

## **70617 ADMINISTRATIVE LAW**

Textbooks: Judith Bannister, Gabrielle Appleby & Anna Olijnyk,  
*Government Accountability Australian Administrative Law*  
(Cambridge University Press, 2015).

### **EXAM NOTES ON**

### **JUDICIAL REVIEW, DELEGATED LEGISLATION AND FREEDOM OF INFORMATION**

**70617 – ADMINISTRATIVE LAW**  
Spring 2017

**WEEK 5**  
**FREEDOM OF INFORMATION**

In order to be able to challenge decisions, we need to know what information the government has – like challenging a local government decision about planning, we may have to access minutes of council meetings so FOI legislation may come into play (or if it is in NSW the GIPA Act), maybe even access to information that the University has about you or something that affects you this may be important to make decision making more transparent.

**Archives Act 1983 (Cth)**

- Access to historic records, usually about family and historic figures.
- Regulates disposal of Commonwealth records
- Requires agencies to transfer their records (document or an object in any form) to the National Archives of Australia (Section 27)
  - o The record must be transferred:
    - (a) if the record ceases to be a current Commonwealth record--as soon as practicable after the record ceases to be a current Commonwealth record; and
    - (b) in any event--within 15 years of the record coming into existence.
- Criminal offence for any person (including an agency head) to alter, damage, or destroy or otherwise dispose of, or transfer ownership or custody of, a Commonwealth record – (Section 26) - Alteration of Commonwealth records
  - o (1) A person is guilty of an offence if:
    - (a) a Commonwealth record has been in existence for more than 15 years; and
    - (b) the person engages in conduct; and
    - (c) the person's conduct results in an addition to or an alteration of the record.
    - Penalty: 20 penalty units
- Applications to Administrative Appeals Tribunal (section 43)
  - o decision refusing to grant to the applicant access to the record on the ground that the record is an exempt record or is a Commonwealth record ...;
    - (b) a decision refusing to grant an extension of partial access to the record on the ground that the record is an exempt record and it is not practicable to make arrangements for giving the further access desired by the applicant in a form that would not disclose information or matter by reason of which the record is an exempt record;
    - (c) a decision refusing to grant to the applicant access to the record on the ground that the record has been withheld from public access pending examination of the record under section 35;
    - (d) a decision refusing to grant to the applicant access to the record on the ground that a determination has been made under section 37 that the record;

CASES:

*Roger W Milliss and Australian Archives* [1998] AATA 925

- Milliss' 5<sup>th</sup> application to seek access to ASIO documents for year 1966 about himself, his father, his brother and ex-wife. He wanted to write a book about how ASIO impact their family's lives.
- Whether some or all of the folios can be released.
- AAT has jurisdiction over refusal of archival documents.
- Balancing act of releasing documents and national security.
- It would reveal the confidential sources and third parties. National Security is always paramount and ASIO fits under the umbrella of national security.
- After review of the tribunal of the documents, he got 50 words out of the documents.

*Pemberton and Director-General, National Archives of Australia* [2015] AATA 115 (27 February 2015)

- Access to documents about naval cadets and one of them was the governor-general.
- Exempt documents – breach of confidence and held information about an individual.

*Morris and Director-General, National Archives of Australia* [2016] AATA 679 (2 September 2016)

- Related to access to documents involved security and defense issues.
- Balancing exercise of public interest and the information in it.
- Did the document actually exist?
- What he was seeking was not actually in records.
- AAT did not have jurisdiction because he was challenging a non-existing document.

**State Records Act 1998 (NSW)**

- Applies to NSW State Records – public hospitals, Local Government, universities
- Provides for the creation, management and protection of the records of public offices of NSW and for public access to those records.
- Establishes State Records Authority and its Board.

*State Records Regulation 2010* (NSW)

- prescribes guidelines as to what constitutes normal administrative practice
- prescribes a number of public offices for the purpose of exempting their collections of private records from the Act
- updated list of other legislation authorising the disposal/ alteration of State records.
- Ensures protection of any confidential or sensitive personal information in records
- Any assessment as to whether records should be open or closed to public access must have regard to the presumption that records should be opened to public access after 30 years (section 50) – XPN: national security, cabinet documents, release would cause harm to individuals.
- Access to census documents – 100 years.

## Freedom of Information (FOI) legislation

Commonwealth: *Freedom of Information Act 1982 (Cth)*

- *Commonwealth government, agencies, Ministers*

NSW: *Government Information (Public Access) Act 2009 (NSW)* "GIPA"

- *Government Information (Information Commissioner) Act 2009 (NSW)*
- *Government Information (Public Access) Regulation 2009 (NSW)*
- *Government Information (Information Commissioner) Act 2009 (NSW)*

NOTE: These ONLY APPLY TO PUBLIC ENTITIES and NOT to private individuals.

### HOW TO ANSWER FOI PROBLEM QUESTIONS

Threshold questions:

1. Check whether NSW or Cth – to apply proper law.
2. Is it a document?
3. Does the agency come under the FOI Act as a prescribed public authority?
  - a. Check actual authority, their nature, do they receive public funding.
4. Right of access, or Exempt, conditionally exempt, general document
  - a. Does it comply with the objects clause as all documents are freely accessible unless not in the public interest to do so.
  - b. Public interest balancing test

#### **IF UNDER COMMONWEALTH: FOI Act 1982 (Cth)**

1. Check whether it is a document under the Act – s 4

**"document"** includes:

- (a) any of, or any part of any of, the following things:
  - (i) any paper or other material on which there is writing;
  - (ii) a map, plan, drawing or photograph;
  - (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
  - (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
  - (v) any article on which information has been stored or recorded, either mechanically or electronically;
  - (vi) any other record of information; or
- (b) any copy, reproduction or duplicate of such a thing; or
- (c) any part of such a copy, reproduction or duplicate;

**but does not include:**

- (d) material maintained for reference purposes that is otherwise publicly available; or
- (e) Cabinet notebooks.

2. Does the agency come under the FOI Act as a prescribed public authority? – s 4

**"agency "** means a Department, a prescribed authority or a Norfolk Island authority.

**"prescribed authority "** means:

- (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council, other than:
  - (i) an incorporated company or association; or
  - (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of this Act; or







- Cth Senate Standing Committee on Regulations and Ordinances checks to see:
  - If the reg doesn't accord with the governing Act;
  - Technical validity and parliamentary propriety;
  - Whether the content and operation of the reg accords with basic public law standards, e.g. not retrospective, doesn't unduly trespass on common law rights, doesn't set out excessive penalty provisions, etc.
  - Ensures that all delegated legislation is on the Cth register.
- NSW: Legislation Review Committee
- "The mere existence of the scrutiny committees is a powerful influence on the way that subordinate legislation is prepared and framed by the executive. The committees also rely heavily on suggestion and persuasion to influence executive practice. These informal measures are backed up by the committee's reporting function, whereby it can make an adverse report to the parliament recommending that a statutory instrument be amended or be the subject of a motion of disallowance."

### Disallowance

- Cth: Section 42- *Legislation Act 2003*  
Disallowance of legislative instruments  
(1) If:
  - (a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
  - (b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;
 the instrument or provision so disallowed then ceases to have effect.
- NSW
  - Disallowance -section 41 *Interpretation Act 1987*
- Disallowance – not a complete check on improper rule-making
  - A regulation commences operation before it is tabled. A reg continues to be operative until disallowed.
  - If not tabled, it becomes inoperative, not invalid ab initio so will have had legal effect in interim.
  - If tabled on last sitting day of parliament, can only be disallowed after parliamentary recess and reg is effective until disallowed.

### HOW TO CHALLENGE VALIDITY OF DELEGATED LEGISLATION

1. Procedural Grounds
  - Legislative requirement – must be authorized by a specific Act of Parliament
  - Publication requirement
  - Registration
  - Tabling – if not tabled, inoperative but not void ab initio
2. Substantive Grounds
  - The delegated legislation is beyond the scope of the Act under which it was purportedly made.
  - Regulation must be reasonably proportionate, appropriate and necessary to purposive Act
  - Not vary or depart from positive legislative provisions – necessary or convenient, regulate vs prohibit, end vs means.

### CHALLENGING THE DECISION MADE UNDER THE DELEGATED LEGISLATION

- NOTE: Full range of grounds of review of administrative decisions is usually not available to challenge delegated legislation.



## WEEK 7-12

### JUDICIAL REVIEW

Administrative Law is a body of principles and procedures which control and supervise government decision-making: *accountability*. In other words, Administrative Law addresses the conduct of those who hold public office or exercise public power (or public authority) through different forms of review of their decisions: *i.e. exercise of authority*. Yet, Administrative Law is not just about accountability but also its reverse: the exercise of public authority/power. Key issue: How can or should public power be exercised?

#### Purpose

Over time, public ideals of the practice and duties of good conduct have been translated into forms of executive and government accountability. Both the exercise of public authority, and practices of accountability, therefore, underpin the purpose and scope of Administrative Law practice.

#### Scope

Administrative law governs administrative decision-making and administrative conduct. This includes government activities as diverse as environmental policy, tax law, migration law, employment law, veterans law and the Victorian Charter of Human Rights and Responsibilities. Central question is 'the decision'.

#### Two main types of review

- Merits Review ('MR')
- Judicial Review ('JR')

#### Similarities

- Both Merits Review and Judicial Review, in different ways, review government decision-making (or government action).
- We focus, therefore, on 'the Decision'

#### Differences

- Main difference: Who is reviewing the ADM?
  - Tribunal (executive) - reviews the decision exercising executive power (this is Merits Review)
  - Court (judiciary) - reviews the decision exercising judicial power (this is Judicial Review)

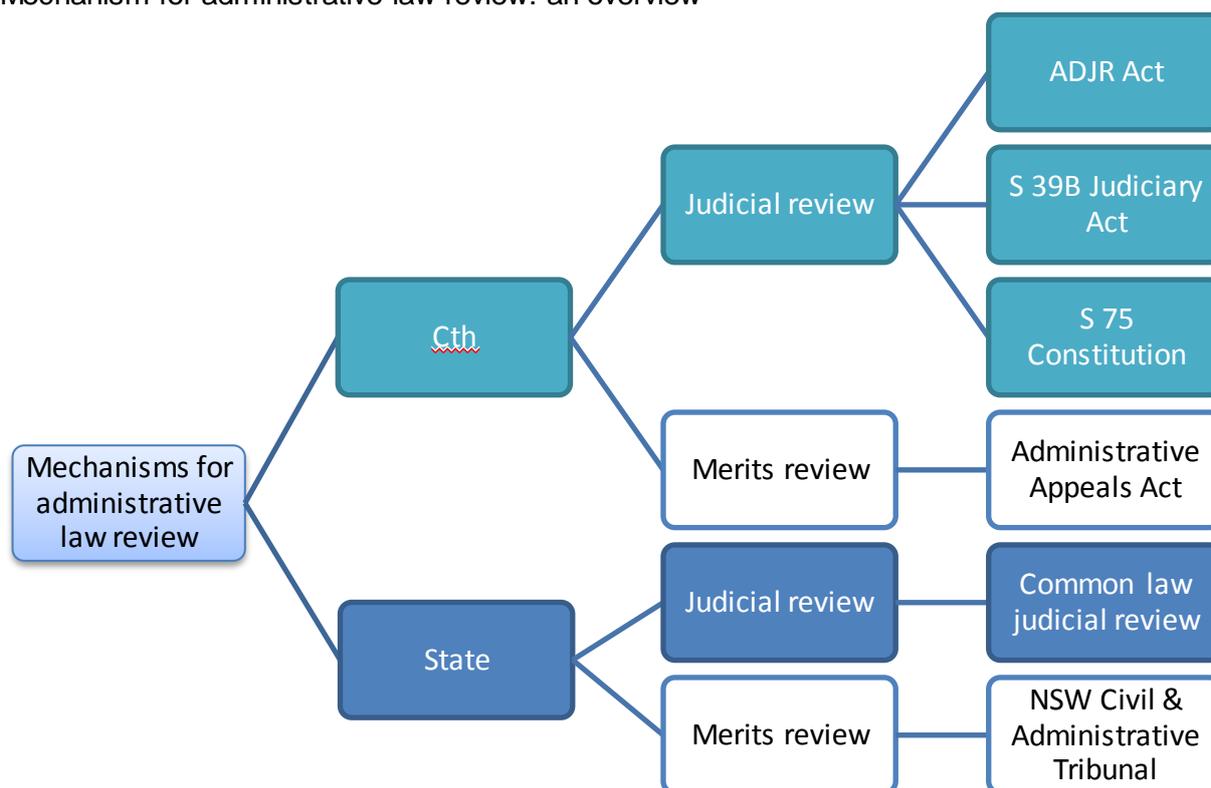
In merits review, the executive reviews the executive by:

- Apply law to facts
- Determination of facts
- Standing in shoes of original decision-maker
- Decision is remade

In judicial review, the Judiciary reviews the Executive by:

- Determination of law - was the decision lawful
  - Did the decision-maker act outside of power?
  - Were procedures not followed?
  - Was the decision so irrational as to be a failure to exercise lawful functions?
- Decision can be quashed and remitted to original decision-maker

## Mechanism for administrative law review: an overview

**Judicial Review**

- is a fundamental aspect of the rule of law, is meant to uphold the principle of legality, and is a key mechanism of the Separation of Powers.
- It is about how Courts can supervise the boundaries of an administrator's legal powers. However, in the process of supervising, Courts cannot exercise those executive powers.
- Therefore, it is concerned with the lawfulness of decisions made by the executive, not whether their decisions are wise and fair. (ie legality/merits distinction)

**Stages**

To successfully bring a JR application:

1. Court must have **jurisdiction** to conduct JR
2. Court must accept issues are **justiciable**
3. Applicant must have **standing**
4. Court must have **power to grant a remedy**
5. There must be a **ground of review**
6. Legislature must **not have validly excluded** the court's review jurisdiction (i.e. privative clauses)

## JURISDICTION

### Jurisdiction

- Jurisdiction is fundamental concept in law: both in relation to the power of a state to enforce its laws, and legislate; and the power or authority of courts to exercise judgment.
- It can also mean the territory or the terrain over which power is exercised
- Jurisdictional questions are central to Admin law. They relate to:
  - the scope of a decision makers power to decide; and
  - the scope and authority of court(s) to interfere with those decisions
- A court can only hear a matter if it has jurisdiction to do so.
- What authority and scope is given to different courts to review the decisions of an Administrative Decision Maker (ADM)?
- Two classes of courts:
  - superior courts of record of general jurisdiction
  - courts of limited jurisdiction.
  - We need to understand the different ways in which the judicial review jurisdiction of the High Court, Federal Court and NSW Supreme Court operate.

#### **RULES:**

- If you're in NSW = Common Law Jurisdiction
- If you're in the Cth = Common Law AND the ADJR Jurisdiction

### COMMON LAW JURISDICTION

<b>1. High Court?</b>	<b>See s75CC, s39B JA</b>  <b>NB: Constitutional</b>
2. Federal Court?	See s39B JA
3. NSW Supreme Court?	See s23 SCA (NSW)

### HIGH COURT JURISDICTION

Constitution, Section 75

*Original jurisdiction of High Court*

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) 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.

- The Constitution specifically vests authority and jurisdiction in the High Court to exercise judicial review via S75 (v):
  - **CONFERS** judicial review jurisdiction on HCA as part of its original jurisdiction
  - **REMEDIES**: gives power to HCA to issue **injunctions**, and writs **mandamus and prohibition**
- Section 75(iii) less significant for judicial review in practice, but remains relevant (and of growing importance)

### 3 KEY ELEMENTS OF S75(V)

1. 'matter'
2. Writs/remedy present
3. 'officer the Cth'

#### 1. 'Matter'

*Re McBain; Ex part Australian Catholic Bishops Conference (2002) HCA 16, per HayneJ:*

- 'matter' is more than a legal proceeding
- Must be an immediate right, duty or liability to be established by the Court's determination
- Hypothetical questions do not give rise to a matter
- Federal judicial power has as a core duty to be exercised to 'quell' matters
  - Reminds then that because matter must involve a controversy. A person must have more than a theoretical interests in its resolutions: must be of immediate direct effect upon them (so standing and matter intertwined)

#### 2. HC's original jurisdiction (writs)

- High Court has original jurisdiction under the Constitution, which derives from common law.
- Writs form part of the common law authority vested in the Crown. They are a form of pleading asking a court for a particular remedy. More specifically, writs are a form of prerogative review and remedy for unauthorised actions.
- The basic functions of these remedies is to:
  - 'quash' (ie deprive of legal effect) invalid or unlawful administrative decisions (writ of certiorari)
  - prevent illegal admin acts or decisions (prohibition)
  - require performance of a duty by an ADM (mandamus)
- The writs did not operate as responses to grounds for review. They were like a formula that required certain ingredients that would (or would not) enable a Court to grant a remedy.
- The way remedies operated therefore created the jurisdiction for courts to exercise judicial review
- The prerogative writs are an ongoing and historic source of authority for judicial review and for the issuing of remedy for unlawful executive action
- Limits:
  - Remedies focus: there is no direct mention of grounds for review in S75 (v). This reflects the 'old' CL approach.
  - Access to the remedies- and therefore HC's jurisdiction- is dependent on fulfilment of the technical requirements of writs
  - Certiorari not mentioned in s 75 (v) although injunctions are.
  - All writs mentioned in 75 (v) need a certain kind of error to be present before the remedy can be invoked. These errors are called jurisdictional errors.

#### 3. 'Officer of the Cth'

- When drafted in 1901, the executive government was small. s 75(v) determines jurisdiction of HC institutionally- in terms of the ‘**officers of the Commonwealth**’ rather than its function, which limits its operation
- Today, is a govt owned corporations, even if performing a ‘public’ function, open to review under 75 (v)CC? ie privatisation limit?
  - See **NEAT v AWB** (In Australia, no JR). Cf: *R v Panel on Take-Over and Mergers, ex parte Datafin* (In UK, JR possible). See C&M ch 2.5.1 – 2.5.21. Issue: Functions v’s source/structure.

## **FEDERAL COURT JURISDICTION**

- Federal Court was set up by *Federal Court Act 1976* (Cth).
- Today, Federal Court has two sources of jurisdiction:
  1. ADJR Act
  2. Judiciary Act
- Originally, the Federal Court only had statutory jurisdiction for JR via the ADJR Act.
- BUT, the interpretation of threshold questions to open up jurisdiction under the ADJR meant not all decisions can be reviewed through the ADJR. That is, there are jurisdictional limits to the ADJR.
- As a result, some cases were not able to invoke FC jurisdiction for JR, and therefore could still only be reviewed under s 75 (v) jurisdiction of the HC.

### **S39B Judiciary Act 1903 (Cth)**

#### **Original jurisdiction of Federal Court of Australia**

##### Scope of original jurisdiction

(1) Subject to subsections (1B), (1C) and (1EA), 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.**

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

- (a) in which the Commonwealth is seeking an injunction or a declaration; or
- (b) arising under the Constitution, or involving its interpretation; or

**(c) arising under any laws made by the Parliament**, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

*Note: Paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia.*

- To avoid overburdening the HC: in 1983 the *Judiciary Act 1903* (Cth) was amended to broaden JR jurisdiction of the FC.
- Introduced s39B(1) and (1A) to the *Judiciary Act*, which gives identical original jurisdiction to the FC as enjoyed by the HC (ie as we saw in *Evans v NSW*).
- NB: s44(1) of the *Judiciary Act* means HC can also remit matters to the FC
- O31.01 of the *Federal Court Rules 2011* (Cth): can however combine S39B and ADJR applications
- NOTE: Federal Circuit Court has same ADJR jurisdiction as Federal Court, does not have the Federal Courts Judiciary Act jurisdiction

### **s39B(1A)(c) Judiciary Act**

- The *Judiciary Act* was further broadened in 1997, when section 39B(1A)(c) was inserted into *Judiciary Act* (Cth).
- As a result, FC now has JR jurisdiction in all matters ‘arising under any laws made by the parliament.’
- This is important because:
  - plugs gaps under the ADJR re non-statutory executive powers
  - can review legality of subordinate legislation (not reviewable under the ADJR)
  - does not matter whether the ADM is ‘an officer of the Cth’ (that limit is on s 75 (v) only)

**NOTE:**

- s39B(1): general judicial review of administrative decisions BUT NOT POSSIBLE to challenge DL validity directly.
- s39B(1A)(c): avenue to challenge validity of Delegated Leg directly.

**MODERN TREND: Constitutional Judicial Review**

- **HCA has ‘rebadged’ the s 75(v) remedies:** no longer ‘common law’ avenue through prerogative writs: now ‘constitutional writs’ and ‘constitutional injunction’, [*Refugee Review Tribunal; Ex Parte Ala* [2000] 204 CLR 82
- Another key broadening of JR jurisdiction is s 75 (iii)
  - HC has been prepared to hear JR application under this section (as opposed to s 75(v)) , and grant remedy although **no jurisdictional error** was shown (ie requirement for s75(v)).
  - The core case is *Project Blue Sky*, and one of the core reasons was the way the court read ‘The Commonwealth’ under s 75 (iii) to include government owned corporations (avoiding limits of ‘officer’ in s 75(v)).

NOTE: Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-3

- ‘Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it **cannot deprive this court of its Constitutional jurisdiction** to enforce the law so enacted’

**NSW: COMMON LAW JURISDICTION****State Courts**

- State Supreme Courts
  - Common law jurisdiction as superior courts of record
    - **s 23 Supreme Court Act 1970 (NSW):** the court ‘shall have jurisdiction which may be necessary for the administration of justice’
    - **s 69 Supreme Court Act 1970 (NSW):** Proceedings in lieu of writs.
  - Some states have an equivalent to ADJR Act but NSW doesn’t
  - NSW therefore has **common law** judicial review
- Note: High Court also has appellate jurisdiction – can hear appeals from state Supreme Courts (on JR of state government acts/decisions) and Federal Court (on JR of federal government)

### s 23 Jurisdiction generally

- The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

### s 69 Proceedings in lieu of writs

- (1) Where formerly:
  - (a) the **Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari** or of any other description, or
  - (b) ....then, after the commencement of this Act:
  - (c) **the Court shall continue to have jurisdiction to grant that relief or remedy** or to do that thing; but
  - (d) shall not issue any such writ, and
  - (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
  - (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.
- (2) ....
- (3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.
- (4) For the purposes of subsection (3), **the face of the record includes the reasons** expressed by the court or tribunal for its ultimate determination.
- (5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

### ADJR (Statutory) JURISDICTION

- ADJR Act jurisdiction applies to Federal Court & Federal Circuit Court (see s 8)
- BUT NOT TO: High Court; NSW Supreme Court

### **Administrative Decisions Judicial Review Act (Cth) (1977) ('ADJR')**

- The *ADJR Act* was passed as a key component of the 'New Administrative Law'.
- Key features:
  - A single procedure for applying for an order for review
  - Shifted focus of JR law from remedies to grounds,
  - Rethinking what powers courts have with regards to applications for an order of review (s 16) (ie remedies)
  - A detailed statement of grounds of review (ss 5 and 6)

### **s 8 Jurisdiction of Federal Court and Federal Circuit Court**

- (1) The Federal Court has jurisdiction to hear and determine applications made to the Federal Court under this Act.
- (2) The Federal Circuit Court has jurisdiction to hear and determine applications made to the Federal Circuit Court under this Act.

**s 5 Applications for review of decisions**

(1) A person who is aggrieved by **a decision to which this Act applies** that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds: ...

**s 6 Applications for review of conduct related to making of decisions**

(1) Where a *person has engaged, is engaging, or proposes to engage, in conduct* for the purpose of making **a decision to which this Act applies**, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the conduct on any one or more of the following...

**s 7 Applications in respect of failures to make decisions**

(1) Where:

- (a) a person has a duty to make **a decision to which this Act applies**;
- (b) there is no law that prescribes a period within which the person is required to make that decision; and
- (c) the person has failed to make that decision;

a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

**NOTE:**

- ADJR Act jurisdiction restricted to the FC and FCC (s 8)
- To access ADJR jurisdiction at FC or FCC, applications can be brought to review in circumstances where:
  - 'a decision to which this Act applies' (s 5);
  - proposed and actual conduct engaged in for the purpose of making 'a decision to which this Act applies' (s 6), and
  - a failure to make a 'decision to which this Act applies' (s 7).

**DECISION**

What constitutes a Decision?: **s 3** Interpretation

(1) In this Act, unless the contrary intention appears: ... **decision to which this Act applies** means a **decision** of an **administrative character** made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

- (a) **under an enactment** referred to in paragraph (a), (b), (c) or (d) of the definition of *enactment*, or
- (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of *enactment*;

**other than:** (c) a decision by the **Governor-General**; or  
(d) a decision included in any of the classes of decisions set out in **Schedule 1**.

### **s3(1): ADJR test for jurisdiction**

1. So, the ADJR Act test for jurisdiction requires there be a 'decision to which this Act applies', which is defined in s3(1) as requiring:
  1. A decision
  2. Of an administrative character
  3. Made under an enactment (further defined in s3(1))
2. Note: some other decisions are explicitly excluded in Schedule 1, and decisions of the GG.
3. The High Court in *Griffith v Tang* warn against treating these as discrete requirements (ie read ADJR Act as a whole) BUT each element has nevertheless involved important thinking about our key theme of separation of powers

### **S 3 (1) : Important Exemptions**

1. Decisions made by Governor General
2. Decisions listed under Schedule 1 of the ADJR are also exempt like tax assessment, criminal process, migration, security and defence

NOTE: although they do not fall under the ADJR jurisdiction, s 75(v)/s 39B jurisdictions remain open

'decision' vs 'conduct'

#### *Australian Broadcasting Tribunal v Bond* (2.4.8C)

- Were preliminary findings in a statement called 'Decision on the Facts' a decision
- A decision must be the final or operative decision which is determinative of the issue for consideration.
  - Except: if the statute expressly provides for an interim decision then this intermediate decision is also a 'decision under an enactment' and can also be a reviewable decision under the ADJR Act.
- A decision must be a substantive determination.
  - a 'decision' does not include 'conduct engaged in for the purpose of making a decision' under the ADJR Act (s 6).
  - 'Conduct' was read as the procedures along the way, the conduct of proceedings, not intermediate conclusions reached in the course of making a final substantive decision.
- So the HC in *Bond* read the scope of 'decisions' narrowly. Reasoning has 2 elements. Why? Because of section 6 ...
- 'Conduct' said to be 'an essentially procedural concept which focuses on actual conduct of proceedings and NOT on 'intermediate conclusions reached en route to final substantive decisions.'
- "It would be strange if conduct were to extend generally to unreviewable decisions which are in themselves no more than steps in the deliberative process and reasoning"

