

PART XIV – STATE ADMINISTRATIVE LAW

I *Review of State Decisions*

A *Purposes of State Legislation*

According to Callaway JA in *Masters v McCubbery*, the objectives of the *Administrative Law Act 1978* (Vic) ('ALA') are fourfold:

- To simplify procedures for judicial review;
- To entitle parties able to apply for review to reasons for a decision: s 8;
- To liberalise technical rules concerning standing: s 2 ('person affected'); and
- To nullify privative clauses in existence prior to enactment: s 12.

The primary purposes are thus 'to facilitate procedure and to eliminate problems associated with judicial review of administrative decisions' (*FAI Insurances Ltd v Winneke* per Mason J).

B *Avenue Requirements*

Like the *AD(JR)*, there exist several requirements for using the *Administrative Law Act* as an avenue for judicial review. Before a decision may be reviewed, these definitions must be satisfied:

Section 3:

Any person affected by a decision of a tribunal may make application ... to the Supreme Court ...

1 *Standing*

The expression 'any person affected' qualifies the right conferred by s 3. It is defined in s 2:

Section 2 — 'Any person affected':

A person whether or not party to proceedings whose interest (being an interest that is greater than other members of the public) is or will be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the tribunal ...

This is a similar test of standing to that adopted by courts determining applications for injunction or declaration. Although no examples of interests which must be affected are specified, certain classes of interests do not confer *locus standi* (eg, emotional or intellectual interests).

A commercial competitor can be a 'person affected' (*Chelfco Ninety-Four Pty Ltd v Road Traffic Authority*). However, an unsuccessful tenderer is not a 'person affected' by a Minister's decision to grant a licence to the successful tenderer (*Croft v Minister for Energy and Resources*).

Legislation may deem standing in certain circumstances. For example, a person aggrieved by the decision of a tribunal in relation to a casino licence is a 'person affected'. This is deemed by the s 155(7) of the *Casino Control Act 1991* (Vic).

The quantum of the decisions effect upon a person's interest is 'to a substantial degree'. 'Substantial' is likely to mean 'significant, in the sense of being more than trifling' (*Charlton v Members of the Teachers Tribunal* per McGarvie J), though this has not been determined.

2 Tribunal

The definition of 'tribunal' is set out in s 2:

Section 2 — 'Tribunal':

A person or body of persons (not being a court of law or a tribunal constituted or presided by a Judge of the Supreme Court) who, in arriving at the decision in question is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.

The mere fact that a body is bound by the rules of natural justice does not automatically make it a 'tribunal' (*Monash University v Berg*). In that case, O'Bryan J confines the Act's operation 'to public or semi-public tribunals and authorities exercising statutory power'. Subsequently, in *Dominik v Eutrope*, Nathan J described this class as 'organic, capable of growth, and not capable of close definition.'

Confining the Act to public bodies is consistent with its purpose being directed to bodies charged with the performance of public acts and duties. Such an interpretation is also suggested by the phrase 'operating in law' in the definition of 'decision'. In *Monash University v Berg*, this feature was held to encompass only those decisions operating from public (as distinct from private, ie contractual) laws. For this reason, it essential to precisely articulate the decision which is alleged to have been made, then determine the statute under which it was made.

A body will only be a 'tribunal' if it is required by law to observe the rules of natural justice (*Masters v McCubbery*).

Masters v McCubbery (1996) Vic SC:

Facts

- The 'opinion' of a medical panel on a 'medical question' under the *Accident Compensation Act 1985* (Vic) is required to be adopted by a court
- The 'opinion' comprises a mixed determination of fact and law, and typically determines the entitlement of injured worker under the Act
- Masters suffers an injury, and his impairment is assessed at 27 per cent (below the relevant threshold)
- He seeks reasons pursuant to s 8 of the ALA

Issue

- Is the medical panel a ‘tribunal’ under the *ALA*?
- If so, is the medical panel obliged to observe one or more of rules of procedural fairness (note ‘act in a judicial manner’ does not add anything further)?
 - It is so obliged if the power of the panel is to ‘(i) destroy, defeat or prejudice a person’s rights, interests or legitimate expectations ... [and] (ii) unless they are excluded by plain words of necessary intendment’ (*Kioa v West*)

Reasoning

- The principal purpose of the statute is to ‘elimin[ate] the complexities which attended applications to the Court for the grant of prerogative writs and similar remedies directed to inferior tribunals or other bodies charged with the performance of (inter alia) statutory duties.’ (at 640)
- ‘Whether the relevant body is or is not a “tribunal” for the purposes of the *ALA* hinges upon the fundamental issue as to whether the body in question is required to observe one or more of the rules of natural justice.’
 - ‘it is now well settled that when a statute confers power on a statutory body to “destroy, defeat or prejudice a person’s rights, interests or legitimate expectations”, then there is a presumption that the rules of natural justice will regulate the exercise of the power “unless they are excluded by plain words of necessary intendment”’ (at 644)
- Here, the rules of natural justice apply because of the statutory effect of the panel’s ‘opinion’
 - ‘the Act does require a medical panel, in forming opinions on “medical questions” referred to it by a court, to observe the rules of natural justice’
 - Such panels are empowered to decide the critical issues of entitlement
 - Although ‘couched in terms of “opinions”, such legislative terminology cannot obscure the fact that the panel is being called upon to decide matters of mixed law and fact which decisions operate by virtue of the provisions of the Act to bind the Court and thus to effectively dispose of the issues which have been raised by the worker and placed by him before the Court for its determination.’
 - The panel assessed incapacity, suitability for employment, gave meanings to concepts expressed in the act, and applied criteria set out in the guides
 - ‘These ultimate conclusions expressed by the panel as “opinions” dispose in all practical senses with the dispute raised by the claim between the worker and the authorised insurer and leave the Court with no relevant function but to give effect to them in money terms. The conclusions by virtue of the Act become binding on the Court.’
 - The powers vested in the panel are therefore ‘capable of interfering with the rights of the individual’
- Has the statute manifested an intention to exclude the rules of natural justice?
 - ‘(A)n intention to exclude the rules of natural justice cannot be gleaned from indirect references, uncertain inferences or equivocal considerations’
 - It can only be inferred ‘if it is clear from the expression of legislative intent ... that Parliament did not intend a medical panel to accord procedural fairness. To reach that conclusion the legislative intent “must be made unambiguously clear”’ (*Twist v Randwick Municipal Council* per Barwick CJ)
 - In this case, ‘I can discern no such intention’ (at 645):
 - No express ousting;

- Exclusion of appeal on merits is not sufficient to support an implication;
- Binding nature of opinion (even when panel acted unfairly) is also insufficient;
- No contrary public policy reasons

Decision

- The appeal is allowed and the decision is subject to review
- Reasons for decision are granted

A body, to be considered a 'tribunal' under the *ALA*, must be required by law 'to act in a judicial manner'. This means that it must be required to observe the rules of natural justice (*Allen v City of Mordialloc*). However, the expression does not add some further element to the definition (*FAI Insurances Ltd v Winneke*; *Masters v McCubbery*);

Issue: can private bodies be a 'tribunal' for purposes of the *ALA*?

In some circumstances, private bodies can be subject to the rules of natural justice. Are such bodies 'tribunals' and therefore subject to judicial review, or must the body be public? The authorities are in conflict about this issue:

- 1 Public bodies only**
Confined to 'public or semi-public tribunals and authorities exercising statutory power' (*Monash University v Berg* per O'Bryan J).
- 2 Not just statutory bodies**
Contra *Carman v Foley* per Starke J, a case concerning the Victorian Football League: 'this Act does not, in terms, apply only to statutory bodies'.

Does the Act extend to all bodies obliged to accord procedural fairness?

Exam issue: if the relevant body is private (and not statutory), does an obligation to accord procedural fairness apply? If so, does the *ALA* apply? Ought it to? See *NEAT* per Kirby J.

Note that the *ALA* does not apply to Commonwealth tribunals, such as the AAT (*Vithana v Buckman*; *AD(JR) Act* s 9).

3 *Decision*

Section 2 defines the term 'decision' as something having legal effect to determine or alter rights:

Section 2 — 'Decision':

Decision operating in law to determine the rights of any person; or grant, deny, terminate, suspend or alter a privilege or licence; and includes a refusal or failure to perform a duty or to exercise a power to make such a decision...

The expression 'operating in law' precludes from review decisions which have their effect upon rights only as a result of a private instrument, such as a contract providing for binding arbitration (*Monash University v Berg*).

***Monash University v Berg* (1984) Vic SC:**

Facts

- Berg is an arbitrator engaged in a dispute between a construction sub-contractor and Monash University
- The construction contract provides for the use of a private arbitrator whose decision will bind the parties, in the event of such a dispute
- However, Berg's decision is very short and neither party is satisfied with it
- Monash University makes an application for Berg's reasons for that decision under s 8

Issue

- Is the award of a private arbitrator, appointed pursuant to the terms of a private contract made between two parties, a 'decision' for purposes of the *ALA* s 2?

Reasoning

- The phrase 'decisions operating in law' does not include decisions which operate by force of private law (eg, contracts, private arbitration decisions)
 - Seems to indicate that the Act applies only to decisions which operate by force of public law
 - 'But an arbitrator on a reference by consent out of court derives his authority from the terms of the private contract made between the parties'
- The purpose of the Act was not to extend review to bodies not already subject to review
 - The *ALA* was intended only to simplify procedures, *not* to grant new remedies: s 7 does not enable any person affected by a tribunal's decision 'to obtain a remedy which was not formerly available' (at 388)
 - 'It would indeed be surprising if, by a sideward, as it were, the [Act] made such important changes to the law of arbitration'
 - The phrase is read down to conform to the objectives of the state

Decision

- 'Certiorari and prohibition did not go to a private arbitrator before the [*ALA*], and they will not go to him after it was passed'
- Not operating in law, there is no relevant 'decision' to which s 8 could apply
- Therefore, no award of reasons is possible

It is also arguable that decision does not extend to the making of a recommendation. If a body has merely investigatory or advisory functions, it cannot 'determine the rights of any person' — not even if an adverse report may jeopardise such rights or expose them to subsequent determination. This may be contrasted with the *AD(JR) Act*, which by s 3(3) can include certain kinds of reports.

A writ will not be issued prior to the making of a decision. The *ALA* only allows decisions already made to be reviewed. However, interim decisions may still satisfy the definition in s 2 (*Trevor Boiler Engineering Co Pty Ltd v Morley*).

The word 'rights' in the definition of 'decision' may include 'legitimate expectations' (*Kioa v West* per Mason J).

Examples of 'decisions':

- Medical opinion given by a medical panel where such opinion is binding on a court (*Masters v McCubbery*)
 - Winneke P: the opinion operates in law to determine a question affecting the rights of a person because the *Accident Compensation Act* obliges the Court to adopt the opinion
 - It thereby makes the opinion conclusive of relevant issues
 - A decision need not be 'an immediately binding and enforceable' one
 - Callaway JA: 'in giving its opinion, the panel decides [the medical] question. It is true that the decision does not operate in law to affect the worker's rights, but it need not do so in order to fall within the statutory definition. It need only operate in law to determine a question, being a question that affects a person's rights.'
- Cancelling an automobile driver's licence (*Currie v Road Traffic Authority*)
- Decision declining to refer applicant to a legal aid review committee (*Serban v Victoria Legal Aid* per Hansen J)
 - Where an Act contains a two stage review process and the applicant seeks review at stage one, only that decision is reviewable (since the second stage decision can only be reviewed when made and requested)
- Decision requiring taxi driver applicant to submit psychiatric report (*El Fahkri v Ellis*)
- Extension of time under *Equal Opportunity Act* (*State Electricity Commission*)
- Failure to make a decision about legal representation application (*R v Equal opportunity Board; Ex parte Burns*)
 - Denial of representation before a tribunal bound by the rules of natural justice and having extensive powers is a decision affecting the rights of that person
- Interim awards (*Trevor Boiler Engineering*) and decisions (*VBI Properties v VCAT*)
- Making an assessment of taxation liability (*Footscray Football Club Ltd v Commissioner of Pay-roll Tax*)
- Making a regulation (*Charlton v Members of the Teachers Tribunal*)
- Refusal to grant a licence (*Nakic v Estate Agents Board*)
- Suspension of a football player (*Carman v Foley*)

Examples of matters not 'decisions':

- Ruling in the course of a hearing on a procedural and not substantive matter (*Australian Broadcasting Tribunal v Bond*)
- Interim ruling of the AAT allowing a submission to be made to a council (*Bayside City Council v Fooks martin Sandow Pty Ltd*)
- Award of a private arbitrator (*Monash University v Berg*)
- Notice of intention to suspend a solicitor's practicing certificate (*AB v Lewis*)

C Comparing the Supreme Court Rules and ALA

Order 56 of the *Supreme Court Rules* provides an avenue for applying for common law remedies.

Advantages of ALA over O 56

- Procedural simplification
- Entitlement to reasons

- Simpler issues re standing

Disadvantages of ALA

- Non-statutory bodies?
 - Can common law review apply to decisions that operate by virtue of contract?

D *Comparing the AD(JR) and ALA Avenue Requirements*

Requirements of the <i>AD(JR)</i>	Requirements of the <i>ALA</i>
<ul style="list-style-type: none"> • ‘Person aggrieved’ • ‘Decision’: finality, operative, substantive • ‘Of an administrative character’ • ‘Under an enactment’ • Not made by the Governor–General • Not a decision in Schedule 1 	<ul style="list-style-type: none"> • ‘Person affected by’ • ‘Decision’: operating in law, determining a question affecting rights • ‘Of a tribunal’: required by law to act in a judicial manner

At first glance, the *AD(JR)* appears to have a narrower scope: decisions must be made pursuant to an enactment, must be of an administrative character, and must not fall within several listed exceptions. However, decisions on the *ALA* are arguably confined to a similar — though perhaps not quite the same — degree:

- The test for standing is similar
- The definition of decision is almost identical
- The nature of a tribunal ‘required by law’ to act in a judicial manner is such that it is likely to be established by a statute
 - *Berg* further suggests that only a public, statutory body will be within the scope of the Act
 - This is similar to decisions being ‘of an administrative character’
- The decision being reviewed will arguably be made under an enactment, because it must ‘have legal effect’ and determine a question affecting rights
- However, the State Governor’s decisions may still be reviewed, depending on the circumstances