

# LAWS2010:

## *ADMIN LAW*

Semester 1 2016

### Problem Question

1. Justiciability
2. Standing
3. Grounds
4. Remedies

## TOPIC 1: INTRODUCTION TO ADMINISTRATIVE LAW

- Holding government to account for the laws it makes
- Vertical element = hierarchy of Courts overseeing that everybody complies with the law
- Horizontal element = where you learn about principles about fair decision-making
- Principles of procedural fairness
- Merits review – tribunals
  - Constitution provides a guarantee of right to judicial oversight of administrative action
- Judicial review – chapter III courts
  - Parliament has established non-judicial bodies to oversee administrative decision-making

### Grounds of Review

- Procedural grounds
- Reasoning process grounds
- Decisional grounds

### Access to Review

- Standing

### Restricting Review

- Privative clauses

#### **1. Constitutional Fundamentals: The Rule of Law, Parliamentary Supremacy & the Separation of Powers**

- Federal judicial power can be conferred only on a Ch III court
- A Ch III court can only exercise judicial power

#### Judicial Power Includes...

- Imposing a sentence of imprisonment
- On administrative detention of non-citizens, *Chu-Kheng Lim; Al Kateb v Godwin*
- Imposing a fine (*Boilermakers*)
- Imposing a coercive order such as an injunction (*Brandy*)
- Making a binding & conclusive declaration of the law

#### **Rule of Law & Constitutionalism**

- Limited government – Principle of Legality
- In its thin sense:
  - There should be legal norms
  - All legal norms should be prospective, open & clear (knowable)
  - It should not be impossible to comply w the legal norm
  - The making of particular legal norms should be guided by open, clear & fairly stable general norms
  - Those have legal authority to apply or enforce legal norms should do so correctly & consistently & should be accountable for their compliance

### Rule of Law

- All persons & authorities – public & private – are bound by law
- Core idea = limited government: Principle of Legality
- I.e. – Executive government subject to law = idea of limited government = principle of legality
- Not specifically referred to in Cth/State Constitutions but assumed to be part of fabric of public law
- S 75(5) Constitution = called ‘Rule of Law’ provision by HCA
- Controversial as to whether purely formal or substantive

### Prerogative Writs

- S 75(V) Const. confers judicial review jurisdiction on HCA in terms of power to issue injunctions & writs of mandamus & prohibition

### More Normative Understandings

- The meaning of the rule of law must be found in ideals of freedom & justice – it is not value-free
- Statutory interpretation & judicial review are informed by general principles of justice derived from the common law
- Parliamentary sovereignty must be understood in this light
  - The intention of Parliament is a product of both legislative purposes gleaned from the statute as a whole & judicial interpretation sensitive to deeply rooted constitutional values

### Separation of Powers

- Avoids concentration of powers in any branch of Constitution
- Dispersal of powers b/w 3 branches – legislature, executive & judiciary
- Cth Constitution
  - Ch I: The Parliament
  - Ch II: The Executive
  - Ch III: The Judicature
- Not replicated in State Constitutions
- No strict separation b/w legislature & executive e.g.
  - Ministers are members of Parliament
- NB: Cannot call separation of powers at State level b/c not called that in Constitution although ‘separation’ still apparent at State level

### Parliamentary Sovereignty (Supremacy of Parliament)

- British constitutional theory of 19<sup>th</sup> century
  - “Parliament can make or unmake any law it chooses”
  - A Parliament cannot bind future parliaments
- Tension with rule of law
- Qualifications in Australia
  - Subjection of colonial parliaments to UK
  - Cth Constitution limits parliaments’ power
  - Judicial review
- Important qualifications generally
  - Distinction b/w legal & moral authority, law & politics
    - ⇒ The electors are the political sovereign

- As a legal concept
  - ⇒ Preferable to limit it to a description of the r/ship b/w Parliament & the Courts in the sense that the Courts will recognize & apply laws duly made by Parliament
  - ⇒ Useful way to limit parliamentary sovereignty is to say it is a description of r/ship b/w Courts & Parliament – describes situation of Courts having to apply laws duly made by Parliament
  - ⇒ Parliament is limited by the rules which prescribe how legal power must be exercised; incl. formal procedures & constitutional practice
  - ⇒ Some theorists argue that Parliament is also limited by a “constitutional morality”

### Accountability – The Westminster System of Government

- Mechanisms of accountability, incl. ministerial responsibility
- Responsible Government
  - Ministers are members of Parliament
  - Individual & collective ministerial accountability to Parliament
  - Influences on Admin Law
    - ⇒ Delayed introduction of FOI, Ombudsman
    - ⇒ Weaknesses in political accountability led to expansion of judicial review, merits review
- Cabinet confidentiality may be a practical impediment to accountability

### Different Ways to Hold Government to Account

- Political (through Parliament)
- Financial i.e. – Estimates Committee (Head Bureaucrats of Departments called into special committee of Parliamentarians to see how money given to each Dept. is spent)
- Legal within Parliament – Parliamentary Committees
  - i.e. – HR Committee
  - Bills & Ordinances
  - Legal & Constitutional Legislation/Affairs
  - Joint Standing Committees

### Tribunals

- Independent Merits Review Tribunals (Cth = AAT, NSW = ADT)
- Independent Investigative Tribunals (Ombudsman; ICAC)
- Issues relevant to Federal administrative tribunals:
  - A tribunal cannot rule on the constitutional validity of legislation (*Re Adams*)
  - A tribunal can rule on the lawfulness of a decision – but not finally (*Collector of Customs v Brian Lawlor*)
  - Federal judges can be appointed to tribunals & inquiries in their personal capacity – *persona designate* (*Drake's case*); but...

## 2. Introduction to Judicial Review & the Law/Merits Distinction

### Merits Review

- About being able to argue from scratch again
- Tribunal can give you result
- Best possible decision according to current policy & law
- 'The merits' = what is best according to the policy & the law
- Involves a personal judgment of the tribunal member
- Merits review body can remake a decision
- Decision is not binding & final

### Judicial Review

- Determines lawfulness
- 'Review of the manner in which the decision was made'
- Decision becomes precedent for future decisions but new decision must be made
- Court can make statement as to whether decision was in accordance with the law, & if not → send it back to redo but CANNOT provide new decision
- Decision is binding – precedent established
- Courts have inherent judicial review jurisdiction
- Power to review certain acts & decisions of government administration
- Purpose of review not to usurp powers of administrators but to supervise their exercise

### Appeal/Review Distinction

- Focuses on idea that, although appeal courts can typically substitute their own decision for that of the original decision-maker, a review court cannot
- Court remits decision to original decision-maker to be made in accordance with the law
- General appeal typically carries with it a remedial power to substitute a new decision

### Grounds of Judicial Review

- Not only must there be a source of legal authority, but government decisions must not be made in breach of an accepted administrative norm
  - Values underpinning judicial review incl. accountability, rationality, efficiency, public interest, fairness, protection of rights, participation, transparency & impartiality
- (1) **Procedural Grounds**
    - Impose on decision-makers requirements which focus on the conduct of the decision-maker
  - (2) **Reasoning Process Grounds**
    - Relate to reasoning processes of decision-making
  - (3) **Decisional Grounds**
    - Relate to decision itself – what was actually decided as opposed to procedures/reasoning processes

## TOPIC 2: MERITS REVIEW

### 1. Types of Tribunals

### 2. Independent Merits Review Tribunals

#### 2.1 Commonwealth: AAT([www.aat.gov.au](http://www.aat.gov.au))

- Defining features = proliferation of 'super' tribunals – tribunals that do almost everything (various divisions that hear reviews on large raft of legislation)
- AAT reviews decisions under 400 statutes federally
- Challenging decision = look at legality of whether it was in government's power
- Used to have to go straight to HCA for challenging government decision (e.g. – cancellation of pension) (1974-76)
- President = Duncan Kerr (Judge of the Federal Court)
- Lower rank members brought in for their expertise (e.g.– disability division, aviation division, specialists in veteran's affair division, specialists in taxation division)
- Key to divisions = appointed by AG who can recommend to GG that you be appointed in the general division but in some other divisions you need recommendation from other Ministers (e.g. – in taxation division you need recommendation from the Treasurer)
- AAT decisions found on Austlii
- Tribunal member not allowed to communicate with either party in absence of another party
- Sometimes oral decision made, especially if interpreter who will translate (adjourn briefly to decide what to say) but if complicated → written decision
- Procedure for 'lesser' tribunals = quasi-inquisitorial & have no government lawyer or applicant lawyer (e.g. – migration division, social security division) → Member controls everything

#### Administrative Appeals Tribunal Act 1975 (Cth)

- S 2A = objectives
- S 5 establishes tribunal
- S 5A sets tribunal into divisions
- S 6 deals with appointments
- NB under s 6 & 7 that judges may be appointed to Tribunal as *persona designate* (personal capacity)
- S 17 = sets out tribunal divisions
- S 25(1), (3), (4) = key provisions → gives Tribunal power to review decisions which have been specified in various enactments (I.e. - Parliament must say in an enactment that certain decisions may be reviewed by the tribunal) ← can also be done by Regulation, but often by legislation
- What is a decision though? → Link s 25 with definition of 'decision' → relevant provision = s 3(3) which means a decision granting/refusing to grant license, revoking something etc.....
- CAN ONLY REVIEW DECISIONS

- S 27 says that a person interested may apply (standing)
- S 28 says if you are a person interested you may seek reasons from the government for the decision which relate to the findings of fact, the evidence & inferences drawn from the evidence & the reasons for decision
- Reasons have to be given within 28 days
- S 30 = parties to proceeding before tribunal
- S 33 = Procedure of Tribunal
- S 35 = Public vs. Private hearings
- S 37 (T documents section) – When applicant seeks review of decision, application goes to Government & they are required to give Tribunal all of the relevant documents
- S 39 = submissions
- S 43 = on reviewing a decision, AAT may affirm decision, set aside decision with directions to decision-maker to reconsider or set aside decision & may a decision in substitution for the decision under review
- Decisions can be appealed on question of law to the Federal Court
- S 44 = can appeal on question of law
- S 42A
- If person doesn't turn up, must be given evidence by Associate or Registry that they have been properly notified of hearing & have been contacted within 3 days of hearing & if necessary, interpreter has been used
- If haven't turned up → matter can be dismissed
- Under ss 9 & 10 of S 42A → Applicant can seek to reopen matter before original decision-maker
- S 42C = where parties can make an agreement that matter will end
- If an agreement reached → matter sent back to Department for review & if applicant not satisfied, can go back to department (what happens in NSW)

#### What Happens when you Apply for a Review?

- When T documents reduced by government →
- Many instances = case conference run by the Registrars & their staff (not supposed to be seen by decision-maker) – where Government officials & applicant work out the issues under guidance of Registry staff (evidence from here cannot be used)
- Often cases settled in a case conference (3/4 settled in disability division)

#### What can the AAT Review?

- S 25(1)(a) *AAT Act* – ‘an enactment may provide that applications may be made to the [AAT] for review of decisions made in exercise of powers conferred by the enactment’
- (1) Does application relate to a ‘decision’?
  - Includes purported decisions, synonymous with illegal (ultra vires) decisions
  - S 3(3) *AAT Act* = definition

- (2) Was the decision made in exercise of a power conferred by an enactment that confers jurisdiction on the AAT to review that decision?
- Only has jurisdiction to review a decision if Cth statute expressly confers jurisdiction to review a decision of that class

#### Applicants

- *S 27 AAT Act* – application for review may be made by or on behalf of any person whose interests are affected by the decision
- ‘Person’ incl. Cth agency
- Incl. corporation provided decision relates to a matter incl. in its objects/purposes
- The interest must be affected by the decision
- If the effect is too slight/indirect, person may lack standing

#### 3 May 1979

- Key day in establishment of Tribunal – 2 significant Federal Court decisions

#### The Nature of Merits Review

- *S 43 AAT Act* –
  - 1) Sets out powers of AAT in relation to a reviewed decision (can affirm/vary decision, set it aside & make substitute decision or remit decision for reconsideration by decision-maker with binding directions or non-binding recommendations)
  - 2) Provides that when AAT varies a decision or makes substitute decision, AAT’s decision is deemed to be a decision of the original decision-maker as from the date of coming into effect of the original decision
  - 3) Provides that in reviewing the decision, the AAT ‘may exercise all [and only] the powers & discretions’ conferred on the original decision-maker’ (i.e. – AAT stands in the shoes of the original DM)
- Task of AAT is to reconsider decisions



<i>Drake (No 1) v Minister for Immigration &amp; Ethnic Affairs (1979)</i>	
<b>Facts:</b>	<ul style="list-style-type: none"> <li>⇒ Daniel Dwight Drake = American</li> <li>⇒ Met 19 year old bar maid in Australia</li> <li>⇒ 1979 – Drake convicted of growing marijuana in NT for export</li> <li>⇒ Under s 12 <i>Migration Act</i> (then) if you commit a crime which has a sentence of 12 months or more (even if you don't get the 12 month sentence), you are subject to deportation</li> <li>⇒ Drake applied for review for Minister's decision to deport</li> </ul>
<b>Judgement:</b>	<ul style="list-style-type: none"> <li>⇒ Davies J said in AAT – decision to deport was reasonable by the Minister on the evidence before the Minister (not going to disturb the decision) – reasonable decision within the 4 corners of the Minister's power</li> <li>⇒ Bowen &amp; Deane JJ said that Tribunal had committed an error of law b/c the task of the Tribunal is to determine what is the correct or preferable decision of the material BEFORE the AAT ('Correct &amp; Preferable' Formula)</li> <li>⇒ Golden Formula of Tribunals = 'Correct &amp; Preferable'</li> </ul>

<i>Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979)</i>	
<b>Facts:</b>	<ul style="list-style-type: none"> <li>⇒ Brian owned bonded warehouse in Brookvale, meaning you can hold exports/imports under bond &amp; you need permission from customs people</li> <li>⇒ Under <i>Customs Act</i> Lawlor granted licence to run bonded store</li> <li>⇒ If you didn't pay licence fees → licence would expire but no other method of cancelling the licence</li> <li>⇒ However, Minister decided to cancel Lawlor's licence</li> <li>⇒ Lawlor sought review from AAT</li> </ul>
<b>Judgement:</b>	<ul style="list-style-type: none"> <li>⇒ Lawlor raised a judicial review question &amp; Brennan J (in his personal capacity on AAT) agreed there was no legal authority to cancel licence but doesn't make decision a nullity as Minister intended to try &amp; exercise powers to cancel licence &amp; if you look at definition of 'Decision' plus powers of review under s 25(3) &amp; (4), Brennan J can regard decision as one he can set aside</li> <li>⇒ If you can't decide legal questions before you, Tribunal would be truncated</li> <li>⇒ Under s 44 <i>AAT Act</i> can appeal on question of law to Federal Court</li> <li>⇒ Full Federal Court = 3 separate judgements</li> <li>⇒ Bowen J said if you cant allow to decide it's own jurisdiction questions &amp; questions of law, then what is the purpose of having a Tribunal?</li> <li>⇒ Smithers J came to same view as Bowen J</li> <li>⇒ Deane J dissented in part – said normally the Tribunal should be able to deal with questions of law that come before it &amp; it could say decision-maker had no power to make decision &amp; set aside BUT problem with this case is that before the proceedings began, the applicant stated that there is no legal power – at this point, review should have gone to court (distinction b/w what was raised at the beginning which would give</li> </ul>

	<p>Tribunal chance to trigger it to go to Court &amp; decisions of questions of law which arose during the proceedings)</p> <p>⇒ <b>Bowen &amp; Smith JJ</b> took view that questions of law were matters for the Tribunal</p>
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<i>Shi v Migration Agents Registration Authority (MARA)</i> (2008)	
<b>Facts:</b>	<p>⇒ First time that role of AAT came before HCA</p> <p>⇒ Looks at 'Golden Formula'</p> <p>⇒ Mr Chi was a migration agent</p> <p>⇒ In 2003, Migration Agent Review Authority cancelled his registration</p> <p>⇒ Chi got a stay of proceedings &amp; applied to AAT which eventually heard matter in 2005</p>
<b>Judgement:</b>	<p>⇒ AAT held that it would set aside the cancellation decision &amp; that it would vary it by allowing him to practice with conditions</p> <p>⇒ Tribunal said they have taken into account what has happened b/w 2003 &amp; 2005 &amp; have more evidence of his good character &amp; despite mistakes in past, it is now appropriate to allow him to practice with conditions</p> <p>⇒ Full Court by majority overturned AAT, saying they were confined to looking at what was before MARA in 2003</p> <p>⇒ HCA held that task of Tribunal is to make 'Correct &amp; Preferable' decision on the material before it <b>at the time</b> (i.e. – 2005)</p> <p>⇒ Majority held that AAT could make decision with conditions having regard to MARA's power</p> <p>⇒ <b>Kiefel J</b> says that they adhere to <b>Bowen &amp; Deane</b> formula in <i>Drake No 1</i></p>

- NB: ADJR Act 1997 (NSW) s 63 sets out Bowen & Deane formula for NCAT

### Government Policy

<i>Re Becker &amp; Minister for Immigration</i> [1978]	
<b>Facts:</b>	<p>⇒ NZ who had been convicted of minor assault</p> <p>⇒ Minister decided to deport Becker</p> <p>⇒ Becker sought review by AAT</p>
<b>Judgement:</b>	<p>⇒ Government said there was policy that people who commit violence should go back to where they are from but Brennan J said he hadn't seen that policy before</p> <p>⇒ Came back with 2 letters from 1961 letters from Minister saying that anyone who commits violence should be sent back</p> <p>⇒ Brennan J questioned whether letters made public or put before Parliament (no to both), so Brennan J said b/c not a public policy or tested before Parliament, he allowed Becker to stay</p> <p>⇒ Brennan J said Becker should be given a 2<sup>nd</sup> chance (relevant for <i>Drake No 2</i>)</p> <p>⇒ Public policy then made by Department</p>

<i>Re Drake and Minister for Immigration &amp; Ethnic Affairs (No 2) (1980)</i>	
<b>Facts:</b>	⇒ Sent back to tribunal for decision
<b>Judgement:</b>	⇒ Said that decision to deport was correct ⇒ Brennan J speaks about government policy put forward by government lawyer which was tabled in Parliament ⇒ Question = should Tribunal be bound by Government Policy? ⇒ Tribunal should usually be bound by Government Policy, assuming Policy is lawful, particularly if policy has been made public ⇒ UNLESS circumstances have changed to make policy irrelevant ⇒ 'Unless a strict adherence to the policy would cause injustice' (i.e. – decide correct & preferable decision) ⇒ Still need to regard everything else, not just government policy

## 2.2 NSW: ADT

- *Administrative Decisions Tribunal Act 1997 (NSW)*

### Administrative Decisions Review Act

- S 64 sets out *Drake No 2* formula
- NB: Premier can outwardly state something to be Government Policy

<i>MZZZW v Minister for Immigration and Border Protection [2015]</i>	
<b>Facts:</b>	⇒ Applicant was Sri Lankan ⇒ Applied for refugee status ⇒ First decision-maker made decision refusing refugee status
<b>Judgement:</b>	⇒ Applicant to FCA under s 474 <i>Migration Act</i> & said decision-maker had exceeded jurisdiction → FCA agreed & remitted matter to Decision Maker 2 to be re-decided ⇒ When you compare decisions of DM1 (overruled) & DM2 there are lots of the same paragraphs – findings about character, credibility almost word-for-word in both ⇒ Applicant sought review from FCA under s 474 ⇒ 2 <sup>nd</sup> DM failed to exercise jurisdiction b/c DM2 didn't decide anything but simply relied upon DM1's decision ('constructive failure') ⇒ Procedural fairness – DM2 failed to listen to evidence before them, failed to accord PF to the applicants

<i>Zhao v Minister for Immigration [2006]</i>	
<b>Facts:</b>	⇒ 7 January 2015 ⇒ Zhau arrives from China at 17 ⇒ At 20, in 2005, Zhau married Australian citizen ⇒ Zhau says in evidence that he bought a permanent visa to come & go from Australia for \$20,000 ⇒ Zhau says he showed visa to first wife who said it cannot be legal & to take it out of his passport ⇒ January 16 2006 – Zhau returns to China to visit mother & has false visa torn out at back of passport

	⇒ Zhau charged of breaching <i>Passports Act</i> ⇒ Zhau before Downing Centre – sentenced to 100 hours community service ⇒ Zhau applies for citizenship 8.5 years later
<b>Judgement:</b>	⇒ Government presented policy to tribunal about character & <i>Drake No 2</i> (abiding by government policy) ⇒ Policy says any breach of passports act = serious

### 2.3 ADR

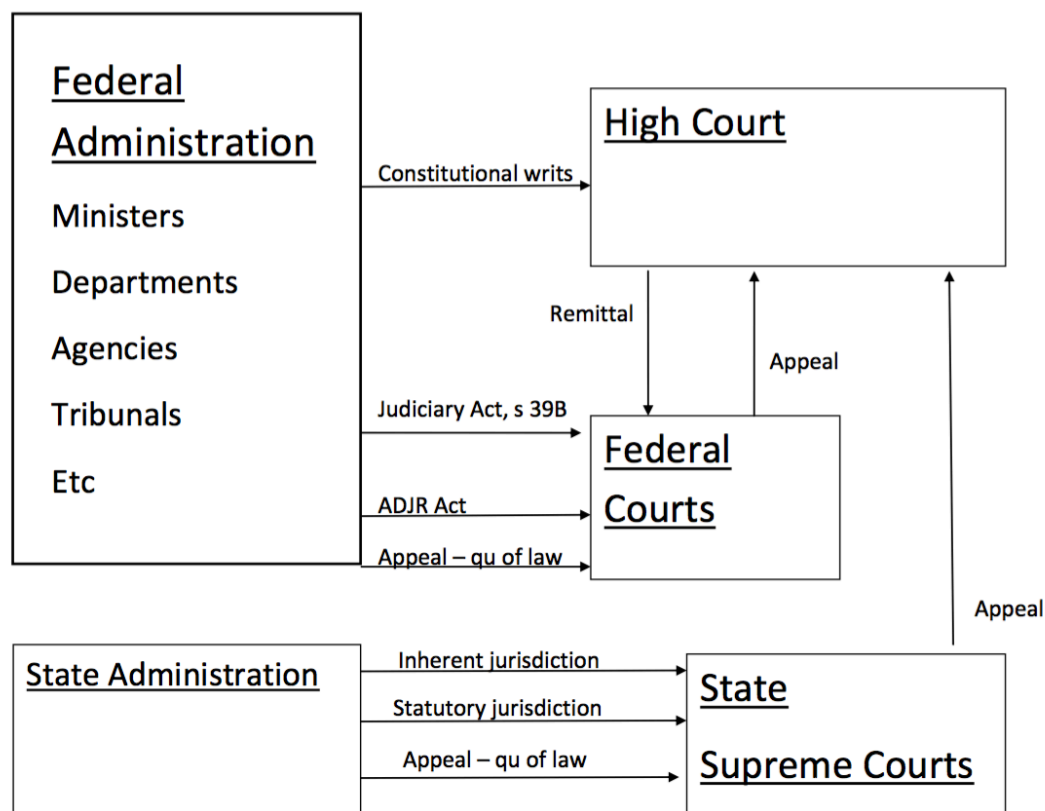
#### Alternative Dispute Resolution

- **S 34 AAT Act**
- Where resolver seeks to bring parties together
- If an agreement is reached & signed that ends the matter after 7 days (cooling off period)
- Can come back within 7 days to retract
- In some decisions, evidence cannot be given from ADR unless party refuses to turn up to the ADR (evidence of failure to turn up can be given if relevant before Tribunal)

## TOPIC 3: JUDICIAL REVIEW – JURISDICTION OF THE COURTS

- Judicial review = constitutional guarantee
- An ordinary Act of Parliament cannot abrogate the Court's constitutional jurisdiction

### Framework of Judicial Review



### Overview of Judicial Review

- Does the Court have jurisdiction?
- Is the decision justiciable?
- Does the applicant have standing?
- Is a breach of one or more grounds of review established?
  - Procedural grounds
  - Reasoning process grounds
  - Decisional grounds
- Is a remedy available?

**NB:** Commonwealth administrator → ADJR Act (NOT FOR NSW)

### **State Administration → State Supreme Courts**

#### NSW Supervisory (Inherent) Jurisdiction

- Inherent jurisdiction = recognised function
- *Supreme Court Act 1970* (NSW)
  - S 23: The Court shall have all jurisdiction which may be necessary for the administration of justice in NSW
  - S 69: The Court has jurisdiction to grant any relief or remedy by way of writ, whether of prohibition, mandamus, certiorari or of any other description

#### Statutory Jurisdiction

- Some states have equivalent of Cth *ADJR Act*
- Not review option for NSW

#### Appeal on Question of Law

- Not judicial review
- Appeal = creature of statute
- Statutes set out appeal paths
- Appeal on questions of law replicate judicial review proceedings
- Most commonplace = tribunal legislation

#### Appeals to HCA from State SC

- Special leave process
- S 73(ii) Const. ensures appeal route
  - The HCA shall have jurisdiction...to hear & determine appeals from all judgements, decrees, orders & sentences:
    - (ii) of any other federal court, or court exercising federal jurisdiction; or of the SC of any State, or of any other court of any State from which at the establishment of the Cth an appeal lies to the Queen in Council....

### **Federal Administration → HCA**

- Original jurisdiction = constitutional writ jurisdiction s 75(iii) and (v) Const.

### **Federal Administration → Federal Court**

#### Judiciary Act s 39B

- Matches HCA's constitutional writ jurisdiction