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Threshold Issues

First Requirement – Jurisdiction

Where are you? Cth? State?

- **Cth**
 - **ADJR:** s 3 ADJR: “Decision of an administrative character made under a (Cth) enactment.
 - **CL:** High Court: s 75 Cth Constitution
 - **CL:** Federal Court: s 39B Judiciary Act
- **State**
 - **CL Judicial Review:**
 - **CL:** NSW Supreme Court: s23 & s69 Supreme Court Act (NSW)

ADJR Act

Answer:

Under statute, both the Federal Court and the Federal Circuit Court are vested with the jurisdiction to review an application by [PLAINTIFF], a person aggrieved, for review. The [INSERT DECISION] is a ‘final and operative’ decision [or at least conduct leading to a decision] for the purposes of s 5 of **ADJR Act: *ABC v Bond (1990)***. Preliminary investigations and reports are not reviewable under ADJR Act: ***Edelsten v Health Insurance Commission***. It is **administrative in character**, as the [INSERT DM] has applied general rules to the specific matter [INSERT MATTER] (***Aerolinas Argentinas (1997)***). In order for a decision to be made ‘under an enactment’, the decision must be expressly or impliedly required or authorised by the enactment and the decision must confer, alter or otherwise affect the legal rights of others: ***Tang (2005)***. It has been made **under the enactment** of [INSERT ACT] (***Griffith v Tang (2005)***), by an Officer of the Commonwealth (aka Federal Court Judge), as required by s 3 of **ADJR Act**.

Furthermore, pursuant to s 3(1) ADJR, it is clear the decision is not explicitly excluded in Schedule 1 (eg ASIO) of the ADJR Act, nor is it a decision made by the Governor General. Therefore, pursuant to the meaning of ss 5, 6 & 7, on the facts the matter is evidently amenable to JR brought under the ADJR.

Thus, despite there being two avenues of JR, both common law and statutory, for the reasons above, the decision will be reviewed pursuant to the ADJR.

Common Law

Answer

On the facts, it would appear that the source of the decision maker’s power is not derived from statute. It is [PICK FROM BELOW LIST]:

- An **exercise of prerogative power** (state power): ***Hawker Pacific v Freeland (1983)***;
- Not an **exercise of public power**: ***Neat v AWB (2003)***;
- An exercise of **power conferred by a private agreement**: ***ANU v Burns (1982)***;

- Anything which is **barred by Schedule 1 of ADJR Act**, such as decisions made by ASIO, or sensitive political decisions.

At common law, the High Court (**s 75 Constitution**) and the Federal Court (**s 39B Judiciary Act**) are vested with jurisdiction to review an application for judicial review. The application is based on a legal duty which gives rise to an immediate, right, duty or liability: **Re McBain (2002)** [ILLUSTRATE FACTS HERE].

[NOW PICK: HC, FC OR STATE]

1. High Court's Jurisdiction (s 75(v) Cth Constitution)

Answer

First and foremost the Court must have the jurisdiction to conduct judicial review (“JR”) of a government decision.

On the facts, the High Court evidently has the jurisdiction to review the decision made by [INSERT DM], an officer of the Commonwealth (aka Federal Court Judge) (**NEAT v AWB (2003)** [OFFICER CAN ONLY BE PUBLIC ENTITY]). Furthermore, pursuant to the HC’s power conferred in **s 75(iii) and (v)**, [INSERT PLAINTIFF] is seeking either a writ of mandamus or prohibition or an injunction in relation to the following matter/decision (**Re McBain (2002)**) [INSERT MATTER].

Despite there being two avenues of JR, both common law and ADJR, for the reasons above, the decision will be reviewed pursuant to common law and the power vested in the High Court’s jurisdiction.

3 key elements to SECT 75(v) Constitution

‘In all matters: ... in which a **writ of Mandamus** or **prohibition** or an **injunction** is sought **against an officer of the Commonwealth**, the **High Court shall have original jurisdiction**.’

1. ‘Matter’
2. Writs/remedy present
3. Against ‘officer the Commonwealth

Step 1 – ‘Matter’

‘Matter’ must be more than a legal proceeding and involve a controversy: **Re McBain (2002)**. A person must have **more than a theoretical interests** in its resolutions, there **must be immediate direct effect upon them**. The ‘matter’ must affect an immediate right, duty or liability in order for the court to make a determination. Hypothetical questions do not give rise to a matter: **Re McBain (2002)** (Hayne J).

Step 2 – HC’s original jurisdiction (writs) – Writs/Remedy

High Court has **original jurisdiction** under the Constitution, which derives from **common law**.

The basic functions of these remedies is to:

- 'Quash' (ie deprive of legal effect) to make **decision invalid** (*Writ of Certiorari*) – jurisdictional error.
- **Prevent illegal acts or decisions** (*Prohibition*)
- **Require performance of a duty by an Administrative decision maker** they are required to do under statute (*Mandamus*)

All **writs mentioned in s 75(v)** need a **certain kind of error to be present** before the **remedy** can be invoked. These errors are called **jurisdictional errors**.

- JE = the administrative decision maker has made an error in its own jurisdiction = fatal error

Step 3 - 'Officer of the Commonwealth'

Officer of Commonwealth applies to all Commonwealth officers both judicial and non-judicial. The decision maker in these facts falls within the meaning of an 'Officer of Commonwealth' as he/she is a [MINISTER, DEPARTMENTAL EMPLOYEE]: *Australian Boot Trade Employees Federation v Whybrow (1910) 11 CLR 311*.

2. Federal Court's Jurisdiction (s 39B Judiciary Act 1903 (Cth))

Answer

On the facts, it appears that this is a [FEDERAL MATTER], and can thus be reviewed by the Federal Court under its jurisdiction granted by **s 39B of Judiciary Act**. The FC has concurrent jurisdiction with the High Court for judicial review which is being sought against an Officer of the Commonwealth (aka Federal Court Judge) (*Evans v NSW (2008)*). Moreover, the FC has jurisdiction to conduct judicial review in all matters 'arising under any laws made by the parliament' (**S 39B(1A)(c)**).

At the commonwealth level, the common law jurisdiction of the FC can only be accessed if the remedies of mandamus, prohibition or injunction are available. Pursuant to the fact [INSERT FACTS], these matters have arisen under laws made by the parliament and therefore the FC has jurisdiction to review.

Despite there being two avenues of JR, both common law and ADJR, for the reasons above, the decision will be reviewed pursuant to common law and the power vested in the Federal Court's jurisdiction.

3. NSW Supreme Court: s 23 & s 69 Supreme Court Act (NSW)

Answer

The facts indicate that the decisions was made at a STATE level. The Supreme Court of NSW has the jurisdiction to hear matters which 'may be necessary for the administration of justice in NSW' under **s 23 of Supreme Court Act 1970 (NSW)**.

The Supreme **Court has the jurisdiction to grant any relief or remedy** or do any other thing by way of **writ**, whether of **prohibition, mandamus, certiorari** in accordance with the Act: **s 69(1)(a) Supreme Court Act 1970 (NSW)**. The Supreme Court also has the jurisdiction to quash the determination of a court or tribunal in any proceedings if it determines the decision was made on the basis of an error of law that appears on the vthe record: **s 69(3) Supreme Court Act (NSW)**. The

face of the record includes the reasons expressed by the court or tribunal for its ultimate determination: **s 69(4) Supreme Court Act 1970 (NSW)**. At NSW level we don't need an Officer of the Commonwealth.

On the facts the **[INSERT DM]** decision is arguably unfair. Therefore, in accordance with administering justice, the SC of NSW has the jurisdiction to hear the **[INSERT PLAINTIFF]** matter. The SC of NSW cannot review decisions made under Federal legislation, and only those made under state legislation. Thus common law will be used.