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TOPIC 3: JURISDICTION

STATE AND TERRITORY COURTS

RELEVANT LEGISLATION

Supreme Court Act 1970 (NSW) s 23 – Jurisdiction generally

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

Supreme Court Act 1970 (NSW) s 65 – Order to fulfil duty

- (1) The Court may order any person to fulfil any duty in the fulfilment of which the person seeking the order is personally interested.
- (2) The Court may, on terms, make an interlocutory order under subsection (1) in any case where it appears to the Court just or convenient so to do.
- (3) The powers of the Court under this section are in addition to any other powers of the Court.

Supreme Court Act 1970 (NSW) 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) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,
 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) Subject to the rules, this section does not apply to:
 - (a) the writ of habeas corpus ad subjiciendum,
 - (b) any writ of execution for the enforcement of a judgment or order of the Court, or
 - (c) any writ in aid of any such writ of execution.
- (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.

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.

HIGH COURT: CONSTITUTIONAL WRITS

RELEVANT LEGISLATION

Constitution s 75 – Original jurisdiction of 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;
- the High Court shall have original jurisdiction

Judiciary Act s 44 – Remittal of matters by High Court to other courts

(3) Where a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party 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.

RELEVANT CASE LAW

Plaintiff M61

Plaintiff M61 v Cth [2010] HCA 41

Principle

1. Independent contractors exercise outsourced statutory/executive authority of the Commonwealth may be 'officers of the Commonwealth' pursuant to s 75(v), but this has been left open by the High Court.
2. Independent contractors that do not exercise Cth authority are not 'officers of the Commonwealth'.

Facts

- Two people 'offshore entry persons' and unlawful non-citizens as per s 46A(1) *Migration Act*, barring them from applying for a visa.
- However, s 46A(2) provided the Minister with non-delegable, non-compellable power to lift the bar.
- Firstly, an assessment was conducted by departmental officers.
- The merits appeal process involved a recommendation being provided by an independent contractor, Wizard People Pty Ltd, before the decision was made by the Minister.
- The two people were not assessed to be refugees.

Issue: was Wizard People P/L an 'officer of the Commonwealth' such that jurisdiction could be found under s 75(v) of the *Constitution*?

Result: no jurisdiction under s 75(v) but through s 75(iii).

Held/Reasoning of the Full Court [50]

Regarding the specific independent contractor within the facts

- The only function of the reviewer was to make a recommendation. Any decision to permit the application would be made by the Minister. Any decision to remove a claimant would be made by a departmental officer'.
- 'It may be accepted that neither the contractor [Wizard People], nor any of the specific persons engaged by the contractor to perform the services it had agreed to provide, is an officer of the Commonwealth'.

Regarding independent contractors generally

- Did not answer the question of whether an 'independent contractor' falls within 'an officer of the Commonwealth' in s 75(v) in circumstances where some aspects of the exercise of statutory or executive authority of the Commonwealth has been contracted out.

FEDERAL COURT: JUDICIARY ACT

RELEVANT LEGISLATION

Judiciary Act s 39B – Original jurisdiction of the FCA

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

FEDERAL COURT: ADJR ACT

RELEVANT LEGISLATION

ADJR Act – s 3(1) Interpretation

'decision to which this Act applied' 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):

- under an enactment...**; or
- by a Commonwealth authority or an officer of the Commonwealth** under an enactment...; other than:
- a decision of the Governor-General**; or
- a decision included in any of the **classes of decisions set out in Schedule 1**.

'**enactment**' means:

- an Act other than:
 - Cth Places (Application of Laws) Act 1970*; or
 - NT (Self-Government) Act 1978*; or
 - An Act or part of an Act that is not an enactment because of s 3A (certain legislation relating to ACT)*; or
 - An Ordinance of a Territory other than the ACT or NT; or
 - An **instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance**, other than any such instrument that is not an enactment because of s 3A; or
 - Any other law, or part of a law, of the NT declared by the regulations, in accordance with s 19A, to be an enactment for the purposes of this Act
- And for the purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment.

ADJR Act – s 3(3) Interpretation

Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of 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.

ADJR Act – s 3(5) Interpretation

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.

ADJR Act – excluded decisions of Schedule 1

- Decisions under: *Fair Work Act*, *ASIO Act*, *Intelligence Services Act*, *Inspector-General of Intelligence and Security Act*, *Telecommunications (Interception and Access) Act*, *Telephonic Communications Act*.
- Privative clause decision within s 474(2) and s 5E of the *Migration Act*.

ADJR Act – s 5 Application for review of decisions

- (1) A person who is aggrieved by a decision to which this Act applies...may apply to the Federal Court or Federal Circuit Court for order of review in respect of that decision on any one or more of the following grounds:
- Breach of rules of natural justice;
 - Procedures required by law not observed;
 - Decision-maker did not have jurisdiction to make decision;
 - Decision not authorised by enactment purported to be made upon;
 - Improper exercise of power;
 - Error of law, whether or not it appears on the record;
 - Decision induced or affected by fraud;
 - No evidence or other material to justify making of decision;
 - Otherwise contrary to law.

ADJR Act – s 6 Applications for of conduct related to making a decision

- (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...for an order of review in respect of the conduct on any one or more of the following grounds (as above)

ADJR Act – s 7 Applications in respect of failures to make decisions

1. Where:
- A person has a duty to make a decision...;
 - There is no law that prescribes a period within which the person is required to make that decision; and
 - The person has failed to make that decision
- A person aggrieved by the failure...may apply...for an order of review in respect of the failure to make a decision on the ground that there has been unreasonable delay...

CASE LAW: **BOND CASE – ‘DECISION’**

Bond case (1990) <i>ABT v Bond</i> (1990) 170 CLR 321	
Principle	<ol style="list-style-type: none"> Decision must resolve an actual substantive issue, must be final or operative and determinative, rather than a mere step along the way. Intermediate findings only reviewable if provided for in an enactment as ‘essentially preliminary’ and resolves a substantive issue.
Facts	<ul style="list-style-type: none"> <i>Broadcasting Act 1942</i> (Cth), s 88(2): the Australian Broadcasting Tribunal ‘may suspend or revoke a commercial licence if (b) the Tribunal is satisfied that the licensee is no longer a fit and proper person to hold the licence. Licenses were held under the licensee companies. <ol style="list-style-type: none"> Bond was not a fit and proper person to hold a broadcasting licence; His licensee companies were not fit and proper persons either.
Result:	(1) was <i>not</i> a reviewable decision; (2) was a reviewable decision.
Held/Reasoning, Mason CJ, Brennan and Deane JJ concurring. <u>‘Decision’ under ADJR Act, s 3</u>	<ul style="list-style-type: none"> ‘Decision’ connotes a determination for which provision is made by or under a statute, one that generally is substantive, final and operative’. ‘Determination effectively resolving an <u>actual substantive issue</u>’. <p><u>Intermediate findings and rulings</u></p> <ul style="list-style-type: none"> Only reviewable if they are provided for in an enactment as an ‘essential preliminary’ matter and that it resolve a substantial issue. Ordinarily a finding of fact will not be, as it is ‘no more than a step along the way’. <ul style="list-style-type: none"> ‘To expose all findings of fact to judicial review would expose the steps of administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government.’ <p><u>Application to the facts</u></p> <ul style="list-style-type: none"> Determination (1): was an ‘intermediate decision made on the way’ but was <u>not</u> ‘essentially preliminary to making of the ultimate decision’.

- Determination (2): intermediate decision made along the way, but was a matter of substance and essentially preliminary so was reviewable.

'Conduct' under ADJR Act, s 6

- Pleading s 6 is 'a complaint...that the process of decision-making was flawed', 'a challenged to conduct is an attack upon the proceedings engaged in before the making of the decision.'
- 'Essentially procedural and not substantive in character'.
- Substantive decisions, findings of fact and inferences from findings of fact generally not capable of review as 'conduct'.

CASE LAW: **ROCHE CASE** – 'ADMINISTRATIVE CHARACTER'

Roche Products case	
<i>Roche Products P/L v National Drugs and Poisons Schedule Committee (2007) 163 FCR 451</i>	
Principle	<ul style="list-style-type: none"> • Legislative character if: of general application, provision for review and disallowance by legislature, require wide public consultation, incorporates wide policy considerations, can be varied/amended by maker, cannot be varied/amended by executive, not subject to AAT merits review, binding. • Administrative character if: provision for AAT merits review, made without public consultation, can be amended/varied by the executive, specific application to particular cases.
Facts	National Drug and Poison Schedule Committee: included drug in Appendix H allowing for direct advertising to consumers, later decision to reconsider its listing and then decision by the Committee for its removal.
Issue:	was the decision of administrative or legislative character?
Result:	Legislative character, not reviewable under <i>ADJR Act</i> .
Held/Reasoning	<p><u>Relevant consideration in determining if legislative or administrative in character</u></p> <p>Consider all relevant factors, but no one is decisive:</p> <ol style="list-style-type: none"> (a) Decisions determined rules of general application or application of rules to cases? (b) Parliamentary control of decision? (c) Public notification and public consultation? (d) Broad policy consideration imposed? (e) Could regulations be varied? (f) Power of executive variation or control? (g) Provision for merits review? (h) Binding? <p><u>Application to the facts</u></p> <ol style="list-style-type: none"> 1. Inclusion of substance in the Poisons Standard schedule determines future lawfulness of conduct in relation to the substance. Decision determines content of rules of general application. 2. Decision applies to substance in general, not merely to substance manufactured/supplied by the defendant, suggesting legislative. 3. Broad policy consideration of public health suggests legislative. 4. No provision for merits review suggests legislative. 5. Decisions published in the Gazette and not amenable to executive variation or control suggests legislative. 6. Though Roche could initiate a process leading to a decision, it would apply to substance in general (all manufacturers/suppliers) as opposed to just affecting Roche. 7. Failure of legislation to provide for disallowance under Act suggests administrative rather than legislative.

CASE LAW: 'UNDER AN ENACTMENT'

General Newspapers v Telstra (1993) 117 ALR 629	
Principle	For judicial review, the decision must be 'made under', that is authorised and/ or required by an enactment.
Facts	<ul style="list-style-type: none"> • Telecom had contract the print White Pages. Hannanprint was interviewed and premises inspected with view of potentially undertaking printing work. • Telecom contracted with McPhersons and News, without calling for tenders from Hannanprint and others. • Under statute, Telecom had power to contract, as they were given 'all the powers of a natural person'.
Submissions:	Hannanprint argued they were not afforded an opportunity to quote a competitive price, and sought orders of review with respect to alleged conduct or decisions on the part of Telecom.
Issue:	was this decision made under an enactment?
Result:	not made under an enactment.
Held/Reasoning	<p><u>Source of decision-making power is the enactment (Act or scheme)</u></p> <ul style="list-style-type: none"> • 'When neither the Cth Act nor scheme is the source of the power to appoint the decision-maker, or the source of the power to make the decision, or the source of the decision's legal effect, it cannot be said that the decision was made under that enactment'. • 'The ADJR Act is concerned with decisions when, being authorised or required by an enactment, are given force or effect by the enactment or by a principle of law applicable to the enactment.' <p><u>Application to the contracting power of Telecom</u></p> <ul style="list-style-type: none"> • A contract entered into by a corporation under a general power to contract is not given force and effect by the empowering statute. • The empowering statute merely confers capacity to contract, whilst validity and effect of contract is determined by ordinary laws of contract.

Griffith v Tang [2005] HCA 7	
Principle	Decision must be expressly or impliedly required or authorised by enactment. The decision must itself 'confer, alter or otherwise affect' legal rights and obligation (pre-existing or created by the decision itself).
Facts	<ul style="list-style-type: none"> • Decision of Griffith University to exclude Tang from the PhD program on the ground that she had engaged in academic misconduct. • <i>Griffith University Act 1998</i> gave the university 'all the powers of an individual' (s 6). • Tang brought proceedings under QLD's <i>ADJR Act</i>.
Issue:	was the decision made 'under an enactment'?
Result:	not under an enactment.
Held/Reasoning by the majority (Gleeson CJ)	<p><u>'Under an enactment'?</u></p> <ul style="list-style-type: none"> • No statutory provision which imposed a duty or discretion on any decision-maker to make a decision. • For a decision to be 'made under an enactment' two criteria need be satisfied: <ul style="list-style-type: none"> ◦ Decision must be <i>expressly</i> or <i>impliedly</i> required or authorised by the enactment; ◦ Decision must itself confer, alter or otherwise affect legal rights or obligations. • This does not require the decision to affect or alter only existing rights or obligations, it is sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. <p><u>Other sources of authority to decide</u></p> <ul style="list-style-type: none"> • 'If the decision to exclude had been made pursuant to terms of a contract, that would have been a consideration adverse to the respondent on the issue'. • Consensual relationship existed here, so no decision was required or authorised by enactment.
Held/Reasoning of the minority (Kirby J in dissent)	<p><u>Dissent towards narrow approach</u></p> <ul style="list-style-type: none"> • HC is adopting an 'unduly narrow approach' to statutory judicial review direct at public power, eroding one of the most important legal reforms of the last century. • Nothing to warrant such an approach upon the 'beneficial and facultative terms' of the <i>ADJR Act</i>, as it 'defeats the attainment' of the Act's purposes. • Incompatible with the express provision that remedies be afforded to those 'whose interests are adversely affect by the challenged decision'.

<p style="text-align: center;">NEAT v AWB [2003] HCA 35</p>
<p>Facts</p> <ul style="list-style-type: none"> • To export wheat, the <i>Wheat Marketing Act 1989</i> s 57 required: <ul style="list-style-type: none"> ◦ (1) Written consent from the WEA. ◦ (3A) WEA must consult AWBI Ltd before giving consent. ◦ (3B) WEA must get prior written approval from AWBI before giving consent to bulk-exports. <ul style="list-style-type: none"> ▪ This essentially gave AWBI a veto power over bulk-exports, allowing it to have a monopoly over the export of wheat. • NEAT wanted to bulk-export, but when applied was not given consent six times. • NEAT brought proceedings under the <i>ADJR Act</i>.
<p>Issue: were AWBI's refusals of consent decisions made 'under an enactment'?</p>
<p>Result: 3:2 majority decided the decision was not made 'under an enactment'. Therefore, Federal Court did not have judicial review jurisdiction.</p>
<p>Held by McHugh, Hayne and Callinan (majority) <u>Decisions of private companies not reviewable</u></p> <ul style="list-style-type: none"> • AWBI's existence was not due to the Act; AWBI 'flowed from corporations' law', being a company limited by shares incorporated under the Corporations Law. • Powers, powers and obligations of its organs were regulated by applicable companies' legislation. • Central duty: observe constitution and pursue interests as expressed in that document. • AWBI need no statutory power to provide approval. Their approval was a condition precedent. <p><u>Intersection of private and public</u></p> <ul style="list-style-type: none"> • Can public law remedies be granted against public bodies? Did not answer. But said the Court's answer would depend upon the particular structure of legislation. • Can public law remedies be granted against AWBI? No.
<p>Held by Gleeson CJ (dissenting)</p> <ul style="list-style-type: none"> • Unnecessary to decide whether the withholding of an approval was 'a decision of an administrative character made under an enactment' because there were no grounds of review. • There was nothing about the particular circumstances that showed a requirement of re-consideration of the policy, or that the policy was improper, or that anything in the circumstances fell outside of the policy.
<p>Held by Kirby JJ (dissenting) <u>Private nature no reservation to liability to admin law remedies</u></p> <ul style="list-style-type: none"> • Private corporations entrusted under statute with public functions affecting others should be rendered liable under administrative law remedies. • There mere fact that a decision may be affected or guided by considerations of a commercial nature will not take it outside of the ambit of judicial review. <p><u>Application</u></p> <ul style="list-style-type: none"> • AWBI had a special statutory position, their impugned decisions were required and made effective by the Act thus within the scope of the <i>ADJR Act</i>.