

## PART XII – REMEDIES

### I Remedies

#### A Introduction

Remedies concern the outcome of an application for judicial review of administrative action. To determine the appropriate remedy, first ask:

*What does the applicant seek in response to the impugned decision?*

Then determine which remedies have this effect. Consider the remedies in turn:

- 1 **Standing**  
Who can apply for each remedy?
- 2 **Types of decision**  
Is this remedy available for this type of administrative decision?
- 3 **Grounds**  
What grounds of review does the applicant need to establish to get this remedy?
- 4 **Discretion**  
Is the court likely to refuse the remedy on discretionary grounds?

#### B Constitutional Remedies

Section 75(v) of the *Constitution* confers jurisdiction upon the High Court of Australia to hear various matters. Whilst not creating substantive rights, it does mention several writs which may be issued by the Court in respect of those matters:

##### **Section 75:**

In all matters —

- ...
- (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.

Section 75(v) essentially confers jurisdiction upon the High Court. However of Australia, it does not create or alter substantive remedies. The original jurisdiction of the Federal Court of Australia also extends to issuance of writs of these kinds: s 39B of the *Judiciary Act 1903* (Cth). Section 39B(a) allows the High Court to remit such applications to the Federal Court.

## 1 Taxonomy

There are three classes of remedy available as a result of judicial review:

### 1 Prerogative writs

- (a) Certiorari
- (b) Prohibition
- (c) Mandamus
- (d) Habeas corpus

### 2 Equitable remedies

- (a) Declaration
- (b) Injunction

### 3 Statutory remedies

- (a) *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('AD(JR) Act')
- (b) Equivalent state legislation

## 2 History

The notion of a writ first developed out of medieval English practices. In the thirteenth century, for example, the Court of King's Bench could bring an official before it for appraisal. By the eighteenth century these writs became known as 'prerogative writs'. They were discretionary and related to Crown action. They included:

- *Certiorari* (commanding an inferior court to 'certify' its record of proceedings; the superior court could quash [set aside] the inferior court's proceedings if they were erroneous)
- *Prohibition* (restraining an inferior court from exceeding its powers)
- *Mandamus* (ordering an executive officer to perform its duty)
- *Habeas corpus* (requiring that a person in custody be brought before the court so that the legality of the detention may be decided)
- *Quo warranto* (requiring a decision-maker to establish their lawful appointment)
- *Scire facias* (requiring a person to justify why a judgment should not be enforced)
- *Ne exeat regno* (preventing a person from leaving the realm)
- *Ne exeat colonia* (preventing a person from leaving the colony)
- *Procedendo* (directing that a matter proceed to trial)<sup>1</sup>

## 3 Procedure for application; jurisdiction

Due to increasing complexity in the way common law writs were issued, Australia introduced sweeping statutory reforms in 1977, in the form of the *AD(JR) Act*. As a result of these changes, parties may obtain an order 'in the nature of' certiorari, prohibition or mandamus more easily. The basic procedure is now as follows:

- A summons is issued and proceedings commence

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<sup>1</sup> Robyn Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) 806–7.

- The person applying for the writ ('the prosecutor') appears *ex parte* (without the other party) before the court to obtain what is known as a *rule nisi*
- This rule is directed at the government officer, requiring them to show cause why the writ should not issue
- Both parties now appear on the named day and argue their cases; the proceedings are referred to as '*R v [government official]; Ex parte [prosecutor]*'
- The court either discharges the *rule nisi* (rejecting the application) or makes it absolute (granting the writ)

In lower courts, this procedure is governed by the relevant court rules. In the Federal Court, jurisdiction is conferred by both the *AD(JR) Act* and the *Judiciary Act 1903* (Cth) s 39B to issue mandamus, prohibition or an injunction. The *Federal Court of Australia Act 1976* (Cth) ss 21–23 further confers upon the Court the ability to grant other remedies, including declaration, certiorari and habeas corpus (*Vadarlis*).

In the High Court, however, the jurisdiction is conferred not by statute but by the *Constitution* s 75(v). For this reason, writs issued by the Court are generally not termed 'prerogative writs' but rather 'constitutional writs'. The difference is more than semantic: it has been indicated that constitutional writs have a larger scope for issue against the Crown.<sup>2</sup>

#### 4 Equitable remedies

The equitable jurisdiction is logically distinct from a court's supervisory jurisdiction when conducting judicial review. Historically, it was exercised by a separate court, the Court of Chancery. Although a single court structure now administers both legal and equitable remedies, there are some differences between equitable and common law remedies that make one more suitable than the other in certain situations.

Advantages of equitable remedies:

- Equitable remedies can be used without differentiation in private and public law matters
  - Prerogative writs can only issue in public law matters
  - For mandamus to issue, the defendant must have a public duty to perform
  - For certiorari to issue, the defendant must have legal authority to determine questions affecting the rights of subjects
- Time limits for seeking equitable remedies are less strictly enforced

Nevertheless, a prerogative writ will generally be more appropriate than an equitable remedy in the following circumstances:

- When a decision must be formally set aside
  - Certiorari is necessary to quash the decision of an inferior court
  - Eg, granting/revoking a licence or interest, imposing a sanction, etc
- The requirement that the prosecutor have standing is less stringent in proceedings for prerogative writs than that applicable to equitable remedies (*Enfield; McBain*)
- The grant of an *order nisi* is relatively easy to obtain in an *ex parte* application, and this could afford a strategic advantage (eg, by making the other defendant answer proceedings at a named time)

*Aala* concerns the distinction between prerogative and constitutional writs.

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<sup>2</sup> *Ibid* 808.

***Re Refugee Review Tribunal; Ex parte Aala (2000) HCA:***

Reasoning

- Section 75(v) is aimed at enforcing the rule of Commonwealth law
- It is directed at covering clause 5 of the *Constitution*
  - ‘This Act, and all laws made by the Parliament of the Commonwealth under the *Constitution*, shall be binding on the courts, judges and people of every State and of every part of the Commonwealth’
  - Section 75(v) gives the Court jurisdiction to ensure that the Commonwealth laws are universally binding on the people
- It is also directed at ensuring the issue of such writs in ‘circumstances not contemplated’ by traditional prerogative writs
  - The rationale for s 75(v) is therefore that writs that are contemplated there can issue in circumstances where they would not issue under the common law

## II Common Law Writs

### A Certiorari

Certiorari is an order quashing the decision of an inferior court or tribunal.

The remedy may issue upon satisfaction of three requirements:

**1 The decision-maker has legal authority to determine questions which affect the rights of subjects**

This is slightly different to the *Kioa*-style test for procedural fairness; it is an indirect influence; and

**2 That body owes a duty to act judicially**

An obligation to apply the rules of natural justice and so accord procedural fairness (*R v Electricity Commissioners; Ex parte London Electricity Joint Committee per Atkin LJ*); and

**3 That acts in excess of its legal authority**

Certiorari is only available on particular grounds:

- Jurisdictional error (*Craig*)
  - When applied to non-judicial bodies, identical to *AD(JR)* grounds (includes broad ultra vires)
  - When applied to courts, jurisdictional error has a much more confined meaning
- Distinction between jurisdictional error and error within jurisdiction
  - Eg, if a court is setup by statute with jurisdiction to hear only criminal trials
  - If that court hears a civil matter, this would be a clear jurisdictional error (asserting jurisdiction it does not have)
  - If that court commits an error of law while interpreting the criminal code, however, that is not a jurisdictional error; it is within jurisdiction
- Breach of procedural fairness;
- Fraud;
- Error of law on the face of the record (*Craig*)
  - The record is comprised by ‘the documents initiating and defining the matter in the inferior court and the impugned order of determination’
  - However, it does not include a transcript or reasons for decision unless incorporated into the order

Orders are typically only a couple of paragraphs in length, at the end of a judgment. Therefore they are very unlikely to contain errors of law (normally just factual matters or conclusions). This essentially restricts this ground of appeal in most cases, preserving the integrity of the appeals structure by narrowing the scope of challenge on this basis.

An error of law on the face of the record does not need to be a jurisdictional error (*Northumberland Compensation Appeal Tribunal*).

### ***R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw (1952)*** **UK CA:**

#### Reasoning (Denning LJ)

- The tribunal had made an error of law but that error was within jurisdiction
- Even so, certiorari can quash an error of law on the face of the record regardless of whether the error was jurisdictional or non-jurisdictional

#### Decision

- Certiorari runs

### ***Craig v South Australia (1995) HCA:***

#### Facts

- Mr Craig is charged with three motor vehicle offences
- The trial judge applied *Dietrich v R* to conclude that the trial be stayed until legal representation was made available
- The state applied to the Court for an order in the nature of certiorari to quash the order of the District Court

#### Issue

- Can certiorari issue?

#### Reasoning (Brennan, Deane, Toohey, Gaudron and McHugh JJ)

- The nature of certiorari
  - **[175]** It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order of decision which the superior court thinks should have been made. Where the writ runs, it mere enables the quashing ... of the impugned order or decision upon one or more of a number of distinct established grounds'
  - These grounds include:
    - Jurisdictional error ('most importantly')
    - Failure to accord procedural fairness, where required
    - Error of law on the face of the record
- Error of law on the face of the record
  - General reasons and other materials are not included in the record
  - **[181]** a situation in which proceeding in an inferior court which involved a disputed question of law could be transformed into superior court proceedings notwithstanding immunity from ordinary appellate procedures would represent a significant increase in the financial hazards to which those involved in even minor litigation in this country are already exposed.'
  - Reasons do not form part of the record for the purposes of *certiorari*, 'unless the tribunal chooses to incorporate them' (*Osmond* per Gibbs CJ)
  - 'Ordinarily, in the absence of statutory prescription, the record will comprise no more than the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings (if any) and the adjudication' (*Hockey v Yelland* per Wilson J at 143)

#### Decision

- If an error of law exists, it is not on the face of the record:

- ‘The fact that, on 28 July, Judge Russell said, ‘For the reasons that I have already published and given in relation to this matter’, before indicating that there would be an order staying the proceedings, did not have the consequence that the record for the purposes of *certiorari* included the reasons for decision given by his Honour on 22 June.’
- An error (if any) by the District Court cannot be quashed by *certiorari*, because any such error is neither a jurisdictional error nor an error on the face of the record

Even if the inferior body is not the final decision-maker, their determination will still ‘determine questions affecting rights of subjects’ if they are able to influence the final decision-maker in some way (*Hot Holdings Pty Ltd v Creasy*).

### ***Hot Holdings Pty Ltd v Creasy* (1996) HCA:**

#### Facts

- Legislation provides for applications to be made to a Minister in connection with the issue of mining licences
- The Mining Warden had to stipulate, in the application, which miner had priority (first in time)
- In the case of a particular mine, all applications for licences are lodged at about the same time (9.00am on the day of opening)
- In such circumstances, the Warden is entitled under the legislation to conduct a random ballot by drawing it out of a hat

#### Issue

- Did the Mining Warden have powers to ‘determine questions affecting the rights of individuals’?

#### Reasoning

- The Minister ultimately determines the rights
- But the test is only determining *questions affecting* rights – indirectly
  - The Mining Warden could not consider applications on their merits; only randomly
  - But he could make findings in a report and recommend to the Minister which licence to grant: like *Peko-Wallsend*, Minister is obliged to take into account the matters in the report
  - Therefore, the Warden has a power to determine matters affecting the applicants’ rights
- It ‘must be possible to identify a decision which has a discernible or apparent legal effect upon rights’
  - In this case, warden’s decision has such an effect upon the Minister’s exercise of discretion

#### Decision

- Having the ability to make recommendations, the Warden had power to determine questions affecting rights; since the Minister this has a discernible or apparent effect
- Therefore he did have the required powers

## B Prohibition

Prohibition prevents an order or decision from being made or the continuation of conduct based on an order or decision.

It can issue against the same bodies as certiorari with two differences:

- Prohibition does not issue for non-jurisdictional error on the face of the record; and
- The effect on legal rights is not so central as the question of whether there is a jurisdictional error.

It is therefore even more difficult than certiorari to establish. An applicant must find a jurisdictional error on the record's face.

It will most commonly be available when a court grants a remedy which it does not have the power to grant. Justice Hayne provides some examples in *Aala*.

### ***Re Refugee Review Tribunal; Exp parte Aala (2000) HCA:***

Reasoning (Hayne J)

- '[141] a distinction is drawn between jurisdictional error and error within jurisdiction. This Court has not accepted that this distinction should be discarded (*Craig v South Australia* ... at 179). As was noted in *Craig* (at 177–8), that distinction may be difficult to draw. The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error.'
- 'There is jurisdictional error 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 power** to do.'
- 'By contrast, incorrectly deciding something which the decision-maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to **decide matters within jurisdiction incorrectly**.)'
- 'The former kind of error concerns departures from limits upon the exercise of power. The latter does not.'

## C Mandamus

Mandamus is a prerogative writ to compel an officer to do an act which the applicant is entitled to have done. In essence, its issuance against a public official forces them to perform a duty that he or she is obliged to perform (*Randall* per Griffith CJ). For example, in *Ipec-Air*, mandamus issued against the Director-General, directing issuance of the licence.

### ***Randall v Northcote Corporation (1910) HCA:***

Reasoning

- Griffith CJ:
  - [105] Citing *R v Arndel*: '[566] Mandamus is a prerogative writ, issued nominally in the name of the Crown, but really on the relation of an individual, to compel an

officer to do an act which the applicant is entitled to have done, and without the doing of which he cannot enforce or enjoy some right which he possesses. If the act sought to be compelled to be done is a discretionary act, mandamus does not go further than to command the exercise of the discretion, and can never go to command its exercise in a particular manner.'

- Isaacs J:
  - '[115] The first question in every case where a mandamus is sought is to inquire what is the public duty. If it be a single ministerial act not involving discretion, as the affixing a corporate seal, the Court may compel its performance specifically ... But if it be an act involving discretion the Court will only see that the discretion is exercised. Whatever the power is, that, and that alone, the Court enforces.'

If the act sought to be compelled is discretionary, mandamus goes no further than to command the exercise of the discretion -- not to exercise it in a particular way. The distinction that must be identified is between the use of the words 'shall' and 'may'. 'Shall', used in statutory provisions, implies a public duty to act (or refrain from acting). 'May' is only a duty to exercise a discretion, not to exercise it in any particular way.

Mandamus will issue when there is a public duty to be performed. This duty includes a duty to exercise a discretion (though not, as noted above, to put it to any particular end).

### ***R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) HCA:***

#### Facts

- Use of the word 'may' in s 25 of Act describing the jurisdiction of a court

#### Issue

- Can mandamus issue against the Court?

#### Reasoning

- 'but ... what s 25 does is to create a jurisdiction in the court, and where such a jurisdiction is created for the public benefit ... the court ... is under a duty to exercise its jurisdiction'
  - Confirms Griffith CJ in *Randall*: order just goes to exercise the discretion, not exercising it in a particular manner
  - The lower court can therefore still reject the application, even after mandamus is issued, but it must exercise its discretion and hear the proceedings

#### Decision

- The Court issues a mandamus requiring the lower court to exercise its jurisdiction

By contrast, in *Royal Insurance Australia*, mandamus was issued which ordered a discretion to be exercised in a particular manner. This was said to be possible when there is a clear expression that, as a matter of law, the discretion must be exercised in a particular manner.

### **Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd (1994) HCA:**

#### Facts

- Royal Insurance overpaid around \$2m in workers' compensation insurance
- Section 111 of the *Stamps Act 1958* (Vic) s 111(1) provided that the commissioner 'may refund' an overpayment
- The commissioner refused
- Royal Insurance challenged the decision

#### Issue

- Can the Court grant mandamus to compel the commissioner to make a refund?

#### Reasoning

- '[64] the question whether a public officer, to whom a power is given by facultative words, is bound to exercise that power upon any particular occasion, or in any particular manner, is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power...'
- '...the first and foremost consideration is that the Act is a taxing Act and that in terms it confers no authority upon the Commissioner to levy, demand or retain any moneys otherwise than in payment of duties and charges imposed by or pursuant to the Act.'
- 'The Court should be extremely reluctant to adopt any construction of s 111 which would enable the Commissioner by an exercise of discretionary power to defeat a taxpayer's entitlement to recover an overpayment of duty.'
- '[80] mandamus requires the exercise of the relevant statutory discretion rather than its exercise in a particular [81] way... But that principle means no more than that the administrator to whom mandamus is directed will be required to perform the legal duty to the public which is imposed by the statute...'
- '[81] However, if the administrator is required by the statute to act in a particular way and in certain circumstances, or if the exercise of a statutory discretion according to law in fact requires the administrator to decide in a particular way, so that in neither case does the administrator in fact have any discretion to exercise, then mandamus will also issue to command the administrator to act accordingly...'

#### Decision

- Yes, mandamus granted

In addition to there being a public duty upon the decision-maker, none of the grounds for refusing mandamus must apply (*Ex parte Ozone Theatres*).

### **R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) HCA:**

#### Reasoning

- '[400] The writ of mandamus is not a writ of right nor is it issued as of course. There are well recognised grounds upon which the court may, in its discretion withhold the remedy.'
- 'For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is

made. The court's discretion is judicial and if the refusal of a definite public policy is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.

- A more convenient or satisfactory remedy exists;
- No useful result would ensue from issuing mandamus (ground of futility);
- A party is guilty of unwarrantable delay; or
- There has been bad faith on the part of the applicant.

### D Habeas Corpus

Habeas corpus is a writ to produce the body of a person before the Court ('you should have the body'). It is a writ directed at a government official to demonstrate the legality of a detention to the Court.

Requirements for habeas corpus to issue:

- There must be detention attributable to a government official;
- That detention must be unlawful; and
- There must be a right to be released.

Note relaxed standing requirements: used by Civil Liberties Victoria to intervene in *Vardarlis*. Remedy designed to be sought by third parties (since the subject of the writ is detained).

#### ***Minister for Immigration and Multicultural Affairs v Vadarlis (2001) FCA:***

##### Reasoning

- Majority:
  - Was there unlawful restraint of liberty attributable to the government?
    - No; because they have no right to enter, the act of preventing their landing is not unlawful
    - Such government action is 'properly incidental to preventing the rescuees from landing in Australian territory where they had no right to go'
  - Is there detention attributable to a government official?
    - 'Total restraint of movement' unnecessary: *Vadarlis* per French J
    - Just need unauthorised 'restraint on liberty': French J
    - Freedom of movement is a liberty
    - Mere presence of troops on board the ship not detention (incidental to preventing landing/maintaining security; also serves humanitarian purpose: food/medicine)
    - It was the captain who would not sail out
  - Is detention unlawful? (French J)
    - If the restraint is imposed under statutory authority, not unlawful:
  - Is there a right to be released to mainland Australia? No
    - Not for non-citizens into Australia: *Vadarlis* per French J (cf Black CJ)

##### Decision

- No habeas corpus issues

### III **Equitable Remedies**

#### A *Injunction*

An injunction is an order made to compel observance of some obligation. There are two classes:

- **Mandatory injunctions**  
Requiring something to be done; and
- **Prohibitive injunctions**  
Preventing something from being done.

Injunctions and declarations can issue to enforce statutory provisions. See *Ku-ring-gai Corp* and *Bateman's Bay*, in which the High Court accepted that these remedies can issue in a public law context.

#### **Cooney v Ku-ring-gai Corporation (1963) HCA:**

##### Facts

- The Ku-ring-gai council seeks an injunction to restrain Cooney from using his house as a function room for weddings contrary to the *Local Government Act 1919*

##### Issue

- Can an injunction be granted?

##### Reasoning (Menzies J)

- '[604] the courts have granted injunctions or mandatory orders to protect benefits or advantages ... that could not be regarded as having any resemblance at all to proprietary rights.'
  - *Warringah Shire Council v Moore* (restraining defendant carrying out unapproved alterations)
  - Council of the *Shire of Hornsby v Dangle* (compelling demolition of buildings unlawfully constructed)
- '[605] Prohibitions and restrictions such as those under consideration are directed towards public health and comfort and the orderly arrangement of municipal areas and are imposed, not for the benefit of particular individuals, but for the benefit of the public or at least a section of the public, viz those living in the municipal area'
- 'A proper case is, I think, made out when it appears that
  - some person bound by ... a municipal law imposing
  - a restriction or prohibition upon the use of land in portion of a municipal area
  - for the public benefit or advantage
  - has broken, and will, unless restrained, continue to break that law
  - for his or her own advantage
  - and to the possible disadvantage of members of the public living in the locality'

##### Decision

- Injunction granted

### ***Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd (1998) HCA:***

#### Facts

- The Land Council creates a funeral benefit fund to compete with the Community Benefit Fund, a private company
- Unlike ACBF, the Land Council lacked statutory authority to establish a fund
- ACBF seeks an injunction preventing the Land Council from pursuing its unlawful plan

#### Issue

- Can an injunction be granted?

#### Reasoning

- '[267] The first question is why equity ... would intervene. The answer for a long period has been the public interest in the observance by such statutory authorities ... of the limitations upon their activities which the legislature has imposed ... the public interest maybe vindicated at the suit of a party with a sufficient material interest in the subject-matter'
- 'Moreover, the use of equitable remedies to ensure compliance by the executive and legislative branches of government with the requirements of the *Constitution* should not be overlooked.'
- A person will have standing (a sufficient interests) when they have an interest in the observance of the statutory limitations that was 'immediate, significant and peculiar'
- 'Here, the respondents had an interest in the observance by the appellants of the statutory limitations upon their activities with respect to contributory funeral funds which, as a matter of practical reality, was immediate, significant and peculiar.'
- 'if not restrained from commencing and concluding their activities, the appellants would [268] cause severe detriment to the business of the respondents. That, in the circumstances of this litigation, gave the respondents a sufficient special interest to seek equitable relief.'

#### Decision

- An injunction is granted

Note, however, that injunction, being an equitable remedy, is 'attended by discretionary considerations' (*Enfield*), and is a highly discretionary remedy.

Broad factors influencing issuance:

- The issue must be 'a real and not theoretical question' (*Forster*)
- The applicant must have 'special interests' in the subject matter (*ACF*)
  - An 'immediate, significant and peculiar' interest (*Bateman's Bay*)
  - Eg, severe detriment to business activities
- The issue must not be futile (*Perder Investments Pty Ltd v Elmer*)
  - Eg, futile to declare invalid a refusal to approve a transfer of a licence since the licence had already expired (*Perderi*)
  - Eg, time limitation for review passed so decision would remain regardless of court's decision (*Punton*)
  - Eg, where there would be no practical effect (*Young v Public Service Board*)

The injunction is a coercive remedy. Breach of an injunction can constitute contempt of court and give rise to criminal liability.

## B Declaration

A declaration is a 'conclusive statement by a court of the pre-existing rights of the parties'. However, it is not a coercive declaration.

### ***Dyson v Attorney-General (1911) UK CA:***

#### Facts

- Plaintiff seeks declaration that an Act imposing burdensome and expensive inquiries, and fines for non-compliance, is unlawful

#### Issue

- Can a declaration of invalidity be granted?

#### Reasoning

- The objection on the basis of 'ab inconvenienti' is irrelevant: the court can reject declarations to others and punish those who bring unnecessary actions; it is a discretionary remedy
- The public interest is in favour of a speedy and easy remedy for any subject with cause of complaint against the exercise of statutory powers by departments or officials
- 'If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression'

#### Decision

- Declaration granted

Like an injunction, a declaration can also be used to enforce a statutory obligation (*Forster, City of Enfield*).

### ***City of Enfield v Development Assessment Commission (2000) HCA:***

#### Reasoning (Gaudron J)

- '[157] Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers (*Clough v Leahy...*)'
- 'the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.'
- '...equitable remedies have long had a role to play in public law.'
- '[158] ...equitable relief should be available although prerogative relief is not.'
- 'There is no need for the importation of other limitations' whether discretionary or otherwise

## IV Statutory Remedies

### A AD(JR) Act

The *AD(JR) Act* confers a general power upon the Federal Court of Australia to provide appropriate relief:

#### **Section 16:**

- (1) On an application for an order of review in respect of a decision, the Federal Court of the Federal Magistrates 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 of thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

These orders may be made whether a court is exercising its common law (prerogative) or equitable jurisdiction. Powers granted by s 16 include powers to do the following:

- Quash a decision;
- Prohibit conduct;
- Issue directions;
- Make a declaration;
- Quash a decision only from a particular date
- Remit to a decision-maker, subject to directions
- Make any direction necessary to achieve justice

The first four of these essentially replicate the common law remedies. The latter three, however, go somewhat beyond. They are construed liberally by courts, and are thus very wide-ranging (*Park Oh Ho*).

Other relevant provisions include:

- Power to make an order in respect of reviewable conduct: s 16(2)
- Power to make an order in respect of a failure to make a decision: s 16(3)
- Power to suspend the operation of a decision being challenged: ss 15, 15A

## II **Consequences of Unlawful Decision-Making**

### A *Introduction*

Government decision-makers are only able to take action and make decisions where they are authorised to do so. In other words, they need legal jurisdiction to act. This is known as the principle of legality. If legal authority is absent, or if the decision-maker oversteps the limits of its jurisdiction (authority), the principle of legality suggests that the resulting action or decision will be unlawful. The issue with which we are here concerned is to determine the consequences of an unlawful administrative decision.

- Is it 'void *ab initio*' such as never to have effect?
- Is it 'voidable' as from the day declared unlawful by a court?
- How are decisions made or actions taken in reliance on the unlawful decision to be treated?
- What happens when the unlawfulness is for breach of associated statutory requirements?
- Does this differ from the position in relation to other forms of unlawfulness?

### B *Theories of Invalidity*

Two heuristics may be gleaned within the various authorities. They do not determine the result, but may be said to underlie competing tensions when determining the consequences of unlawfulness:

#### 1 *Principle of legality*

In general, any action undertaken without proper legal authority is invalid (*Wattmaster*). Invalidity usually results from the date the action was undertaken, rendering it void *ab initio*. The action is treated as if it never occurred. In law, it simply does not exist and no consequences can flow from it. Consequently, it cannot provide a lawful foundation for subsequent conduct.

Because an unlawful action or decision is without legal effect, invalid decisions are void *ab initio*. Subsequent conduct in reliance upon the unlawful action or decision is similarly unlawful.

For example, *Cooper's Case* involved a successful trespass action brought against a demolition board. In failing to observe the rules of natural justice, the board had unlawfully determined that his house should be destroyed, and proceeded to do so. Its subsequent destruction was therefore tortious. A similar basis exists for an action for unlawful imprisonment where the order of detention is invalid (*Park Oh Ho*).

Applied strictly, this leads to the doctrine of absolute nullity. However, it can be highly problematic where many consequential actions flow. For example, consider the position of a judge who, invalidly appointed, subsequently hears and decides many cases, upon the results of which many parties rely and order their affairs.

#### 2 *Separation of powers and the presumption of regularity*

This approach argues that the decision whether an administrative act is invalid is a judicial function properly exercised by a court. Until such a determination is made by a judicial body,

executive actions are presumed to be lawful. Because absolute nullity causes problems for third parties (in a manner similar to contractual rescission), third parties should treat government acts and decisions as operative until otherwise declared. Actions are presumed to be lawful until judicially declared unlawful.

Were it otherwise, and individual citizens or non-judicial bodies determined what was or was not lawful, the rule of law would be undermined and government decisions ignored. In *Macksville*, for example, Kirby J (dissenting) speaks of the 'principle of legitimacy', of the inconvenience of a doctrine of absolute nullity and the 'relative' theory of invalidity.

Both the above principles influence decisions on unlawfulness. Which will be adopted seems to depend on the inconvenience that would result in a decision being void *ab initio* (as compared with it being merely voidable prospectively).

*Wattmaster* suggests that where a party has incurred costs complying with a decision which was unlawful, the decision will be declared void *ab initio*. If the costs were paid to the decision-maker, this will generally allow the complying party to recover their losses since the payment was also invalid. It also puts all such affected persons on an equal footing as regards the date of invalidity.

### ***Wattmaster Alco Pty Ltd v Button* (1986) FCA:**

#### Facts

- A declaration made by a Minister under the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) is invalid, but *Wattmaster* had nonetheless paid dumping duty under that declaration
- Pincus J, who held the declaration to be invalid, ordered that invalidity would result from the date on which it was made (17 months after the original conduct)
- *Wattmaster* appeals the decision, seeking to recover their dumping duty

#### Issue

- At what point should the Minister's declaration be considered invalid?

#### Reasoning

- Under s 16(1)(a) of the *AD(JR)*, 'the Court has a choice from all the available possibilities: the date of the [Court] order, an earlier date or a later date'
- No presumption arises as to the appropriate date from which a decision should be quashed or set aside; the matter 'is left entirely to the discretion of the Court' (at 257)
- 'A decision made in purported exercise of a statutory discretion, but which is affected by a relevant irregularity, will normally be treated as valid until successfully impugned by an appropriate plaintiff; but once the decision is held to be bad in law it will be treated as being invalid — at least insofar as substantive rights are concerned — as from the date upon which it was made' (at 258)
- Procedural circumstances ought not to affect substantive rights
- For an applicant concerned only with the future effects of the unlawful decision, the point at which it is invalid (before or now) does not matter, since they will not be bound in the future either way
- However, for the plaintiff who has already incurred costs in reliance on the unlawful decision, as here, 'it seems generally appropriate that the substantive effect of orders under s 16(1)(a) be consistent with that of those made in the grant of other forms of relief'
- 'As a matter of strict law, a finding that a statutory decision is invalid — at least where invalidity stems from a procedural defect — binds the decision-maker only as against the applicant in the particular proceedings ... [T]he finding is binding only as between the

original parties. Thus, although the decision is 'set aside' under s 16(1)(a) it is set aside only as against the applicant in the particular proceedings in which the order is made. Theoretically, it would be open to the decision-maker to continue to insist upon [its] validity ... as against all other affected persons'

- '[T]here is no justification in law for the assumption that the date of decision in the first proceedings has equal significance for all affected persons' (at 258)
- '[T]he common law position of invalidity from the outset puts all affected persons upon an equal footing, regardless of when ... an action is brought' (at 258)

#### Decision

- The appeal is upheld
- The order of invalidity should operate from the date of the original declaration, rendering it void *ab initio*

### C Breach of Statutory Requirements

What is the consequence of a decision-maker's breach of a statutory requirement? Such requirements are normally procedural (application fees, public notice, etc). Obviously Parliament intends for such requirements to be followed; the issue is whether it also intends any single failure in respect of them to invalidate the resulting decision.

Whether such a decision will be void for unlawfulness seems to depend on the point during proceedings at which the question is raised. If it arises at a preliminary stage (before any substantive decision is made), a courts will probably rule that compliance is essential for validity. However, if breach of the requirements is raised at a point where significant resources have already been expended (eg, public hearings, consultation, time, applications), a court will be far more hesitate to treat the final decision as tainted by the breach.

This position may be summarised by noting that legal non-compliance with a statutory provision will not *necessarily* invalidate a resulting decision (*Project Blue Sky*). In that case, it was observed that the

*better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid (at 390).*

#### ***Project Blue Sky Inc v Australian Broadcasting Authority (1998) HCA:***

##### Facts

- Section 160 of *Broadcasting Standards Act*: confers power to create a 'local content standard' (proportion of locally produced television shows)
  - However, this power must be exercised in accordance with the Minister's directions, any common law or international obligations
- The relevant obligation is here a FTA between Australia and New Zealand
- Section 160 effectively prefers local broadcasting over that of New Zealand, and therefore inconsistent with the FTA
- The section is found to be made in breach of s 160

##### Issue

- Was standard invalid?
- If so, what are the consequences of invalidity for the local content standard?

- If it was completely void, it would have wide-ranging effects upon many content producers and broadcasters

#### Reasoning (McHugh, Gummow, Kirby and Hayne JJ)

- The consequences depend on the circumstances
  - The fact that an act is in breach of a statutory requirement will not necessarily make it invalid
  - Whether it is depends on construing the statutory purpose: language, subject matter, objects, and -- most importantly -- the consequences of holding that all subsequent actions are void
- ‘An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid ... Whether it is depends on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, ... this often reflects a contestable judgment.’ (at 388–9)
- Application:
  - Purpose of s 160
    - The requirements of s 160 are not preconditions for exercise of the power; it just ‘regulates the exercise of functions already conferred upon the ABA’
    - The power is granted, then imposed
    - This ‘strongly indicates’ that the Act did not intend to invalidate any action in breach of s 160
  - Nature of the obligations imposed by s 160
    - The requirements do not all have a ‘rule-like quality’
    - Compliance is a matter of degree; they are general directions and very broad
    - There is room for ‘widely differing opinions’ as to whether a particular function has been carried out in accordance with the policies
    - ‘When a legislative provision directs that a power or function be carried out in accordance with matters of policy ... [it] goes to the administration of a power or function rather than to its validity’ (at 391)
  - ‘It is hardly to be supposed that it was a purpose of the legislature that the validity of a licence allocated by the AB should depend on whether or not a court ultimately rules that the allocation of the licence was consistent with a general direction, policy or treaty obligation falling within the terms of s 160.’
    - The policies are not required to be publicly recorded
  - The language of the section also suggests that a decision under it won't be null because of breach of the section
- The ‘best interpretation’ of s 160 is therefore that, while imposing a legal duty on the ABA, ‘an act done in breach of its provisions is not invalid.’
  - A great deal of public inconvenience would be caused by invalidating all subsequent conduct: standards also apply to licences granted to broadcasters
    - Inconveniences licensees
    - Broadcasters, content producers
    - Viewers

#### Decision

- The failure to comply with s 160 does not necessarily mean that cl 9 of the Standard is

- invalid
- Disapproved of the mandatory/directory dichotomy
    - Previously, if a provision was characterised as mandatory, then breach would be nullified and of no legal effect
    - However, if a provision was simply directory (eg, procedural), then substantial compliance was said to be sufficient for conduct to have legal effect
  - Instead, what should be considered is the language of the section, the nature of the requirements it imposes, any inconvenience of invalidation, and other like factors
  - Contravening s 160 is still unlawful, even though it will not render the licences invalid
    - Consequently, a person with a sufficient interest in the subject matter is entitled to sue for a declaration that the ABA has acted in breach of the Act and may be granted an injunction to restrain the ABA taking further action based on its unlawful non-compliance

In *ABC v Redmore*, the High Court adopted the mandatory/directory dichotomy to classify a statutory provision as directory. In the result, unlawful decisions made under it were not invalid. The linguistic and interpretive factors proposed in *Project Blue Sky* are quite similar to those considered when characterising a provision as mandatory or directory. However, as useful labels their applicability has now been rejected.

#### D Jurisdictional and Other Errors

A deportation order vitiated by an improper purpose will be void *ab initio* such as to give rise to an action for wrongful imprisonment by anyone detained pursuant to it (*Park Oh Ho*).

This reflects a legality approach to the consequences of an invalid decision. The statute must be interpreted to determine whether the consequential powers are dependent for their lawful exercise upon the anterior, impugned decision.

#### ***Park Oh Ho v Minister for Immigration and Ethnic Affairs (1989) HCA:***

##### Issue

- What is the consequence of the invalidity of the deportation order??

##### Reasoning

- Powers of detention can only be exercised in relation to a 'deportee' 'pending deportation'
- Whether they may be lawfully exercised is a matter of statutory construction
  - Here, 'the continued detention of the appellants in custody ... was not justified by the ... provisions of s 39 for two related reasons'
  - First, 'the powers of arrest and detention ... exist in relation to a "deportee", ... a person in respect of whom "an order for ... deportation ... is in force"'
    - Because the deportation orders were vitiated by and impermissible purpose, those orders were void
    - Therefore, those orders were not 'in force' and no relevant party was a 'deportee'
  - Second, detention is not authorised for an indefinite duration for some ulterior purpose; it is only authorised for a deportee 'pending deportation'

Decision

- By construing the words of the statute, it may be observed that powers of detention hinge upon a lawful deportation order
- Here the order was unlawful, so no power to detain existed
- Therefore, an action for wrongful imprisonment is available
- Each of the appellants is entitled to a declaratory order that his detention was unlawful in addition to an order formally quashing the deportation order on which that detention was based

If a decision-maker does not comply with an Act's requirements, he or she will have made a jurisdictional error. This means that no decision has been made for purposes of the Act. Consequently, a subsequent attempt to remake the decision is not to be considered in breach of the doctrine of *functus officio* because the decision was never made (*Bhardwaj*). In considering whether jurisdictional error was present, the Act is of prime importance.

***Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) HCA:***Facts

- Bhardwaj is an international student; he is therefore required, pursuant to his student visa, to undertake a course and regularly attend classes
- He is reported for not attending classes, and the Department of Immigration subsequently cancels his student visa
- He appeals to the Tribunal, which is set for 15 September
- Two days before, he falls ill
- The day before, his solicitor faxes the Tribunal but they don't receive the fax
- The Tribunal affirms the decision in his absence, but then discovers the fax and rehears the appeal, during which they cancel the decision to revoke his visa
- The Minister for Immigration applies for judicial review in relation to the revocation of the cancellation of Bhardwaj's student visa
- He argues that the Tribunal had already made a 'decision' in circumstances ignorant of the fact that the applicant was ill, but then revisited his case a second time
  - The doctrine of *functus officio* states that once an officer has already performed his function, he cannot go back and perform it again
  - The Minister appeals on the basis that a decision had already been made the first time, and hence could not be made again
  - If the appeal is successful, the Tribunal's revocation would be of no legal effect
- Bhardwaj argues that the first decision was void *ab initio* because it didn't take into account a relevant factor (his legitimate absence), so when they heard his case they were deciding for the first time

Issue

- Is the failure in law of the Tribunal at first instance to afford procedural fairness, etc, of such significance that no decision was made?

Reasoning

- Gleeson CJ:
  - The legal effect of the first 'decision' depends upon the statutory provisions in question
  - To treat the first decision as legally ineffective and consider afresh the matter that was originally before it would have been inconsistent with the scheme of the Act

- However, the Tribunal, when it learned of its own administrative error, simply recognised that it had not performed its functions and proceeded to do so
- ‘In those circumstances, it was not inconsistent with the statutory scheme for the Tribunal, upon becoming aware that it had not given effect to its own intention, and that it had failed to conduct a review of the delegate’s decision, to give the respondent the opportunity which the statute required, which eh wanted, and which the Tribunal had intended to give him. On the contrary, it was in accordance with the requirements of the Act.’
- Gaudron and Gummow JJ:
  - There is no reason in principle why law should treat administrative decisions involving jurisdictional error as having effect unless and until set aside; a decision without jurisdiction ‘is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all’ (at 614–15)
  - If the duty of the decision-maker is to make a decision with respect to a person’s right but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed.’
  - The Tribunal’s failure to give Mr Bhardwaj a reasonable opportunity to present evidence and argument meant that it did not comply with the Act’s requirements
  - It follows that the second decision was not a ‘decision on review’ under ss 367–368 of the *Migration Act 1958* (Cth)
- Hayne J:
  - In considering unlawful administrative action, ‘there is no such thing as voidness in an absolute sense, for the whole question is, void against whom?’
  - The error committed by the Tribunal in reaching its September (first) decision was a jurisdictional error
  - What it did was not authorised by the Act and therefore did not constitute performance of its duty under the Act
  - ‘In general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction’
  - ‘By contrast, administrative acts and decisions are subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues’
    - Jurisdictional error when applied to tribunals is broad *ultra vires* (Craig)
    - Therefore, if a form of *ultra vires* can be argued, then the decision may not be of any legal effect
    - But when applied to courts, jurisdictional error is much narrower (just mistaken jurisdiction)
    - For administrative decisions, there need be proof of some invalidating feature, but it is not a presumption that all administrative acts and decisions have valid and binding effect until set aside
    - No useful analogy can be drawn with the effect of jurisdictional error by courts, because here an administrative decision is concerned
  - ‘Once it is recognised that a court could set [the September decision] aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.’ (at 647)
  - ‘The critical steps in the reasoning [about invalidity] must ... begin and end in the statutory provisions which are the source of that power it is said has been exercised.’

#### Decision

- Majority:

- If there is a jurisdictional error, a presumption arises that the decision is of no legal effect
- Here, the first decision is of no legal effect because it was not a decision under the *Migration Act 1958* (Cth) for want of procedural fairness
- Minority (Kirby J):
  - To interpret the Act as the majority have done would have the effect of rendering all decisions by the Tribunal merely provisional
  - In light of the significant consequences attached to those decisions, the inconvenience of setting them aside *ab initio*, and the many other remedies available to the respondent, there is no reason to treat the September decision as not having been made