



Case Note

The High Court and administrative discretions: invisible limit

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Introduction

Do you make decisions or exercise discretions under a statute? If so, three recent cases in the High Court remind us that the notion of "unbridled discretion" has no place in the exercise of statutory discretions in Australia.¹ Thus, administration discretions or powers will often be narrower than the terms of the legislation might suggest.

Courts construe legislation upon the understanding that Parliament is aware of, and acts consistently with, constitutional and other limits upon its powers; for example, that Parliament will not interfere with common law rights without clearly expressing that intention. Such understandings also affect administrative discretions, as courts will construe any empowering legislation as subject to these same limitations. Accordingly, decision-makers must be careful to ensure that any discretion is exercised in light of these principles of construction. This is in addition to any obligations under the *Charter Act*.

The cases

In *Wotton v Queensland*,² Mr Wotton had been convicted and imprisoned for his role in the Palm Island riots, following the death in custody of a community member. He was released on parole, subject to various conditions, including that he not attend public meetings on Palm Island without the prior approval of a corrective services officer.

Summary

Three recent cases from the High Court provide a timely reminder of the limits on administrative decision-making and the exercise of statutory discretions. No matter how broadly expressed, no power or discretion is "unbridled" in our system.

In *Wotton v Queensland*, a parolee who had been convicted for his role in the Palm Island riots challenged parole restrictions that limited how he could talk to the media, invoking the implied freedom of political communication under the Constitution.

In *Sportsbet* and *Betfair*, the High Court looked at the limits imposed by the Constitution regarding free trade among the States.

In each case, the Court confirmed that there are real, though unexpressed, limitations on even the most broad statutory powers.

He was also precluded, as a 'prisoner' under Queensland legislation, from being interviewed without the approval of Queensland correctional authorities. He challenged the validity of the parole conditions and the provision precluding interviews on the ground that they infringed the constitutionally implied freedom of political communication.

The Court dismissed the challenge, but observed that any administrative action in relation to his parole (including imposing any conditions or granting or refusing an approval) would have to comply with the implied freedom, and if it did not, that decision could be successfully challenged in judicial review proceedings.

In *Betfair v Racing NSW*³ and *Sportsbet v NSW*,⁴ the High Court rejected constitutional challenges brought under s 92 of the Constitution (and the Northern Territory equivalent) which prohibit any governmental measure that discriminates against interstate trade and commerce in a protectionist sense.

The NSW racing authorities, exercising a statutory discretion, imposed a fee upon the use of race fields information, applicable equally to intra and inter-state traders. Betfair, an interstate trader, operated a business model that was more severely affected by this fee than its intrastate competitors. The NSW racing authorities also settled a dispute with intrastate traders in relation to them having to make 'double-payments' by making compensation payments equivalent to the fee, such that they were effectively exempt from the fee. Sportsbet argued that the compensation payments were a measure which was discriminatory in a protectionist sense. The High Court held that the fee was not discriminatory, as they applied equally to all market participants, irrespective of whether they were intra or inter-state traders; further, no competitive disadvantage had been demonstrated. The compensation payments were held to be a legitimate resolution of a commercial dispute in relation to fees which had already been paid by intrastate traders for race fields information, and were therefore not protectionist. The Court again observed that although the fee and compensation payments were actions of an administrative body pursuant to statutory authority, because the statute could not infringe s 92, those administrative actions could not be inconsistent with the guarantee in s 92.

These cases are examples of unexpressed, but very real, limitations upon administrative power. The unexpressed limitations in these cases were

constitutional in origin, but there are also many non-constitutional unexpressed limitations which may apply to State legislation, operating as a restriction on what otherwise appears to be a broad discretion.

Decisions that are contrary to an unexpressed limitation can be successfully challenged on the full scope of judicial review remedies. We regularly advise on these issues, and are able to assist you in determining whether any such limits apply to the discretions that you exercise.

When might an unexpressed limitation apply?

Unexpressed limitations are most likely to apply where a statutory power is conferred in broad terms. For example, where various functions are conferred upon a public body in conjunction with a general power to do anything 'necessary or convenient' to perform those functions, it is very likely that the power to perform those functions is implicitly limited by the nature of the functions themselves. Although the power is conferred in broad terms, it would not *literally* allow officers to do *anything* to perform those functions. And it certainly does not extend to anything that the officer thought was necessary or convenient to perform their functions, because the scope of a power is determined according to an objective standard, not the subjective views of officers.

Administrative discretions conferred by legislation are always conferred in order to achieve some purpose, and even if expressed in unrestricted terms, that purpose will always limit the scope of what actions are authorised. Further, as all legislation must comply with the Constitution, no administrative discretion may be conferred, and therefore exercised, in a manner that is inconsistent with the Constitution. In Victoria, the *Charter Act* also limits the scope of administrative discretions. And further still, the general law may implicitly define the context in which an administrative discretion is exercised, further limiting what the legislation otherwise appears to authorise; presumptions such as those concerning the interference with common law rights without

clear statement is one example of this, numerous grammatical and syntactical presumptions of statutory interpretation are another.

Unexpressed limitations may arise under s 92 where an administrative discretion can be used to regulate a market for goods or services, especially where it might affect the competitive relativities within that market, or preclude a party from entering into that market. Other limitations may arise where an administrative discretion could be used to restrict civil and political freedoms.

What this means for Victorian officers

Where some administrative action is proposed, relying upon a power conferred by legislation expressed in broad terms, consider whether any unexpressed limitation might apply to that power. There is a very real chance that many proposed actions, although apparently authorised by the broad terms of legislation, are actually beyond power because of some unexpressed limitation, constitutional or otherwise.

Although decision makers will often have a high level of 'content knowledge' of their area, if there has not been a recent statement by a superior court as to the scope of a discretion, or where a new discretion is conferred or an existing discretion is amended, we recommend decision makers consider the following matters:

- (a) could any constitutional prohibition be enlivened in relation to this discretion?
- (b) could any presumption of statutory construction be relevant to this discretion?
- (c) could any other matters affect the scope of the discretion?

If there is any doubt, seek legal advice to minimise the risk of acting beyond power. Seeking advice early is likely to reduce legal costs to your agency in the long term by reducing likelihood of judicial review proceedings and successful claims against the State.

¹ *Wotton v Queensland* [2012] HCA 2, [10] (per French CJ, Gummow, Hayne, Crennan, Bell JJ).

² [2012] HCA 2.

³ [2012] HCA 12.

⁴ [2012] HCA 13.

Further Information

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