



ANU LAW STUDENTS' SOCIETY

LAWS2201 Administrative Law 1st Semester 2009

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Question 1

Mark = 80

1) Most effective ways for plmts to limit JR

Parliamentary supremacy allows parliaments to legislate as they see fit, subject only to constitutional limitations. Whilst maintaining separation of powers (SOP), judges can review administrative decisions but are also subject to the intention of parliament. Parliament has made many attempt to limit judicial review (JR), some more successful than others.

Privative Clauses (PCs)

Federal privative clauses attempt to restrict review by courts of 'decisions'. Initially, these were allowed to limit JR up to the limits of the 'Hickman provisos' (bone fide, relates to the subject matter, reasonably capable of reference to the power). However, in more recent times, courts have interpreted their way around PCs to give them less effect. In S157, a PC that applied to decisions was held not to apply to 'purported decisions', or those tainted by a jurisdictional error. If the court did not interpret it this way, it would conflict with s75(v) of the Constitution. The only practical effect of this sort of PC is to expand what may be considered a jurisdictional error under the act.

S157 made it clear that there is an 'entrenched minimum standard of review' in s75(v) that a PC cannot erode.

The issue here is that s75(v) entrenches available remedies, not grounds of review. So an insistent parliament could theoretically oust all grounds of review and therefore manage to get around this entrenched minimum standard. Whilst this sounds like an issue, one can be sure that our cunning HCA will find a way to 'interpret' a PC such as this one away.

No Invalidity Clauses

'No-invalidity clauses' are a slightly more effective way of ousting JR. They state that breach of any provision will not lead to invalidity, making legislative intention of the consequences of breach clear (Project Blue Sky). This sort of clause was upheld in Palme, although here only a requirement to give reasons was breached, arguably breach of a more fundamental condition would not fall under the no-invalidity clause. [✓]

At state level, Mitchforce has shown us that no-invalidity clauses are effective up tot the limits of the Hickman provisos, even when they apply to 'purported decisions'. States do not have the advantage of an entrenched s75(v), but they do have witty judges to interpret their way around most blockades.

In summary, Australian plmts have the power to limit HR but implementing privative and no-invalidity clauses, but it is highly unlikely that judges, ever protecting the rule of law, will allow these clauses to oust judicial review entirely. [states?].

2) Grounds of review providing standards of good administration

The grounds of JR can be broken into procedural, reasoning process and decisional grounds. They amount to the 'boundaries of admin powers'. The HCA has stated that JR should not allow courts to impose ideas about 'good administration' (Lam) [✓]. Possibly as an attempt to maintain the legality/ merits distinction. Despite this, grounds of review can 'concrete' the values of good administration, such as procedural fairness, efficiency, protection of rights etc and create normative values to which administrators can aspire.

Regulatory Approach

A forward-looking, regulatory approach to admin law sees regulation and judicial review as an attempt to influence human behaviour. By emphasizing the boundaries of power and listing them as grounds of review, administrators can be educated as to the effective application of their power. Arguably this will result in less need for JR as administrators know the boundaries of their power and what fairness requires to stick to this.

In this way, JR and the grounds of review are able to influence decision making without encroaching on the merits of the decision making process. [✓]

Despite this, not all forms of maladministration will fall without a ground of review, therefore we must rely on other forms of accountability such as merits review and the ombudsman. [✓]

3) Nature and identity of decision-maker influencing procedural fairness

When determining notions of 'fairness', courts often look to the nature and identity of the decision maker. This has been applied in relation to the content test of the fair-hearing rule and the rule against bias.

Fair Hearing Rule

Whilst the content test from Kioa is a subjective test about 'what is fair in the circumstances', the courts have been very clear that they will look to the nature of the power and the identity of the decision maker. [✓]

In Miah, the subject matter/ nature of the power was a migration decision that clearly affected people's lives in a drastic way. This required quite a high standard of fairness. The court did say that if the nature of the power was urgent, the fair hearing rule could be 'reduced to nothingness'. In VEAL the process was looked at in detail, and public interest of not disclosing informants was also considered. [✓]

In the context of the fair hearing rule 'what is fair in the circumstances' necessarily requires looking to the nature of the power and who is making the decision.

Rule Against Bias

This distinction between different decision makers is particularly apparent in the rule against bias.

In Jia Legeng a minister made public comments appearing to 'pre judge' the case. The majority placed great weight on the fact that he was a minister. They argued that, because he was accountable to parliament and his electorate, he was entitled to express his view in public. The power was his alone to exercise and his power was broad and discretionary, allowing value judgements.

In Jia, Kirby J rejected this broad leeway given to the minister, he focused more on the nature of the decision itself. He thought that the decision had far reaching consequences on Jia and therefore the minister should not effectively be immune from the rule against bias. Arguably giving the minister so much discretion to make public comments frustrated principles of fairness.

In summary, the court will always look to the nature of the decision and identity of the decision maker when determining what is fair in any given circumstance.

4) Enfield – Deference

In Enfield, the court determined that whether or not an industry was 'smelly' was a jurisdictional fact, the determination of which was a condition of the statutory power. This notion of 'jurisdictional fact' arguably crosses the legality merits distinction by allowing courts to substitute their own judgement on whether or not it has been found correctly. In Enfield, the court directly addressed the issue of deference to administrators in interpreting and applying their own statute.

Deference

'Deference' relates to the courts acknowledging the expertise of administrators in certain areas. Arguably, this would lead to internalization of responsibility, more speed and efficiency and leaving more decisions in the democratically accountable realm. Despite this, the judges in Enfield specifically rejected a doctrine of deference.

HCA in Enfield

The judges considered the American 'Chevron' doctrine and its critics. Criticisms include that administrators could step outside their bounds if left unchecked. The HCA here relied strongly on constitutional grounds for rejecting deference, stating that it is the role of the chapter III courts to enforce rule of law.

Gaudron argued that this essential check on admin powers was the 'function' of the court, and to do less would be to 'abdicate its judicial responsibility'. Judges did not that where minds might reasonably differ, great weight could be given to initial findings by those with expertise.

Should Judges have allowed more deference?

Consistent with the arguments above, too much deference would undermine the rule of law. It is the Ch III courts' place in our system to determine the limits of admin power, and , in the

context of jurisdictional facts, where a power is conditioned on the finding of a fact, this is necessary to ensure that administrators do not act arbitrarily, unfairly or outside their jurisdiction. Particularly in Australia, in the context of s75(v), SOP and the rule of law, the judges were right to maintain their judicial review function and not adopt a doctrine of deference. [√]

5) AAT Applying Government Policy

The AAT has a function of merits review, this means that it has more discretion in its reviewing powers than a court does. S43 provides that the AAT can 'stand in the shoes of the original decision maker'. However, when faced with an 'unfair' or 'ill-considered' government policy, what should the AAT do?

This area is slightly unclear. Firstly, statute may expressly provide that the AAT may not consider the merits of a policy (Leppington Pastoral). In absence of such a provision, the AAT could look to whether or not the policy was 'unlawful' (Australian Fisheries). Similar to the initial decision maker, the AAT must not apply policy inflexibly or fetter their own discretion (Green, Rendell, Riddel).

Consistency

Drake No 2 makes it clear that the AAT must be consistent when making decisions. But surely this requirement does not extend to 'consistent unfairness'. The AAT must, therefore, have the power to depart from unfair policy when deciding which decision is correct or preferable. The court may look to the political level at which the decision was made (Becker), policy at the 'highest level' should only be deviate from where it is 'entirely misconceived' (Re Aston).

In summary, the AAT has a discretion whether or not to apply government policy that it disagrees with. But, to defer from a policy probably requires a good reason in the interests of consistency. It is essential that the AAT critically assesses policies applied by the original decision maker when determining what is the correct or preferable decision. However, the AAT might be better to find a legal ground for not applying the policy, such as inflexible, adds a criterion (Green), not applicable to decision making power or requires consideration of irrelevant factor (Drake 2). **Tribunal will normally look at whether a practical injustice will occur from applying the policy.** [√]