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TOPIC 3 – JURISDICTION OF THE COURTS

Fundamental Question: Does the Court have jurisdiction?

- **State** legislation or a **State DM: State Courts**
- **Cth** legislation or a **Cth DM: Federal Court or High Court**
 - **Federal Courts:** Governor-General; Prime Minister/Cth minister; Cth Department; Agency/Tribunal/Commission est. by Cth statute, exercising powers conferred by Cth statute; private entity doing something bearing on powers of decisions conferred in Cth Statute (e.g. IMR of RSA in **M61/2010E**).
 - **NSW Courts:** Governor; Premier/NSW Minister; NSW Department; Agency/Tribunal/Commission est. By NSW statute, exercising powers conferred in NSW statute; private entity doing something bearing on powers of decision conferred in NSW law; private entity doing something in exercise of ‘private’ powers that is arguably a ‘public function’ (and does not bear on powers of decisions in Cth law).

1. State and Territory Courts: No ADJR Act → straight to the **common law (inherent) supervisory jurisdiction of the Supreme Court:**

- **Supreme Court Act 1970 (NSW):**
 - Section 23: The Court shall have **all jurisdiction** which may be necessary for the **administration of justice in NSW**.
 - Section 69: The Court has jurisdiction to grant any relief by way of **writ**, whether of **prohibition, mandamus, certiorari or of any other description**.
 - **Uniform Civil Procedure Rules 2005** – Rule 59.9: Where JR proceedings are filed in relation to the decision of a ‘public authority’, the Court may order the authority to comply with a request by the Plaintiff to give a statement of reasons for the decision.

‘Public’ DM powers and CL JR: Judicial Review jurisdiction extends to the following:

- **Public entities exercising DM powers conferred by statute;**
- **Public entities exercising powers conferred by prerogative** – **Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 15 FCR 274; State of Victoria v The Master Builders’ Association of Victoria [1995] 2 VR 121.**

- **Private entities exercising statutory functions:** *Chase Oyster Bar*.
- **Private entities performing functions that have a legal effect in DM under statute** – e.g. *M61/2010E* – i.e. corporate DM is ‘knitted into’ statutory power (but contra: *NEAT Domestic Trading*).

2. High Court: Constitutional Writs: s 75(iii) and (v) – Cth Constitution:

→ Section 75 Original Jurisdiction of the High Court

- ‘In all matters...
 - (iii) in which the **Commonwealth, or a person suing or being sued on behalf of the Commonwealth is a party;**
 - (v) in which a **writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth...**
- [in all those matters] the High Court shall **have original jurisdiction**’.

Plaintiff M61/2010E v Commonwealth of Australia (2010) 243 CLR 319 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ): Did the High Court had jurisdiction to review an IMR decision under s 75?

→ Held [51]: The **contractor** engaged to conduct the IMR was not ‘an officer of the Cth’. But this only means that ‘a claim for mandamus, prohibition or injunction against those persons would not, standing alone, found the original jurisdiction of this Court under s 75(v) of the Constitution.’ Jurisdiction was found in the following ways:

- Section 75(iii): Where the Cth, or a person being sued on behalf of the Cth, is a party.
- Section 75(v): Where mandamus, prohibition or injunction are sought against an ‘officer of the Cth’ (i.e. a Minister; departmental officer; Secretary of the Dept).
- Or, s 75(i): Matters arising under a treaty (Refugees Convention; Refugees Protocol).

→ ‘**Leave for another day**’ whether an ‘**independent contractor**’ may fall within the expression ‘**officer of the Cth**’ in s 75(v) in circumstances where ‘**some aspect of the exercise of statutory or executive authority of the Cth has been contracted out**’.

Section 75(v): ‘Officer of the Cth’ = Federal judges (but **not High Court judges:** *Re Carmody*; *Ex parte Glennan* (2003) 198 ALR 259 at [6], **nor State judges exercising federal jurisdiction:** *R*

v Murray and Cormie; Ex parte Cth (1916) 22 CLR 437); includes Ministers and delegates; and public servants (*Church of Scientology v Woodward* (1982) 154 CLR 25 at 65).

→ *Plaintiff M61/2010E* above is a good example of how to avoid the ‘officer of the Cth’ issue if the Court has jurisdiction on other bases.

- Section 75(v) ‘was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Cth from exceeding federal power’: *Bank of NSW v Cth* (1948) 76 CLR 1 at 363 (Dixon J).
- It is ‘a means of assuring to all people affected that officers of the Cth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them’: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (plurality).

3. Federal Court

1. ***Always try the ADJR Act first***: more flexible; provides reasons; greater scope for remedies.
2. If unsuccessful under the ADJR Act, then fall back on s 39B of the *Judiciary Act*.

Federal Court – Statutory Extension of Jurisdiction

Judiciary Act 1903 (Cth): s 39B – Original jurisdiction of the Federal Court of Australia

(1) ...the original jurisdiction of the FCA includes jurisdiction with respect to any matter in which a writ of mandamus, a prohibition or an injunction is sought against an officer of the Cth

(1A) The original jurisdiction of the FCA also includes any matter:

- (a) In which the Cth is seeking an injunction or a declaration; or
- (b) Arising under the Const., or involving its interpretation; or
- (c) Arising under any laws made by the Parliament, other than in a matter in which a criminal prosecution is instituted or any other criminal matter.

→ **Construed to be as wide as s 75(v)**: *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

Judiciary Act 1903 (Cth): s 44 – Remittal of matter by High Court to other courts

(1) **Any matter** other than a matter to which subsection (2) applies that is at any time pending in the High Court, whether originally commenced in the High Court or not, or any part of such a matter, **may**, upon the application of a party or of the High Court’s own motion, **be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties**, and, **subject to any directions of the High Court**, further proceedings in the matter or in that

part of the matter, as the case may be, shall be as directed by the court to which it is remitted.’

- (2) Where a matter referred to in paragraph **38(a), (b), (c) or (d)** is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, **remit the matter**, or any part of the matter, **to the Federal Court of Australia or any court of a State or Territory**.
- (2A) Where **a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth**, is a party at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, **remit the matter, or any part of the matter, to the Federal Court of Australia**.
- (3) Where the High Court remits a matter, or any part of a matter, under subsection (2) or (2A):
 - (a) that court has jurisdiction in the matter...; and
 - (b) subject to any directions of the High Court, further proceedings in the matter, or in that part of the matter, as the case may be, shall be as directed by that court.
- (4) The High Court may remit a matter, or any part of a matter, under this section without an oral hearing.

ADJR Act: Decisions Subject to Review – ONLY APPLIES TO FEDERAL JURISDICTION

Section 3(1): ‘decision to which this Act applies’ means a decision of an administrative character made under an enactment other than a decision of the G-G or a decision included in Sch 1.’

- **Note:** Delegated legislation and regulations **cannot be challenged** – they are not decisions of an ‘administrative character’.
- **Do everything possible to get under the ADJR ACT:** The remedies are more flexible, reasons are provided, and there is no requirement to prove judicial error to get certain remedies (i.e. a decision to be remade).

What is a ‘decision’?

ADJR Act s 3(2) In this Act, a reference to the making of a **decision** includes a reference to:

- (a) **making, suspending, revoking or refusing to make an order, award or determination;**
- (b) **giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;**

- (c) **issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;**
- (d) imposing a **condition or restriction;**
- (e) making a **declaration, demand or requirement;**
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing;

and a reference to a failure to make a decision shall be construed accordingly.

(3) Where **provision is made by an enactment** for the making of a **report or recommendation** before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation **shall itself be deemed, for the purposes of this Act, to be the making of a decision.**

5) A reference in this Act to **conduct** engaged in **for the purpose of making a decision** includes a reference to the doing of any act or thing **preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation.**

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321: The ABT found Bond guilty of improper conduct and that he (and his company) would not be a 'fit and proper person' to hold a commercial broadcasting licence, notwithstanding that he, as a natural person, was not eligible to hold such a licence. The issue: Were the ABT's findings actually **decisions** that were reviewable by the Court under the ADJR Act?

→ Mason CJ held: The decision to give the licence to the company – but not the finding about Bond himself – was reviewable under the ADJR Act.

- **ABT finding on Bond – not a decision:** it was not provided for by the Act, and was merely a '**step along the way**' to the final decision.
- ABT finding on the Licensee company **was** a 'decision of an administrative character' made 'under an enactment' (s 88(2)(b)(i)) of the *Broadcasting Act*.

→ **Principle:** decision = '**final and operative decision, not a step along the way**'. At 335: '...meaning must be determined by reference to the text, scope and purpose of the statute'.

→ *ADJR Act* s 6 (Conduct) covered **procedural issues** – i.e. not the ABT making findings on Bond. It applies to action taken for the purpose of making a reviewable decision i.e. proceedings before decisions.

- **Effect: restricted** scope of the *ADJR Act* – a ‘decision’ must be ‘final or operative and determinative’ and ‘substantive’ (i.e. not procedural/conduct). The rationale is grounded in public policy: to allow review before a final decision would be to fragment the decision.

SUMMARY: The **Bond** test:

- An intermediate finding is only reviewable if:
- It is provided for in an enactment, and
 - If it would resolve an important substantive issue
- An essential quality of a ‘decision’ under s 5 is that it is a **substantive determination with the quality of finality**.

Reports and Recommendations: not ‘decisions’ unless statute provides for the making of a report or recommendation before a decision is made: s 3(3) *ADJR Act*.

- This does not simply cover all acts prior to making a decision – this is covered by ‘conduct’.
- **Note:** *Judiciary Act* s 39B fills some gaps – it is possible for applicants to use both reports and recommendations, and conduct.

Bond’s Legacy: Prior to *Bond*, the FCA had indicated that ‘decision’ could be taken broadly, and that the problem of premature applications could be controlled through the Court’s broad discretion to refuse a remedy: s 16 *ADJR Act*.

- The existence of alternative sources like s 39B of the *Judiciary Act* has rendered much of the *ADJR Act* jurisprudence moot, namely, since s 39B exercises common law jurisdiction.

Is the decision of an ‘administrative character’?

- Important to distinguish between legislative/judicial character and administrative character:
ADJR Act applies to administrative decisions:

Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee (2007) 163 FCR 451
(Branson J): ‘Orlistat’ was removed from the ‘poisons/medicine’ standard meaning that it could

not be directly advertised to consumers. The issue: Was the decision to put the drug on the list a decision of an 'administrative character'?

- Held: The decision was 'legislative' in character. This was a decision about determining the content of rules of general application, affecting all companies uniformly.
 - But, while the ADJR Act could not apply, the Court still had jurisdiction under s 39B of the *Judiciary Act*. The case could still be reviewed.
- Citing *Commonwealth v Grunseit* (per Latham CJ): 'The general distinction between legislation and the execution of legislation is that **legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.**'
- The following indicate a '**legislative character**' i.e. no ADJR Act:
 - Decisions that determine the **content of rules**
 - If there is parliamentary control of the decision
 - If there was public consultation
 - If there is binding legal effect i.e. it directly affects the operation of other statutory provisions
 - Note: Regulations are legislative
- The following indicate an '**administrative character**' i.e. ADJR Act applies:
 - Application of rules to a particular case
 - Provision for merits review (e.g. AAT)
 - **NOTE:** Decisions of the **Attorney-General** are not reviewable under the ADJR Act, but they **are reviewable under s 39B**.

Is the decision of an administrative character made 'under an enactment'?

General Newspapers Pty Ltd v Telstra (1993) 117 ALR 629 (Davies and Einfeld JJ (Gummow J agreeing)): GN sought orders of review 'with respect to alleged conduct or decisions on the part of Telecom. The actions of T had the effect that **contracts** were not put out to tender, and that Hannanprint was not afforded an opportunity to quote a competitive price.' The ADJR Act was relied upon. The issue: Was this a decision made 'under an enactment'?

- Held at 633: 'In our opinion, there was no conduct or decision on the part of T which was amenable to an order under the ADJR ACT...**[ADJR] review is not of acts taken under the general law applicable in the community, but of acts which have statutory effect because of the provisions of a federal enactment.**'

- A ‘decision taken under a federal enactment’ is ‘**an action or a refusal to act which, by virtue of the statute, affects legal rights and/or obligations**. A step which has no such effect is not a reviewable decision for the purposes of s 5 of the ADJR Act. And conduct is not reviewable under s 6 of the ADJR Act unless it is ‘conduct for the purpose of making a decision to which this Act applies.’
- The statute in this case only conferred the **capacity to contract** – at 636: ‘A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute [*Corporations Act*]. That is to say, the contract itself was not ‘made under an enactment’.

Griffith v Tang (2005) 221 CLR 99: Was the **decision to exclude T from a PhD program** a decision of an administrative character made **under an enactment**? (Here, under the Qld equivalent of the ADJR Act.) Gummow, Callinan and Heydon JJ held:

- At [89]: ‘The determination of whether a decision is made ‘**under an enactment**’ involves **two criteria**: first, the decision must be **expressly or impliedly required or authorised by the enactment**; and, secondly, the decision must itself **confer, alter or otherwise affect legal rights or obligations**, and in that sense the decision must **derive from the enactment**.’
 - An ‘administrative decision’ might **fail this test** if (i) it is **not ‘required or authorised by an enactment’** [78]; (ii) it **derives its capacity to affect legal rights and obligations from a ‘non-statutory source’** (e.g. contract/private law source) [81]; (iii) it **lacks ‘capacity to affect legal rights and obligations’** [80].
- [96]: ‘The decisions of which the respondent complains were **authorised, albeit not required, by the University Act**.’ The Committee’s existence and powers came from the Act, but decisions were not ‘made under an enactment’ since ‘**the decisions did not affect legal force and obligations. They had no impact upon matters to which the University Act gave legal force and effect. The respondent enjoyed no relevant legal rights and the University had no obligations under the University Act with respect to the course of action the latter adopted towards the former.**’

SUMMARY – Test for whether an administrative decision is ‘under an enactment’:

1. The decision must be **expressly or impliedly requires or authorised by the enactment**;
and

2. The decision must itself **affect legal rights or obligations** and, in that sense, the decision must derive from the enactment.

NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277: The appellant was a competitor of AWBI, who were given the sole right to export wheat under the *Wheat Marketing Act 1989*. They complained that the AWBI contravened the *Trade Practices Act 1974* (Cth). The issue: Were AWB's refusals of consent decisions made '**under an enactment**'?

- Gleeson CJ contended that the refusal of the AWBI to give them approval was (at [9]) a 'decision of an administrative character **under an enactment**, and that it involved an improper exercise of power, being an exercise of a discretionary power in accordance with a rule of policy without regards to the merits of the case (*ADJR Act* ss 5(2)(f) and 6(2)(f).'
- McHugh, Hayne and Callinan JJ at [64]: '...neither a decision of AWBI not to give approval to a consent to export, nor a failure to consider whether to give that approval, was open to judicial review under the *ADJR Act* or to the grant of relief in the nature of prohibition, certiorari or mandamus.'
 - The AWB had its authority under its **articles of association and company law**. The company does **not derive its source of power from the Act**.
- Kirby J (dissenting) at [133]: 'In so far as private corporations are entrusted under a statute with public functions affecting others, they are thereby rendered liable to administrative law remedies and, depending upon the terms of the legislation, quite possibly to the writs provided by the Constitution.'
 - He held that the 'special statutory position' of the AWBI and that the decisions were 'required and made effective' by the Act meant they were made 'under an enactment'
- Kirby (dissenting) in **Griffith v Tang**: Believed **NEAT Trading** (below) marked a 'wrong turn'
 - Kirby's argument is for judicial review to hold government power accountable – in doing so, he looks at the plain language of the statute as to whether Tang was a 'person aggrieved' and her 'interests' were affected under the Act. '
 - At [104]: 'The gloss favoured by the majority is contrary to the text and the purposes of the Review Act. Properly construed, that Act is applicable to this case. The University's appeal should be dismissed.'

SUMMARY of *ADJR Act* Limits

1. 'Decision': must be 'final and operative' – not a step along the way (*Bond*)
2. 'Administrative Character: legislative decisions and judicial decisions are not decisions of an 'administrative character' (*Roche*)
3. 'Enactment': Decisions under **contracts** or that are made according to **consensual agreements** are not made under an enactment (*Griffith; General Newspapers*); and decisions made under legislation but by companies, where the **primary source** is articles of association, are not made under an enactment (*NEAT*). The **primary source** must be addressed.

Public/Private Distinction

Question: Can the Court review decisions of private entities/institutions that exercise public functions?

→ **Note:** Telstra, the AWB and Macquarie University were all public institutions – but the court used 'enactment' to avoid the issue.

Forbes:

- Judicial review was allowed because the public club was applying rules that impacted the public significantly; and it was allowed because Forbes was not afforded procedural fairness
- Judicial review is allowed if the private institution/body is exercising/applying rules that affect the public and the applicant has not been afforded procedural fairness.

R v Panel on Take-Overs: Note: not accepted in Australian courts – it is preferable to avoid the issue and resolve it in other ways. The issue: Did the Court's judicial review jurisdiction extend to supervision of the takeover panel?

- Held: Judicial review was available because the Panel:
 - Carried out public functions
 - Performed a public duty
 - The government used the Panel as a form of regulation
 - Had a duty to act judicially
 - Had statutory powers of the Department of Trade and the Bank of England
 - Gave procedural fairness
 - The rights of citizens were indirectly affected by the Panel's decisions.