Administrative Law

(LAWS5010)

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ADMINISTRATIVE LAW (LAWS5010)

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1. Does the Court Have Jurisdiction?

**NSW Jurisdiction**

- **NSW Supreme Court**
  - The Supreme Courts have inherent common law jurisdiction to review administrative decisions made under NSW legislation [*s.23 of the Supreme Court Act*].
  - The Supreme Courts have jurisdiction on appeals of questions of law where granted by legislation relevant to a decision.
  - ADJR DOES NOT apply at State level

**Commonwealth Jurisdiction**

- As the decision is made under Cth legislation and/or by a Cth decision maker, the judicial review claim can be brought at either:
  - **The Federal Court**
    - The federal court under its statutory jurisdiction of the ADJR Act for decisions under an enactment of an administrative character [*ADJR Act 1977 (Cth)*].
    - The federal court under its original jurisdiction where a remedy of a writ of mandamus or prohibition or injunction is sought against an officer of the Cth [*s.39B of the Judiciary Act (1903)*].
    - The Federal Court has jurisdiction on appeals of questions of law where granted by legislation relevant to a decision.
    - The HC can remit cases of review back to the Federal Court [*s.44 of the Judiciary Act (1903)*].
  - **The High Court**
    - The High Court has original jurisdiction where:
      - The Cth, or a person suing or being sued on behalf of the Cth, is a party [*s.75(iii) of the Constitution*].
      - A remedy of a writ of mandamus or prohibition or injunction is sought against an officer of the Cth [*s.75(v) of the Constitution*].
        - An officer of the Cth refers to government bodies such as ministers, public servants etc and not non-government bodies such as corporations.
    - The High Court has appeal jurisdiction from decisions made in the State Supreme Courts and the Federal Courts.
2. Is the Decision Justiciable?

- This topic considers whether non-government bodies that exercise powers akin to those of government should be subject to judicial scrutiny. Also looks at how government contracts are subject to the no fettering principle.

**The Private / Public Decision**

- Resulting from case law are two distinct approaches when considering the boundaries of judicial review:
  1. Functionalist Approach
     - Consider whether there is a public nature to the activity and whether the body has power to affect members of the public (public power)
  2. Institutional Approach
     - Consider whether the institution is public in nature

- The latter cases specifically look at the institutional approach (much to Franklin’s distaste). However, because of the uncertainty it’s probably worthwhile to mention both and weigh up whether you think the decision is under the scope of judicial review. Just make sure to **stress that the favoured position by the Australian courts is the institutional approach.**

**Functionalist Approach**

- Domestic bodies that have the power to affect members of the public to a significant degree must observe procedural fairness, such as disciplining or expelling members (*Forbes v NSW Trotting Club*)
- You can’t use the ADJR Act against domestic bodies – not “an officer of the Commonwealth” (*Forbes v NSW Trotting Club*)
- The English case of *Datafin* provided that a decision by a domestic body is held reviewable if:
  - i. there is a public element
  - ii. The jurisdiction is not wholly consensual (i.e. the decision applied to all whether or not members of the body represented on the panel).
- The court in *Datafin* identified certain indicia of “public” such as:
  - Panel performed a public duty
  - Government limited legislation and used Panel as preferred for of regulation
  - Rights of citizens were indirectly affected by Panel’s decisions
  - Panel had a duty to act judicially
  - Panel’s source of power was only partly based on moral persuasion and assent of members
  - Considerable indirect legal support
  - Woven into the fabric of government regulation
  - Comparison with other countries

**Institutional Approach**

- The test for whether you can access judicial review or not under the ADJR Act. To satisfy “made under an enactment” both limbs must be met (*Griffith University v Tang per Gummow, Callinan and Heydon JJ*)
  - The decision must be expressly or impliedly required or authorised by the enactment
  - The decision must itself confer, alter or otherwise affect legal rights or obligations.
- *NEAT v AWB* – not under an enactment (McHugh, Hayne and Callinan)
− AWB was a private corporation who was given a role in a scheme of public regulation.
− The court said that having been given a wheat export monopoly and being required by company law to pursue its commercial interests, it did not make sense to impose public regarding obligations on the company.
− Gleeson – The virtual monopoly AWB enjoys is one conferred by the legislative scheme which is regarded as being in the national interest – not private interests.

• **Griffith University** – not under an enactment
  − The university acted under a disciplinary code (soft law).
  − Held that the University Act did not give the decisions legal force and effect. The terms of the Act (e.g. to provide courses of study and confer higher awards) were too broad
  − The relationship between the University and the student was consensual – the student had no statutory rights and no substantive rights arising from any expectation that the University would act fairly

• **Commentary from Franklin** – Disagrees with this decision – arguing that it could be covered by either theory:
  − Public institution
    ▪ Public funding of universities
    ▪ Government representation on the University governing body
    ▪ Legislative brand of protection of university degrees
    ▪ Ombudsman, FOI and Auditor General jurisdiction over universities
  − Public Power
    ▪ The huge power that universities wield over the reputation and future careers of students – not wholly consensual

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### A Public Contract

**Non Fettering Principle**

- A government can enter into a contract themselves. This can be done by either: (i) statute or (ii) in the capacity as a private individual
- The no fettering principle applies to government – if the contract fetters discretion to be exercised in the public, the contract would be invalid (**Ansett v Commonwealth**).
- A contract cannot be inconsistent with a government statutory function, unless given statutory support (**Ansett v Commonwealth**)

**Remedies**

- *Obiter by Mason J* in **Ansett v Commonwealth**
  
  1. Where government enters a contract which relates to a discretion vested in an administrator who is not a party to the contract, the unfettered exercises of the discretion may be sufficiently preserved if the validity of the contract is upheld provided that it is enforceable only by way of action for damages and not specific performance.
  
  2. If a contract is authorised by statute and valid, the remedy for breach of contract depends on whether the statute preserves the discretion or converts the discretion into a duty:
    - i. If it preserves the discretion: damages only
    - ii. If it converts the discretion to a duty: specific performance
3. Does the Applicant Have Standing?

Summary

1. Consider whether the applicant has standing:
   a. Under the ADJR Act where a person is aggrieved by a decision made under a Cmwlth enactment (1). But the ADJR Act won’t apply if it falls under a statutory exception (2)
   b. To seek a prerogative remedy. This can be at common law for prohibition / certiorari; mandamus; and habeas corpus (3). Or it can be under NSW statute for mandamus (4).
   c. To seek an injunction or declaration – equitable rights (5).

2. Can the applicant access judicial review in some other capacity:
   a. Through intervention / joinder or as a friend of the court (6).

3. Can the applicant gain access to merits review:
   a. Through the AAT (7).

a. Does the applicant have standing under the ADJR Act?

Is the applicant eligible under the ADJR Act?

• Decisions of an administrative character made under a Commonwealth enactment
• “A person who is aggrieved by decisions to which this Act applies” ss 5, 6, 7

Determining whether a person is aggrieved by the decision:

• Under s3(4) ADJR Act:
  – A person aggrieved includes reference to a person whose ‘interests are adversely affected’ by the decision or conduct

• The common law has augmented and liberalised the meaning of ‘a person aggrieved’
  – Vocational and professional interests confer standing (Ogle v Strickland)
  – Participation in a primary decision making process confers standing (US Tobacco v Minister for Consumer Affairs)
  – Standing is conferred where a group is capable of representing the interests of the public. The group will be capable where the “Sackville factors” are satisfied: objects of the organization; status as a peak organization; recognition by government; and research and other activities related to the subject matter (North Coast Environmental Council)
  – The interest being advanced by the party must be related to the purpose of the regulatory scheme (Right to Life Association)

Facts from Key Cases:

• Ogle v Strickland – Anglican Ministers and Catholic priests were allowed standing for judicial review of a decision by the Censorship Board which allowed the importation of blasphemous ‘Hail Mary’.
• US Tobacco v Minister for Consumer Affairs – AFCO was held to be a party to proceedings (and not just an amicus) because it had participated in a formal conference.
• North Coast Environmental Council – An environmental group successfully established standing to judicial review for a minister’s decision on exporting woodchips to Japan.
• Right to Life Association – Anti-abortion group was seeking to challenge the decision of the Secretary Department of Health to put a stop to trials of the abortion pill. However, standing was not granted because the legislation had nothing to do with abortion – it was about the safety of therapeutic goods and their timely delivery to the public.

b. Exceptions where the ADJR Act does not apply to an applicant