JUDICIAL REVIEW OF ASC INVESTIGATIONS: THE ADJR ACT

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Application of ADJR Act to ASC Investigations

By virtue of the Australian Securities Commission Act and Law (ASCA) s244, the Administrative Appeals Tribunal has no substantive role in the review of ASC investigations. Equally, much of the case law on ASC investigations does not involve the Administrative Decisions (Judicial Review) Act (ADJRA). The role of this Act is to provide a mechanism to regulate challenges to administrative activity. It has no application (except pursuant to a relevant cross-claim) where an action for compliance or breach is initiated by the ASC.

With this in mind, many of the recent leading cases on the ASC investigative powers fall away. The most common situation leading to litigation is by virtue of an application for compliance under ASCA s70, eg *ASC v Graco* (1991) 5 ACSR 1; *ASC v Zarro* (1991) 6 ACSR 385; *ASC v Lord* (1991) 6 ACSR 350; *ASC v Dalleagles* (1992) 6 ACSR 674 (subject to an ADJRA based cross-claim).

In some other situations the parties have proceeded pursuant to an application for a declaration heard by consent, eg *Dalleages v ASC* (1991) 6 ACSR 498 (whether certain documents were covered by legal professional privilege); *Johns v Connor* (1992) 10 ACLC 774 (whether a notice complied with the requirements of ASC s.19(3) (a) to state the 'general nature of the matter that the Commission is investigating').

It is only in the more limited situation where a person initiates a challenge (or enters a relevant cross-claim) that the ADJRA applies. The number of cases where the ADJRA has been referred to, let alone argued at length, are far from numerous. Looking back over the period since 1 January 1991, the list is relatively short eg *Bell v ASC* (1991) 5 ACSR 638; *Financial Custodian Corp v Taylor* (1991) 6 ACSR 215; *Little River Goldfields v Moulds* (1991) 6 ACSR 299 (possibly the most significant decision); *ASC v Dalleagles* (1992) 6 ACSR 674 (a continuing case); *Johns v ASC* (1992) 10 ACLC 684 (first instance); Full Federal Court (19 June 1992); and *Allen Allen & Hemsley v ASC* (Federal Court, 29 May 1992).

Overview of ADJRA

Under the ADJRA, the Federal Court reviews only the legality of administrative decisions; it does not remake decisions on the merits as can the AAT under s43 of the AAT Act. Thus the mere fact that the Federal Court might have made a different decision if left to its own devices does not mean that it will interfere with an ASC decision on ADJRA review. Only if the decision maker has made an error of law in reaching a decision (as interpreted in ss.5-7) will the Federal Court intervene.

In relation to State Supreme Courts, s9(1) of the ADJRA expressly provides that a State Supreme Court has no power to review any decision, conduct or failure to decide, falling within ss5-7 of the ADJRA.

Under the ADJRA, the key remedies which an applicant may seek are:

- a statement of reasons from the decision maker;
- review of the legality of a decision.

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Right to a statement of reasons

As we know from *Public Service Board v Osmond* (1985) 159 CLR 656, the common law does not require the giving of reasons as an aspect of natural justice. Accordingly the right under s13 to seek a statement of the decision maker's reasons may be a crucial aspect of the remedies provided by the Act.

The fact that little or nothing may be known about how and why the decision was reached is precisely what makes it difficult in many cases to mount a successful challenge to an administrative decision. The information obtained under s13 can fill crucial gaps in the applicant's understanding of the decision making process and either identify defects in that process or suggest that the applicant's doubts about the propriety and correctness of the decision were misplaced.

Given this, to obtain a statement of reasons under s13 will often be a very useful preliminary step in determining whether or not to commence a formal action under the Act. In essence, the s13 procedure acts in fact as a form of 'particulars' of the Government's case.

Any person making an application for a statement of reasons by the ASC, in the context of current investigations, faces two fundamental hurdles:

- the statement of reasons applies only to decisions which are subject to s5. For actions short of a s5 decision, s13 has no application. I will review this later when discussing *Little River Goldfields v Moulds* (1991) 6 ACSR 299;

- Schedule 2 (e). This excludes from the operation of s13 decisions relating to the administration of criminal justice and, in particular, decisions in connection with the investigation or prosecution of persons; decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations; decisions in connection with the issue of search warrants; and decisions requiring the production of documents, the giving of information or the summoning of persons as witnesses. Schedule 2(f) contains a similar exclusion for decisions in connection with the institution of civil proceedings, including pecuniary penalties.

The terms of Schedule 2 para (e) were discussed by Davies J in *Hatfield v Health Insurance Commission* (1987) 77 ALR 103. This case discusses the outer limits of decisions coming within this particular paragraph. However it is clear that decisions centrally related to investigations, eg to issue notices for production of books or attendance at examinations fall squarely within the Schedule. Thus s13 has little utility for current ASC investigations. However the ASC has provided reasons, under s13, concerning a past investigation: *Allen Allen & Hemsley v ASC* (Federal Court, 29 May 1992, Ryan J).

Before leaving this area, I wish to draw your attention to ADJRA s13A. This provides that in other circumstances where the ASC may be required to provide reasons (eg pursuant to non-investigative decisions under the Corporations Law) it may exclude from that statement information supplied in confidence to the ASC or information furnished to the ASC by a third party 'in compliance with a duty imposed by an enactment'. The effect is that the ASC may exclude from any statement of reasons information provided to the Commission pursuant to its statutory investigative and other information gathering powers. This ensures against 'back door' compulsory disclosures of investigative material.

Reviewing the legality of a decision

Under s11(1) of the ADJRA, an application for review of a decision must be made in the prescribed manner, set out the grounds for the application, and be made within the prescribed time. The Court has power to strike out parts of an application eg where they disclose no ground for review under the ADJRA but, conversely, an applicant is not limited to the grounds set out in the original application. The Court has a discretion

under s11(6) to permit the addition of new grounds. The Court also has a discretion to extend the time for lodgement of an application in appropriate circumstances. This is discussed further below.

Analysis of the relevant provisions.of ss5-7 and s11 disclose that there are six hurdles which must be successfully negotiated before a person will be entitled to remedies under s16 of the ADJRA namely:

- there must be a decision, or conduct for the purpose of making a decision (or failure to make a decision), to which the ADJRA applies;
- the decision must not be 'excluded' from review;
- the applicant must be a 'person aggrieved';
- the application must be made within time;
- the applicant must establish one of the statutory grounds set out in ss5-7; and
- the case must not be one where the court in its discretion regards it as inappropriate to grant relief.

First element: there must be a relevant decision or relevant conduct (failure) for the purpose of making a reviewable decision

Section 3(1) of the ADJRA defines 'a decision to which this Act applies' as:

- a decision;
- of an administrative character;
- made under an enactment.

Also, s3(8) provides that decisions of a delegate or lawfully authorised representative are deemed to be decisions of the principal.

Decision

We are all no doubt aware of the High Court decision in *ABT v Bond* (1990) 170 CLR 321. However this does not render unnecessary consideration of the pre-Bond decisions, which, I suspect, are not disturbed to the extent first contemplated when the *Bond* decision was handed down. There are a number of taxation cases which, I suggest, are still good law and would have equal application, by analogy, to ASC investigations. For instance, it was held in *FCT v Citibank Ltd* (1989) 85 ALR 588 and *Allen Allen & Hemsley v DCT* (1989) 86 ALR 597 that a decision to exercise the powers under s263 of the Income Tax Assessment Act to obtain access to premises or documents constituted a reviewable decision. Likewise, a decision to serve a notice under s264 of the Income Tax Assessment Act seeking information, evidence, or the production of records constituted a reviewable decision, eg *Perron Investments Pty Ltd v DCT* (1989) 90 ALR 1.

Overall, we might say that prior to *ABT v Bond*, the Courts had taken a pragmatic and broad approach to the question of identifying a relevant decision, thus ensuring that applicants were not blocked off from the possibility of a remedy on technical or narrow grounds.

Post ABT v Bond

It was feared by some that the *Bond* decision, and the test formulated in it, intentionally narrowed the scope of 'decisions' covered by the ADJRA, by excluding 'intermediate' decisions from review. However subsequent cases that impinge on ASC investigations suggest that *Bond*, properly understood, does not in practical terms significantly narrow the grounds for review.

Before turning to ASC decisions, I would like to refer quickly to a number of other cases which have interpreted *ABT v Bond*. The first, and the one most favouring a narrower interpretation, is *Edelsten v Health Insurance Commission* (1990) 96 ALR 673. In that case the Full Federal Court held that a decision to refer to the Minister for consideration

allegations of medical over-servicing did not constitute a reviewable decision because the Minister was under no duty to act on the reference. Secondly, and possibly more relevantly, a subsequent decision by the Minister's delegate to refer the allegations to the Medical Services Committee of Inquiry did not constitute a reviewable decision because it merely required the Committee at the preliminary stage to consider whether Dr Edelsten may have rendered excessive services. This case is therefore support for the proposition that the mere commencement of an investigation does not constitute a reviewable decision for the purposes of the ADJRA. This point is further taken up and applied, although without specific reference to the *Edelsten* case, in *Little River Goldfields NL v Moulds* (1991) 6 ACSR 299, as to which see later.

The next case is *FCT v McCabe* (1990) 21 ALD 740. In that case Davies J of the Federal Court pointed out that conduct not constituting a decision may still be relevant to the *evaluation* of a decision. He quoted Mason CJ in the *Bond* case then added:

> Those words do not convey that a finding of fact which is not itself a decision but is made in the course of the reasoning leading to a decision is not examinable. His Honour said that such a finding must be examined only in the context of the review of a decision. Thus a decision may be invalidated on the grounds of unreasonableness if, taking into account the reasoning process leading to it, it was a decision to which no reasonable decision maker would have come.

This does not overcome the hurdle of attaching your case to a reviewable decision; but it does suggest that in the context of ss5-6, the course of reasoning leading to a decision, as well as the ultimate decision itself, can be reviewed by the Court.

The outer limits of the meaning of 'decision' for the purposes of the ADJRA is exemplified in *Pegasus Leasing Ltd v FCT* (1991) 104 ALR 442. In that case, O'Loughlin J held that an advice by the ATO to a taxpayer did not constitute a decision for the purposes of the Act. The Court pointed out that the Income Tax Assessment Act did not require the Commissioner to make any such communication; the communication was only advice, and it did not have the character and quality of finality. As the Court pointed out:

> 'The whole tone of the letter is suggestive of on-going investigations and opinions - all of which would most probably lead, in due course of time, to a decision'.

There are four cases under the national scheme laws that have touched on the concept of a decision.

In *Bell v ASC* (1991) 5 ACSR 638, Pincus J accepted an application under the ADJRA to review the 'decision' of an inspector relating to the right of attendance of the legal representative of the examinee, pursuant to ASCA s23. The ASC did not dispute the 'decision' point.

In *Financial Custodian Corp of Victoria v Taylor* (1991) 6 ACSR 215 an application was made pursuant to ADJRA s15 (stay of proceedings) to suspend the operation of a certain 'decision' - being the decision to issue and serve three notices under ASCA Part 3, Division 3 to produce documents. Again this was conceded without argument.

The next case, and the only one to apply *ABT v Bond* so as to place restrictions, is *Little River Goldfields v Moulds* (1991) 6 ACSR 299. In this case Davies J ruled that the exercise of the power under ASCA s13 to initiate an investigation 'does not confer a power upon the Commission to take a decision which is an ultimate or operative determination [as in *ABT v Bond*]. Section 13 merely confers a power upon the Commission to commence an investigation when there is reason to suspect that there may have been committed a relevant contravention.' His Honour also took the view that the original report which initiated the investigation, the internal approval given to investigate, or the mere

carrying on of the investigation did not constitute reviewable decisions. By contrast 'the notices [to attend at examinations and to produce books: ASCA ss19, 31, 33] stand, however, in a different position for they are formal acts which impose obligations upon the recipients. Counsel for the Commission accepted that those notices were reviewable'.

The ruling in this case in regard to commencement of an investigation under ASCA s13 is consistent with *Edelsten v Health Insurance Commission.*

A recent relevant decision is *Johns v ASC* (1992) 10 ACLC 684. In that case Heerey J held that the relevant 'decision under an enactment' for the purposes of the ADJRA was the decision of the ASC on 11 February 1991, reflected in the resolution in the formal Minutes of an ASC Commission meeting of that date, to make available to the Victorian Royal Commission into the affairs of Tricontinental the services of certain ASC officers, including the delegation of certain investigative powers to them. It was resolved at the ASC meeting that the Commission execute an instrument to give effect to the Commission's decision concerning the delegation of powor.

It would seem unwise for the ASC, in the light of this case, to make a general practice of initiating a s13 investigation through a formal procedure. To so do may provide grounds for distinguishing *Little River Goldfields v Moulds* and attracting ADJRA remedies.

There is another area, at the other end of the investigative context, where an ASC decision could be subject to challenge. ASCA s25, for instance, allows the ASC to pass on information gathered in investigations to private litigants. Tony Hartnell in a speech in March to an Australian Institute of Criminology Conference described third party civil litigation as 'a major part of the enforcement weaponry available to the ASC. It clearly underpins a Government philosophy to encourage enforcement of the Corporations Law through private actions and not just rely on action by the ASC'.

A key question is whether the ASC is obliged to comply with requests under ASCA s25 for release of information. In *Ex Parte Wardley Australia Ltd* (1991) 5 ACSR 786, the Full Supreme Court of Western Australia in interpreting the forerunner of ASCA s25(1) held that, when requested by a private litigant, the NCSC had a duty, rather than a discretion, to provide information, upon satisfaction of the statutory pre-conditions. It could decline disclosure only for good reason, eg anticipated prejudice to a continuing investigation. However the NCSC retained a general discretion under the forerunner of ASCA s25(3) to provide the information to any other party.

It is doubtful whether this case is still good law on ASCA s25(1). The Corporations Law s109ZB(3), which had no equivalent in the Companies Code, indicates that the word 'may' in ASCA s25(1) and (3) confers a discretion on the Commission whether to act. ASC Policy Statement 17 (March 1992) sets out the considerations that the Commission will take into account in determining applications. For instance 'Generally the ASC will not release information under [ASCA] s25 unless the investigation to which the examination relates is completed or is sufficiently advanced so that the release of the information would not jeopardise the continuing investigation': para 6, 21. Judicial review pursuant to the ADJRA ss5, 6 could be sought either by a rejected applicant or other 'aggrieved person', eg (as in *Johns v ASC*) the provider of the information to be released: ADJRA s3(4). Alternatively, an applicant may seek the information from the ASC by way of a *subpoena duces tecum.* The court may enforce the subpoena, notwithstanding the general duty of confidentiality on the ASC under ASCA s127.[3] The ASC could resist production, where appropriate, on the grounds of public interest immunity: *Zarro v ASC* (1992) 10 ACLC 831.

The decision must be of an administrative character

In various cases, the courts have tested the boundaries between decisions of an administrative, legislative and judicial

nature. There is little doubt that any investigative decision would be of an administrative nature. Clear precedent is found in *FCT v Citibank*; *Allen Allen & Hemsley*; and *Perron*. See also the early case of *Houston v Costigan (No1)* (1982) 5 ALD 90, where it was held that decisions by a Royal Commission to examine witnesses and pursue a particular line of inquiry constituted a decision of an administrative character.

The decision must have been made 'under an enactment'

The term 'enactment' covers Commonwealth Acts. By virtue of the terms of Part 8 Div 2A of the Corporations Act, and equivalent provisions in the Corporations [name of State] Acts, any ASC decisions satisfy this element. The concept of 'under' an enactment was reviewed in *Century Metals and Mining NL v Yeomans* (1988) 16 ALD 406, where French J said at 421 that a decision will be made 'under an enactment' if it is made 'in pursuance of' or 'under the authority of' the Act. Any decision relating to the exercise of ASC investigative powers would appear to establish a sufficient nexus between the enactment and the making of the decision.

Conduct for the purpose of making a decision

Section 6 allows a review of conduct undertaken by the decision-maker for the purpose of making a reviewable decision. Setion 3(5) provides that this includes the doing of any act or thing preparatory to the making of the decision. In *ABT v Bond*, Mason CJ concluded that 'conduct' for the purposes of ADJRA s6 is essentially procedural and not substantive in character.

One could possibly describe the initiation of an investigation under ASCA s13 as conduct which may well lead to a decision, eg to issue notices. Whether it would be conduct 'preparatory' to making that decision is another matter. I would suggest, based on tax cases, particularly *DCT v Clark and Kann* (1983) 15 ATR 42, that the courts would see the relationship as too remote to describe it as being preparatory to making a decision. However this line of attack on the ASCA s13 commencement procedure may be argued in a future case.

Second element: the decision must not be one excluded from review

Certain decisions which would otherwise be reviewable are expressly excluded from review. These are set out in Schedule 1 to the ADJRA. No paragraph in Schedule 1 applies directly to ASC decisions. Incidentally, the exemption in paragraph (e) referring to decisions making or forming part of the process of making or leading up to the making of tax assessments is not wide enough to encompass a decision to issue a s264 notice under the Income Tax Assessment Act. (*DCT v Clark & Kann* (1983) 15 ATR 42 at 47, per Sheppard J).

Third element: the applicant must be a 'person aggrieved'

This is defined under s3(4) of the ADJRA. Under these provisions, as applied in numerous cases, a person aggrieved is (broadly) any person whose interests are (would be) affected by the decision. A person aggrieved must be able to show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public. The grievance may be shown because the decision directly affects his or her existing or future legal rights. On this reasoning a suspect may be able to challenge a notice issued to a third party.

Fourth element: the application must be made within the prescribed time

This is set out in s11 of the ADJRA. The policy behind s11 was neatly summarised by Hill J in *Victorian Broadcasting Network v Minister for Transport and Communications* (1990) 21 ALD 689 at 690 where His Honour commented that:

> The policy of s11 is quite clear. Applications to review decisions to which the Act applies are to be made without undue delay. Many decisions, which are reviewable under the Act, are decisions

> essential to implementation of Government policy and administration. The relevant Government authority must know, within a relatively short time whether that decision is under attack, and if it is, the grounds upon which the review is to be sought. It is for this reason that the legislature has set a short period (28 days) in which a person aggrieved by a decision must commence his or her proceedings in the Court.

His Honour also discussed the meaning of the term 'a reasonable time' as set out in s11(4). His Honour said:

> The question of what is a reasonable time must be considered in the light of the facts of each particular case ... Nevertheless, in considering the reasonableness of a period of time, it will clearly be relevant to consider any prejudice that may result to the decision maker ... so too, the complexity of the issue will be a relevant matter.

The Court has the discretion pursuant to s11(1)(c) to permit an applicant to lodge the application within 'such further time as the court (whether before or after the expiration of the prescribed period) allows'. That is, the Court has an unfettered discretion to allow extensions of time for lodgement. Various criteria have been identified in *Victorian Broadcasting Network* and other cases, including

- the period of delay involved;
- the conduct of the parties in connection with the delay (eg whether and when the applicant voiced dissatisfaction with the decision);
- whether the application raises matters of public importance; and
- whether any prejudice would be suffered by the decision-maker if the application under the ADJRA were to be permitted despite the delay.

This power was recently exercised in *Johns v ASC* (1992) 10 ACLC 684. In February 1991 the ASC entered into arrangements with the Victorian Royal Commission into the affairs of Tricontinental to make available the services of certain ASC officers. Heerey J ruled that this constituted the relevant 'decision under an enactment' for the purposes of the ADJRA ie from when the 28 day prescribed period commenced. In July 1991 Mr Johns, through his solicitors, was advised in writing by solicitors for the Royal Commission of the use of a transcript of his examination in a way of which he later sought to complain. He entered no protest until January 1992. In the meantime the Royal Commission proceeded. When the action came before Heerey J in April 1992, the ASC opposed an extension of time. Notwithstanding the delay the extension was granted.

> In my opinion, considerations of public policy weigh strongly in favour of a grant of the extension sought. An attack has been made on the legal validity of the Royal Commission's proceedings in a fundamental respect (ie use of information supplied by the ASC). This has now been fully argued over a trial lasting five days. I think there would be a substantial risk to public confidence in the Royal Commission's conduct of its proceedings and any subsequent report were these issues to remain unresolved. This is particularly so when a contributing cause to the delay by Mr Johns in bringing his complaint before a court was a persistent refusal of the Victorian Government to grant him legal assistance until quite recently, notwithstanding that all other major figures appearing before the Royal Commission had substantial legal representation (most of them at public expense) and despite the Royal Commission's recommendation for such a grant as long ago as 28 March 1991.

This ruling was upheld by the Full Federal Court on appeal (*Johns v ASC*, 19 June 1992).

Fifth element: the applicant must establish one of the statutory grounds set out in the ADJRA

The grounds of review under ASCA ss5-7 are really an elaboration of common law administrative law principles, including denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law.

There are a liberal sprinkling of investigative orientated cases under these provisions particularly under Trade Practices Act cases such as *Melbourne Home of Ford Pty Ltd v TPC* (1982) 39 ALR 565, and tax cases such as *Perron Investments Pty Ltd v DCT* (1989) 90 ALR 1.

There is really very little to report under the ASC regime. Claims of *ultra vires*, error of law, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and a general ground of unreasonableness were contained in the cross-claim against the ASC in *ASC v Dalleagles Pty Ltd* (1992) 6 ACSR 674.

In *Johns v ASC* (1992) 10 ACLC 684 the plaintiff claimed breaches of s5(1) (c) (d) (e) (f) (g) and s5(2) (c) (j). None of these claims were successful. Heerey J ruled that aiding a Royal Commission was a proper purpose for which the ASCA conferred power on the ASC. The Court noted that the subject matter of the Royal Commission's enquiry - the collapse of the Tricontinental Group - was squarely within the province of the ASC. The ASC had 3 courses open to it: do nothing, conduct its own investigation or aid the Royal Commission. Heerey J noted the terms of ASCA s127(4) and ASCA s25(3) and concluded that these provisions expressly authorised the disclosure of ASC material to the Commission. Furthermore 'such authority [to disclose information] is not conditional on the consent of the person who provides the information to the ASC'. It was not a case of an unauthorised and unlawful breach of confidentiality. This ruling was upheld by the Full Federal Court on appeal (19 June 1992).

The most detailed analysis of the application of ADJRA s5 to the ASC is found in *Allen Allen & Hemsley v ASC* (Federal Court 29 May 1992, Ryan J). This case dealt with a decision by the ASC under ASCA s127A (2) (c) not to disclose to the applicant information obtained by the NCSC in an earlier investigation. The Court discussed various grounds raised by the plaintiff, including taking into account irrelevant considerations, failure to take into account relevant considerations, exercise of power for an ulterior purpose, unreasonable exercise of power, abuse of power, error of law, and absence of evidence or other material to justify the decision. Ryan J concluded that the ASC's exercise of its discretion may have miscarried only by failing to take into account a relevant consideration concerning the 'public interest' element in ASCA s127A (2) (c), namely that its decision, in the circumstances, could unfairly treat different parties to relevant civil litigation. The matter was referred to the ASC for further consideration, but with no order as to costs.

Sixth requirement: the case must not be one where the Federal Court regards it as appropriate to exercise its discretion to refuse a remedy

Applicants who satisfy the statutory requirements in ss5-7 of the ADJRA will be entitled prima facie to a remedy under the Act. The powers of the Federal Court are set out in s16. However the Federal Court has under s16 a discretion as to whether or not to grant a remedy and in appropriate cases will refuse to do so even where the applicant establishes a statutory ground, eg where the making of an order would be futile.