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Topic: Where a power expressed in general terms to enter into contracts is granted under statute to an incorporated Government Business Enterprise (GBE), is a decision of the GBE to enter into a contract justiciable under the ADJR Act?

Should the decision be justiciable?
Discuss with reference to *General Newspapers Pty Ltd v Telstra Corp (1993) 45 CFR 164 and also, NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277.*

This work will discuss whether a "decision" to enter into contract is Justiciable, however we must first look under what circumstances that decision was made and where commercial interest meets public interest. Government Business Enterprises (herein after GBE's) are often placed in a decision making position where it could be argued that their commercial interests must give way to what is best for the public to which they represent government in delivering a service.

The historical perspective of how and whether the decision is justiciable is an important part of the answer to the question. For this we must revert back to 1968 when the Administrative Review Committee was set up and known as the *Kerr Committee*[1] primarily focused on examining the grounds and procedures for the review of administrative decisions, this led to the creation and passing of three significant Acts at Commonwealth level[2], one of which was the *Administrative Decisions (Judicial Review) Act 1977*[3]. The *ADJR Act* opened up avenues for decisions of an administrative nature to be reviewed and this is what constitutes the judicial review component of the Act. The fact that a GBE or indeed a semi government entity makes a decision which impacts a third party brings about the "reviewable" question as to the legality of such a decision and the conduct of the entity in making that decision then also becomes subject to the *ADJR Act*. In the definition section of the Act (s3)[4] a reviewable decision is one that:

"has been made, Or is proposed to be made Or is required to be made under a Commonwealth Act of Parliament".

In this context it also includes any conduct which leads to a decision, this in turn may include making a recommendation or a report to make a decision and may include failure to make a decision[5]. Therefore the decision by a GBE has to be made either under an enactment or a contract for the purpose of altering or terminating a contractual arrangement. There are two distinctive case examples of enactment[6] and contract[7] based decisions. The basis for Administrative law therefore rests on the ADJR Act and Common Law the latter with reference to the *Judiciary Act 1903 (Cth)* and the relevance of s39B(1) and s39B (1A(c)[8].

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[1] John R.Kerr (Chair), Commonwealth Administrative Review Committee,(Parl paper No.144 of 1971).
[2] The others were Ombudsman Act 1976 and Administrative Appeals Tribunal Act 1975
[3] Albeit ADJR Act (Cth) was passed in 1977 it was not implemented till 1980 .
[4] Administrative Decisions (Judicial Review) Act (Cth) 1977 (ADJR Act Cth)
[5] , Anne Ardagh, summarised in "Administrative Law" Nutshell Edition 3rd, Pg.73
[6] Australian Broadcasting Tribunal v Bond (1990) HCA
[7] Australian National University v Burns (1982) FCA
[8] Terms by which jurisdiction is conferred on the Federal Court (FCA)

It is here that the criticism of the lack of coverage of the Act in particular when compared to common law judicial review ad in turn when looked at under the reach of the Judiciary Act.

Justiciability is a concept developed by the Courts to assist in the identification of areas of executive action or legislation where the power of judicial review cannot or should not be exercised.[9] The criteria and tests for Justiciability are varied, but generally agreed by administrative lawyers that the following, each or in combination are accepted[10]:

i. source or nature of power to make decision;
ii. status of decision maker;
iii. nature of decision, by reference to its character as administrative rather than legislative or judicial;
iv. nature of decision, by reference to its place in the decision-making` process;
v. subject matter of decision;
vi. interests of applicant affected;
vii. source of power by which decision-maker established and
viii. whether the decision has a public element or is a matter for private law

This list has become critical to the argument of justiciability in any contractual arrangement between private and public entities. The first criterion is defining whether the decision was made under and enactment or as part of contract as stated earlier. Furthermore the decision must have an administrative element or "be of an administrative character"[11], hence providing a differentiation between administrative powers and powers of judicial or legislative nature, this fits in well within criterion (iii).

There seems to be a school of thought that since *Australian Broadcasting Tribunal v Bond*, criterion (iv) has become of major importance in that it requires that "the decision be the final or ultimate or operative"[12] in order to be one that is justiciable.

Referred to earlier, the *Judiciary Act* comes into play and is supported in criterion (ii) as it distinguishes between "an officer of the Commonwealth" and a private sector corporation or indeed a statutory corporation. In fact the evidence in research seems to indicate that the test for criterion (ii) is no longer available in general law and is indeed now a given that a GBE has the status of a corporation in conduct and decision making. In parallel the common law test of justicaibility using criterion (i)[13] has continued to be of relevant importance and therefore it can be argued that if the source and power to make the decision is clearly that of a corporation in commercial standing then the source falls within *ADJR* Act and it may be tested.

[9] Administrative Review Council Report #47, April 2006 , Pg. 32.
[10] Prof. Margaret Allars, "Public Administration in Private hands", (2005) 12 AJ Admin Law, Pg.127.
[11] ADJR Act, s3(1).
[12] Allars , op. cit, pg.127.
[13] As under s39B(1) of Judiciary Act 1903 (Cth).

However, even with such clear criteria as a test we still have the role defining criterion (viii), which calls for a distinction between public and private status for making the decision. It is in this voice that we hear contract obligations debated as maybe non-justiciable in the framework of a GBE entering into or breaching a contractual arrangement.[14]

This argument is weakened when going back to our initial distinction of whether a decision to enter the contract was made "under an enactment". This thinking then places a heavy burden of clarification in criterion (i) and (ii), which we saw tested in *Burns*[15], the court determined that the decision was not made under an enactment ad therefore it was deemed that the statutory body (*ANU*) made a decision under statute as it had the power to do so but was found to be acting in contract and exercising its power within contract law.

In *Australian Broadcasting Tribunal v Bond* the decision was said to be "final or operative and determinative", however not all decisions that are so are necessarily decisions made and delivered "under enactment"[16].

The *ADJR Act* can be said to deliver a precise and purpose based test on justiciability. Albeit not a test which is predicated by criterion (viii) (which is distinction of private versus public), so in fact it retains some complexity of how one can best review decisions of GBE's and other corporations which hold statutory power. Neither the case law nor the judiciary in their commentary have helped in clarifying this perceived complex issue.

In Schedule 1 of the *ADJR Act* it is expressed that the decisions of at least some GBE's which are "expressly excluded"[17] that when such exclusions are not clear then a question may arise as to whether the decision sits well within the "inclusionary aspects"[18] of the test. Therefore it makes logical sense to read that within a very short time of the *ADJR Act* becoming active the test was superseded by the general law test which consequently had negative impacts on the role of both criterion (i) and (ii).

Kirby J in passing a judgment[19] he did comment that although "overwhelmingly beneficial", he believed that it did hamper the growth of Australia's judicial review at common law.[20]

This may be a critical comment in that it again leaves open the debate of the Act retarding the potential for judicial review when dealing with an administrative decision or matter.

Case law then predicated that the justiciability within ADJR Act is contentious to say the least but nonetheless available as a framework to which common law may provide support.

It was from this point that the advent of judgments in *General Newspapers* and *NEAT Domestic Trading* become significant to the distinction between corporatized GBE's acting as private corporations or those exercising statutory powers.

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[14] In private sector Contract Law related breaches and remedies are clearly defined via TPA(1974)

[15] ANU v Burns (1982) op. cit.

[16] ADJR Act s3(1) (a) as discussed in N. Seddon ibid. Pg 409.

[17] Allars, Op.cit. Pg. 132

[18] Allars Op.cit. Pg. 132

[19] Re Minister for Immigration and Multi cultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59

[20] Aronson Op.cit. pg. 80

In *General Newspapers* the distinction was made even more so ambiguous because Telstra (*Telecom*) at the time was transitioning from being a statutory entity to a GBE. It was judged[21] as a decision not quite made under an enactment as required by the *ADJR Act* test, therefore not justiciable.

The conversion by *Telstra* from *Telecom* was out of a Statute which did at the time give the new Telstra the capacity to contract as a GBE. However, the contract was made valid only by the resolve of private law norms within contract law rather than public law.

Commentary on the case of *General Newspapers* (judicial commentary) says it was around whether misleading conduct was enforceable (Wicox J)[22] and then in determining if the power under which the decision was made came from common law or statute. Hence the validity of the decision turned on whether the basis for the argument would ultimately have a decisive impact on whether justiciability existed[23].

The judicial opinions of Davies and Einfield JJ held that :

> "A contract entered into by a corporation under general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract whilst the validity and effect of the contract is determined by the ordinary laws of contract"[24]

The logic here is fair as supported by the precedence set by *Burns* where it was is now well accepted that the termination of the contract did not happen "under enactment" albeit it was in the statute that the power to make it was given.

Following *General Newspapers*, the decisions of some other GBE's which have entered into contract have not been judged as doing so "under an enactment", and example in case law has been quoted in highlighting this approach [25].

In similar fashion *General Newspapers* has held strong the argument that statutory functions may not "require or authorize" certain decisions[26], which in turn we believe means that actions related to the performance of such functions are not necessarily executed "under and enactment", as described in *ADJR Act* s3(1) (a).

The status of Telstra (then Telecom) was in my opinion the most critical factor in that any push to consider it in administrative review was justified as at the time of making or planning to make the decision Telstra was still acting as a Statutory Commonwealth Corporation. When the transition completed and the case was heard further the transition to a corporation incorporated under the Corporation Laws, and therefore making contract law jurisdiction once again pertinent to the decision.

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[21] Davies &Enfield JJ and then agreed with by Gummow Jin ABT v Bond. Op.cit. Allars
[22] (1993) 117 ALR 135
[23] Allars Op.cit. Pg. 133 argument on validity of Private vs Public law in Journal 6 PLR 44 (1995)
[24] (19993) ALR ibid .in Seddon [8.7]
[25] Dardak v Minister for Regional Services , Territories & Local Government (2001) 65 ALD 451
[26] Allars; expressed this concept in arguing justiciability , op.cit.pg.133

So *General Newspapers* made justiciable the decision on the basis of which jurisdiction carried the greatest weight, this leaves us to then look at NEAT[27] to consider another perspective.

The High Court decision in *NEAT* complicated a possible defining argument; that in exercising public power a private body is leaving itself open to judicial review. The resulting issues and judgment became consequently complex. The case involved the role of the Wheat Export Authority and its related legislation[28] which ran as an undercurrent to provide the authority to the AWB in determining exports and in fact went further to deliver a monopoly position to that entity. This in turn brought into play the *Trade Practices Act 1974 (Cth)*[29] and then judicial review as per the ADJR Act.[30]

NEAT was left to seek success and possible claims for damages under the TPA but let this opportunity pass as it sought to pursue AWB under the ADJR Act. Initially we read that *Mathews J* held that AWB was justiciable under the *ADJR Act*[31] and that the merits of the application were valid. Conversely the Full Federal court held that AWB was "outside the province of administrative law"[32], it was here that *Mansfield J* found that it became unnecessary to determine whether justiciability was to be tested.

When the case appeared to the High Court the reasoning moved again, the majority there held that AWB's decision to refuse to approve the export was not justiciable under the *ADJR Act*. The argument turned on whether the decision made by AWBI was in fact made "under an enactment" namely the *WM Act*[33], the justices then submitted that AWB did not enjoy vesting of implied statutory power. *"It gave or refused approval as an exercise of its common law power to do so , as derived from its incorporation and the applicable corporations' legislation"*[34] . It was further determined that AWB was in a position to make decisions to benefits its own private interests as a priority over any public considerations it may have encountered as a result of operating with the statute of the *WM Act*.

It was also determined that because no probable adaptation could be made between the public and private interests , then AWB was not subject to a review under the *ADJR Act*.

The subsequent considerations are what then went on to create further complexity to the judgment in that the majority in the High Court looked at the role of "*private character*"[35], this was based on the typical behaviour of a company which by incorporation was driven to maximize profit and opportunities in the market place (in this case for those who sold wheat through the pooled arrangement vehicle). The judicial debate between *Gleeson J and Kirby J*

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[27] NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 77 ALJR 1263.

[28] Wheat Marketing Act 1989(Cth) Section 57 (3B)

[29] TPA ss 46 and 82

[30] NEAT Domestic Trading Pty Ltd v Wheat Export Authority (2000) 64 ALD 29 at [2]

[31] NEAT Domestic Trading Pty Ltd v Wheat Export Authority (2000) 64 ALD 29

[32] Neat Domestic Trading Py ty Ltd v AWB Ltd (2001) 114 FCR 1, 8 @ [26]

[33] Wheat marketing Act 1989 which gave power to AWB to make such decisions and in fact probably enough power to create a monopoly as a consequence, hence again a probable fall back to the TPA.

[34] NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 77 ALJR 1263 @ [193 & 194]

[35] Allars Op.Cit Pg 135 out lining the definition as per the judicial statements in NEAT.(2003)

is what underpins the validity of *ADJR in NEAT* . *Gleeson J* argued that AWB represented a great majority of wheat growers who relied heavily on its decision and hence had the power to create a statutory monopoly in the export of bulk wheat[36]. *Kirby J* held that the AWB decision was a demonstration of "an exercise in public power" and that therefore it fell within the justiciability of the *ADJR Act*. He supported this by also saying that the decision had "an administrative character" about it and was moved "under enactment".
This submission by both justices diminished the role of criterion (i) and (ii) along with criterion (vii) and (viii), so effectively they took it one step further and looked at AWB's self interest angle as a decision maker. It is however sufficient to say that both *Gleeson J* and *Kirby J* based their opinions and judgments on the criterions (i), (iii) and (viii) jointly to conclude as they did.
The conclusion that one may draw from the debate of both these cases[37], is that decisions coming from a GBE with leaning on statutory powers will be justiciable as they are made with a footing in each jurisdiction, that of statute and that of common law. The cases do bring about strong debate about the vesting of statutory power within the decision making process. They manipulate the "*under enactment*" process and rest on the contractual forces at play within the *TPA and Judiciary Act*, in so doing they still leave the opportunity for testing justiciability. *Gleeson CJ* in NEAT do id offer a sense of clarity in the rationale for his declaration on justicaibility as the case was peculiar as it was a private sector corporation making competitive use of a statute in the *WM Act*, with which it then had to assume statutory status.
This duplicitous role was backed up by *Ellicott J in Burns*[38], where he focused on the character of what the decision maker does. This was then backed by the statement that a decision maker may have more than one role and therefore be judged accordingly. This effectively means that the decision maker may be seeking private interests while still grounded in statute and therefore allowing for justiciability to exist with the Act.

The test for justiciability then rests on whether the decision maker, as in *General Newspapers*, is subject to judicial review on the basis that it has used its power improperly and for commercial gain in a commercial environment. The GBE in such circumstances is challenging the validity of its action/decision being taken as made under an enactment and thereby justiciable under *ADJR Act*.
If we hold this school of thought and all that has preceded in this work then yes, the decision is justiciable and should continue to be so. To not allow it to be so would allow GBE's to find protection in *ADJR Act* and would then extend the debate into immunity[39] as a possible shelter from a challenge when competition equity is being distorted by misuse of powers.

[36] Ibid. Pg.135
[37] General Newspapers and then NEAT
[38] Burns v ANU (1982) Ibid. in Allars Pg.141
[39] Derivative Immunity as the concept of GBE's seeking protection within the legislation

Both cases discussed in this work have highlighted the need for the ADJR to remain pertinent to the judgment of behaviour in GBE's when the power to deliver a decision or recommendation is based on statute. Judicial review is still the best possible resolution for clarifying the possible breaches in both General Newspapers and NEAT.

In conclusion the debate of justiciability in the decision of the GBE to enter into contract as interpreted under the *ADJR Act* is held in the balance by the case law discussed in this body of work. That "the decision" should be justiciable remains a case for the affirmative as to assume anything else would in my opinion be interference in competitive markets and create a severe imbalance in the comparative ad vantage of GBE's over their trading partners, as well as allow for selective discrimination in choosing such business partners.
The test is all based on the argument of public versus private character distinction when acting or making a decision in business practices.

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