

## WEEKS 1-9

# JUDICIAL REVIEW

### Judicial Review

Application by an individual who has been affected by a decision, who asserts that legal errors were made and are applying to a court in relation to those erroneous legal decisions. If Court finds an error, they remit the decision back to the original decision-maker.

### ELEMENTS

- 1 Parties
- 2 Jurisdiction
- 3 Common Law or Statutory
- 4 Standing
- 5 Grounds
- 6 Remedies

## 1. PARTIES?

State the parties. Identify who they are.

## 2. JURISDICTION?

	Commonwealth Legislation	State Legislation
Jurisdiction	Federal	State
Act Applies	<b>ADJR Act</b>	<b>Judicial Review (JR) Act</b>
Explanation	At the federal level, the ADJR Act confers jurisdiction on the Federal Court and Federal Circuit Court to undertake review of 'a decision to which the Act applies' and 'conduct for the purpose of making a decision to which this act applies' – <b>ss 5, 6 ADJR</b>	At the state level, jurisdiction is conferred by the Judicial Review Act on Qld Supreme Courts  Schedule 1: Decisions for which reasons need not be given are NOT subject to judicial review

## 3. COMMON LAW OR STATUTORY JR?

If there is a privative clause, or if there is an issue establishing standing, it will be Common Law. Otherwise, it will be Statutory.

## Considered

- 1 Statutory JR (Preferred)
- 2 Common Law JR

### 1. STATUTORY JR (PREFERRED)

Benefits	Streamlines & simplifies procedure for instituting judicial review of administrative actions	
	Codifies the grounds of judicial review recognised under Common Law	
	Plain English drafting of ADJR and JRQ	
	Statement of reasons (s 13 ADJR Act/Pt 4 JR Act) – enables potential applicants to assess their case; improves administrative decision-making; allows each party to identify the basis on which the original decision was made which allows easy identification of potential errors made in good faith. There is no common law right to reasons: Wingfoot	
Requires either:		
Decision	A person may apply for statutory review if they are a person aggrieved by a ‘decision to which this Act applies’	s 5(1) ADJR Act s 20(1) JR Act
Conduct	A person may apply for statutory review if they are a person aggrieved by conduct of a person who has engaged in conduct for the purpose of making a ‘decision to which this act applies’	s 6(1) ADJR Act s 21(1) JR Act
“Decision to which this Act applies”	Decision (or conduct engaged in) of an administrative character, made under an enactment, other than a decision of a Governor General	s 3 ADJR Act s 4 JR Act
Person Aggrieved	Person (including corporation) whose interests are adversely affected by the decision, conduct, or making a report	s 3(4) ADJR s 7 JR Act
	Incorporates basic common law/equitable rules as to standing	AIME

**\*GG DECISIONS NOT REVIEWABLE UNDER CTH, BUT QLD GOVERNOR'S DECISIONS ARE REVIEWABLE UNDER JR\***

## Elements

1	Decision (Alternate)
2	Conduct (Alternate)
3	Of an administrative character
4	Made under an enactment
5	Not otherwise excluded

### 1. DECISION (ALTERNATE)

YES	Making, suspending, revoking or refusing to make <b>an order, award or determination;</b>	s 3(2) ADJR s 5 JR Act
YES	Giving, suspending, revoking or refusing to give a <b>certificate, direction, approval, consent or permission;</b>	
YES	Issuing, suspending, revoking or refusing to issue a <b>licence, authority or instrument;</b>	
YES	Imposing a <b>condition or restriction</b>	
YES	Making a <b>declaration, demand or requirement;</b>	
YES	Retaining, or refusing to deliver up, an <b>article;</b> or	
YES	Doing or refusing to do [any other act or thing/anything else];	
NB	Reference to a failure to make a decision shall be construed accordingly.	

## FINAL AND OPERATIVE?

Decision must generally, but not always, be final and operative			<b>ABT v Bond</b>
<b>NO</b>	Step along the way leading to decision – unless:		
	<b>YES</b>	Step is a condition precedent for making final decision	
	<b>YES</b>	Statute specifically requires making of a finding or ruling on this interim point	
	<b>Facts</b>	<p>Bond had interest in Ch 9. Lots of legal action against Bond concerning corruption. s 88(1) Broadcasting Act: Tribunal may suspend or revoke licence where tribunal satisfied licensee is not fit and proper person. Bond was not a fit and proper person.</p> <p>So had to determine whether fit and proper person, and then after this, could decide to suspend or revoke licence. Bond wanted to review that companies were not fit and proper, and that he would not be fit and proper to hold a licence.</p>	
	<b>Held</b>	Decision to revoke licence (final decision), and whether he was a fit and proper person (step along way), could both be challenged, as both within legislation. However, legislation focussed on whether licensee was fit and proper (Ch 9) not whether person with interest in licence was fit and proper (Bond). Therefore it couldn't be reviewed.	
	<b>NB</b>	Narrow distinction only within ADJR	

## REPORT OR RECOMMENDATIONS AS DECISIONS? (CONDITION PRECEDENT)

<b>YES</b>	<p>Where:</p> <ul style="list-style-type: none"> <li>Statute provides for 'report' or 'recommendation' to be made before decision; and</li> <li>That statute (or another law) provides for making of (final) decision; and</li> <li>Statute creating report/recommendation making power' must specify making of 'report' etc is <b>condition precedent</b> to valid exercise of power to make final decision</li> </ul>	<b>s 3(3) ADJR; s 6 JR Act; Ross v Costigan</b>
------------	---	---

## ADDITIONAL CASES (NOT IN LECTURES) – FINAL & OPERATIVE?

Where public officials are authorised to provide guidance, opinions or advice		
YES	Written advice from Commissioner that he considered them ineligible for tax-exempt status <b>sufficiently substantive to constitute reviewable decision as denied applicant a benefit previously conferred</b> by commissioner's past advice	AWTA v FCT
NO	Commissioner provided written opinion certain payments not deductible. Decision not reviewable as hadn't been applied to formal assessment.	Pegasus v FCT
NO	Draft rulings issued by Commissioner at party's request not reviewable as subject to further consideration by Commissioner	Barkworth Olives Mgmt
NO	Commissioner's decision to vote against motion at meeting of creditors was not reviewable because it did not, in itself, determine anything	Hutchins v DFCT
Decision part of series of related steps		
YES	Decision to raid premises reviewable. Although part of broader investigation into appellant, different from other decisions because directly & immediately impacted appellant's legal right to quiet enjoyment of property. Thus, sufficiently final or operative.	Salerno v NCA
Decision effectively instigates judicial proceedings		
NO	Decision to commence proceedings doesn't affect legal rights and isn't reviewable	Oates v AG
YES	Decision to lift statutory time limitation affects legal rights & is reviewable.	
YES	Refusal to refer complaint to DPP. It was a final determination of applicant's complaint even though ultimate decision to prosecute lay with DPP (after investigation at AFP's discretion).	Schokker v FCT
Staged processes of referral and report established by Statute		
NO	Minister's referral to a committee for inquiry generally not final or operative	Edelstein
	<div>BUT</div> May be final where intermediate report has immediate and obvious career consequences for public officials against whom adverse findings are made <i>(Report regarding workplace harassment referred to Minister had immediate and obvious career consequences for public officials against whom adverse findings made)</i>	Kelson
NO	Commencing an investigation into a matter insufficiently substantive to be reviewable as doesn't determine anyone's rights	Harris v Bryce
NO	Conclusions reached in process of conduct investigation leading to final decision not reviewable	Von Stalleim
	<div>BUT</div> Can be where legislation expressly provided for it	Cth HREOC

<b>YES</b>	Urban development – decision to amend tscheme before proposing to GG because was final decision required of local authority and specifically required by legislation	<b>RMS v Noosa SC</b>
<b>NO</b>	Urban development – decision to propose amendment not sufficiently substantive to be reviewable.	<b>Redland SC v Bushcliff</b>

## 2. CONDUCT FOR PURPOSE OF MAKING DECISION (ALTERNATE)

Conduct	Administrative activity proceeding decision revealing flawed administrative process		Bond
	Refers to procedural rather than substantive aspects (interim steps) of decision making		
	Note whether it is or is not conduct		
Examples	YES	Failure by tribunal to take evidence from witness	Courtney
	YES	Denial of request for adjournment	
	YES	Referral of complaint to committee for investigation	Edelstein
	NO	Tribunal's finding Bond wasn't fit and proper was not conduct engaged in, rather merely interim step taken to reach final decision	Bond
	NO	Objection to decision Commissioner had jurisdiction to hear matter halfway through unfair dismissal case. If objected at outset, it could have been.	Port of Devonport
For purpose of making decision	Conduct must have been engaged in for purpose of making a decision		s 6 ADJR; s 21(1) JR
	NB	No need for person/body engaged in conduct to be same person/body who makes final decision	Chan v MIEA

Refer to the above notes on 'decision' to determine whether it is an applicable decision

## 3. OF AN ADMINISTRATIVE CHARACTER

Only decisions of administrative character are reviewable	<b>ss 3, 5 ADJR ss 4, 20 JR</b>
It is administrative if it is not legislative or judicial	<b>GU v Tang</b>

**IF RELEVANT – CONSIDER WHETHER DECISION IS INSTEAD:**

<b>1</b>	Legislative
<b>2</b>	Judicial
<b>3</b>	Managerial

**BUT EVEN IF NOT A DEBATE – GO THROUGH MULTI FACTORIAL TEST?**