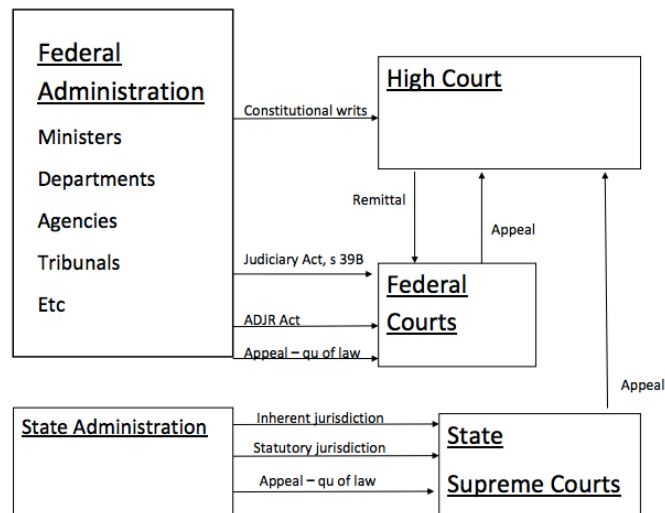


## Administrative Law Scaffolds

### Judicial Review Summary

#### Jurisdiction



#### General Rules

1. A Federal administrator dealing with Federal legislation = Federal Court
2. A State administrator dealing with State legislation = State Supreme Court
3. Assume that the Act is not listed in Schedules to the **ADJR Act** = reviewable under the Act

#### Effect of a Privative Clause

- A privative clause will not be effective to preclude review for jurisdictional error – go through entrenched judicial review jurisdiction (cannot seek review under the **ADJR Act**)

#### Effect of a No Invalidity Clause

- The existence of a no invalidity clause will not preclude judicial review, but if effective, no remedy will be granted

#### Identify the Remedy Sought

- Jurisdictional error required for constitutional writ remedies
- Certiorari has a non-entrenched component
- Review pursuant to the **ADJR Act** does not require jurisdictional error to be established (remedies contained within s 16)

#### Jurisdictional Errors

- Jurisdictional errors are the “most serious legal errors” that the court will always intervene to correct
- Have the consequence that the decision is a nullity – the rights and obligations of the person aren’t as declared in the decision
- Breach of procedural fairness: *Aala*
- Unreasonableness: *Li*
- Jurisdictional fact: *SZMDS*
- Breach of statutory procedures in some situations (where the procedure is required): *Project Blue Sky, Palme*
- *Craig* (affirmed in *Yusuf*) suggests that breach of one of the reasoning process grounds will establish jurisdictional error:
  - *Yusuf* [82]: identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law
  - Considerations grounds, improper purpose, policies, acting under dictation, unauthorised delegation
- Errors where decision is within jurisdiction may be reviewed where the error is apparent on the face of the record: *Craig*

#### Standing

- Person aggrieved (**ADJR Act**); special interest test (common law)

## STEP 1: DOES THE COURT HAVE JURISDICTION?

### State Jurisdiction

#### (a) Inherent Jurisdiction (Supervisory Jurisdiction)

- Section 23 *Supreme Court Act 1970 (NSW)*: The Court shall have all jurisdiction which may be necessary for the administration of justice in NSW
- Section 69 *Supreme Court Act*: The court has jurisdiction to grant any relief or remedy by way of writ, whether of prohibition, mandamus (require one to carry out a duty), certiorari (quash a decision) or of any other description

#### (b) Appeal on a Question of Law

- Different statutes allow for an appeal of a public decision to a State Supreme Court – statute will expressly include it
- Has the same scope of review, but is technically not judicial review – it is an appeal (all the same principles apply)

### High Court Jurisdiction

#### (a) Original and Appellate Jurisdiction

- Section 75(i): obligations arising under a treaty, including the Refugee Convention: *Plaintiff M61 v Commonwealth*
- Section 75(iii): where the Commonwealth, or any person suing or being sued on behalf of the Commonwealth, is a party: *Plaintiff M61 v Commonwealth* (Commonwealth being sued)
- Section 75(v): review the decisions of Ministers and officials who are considered officers of the Commonwealth, where a writ of mandamus or prohibition or an injunction is sought: *Plaintiff M61 v Commonwealth*
- Section 73(ii): The High Court shall have jurisdiction to hear and determine appeals from all judgments, decrees orders and sentences...of any:
  - Federal Court, or
  - Court exercising Federal jurisdiction; or
  - The Supreme Court of any State, or
  - Any other court of any State from which the establishment of the Commonwealth an appeal lies to the Queen in Council

### Federal Jurisdiction

#### (a) Judiciary Act (s 39B)

- Section 39B: The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth
- May be available where the Federal Court does not have jurisdiction under the *ADJR Act* (*Roche* Branson J)

#### (b) ADJR Act

- Section 13 gives the applicant the right to seek reasons from the administrator – these reasons form the basis of the review (e.g. procedural unfairness, Minister considered irrelevant factors)
  - This is not available at common law
  - Must have standing to obtain reasons

#### Application to Review a Decision

- Section 5: a person aggrieved (standing) by a decision to which the Act applies may apply to the Federal Court for an order of review
- Section 3(1): decision to which this Act applies means a decision of an administrative character, made under an enactment, made by someone other than the Governor-General and decisions regarding the *Migration Act*

#### Decision:

- The final or operative decision and not a preparatory step in the making of a decision: *Bond* (Mason J)
- Exception: mandatory report – where statute provides for findings which are preparatory to the making of a decision (e.g. a report or recommendation), these also constitute a decision (*Bond*, Mason J)

#### Administrative Character

- General rule: decisions which relate to the application of a rule are generally administrative, whereas, decisions regarding the content of the rule are of a legislative character: *Roche*
- Indications of legislative: *R G Capital Radio Ltd v Australian Broadcasting Authority*
  - Decision determining the content of rules (e.g. inclusion of something in a Schedule to which a provision of the legislation applies)
  - Parliamentary control (e.g. disallowance procedure where Parliament may review the regulation and make it inoperative)
  - Public consultation (usually for rule-making which is of a legislative character)

#### Made under an Enactment

- Decisions granted by general statutory provisions which confer contractual power or made according to consensual agreements are not made under an enactment: *General Newspapers v Telstra*
- Two criteria: *Griffith v Tang*
  - The decision must be expressly or impliedly authorised by the enactment
  - The decision must itself confer, alter or otherwise affect, legal rights or obligations and in that sense the decision must derive from the enactment
- Decisions made under legislation but by companies are not made under an enactment: *Neat Domestic Trading v AWB Ltd*
  - The decision must be empowered by the Act, and statute must be the source of that power rather than mere statutory significance

#### (c) Appeal on a Question of Law

- Errors of fact and law distinction

#### Is there a privative or no invalidity clause?

#### **Privative Clause**

- Privative clauses are read down so that decision only refers to valid decisions
  - Those which are a “nullity” fall outside the definition of decision and are therefore reviewable
- Effect: the entrenched judicial review jurisdiction is the only option available where a privative clause operates
- NSW
  - Common law is the source of jurisdiction (*Kirk*)
  - Entrenched component is the review for jurisdictional error
- Commonwealth
  - Section 75(v) of the Constitution – jurisdictional error by an officer of the Commonwealth

#### Jurisdictional Errors

- Constitutional writ remedies require jurisdictional error: prohibition (order to restrain further action); mandamus (order to compel performance of an unperformed duty) and certiorari (quash the decision)
  - NB: certiorari has a non-entrenched component for error of law on the face of the record
- Jurisdictional error has the consequence that the decision is a “nullity” – the rights and obligations of the person aren’t as declared in the decision
  - Procedural Fairness *Aala* [41] confirmed in *Plaintiff s157/2002* [83], *Li* [21]
    - “If an officer of the Commonwealth...does not accord procedural fairness and if that statute has not...limited or extinguished any obligation to accord procedural fairness, the officer exceeds jurisdiction.” *Aala* (Gaudron and Gummow JJ)
  - Unreasonableness in the exercise of discretion *Li* [28] – [29] (French CJ)
    - Reasonableness is an “implied condition of the exercise of a discretionary power” (Gageler J, [89])
  - Jurisdictional facts: *SZMDS*
    - Subjective: rationality in the formation of an opinion that is a jurisdictional fact *SZMDS* [23] – [24]
  - No Evidence: *R v Melbourne Stevedoring Company*
  - Breach of statutory requirement or procedure – depends on the legislative purpose: *Project Blue Sky*
  - Breach of consideration grounds: asking the wrong questions/ignoring mandatory considerations/relying on prohibited considerations
    - Failure to consider relevant matter is a jurisdictional error *Minister for Immigration and Multicultural Affairs v Yusuf* (Gaudron J [41])
    - Breach of considerations grounds by administrative tribunals in the reasoning process grounds are recognised to be jurisdictional errors: *Craig v SA* (p 179)