

Administrative Law — Process and Structure

1. Justiciability

- a. **Jurisdiction:** is it a Commonwealth or State (NSW) matter?
- b. **Commonwealth** — what is the relevant court and basis for judicial review?

- i. **Federal Court**

For non-ADJR matters, state the basis for judicial review (e.g s 39B, *Judiciary Act*) and the specific remedy that will be sought by the applicant on the facts. Then becomes a matter of proving whether the ground exist to justify that remedy (e.g. jurisdictional error). Remember: Remedies are discretionary.

- 1. **AD(JR) Act, s 3(1):** ‘decisions of an administrative character made under an enactment’ can be reviewed.
 - a. Does the matter meet this requirement?
 - b. Is it an exempted decision? e.g. national security
 - c. Use AD(JR) if possible: provides statutory procedure, grounds, and remedies to make whole process easier.
 - 2. **Judiciary Act, s 39B:** use when the AD(JR) is not available — gives FCA common law judicial review power — need to find jurisdictional error OR error of law on face of record:
 - a. **Writs:** any matter where a writ of mandamus or prohibition (or certiorari) is sought against a Cth officer.
 - b. **Equitable Remedies:** any matter where an injunction (or declaration) is sought against a Cth officer.
 - c. **Cth Laws:** any matter arising under Cth law.
 - 3. **Migration Act, pt 8:** separately granted jurisdiction for migration.
 - 4. **Remittal: Judiciary Act, s 44:** HCA can remit matters to FCA

- ii. **High Court**

- 1. **Constitutional Writs, ss 75(iii), 75(v):** jurisdiction to do the following — need jurisdictional error OR error of law on the face of the record:
 - a. **Writs:** mandamus or prohibition (or certiorari) sought against Cth officer.
 - b. **Equitable Remedies:** injunction (or declaration) sought against Cth officer.
 - 2. **Appellate Jurisdiction, s 73(ii):** from FCA and State Supreme Courts

- c. **State (NSW)** — NSW Supreme Court has the following jurisdiction:

- i. **Inherent Jurisdiction:** Supreme Court has inherent jurisdiction to conduct judicial review and issue writs and equitable remedies need to show either:
 - 1. Jurisdictional error (always available), or
 - 2. Error of law on face of the record (can be modified by statute) — record in NSW includes transcript of decision — s 69(4), *Supreme Court Act*
 - ii. **Supreme Court Act, s 23:** affirms common law power of judicial review, still need to show either jurisdictional error OR error of law on face of the record.

- d. **Privative Clause (other limitation clause)?** — is there a privative, ‘no invalidity’, or ‘time limit’ clause that purports to limit the jurisdiction of the court or the grounds of review?

- i. **Generally ok:** privative clauses are generally valid and can oust as much jurisdiction and as many grounds of review as they like, subject to certain exceptions.
 - ii. **Entrenched Minimum Judicial Review:** privative clauses cannot remove the jurisdiction of the HCA or State Supreme Courts to issue writs and remedies for jurisdictional errors.

2. Standing — only need to make an issue of standing if facts ask for it.

- a. **Basis for Review** — is the matter under the AD(JR) or common law?
- b. **ADJR:** aggrieved person test.
- c. **Common Law:** special interest test.
- d. **Alternatives to Standing:** could the applicant intervene or be an amicus curiae?

3. Grounds of Review: breaches of administrative law norms

- a. **Basis for Review** — is the matter under the AD(JR) or common law?
 - i. **AD(JR):** frame the grounds around the statutory provisions (ss 5-6):
 - 1. Procedural grounds
 - 2. Reasoning Process grounds
 - 3. Decisional grounds
 - ii. **Common law:** need to show jurisdictional error or error of law on the face of the record (latter may be modified by statute) to invalidate decision — frame response around jurisdictional error or error of law and then go into substantive grounds:

1. Procedural grounds — *Re RRT; Ex parte Aala*
 2. Reasoning Process grounds
 3. Decisional grounds
- b. Consequences of Breach** — if a breach of an administrative law norm is made out, then need to determine whether it invalidates the decision itself — anything that is procedural or a Jurisdictional Error will nearly always invalidate. Otherwise, need to consider *Project Blue Sky*, *Ex parte Palme* etc and equitable remedies (e.g. an injunction could be issued anyway for breach of procedure)
- c. Procedural Fairness:**
- i. **Implication Principle** — when do rules of Procedural Fairness apply? Almost always.
 - ii. **Content of Hearing Rule** — e.g. disclosure of adverse info, disclosure of critical issues.
 - iii. **Rule Against Bias** — was the decision-maker biased?
 - iv. **Further Principles of PF** — obligations to consider arguments, give reasons...not a thing.
 - v. **Effect of PF Breach and Discretion** — PF = jurisdictional error, court has discretion
 - vi. **Breach of Statutory Procedures** — does it invalidate decision? — *Project Blue Sky* rule
- d. Reasoning Process Grounds:** various grounds
- i. **Considerations Grounds** — failure to have regard to relevant considerations, having regard to irrelevant considerations
 - ii. **Improper/Unauthorised Purpose** — power exercised for ulterior purpose
 - iii. **Policies** — unlawful policies, policies must not be applied inflexibly
 - iv. **Representations and Estoppel** — not a thing...
 - v. **Acting under Dictation** — decision-maker must not act under direction of another
 - vi. **Unauthorised Delegation** — when discretionary power is unlawfully delegated
- e. Decisional Grounds:**
- i. **Jurisdictional Error** — grave legal error invalidating decision — exceeding authority to decide:
 1. **Basic Jurisdictional Errors**
 - a. **Incorrect Assertion/Denial of Jurisdiction** — literal absence of authority
 - b. **Misapprehend Extent of Power** — do something beyond powers granted
 - c. **Objective Jurisdictional Facts** — prerequisite facts for authority to decide
 - d. **Subjective State of Mind Powers** — state of mind for authority to decide
 2. **Procedural Fairness** — almost always jurisdictional error — *Ex parte Aala*
 3. **Reasoning Process Grounds** — any error in reasoning process meaning decision-maker exceeds authority to decide — e.g. consideration grounds, improper purpose
 4. **Wednesbury Unreasonableness** — almost always jurisdictional error — *MLAC v Li*
 5. **No evidence** — demonstrates or indicated an error in jurisdictional facts
 6. **Breach of Statutory Requirements** — when compliance was essential pre-condition to an exercise of power, then jurisdictional error — *Project Blue Sky* rule.
 - ii. **Errors of Law on the Face of the Record** — any error of law allows certiorari
 - iii. **Errors of Law vs Errors of Fact** — distinguishing between the two for *AD(JR)* purpose
 - iv. **Error of Law under *AD(JR)*** — any error of law is a ground of review — s 5(1)(f), *AD(JR)*
 - v. **No Evidence**
 - vi. **Uncertainty of Statute and Delegated Legislation**
 - vii. **Wednesbury Unreasonableness**

4. Remedies — remember: all remedies are discretionary (*Ex parte Aala*; s 10, *AD(JR)*)

- a. **Basis for Review** — is the matter under the *AD(JR)* or common law?
- b. ***AD(JR)***: select from s 16 shopping list of remedies for appropriate one(s) — s 16
- c. **Common law**
 - i. **Writs**: writs can be issued for jurisdictional error or error of law on face of the record
 - ii. **Equitable Remedies**: injunction or declaration can be used instead of or in addition to writs for jurisdictional error or error of law on face of the record. **ALSO**: because they are equitable, courts can issue injunction or declaration if decision is valid, but was made unlawfully if it is “just and convenient” (*City of Enfield v DAC*) to do so (e.g. *Project Blue Sky*)
 - iii. **NSW: Statutory Remedies**: Supreme Court has power to make following orders:
 1. **Statutory Mandamus**: order government to fulfil duty — s 65(1), *Supreme Court Act*
 2. **Make Orders**: make any orders to give effect to judgements — s 69(1)
 3. **Statutory Certiorari**: quash decision of tribunal etc — s 69(3)

Additional factors (5)

1. **Judicial Review of Rule Making** — challenging the validity of delegated legislation.