is made in furtherance of a purposive power is one of reasonable proportionality: whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose. (*SA v Tanner*; *AG v Adelaide*)

C. Remedy?

- If you're suggesting that the relevant rules are open to review, the remedy would be sought in the common law inherent jurisdiction of a state Supreme Court, or the original jurisdiction of the HCA or FCA, as you would be seeking the equitable remedy of a declaration of invalidity.

4. Are there any procedural fairness grounds for review?

A. Do the rules of procedural fairness APPLY to this particular decision-maker?

- The Test (*Kioa v West*)
 - Implied common law duty to act in accordance with PF;
 - Except when excluded by statute and;
 - Only if the decision directly affects rights, interests, and legitimate expectations.
- Consider if PF is required in special cases of:
 - Advisory Reports;
 - Recommendations;
 - Cabinet/Executive Decisions;
 - When there's a right of appeal;
 - Situations of Urgency.

B. If PF applies in the particular case, what is the *content* of PF?

- i. The Hearing Rule: Basic principle here is that procedural fairness requires the right to a fair hearing. Consider issues pertaining to:
 1. The Disclosure of Adverse Information;
 2. The Disclosure of Critical Issues;
 3. The Disclosure of Adverse Information;
 4. The Disclosure of Process;
 5. Whether the person who decides must hear;
 6. Issues of delay;
 7. Issues relating to the calling of witnesses;
 8. Issues relating to a right to cross-examine those witnesses
- ii. The Rule Against Bias: Urges genuine consideration; decision-maker must consider evidence and submissions provided to them to come to their own conclusion, free of any pre-established preference.

Can establish either:

1. *Actual Bias* – requires evidence of the state of mind and actual views held by the decision-maker; need to show that they had a ‘state of mind so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments might be presented.’” (*Jia* at [72])

Or more usually;

2. *Apprehended bias, or ‘the reasonable apprehension of bias’* – this is where a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide (*Ebner* at [6]). The test is:
 - Identify what is said that might lead the decision-maker to decide case other than on its legal and factual merits; and
 - Find a nexus between the matter and the feared deviation from the course of deciding the case on its merits.

Consider issues of:

1. Prejudgement;
2. Consideration of extraneous information;
3. Decisions by Committees, and incompatibility of roles;
4. Extending the boundaries of PF to include:
 - i. Right to not just a hearing but ability to address specific claim that is made;
 - ii. Right to reasons.

Consider exceptions:

1. The common law principle of necessity;
2. Statutory exclusion;
3. Waiver

C. What is the effect of a breach of PF?

- i. Effect of a breach is that it enables prerogative/constitutional writ jurisdiction, as lack of procedural fairness amounts to jurisdictional error (*Aala*);
- ii. However, the court still retains the discretion to refuse relief.

D. Breach of Statutory Procedures

- Sometimes certain procedural requirements are provided for under statute. Consider challenging either common law judicial review, or statutory judicial review under s5(1)(b) of ADJR Act.

5. Are there any reasoning process grounds of judicial review?

A. Is there a breach of any ‘Considerations’ Grounds? Consider:

- i. Either failing to have regard to relevant considerations, or;
- ii. Having regard to irrelevant considerations;

B. Improper or unauthorised purpose?

Test is:

- i. What is the purpose for which the power is conferred? (Either express or implied from statute);
- ii. Was it for this purpose that the decision-maker acted?

C. Unlawful policies?

Policies in administrative law:

- i. Must be consistent with the enabling statute; and
- ii. Must not fetter the decision-maker's discretion.

D. Representations and Estoppel?

Kurtovic:

- i. There must be a clear and unambiguous representation;
- ii. The person making the representation must have intended that it be relied on;
- iii. There must be detrimental reliance (which does not include emotional or psychological detriment), and;
- iv. It must have been reasonable to rely on the representation.
 - However, the likelihood of public law cases establishing the elements of estoppel is extremely low; limited to very exceptional cases only, especially given that estoppel cannot operate to prevent or hinder the performance of a positive statutory duty or the exercise of a statutory discretion that is intended to be performed or exercised for the benefit of the public or a section of the public.

E. Acting under dictation?

- i. Rule is that discretion must not be exercised at the direction or behest of another person. Main issue relates to how a Minister might influence:
 - Heads of department who have discretion under statute but are often influenced by relevant Minister, and;
 - Independent bodies who have discretion under statute but are often influenced by relevant Minister.
- ii. If statute confers Minister power to give directions to the administrator with discretion, must interpret the statute on a case by case basis to determine whether that right to give directions is meant to provide general guidance or something else.

F. Unauthorised Delegation?

- i. General Rule = where a statute gives a power to a decision-maker, that person alone must make the decision. If they don't, that is reviewable.
- ii. Exceptions:
 - Delegation; when statute expressly allows decision-maker to delegate their power to another party.
 - Agency; when statute impliedly allows an authorised agent to act for the principle
 - Administrative assistance

6. Are there any decisional grounds for judicial review?

The following are the new decisional grounds of review that we consider in this topic:

A. Absence of Jurisdictional Facts

- i. 'Objective' Jurisdictional Facts:

This is a situation where legislation makes a decision-maker's power conditional upon the existence of a fact/state of affairs, and the decision-maker decides in the absence of that fact/state of affairs (*Enfield*). E.g. – 'If house is within 200m of nuclear plant, minister may decide it must be

demolished.’ → JF = there is ‘house must be within 200m’ → objective fact that enlivens the decision-making power.

ii. ‘Subjective’ Jurisdictional Facts → Decision-maker’s ‘state of mind’

Where statute provides that a decision-maker may act only if they have a certain subjective ‘state of mind’ E.g. – “if administrator is *satisfied* that X exists, the administrator may do Y” → i.e. clearly X doesn’t have to exist; the Act is just requiring the Minister’s *satisfaction* that it exists.

Test for whether the subjective jurisdictional fact exists will be whether the decision-maker’s state of mind could not have been formed by a reasonable man who correctly understands the meaning of the law under which he acts (*R v Connell*)

B. Errors of Law (cf. errors of fact)

Often the relevant statute will offer a right of appeal if the decision was made on the basis of an error of law. This ground of review requires proving the error was one of law and not one of fact.

1. Fact Finding → determining the facts by way of primary findings and inferences generally involves questions of fact (See *Azzopardi*)
2. Law-Stating → this will be a question of law if you can prove that the administrator was needing to legalistically interpret the meaning of a word rather than just using its non-legal/ordinary meaning (see *Pozollanic Principles*)
3. Third-Stage → Law applying; generally a question of law.
 - See also ‘error on a question of law’ in ADJR Act
 - **NB** ‘no evidence’ is an exception to the rule that an error of fact is not an error of law: ‘the making of findings of fact in the absence of evidence is an error of law’ (*Bond*)

C. Wednesbury Unreasonableness

An exercise of power that is so unreasonable that no reasonable person could have so exercised the power (*Wednesbury Corporation*). Consider:

- Consistency of Treatment;
- Oppressive Treatment;
- Statistical Flaws;
- Failure to make inquiries.

D. Uncertainty

Where uncertainty is produced in either result or operation when applying a law, there will be a decisional ground of review. (*Dixon J in King Gee Clothing*)

E. Breach of Statutory Requirements

General Rule: A breach of a statutory requirement will be a jurisdictional error if, on proper construction of the Act, it was clear that if that provision was breached then the decision should be invalid.

- However, NB *Project Blue Sky* principles, which said that just because there’s a breach of the provision doesn’t make the decision invalid: must look at the a)

language of the statute, b) statute's subject matter and object, and c) consequences for the parties if every act done in breach of the condition was held void (e.g. public inconvenience, injustice to the parties, uncertainty in the industry etc.) to determine whether breaching a statutory requirement makes a decision invalid.

Moreover, this topic discusses the concept of *what engages the prerogative writ remedies*.

A. Jurisdictional Error;

Important because these engage all the prerogative writs, and also cannot be ousted by privative clauses.

iii. Introduction:

- *Craig v State of SA* (1995) 184 CLR 163;
- *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323
- *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531

iv. Currently, what has been held to amount to a 'Jurisdictional' Error?

- Breach of procedural fairness (*Aala*)
- Breach of reasoning process grounds (see *Craig* and *Yusuf*)
- Wednesbury Unreasonableness (see *Li*)
- No evidence (see *ex parte Melbourne Stevedoring Co*)
- Breach of statutory requirements (but see *Project Blue Sky; Wei*)
- Decisions made in the absence of required objective or subjective jurisdictional facts

B. Error of Law on the Face of the Record.

- EoL on the FotR is enough to engage the prerogative writ remedy of **certiorari**
- This is where there is an error of law in the documentation that initiates the proceedings, the pleadings, and the actual order or ruling.
- Note this is NOT a jurisdictional error, but it has been held as a sufficient ground to engage prerogative writ remedy of certiorari.

7. Are there any restrictions placed on judicial review?

A. Privative Clauses

Privative clauses exclude challenges to decisions and judicial review remedies.

- Must comply with the principles in *Hickman*: e.g. relate to only bona fide attempts to exercise the decision-making power etc.
- **Cth privative clauses:** However, privative clauses cannot oust or limit judicial review of jurisdictional errors at a Cth level, because HCA s75(v) jurisdiction is entrenched in the constitution (*Plaintiff s157/2002*)
- **State privative clauses:** This also applies to Supreme Court's ability to review jurisdictional errors at a State level, because constitution s73 requires the existence of a supreme court befitting the description it provides (*Kirk*)

B. 'No Invalidity' Clauses

Clauses providing that non-compliance with the legislation does not affect validity of a decision.

- Apply *Project Blue Sky* analysis and note that potentially *can* turn a jurisdictional error into a non-jurisdictional one: “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 the conditions.”
 - Upheld in both *Palme* and *Futuris*.
 - Per *Futuris*, courts will be more inclined to uphold a lack of ability for JR if they allow other review mechanisms e.g. merits review or appeal on question of law.

C. Time Limit Clauses

Clauses placing time limits on applications for review.

- A time limit on commencing proceedings is *only constitutionally valid if it does not so curtail or limit the right or ability of applicants to seek relief* under s75(v); this is a question of substance or practical effect. (*Bodrudzka*)
 - Making a time-limit start from the point the original decision is handed down and not from the time it becomes clear the applicant might have a right of review is an example of an unacceptable curtailment (*Bodrudzka*).

8. What remedies are available?

A. What Remedy would be relevant?

- Common Law Remedies (Prerogative Writs):
 - Certiorari*: quashes decision;
 - Prohibition*: Restrains decision-maker from further action;
 - Mandamus*: Commands performance of a duty that remains unperformed
- Equitable remedies:
 - Injunction*: restrains commission or continuance of a wrongful act OR directs the doing of something which ought to be done.
 - Declaration*: Creates, preserves, asserts or testifies to a legal right; declares some act unlawful/invalid.
- ADJR Act Remedial Model (s16)

B. Additional Issues:

- Remedial discretion – should the remedy be granted even if it is allowed?
- Severance – can an unlawful regulation or ruling be severed so that the rest of it stands?
- Rival theories of invalidity