

“Is this State or Federal Jurisdiction?”

Eg: First we must determine the jurisdiction of X issue. On reviewing the facts, it is evident that X was seeking (X) under the (X) ACT (Cth), (X) is appealing a decision made by the relevant Minister. It is evident that (X) falls under Commonwealth statute, and thus the jurisdiction is Federal.

Justiciability

It needs to be determined whether the decision made by the x/Minister is justiciable or reviewable. As this matter falls under Federal jurisdiction, it is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), ‘ADJR’.

“Is this an exclusion as per Schedule 1 of the ADJR?”

EG: Both the Minister and the issue are not enlisted as exclusions in the ADJR. Therefore the Minister’s decision(s) are potentially reviewable under the ADJR.

- **Schedule 1 of the ADJR Act excludes a certain range of decisions from judicial review under the ADJR Act.**
- These include many classes of decisions where there are specialised systems of review and appeal, policy decision, eg., under *Foreign Takeovers Act* and also decisions relating to assessment and calculations in relation to income tax.
- **Note however that these decisions are still susceptible to judicial review before the High Court pursuant to s75(v) of the Constitution.**

In order to use the ADJR Act what do you need to be able to show the Ct? (jurisdictional prerequisites)

- **S.5** ADJR allows you to review “*a decision to which this Act applies*”.
- **S.6** allows you to challenge “*conduct engaged in for the purpose of making a decision to which this Act applies*” (reaching back to activity leading to a decision to which this Act applies)

“Has there been a ‘decision’?”

The ADJR must be satisfied to determine whether an appropriate ‘decision’ has been made, and permitted by statute: *ADJR* s 3(1).

The phrase “**to which this Act applies**” is defined in s.3:

1. You need to show there is a “**DECISION**”,
2. that the decision is of an “**administrative character**”,

3. and that the decision was made “**under an enactment**”, “other than a decision made by the GG” and “other than a decision made in schedule 2” (this is already covered in justiciability re: minister and decision not enlisted)

Decision in the ‘Bond’ Sense:

A decision must be an ultimate, final, or operative determination and not a mere preliminary expression of opinion or statement.

Australian Broadcasting Tribunal v. Bond

Held:

- **The HC took a close look at the word “decision” and first made it clear that Lamb v. Moss was wrong.** They said that the word “decision” has a much more limited field of operation.
- Mason CJ said “it will generally but not always, entail a decision that is final, operative and determinative”. He also said that a conclusion which is simply reached as a step along the way to making a final or operative decision does not ordinarily amount to a “decision”.
- **S.5 of the ADJR Act only allows you to review the “final decision” in a decision-making process.**
- **The HC also added that an interim or preliminary decision may still be reviewable under s.5 of the ADJR Act PROVIDED that the statute in question expressly creates this interim decision as a step.**

“Is the decision of an administrative character?”

Decisions made under the ADJR must be ‘of an administrative character’: (Burns v ANU pp 714.

- Must distinguish between legislative (making or changing new laws) and administrative (applying the general law to the existing law). You can only use ADJR to review ‘administrative decisions’
- **What is a decision of a legislative character and therefore not of an administrative character?**
 - It is a decision that creates rules, standards, and guidelines. This is very different from a decision which applies a standard or a rule to a given fact situation to produce a result – that’s a decision of an administrative character.
 - Eg a local council given power by a statute that creates it, to make by-laws. If the local council exercises that power to make by-laws, its decision will be of a legislative character because it is making laws.
- The ADJR Act cannot be used to judicially review decisions made by Magistrates when they are exercising federal jurisdiction.
- **However, when a magistrate decides to commit somebody for trial, it’s not an exercise of judicial power, it is an administrative** – after conducting an inquiry there is sufficient evidence that somebody stands trial.

So the decision by a magistrate that somebody should be committed for trial is reviewable under the ADJR Act because it is of an administrative nature.

“Does the decision arise under an enactment?”

For a decision to be reviewable, it must arise under an enactment. (Definition: ADJR s 3(1); ANU v Burns)

- **The ADJR only applies to a decision of an administrative character “made under an enactment”.** This means that decisions which are not made in the exercise of a statutory power will fall outside the ambit of the ADJR Act review.

EG: Regarding the Minister’s decision to _____, the ACT ‘expressly authorised’ that decision, and it ‘derived’ from that enactment (Griffith University v Tang (2005)). The express authorization is further reinforced by ‘Bond’ as there is a link between the decision and the legislative power to make that decision: ABT v Tribunal v Bond (1990). Therefore the decision did arise under an enactment.

Grounds of Review: Jurisdictional Error

*The basis for s 75 (v) review- the constitutional writs only available if JE proved.
Essential to overcome a privative clause.
S 75(v) cannot be overridden.*

**Jurisdictional error means that the decision maker has not made a valid decision.
These errors cannot be protected from review by a privative clause.**