

**PRINCIPLES OF  
ADMINISTRATIVE LAW  
T1 2018**

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## JUDICIAL REVIEW

Conducted at the federal court and then further escalated at the High Court if necessary and leave is approved.

Jurisdictional error occurs when the extent of that authority is misconceived

### COMMON LAW APPLICATION

Satisfy 1,2,3, check if there are any barriers (4) + remedies (5)

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#### (1) *Jurisdiction*

Pursuant to s 75(v) of the Constitution, the High court's original jurisdiction is in all matters to which a remedy applies:

- In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party... (iii)
- in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; (v)

#### Justiciability

\*\*NOTE YOU DO NOT USE TEST WHEN APPLYING FOR JUDICIAL REVIEW UNDER ADJR\*\*

There are two separate but interrelated question which must be satisfied to make up common law justiciability.

1. Can the court resolve the matter?
  - a. COPY: The Courts can only resolve matters where the controversy about rights, duties or liabilities is real and immediate. Hypothetical questions give rise to no matter (**Re McBain; Australian Catholic Bishops Conference**)
2. Should the court resolve the matter?
  - a. Courts will use the following factors to determine (No single factor is decisive)
    - i. Status of the decision maker
    - ii. Source of the power
    - iii. Nature of the power and what is involved in its exercise
    - iv. Subject matter of the decision

#### Common law Cases

- The Governor in Council is obliged to observe the rules of natural justice when there is a true relationship between the Governor and the Executive (**Fai**) [*Decisions at the highest level are justiciable*]
- Prerogative power is subject to judicial review. However, on matters of National security the court has said that it is not subject to judicial review as that is for the executive government not that of the courts. (**Council of Civil Service Union (UK); Peko**)
- There are obiter comments regarding Cabinet Decisions being subject to judicial review, 1 -1 split (**Peko**).
- Policy matters are not justiciable (**Peko**) – Decision was an exercise of prerogative power concerning Australia's rights and obligations as a party to an international convention. **PEKO**
- Cases of Foreign relations do not preclude judicial review (**HICKS**)

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**(3) Reasons – Do NOT touch unless necessary – DO YOU NEED MORE REASONS TO MAKE A BETTER CASE FOR REVIEW?**

X can seek reasons to more clearly understand the position of Y.

Starting Point

- There is no common law duty to provide reasons for administrative decisions, even when they have been made in the exercise of a statutory discretion and may adversely affect the interests of other persons. **(Osmond)**.
- Exceptions in ‘special’ circumstances
  - Natural justice
  - Right can be inferred from the Act under which the decision was made
- No common law duty to give reasons for making a statutory decision.
  - Any duty to give reasons must be imposed by statute (Express)
    - Determined as an exercise of statutory construction
  - Implied – requires special or exceptional circumstances
    - failure to provide reasons would be a breach of natural justice
      - significant impact on the person's interests
      - extent to which the matter (facts) are contested
    - failure to provide reasons would frustrate a right of appeal
      - e.g., appeal on a question of law may be rendered illusory or nugatory without reasons
    - decision is of a quasi-judicial nature
    - matter is contested; hearing is adversarial; decision-maker expected to act ‘judicially
- Content of duty (if not express) a matter of implication (statutory construction) looking at –
  - the function performed by the decision-maker in forming and giving its opinion.
  - the objective of requiring the relevant decision-maker to give reasons.
- Failure to give reasons when required by statute is an error of law
- If for a matter of policy that there is a consensus the common law position should be changed, then that is a matter for the legislature **(Osmond)**

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# ADJR

## 1. JURISDICTION

Does (court) have jurisdiction to conduct Judicial Review.

### (1) Can x seek judicial review under the ADJR?

Rule = x can apply for review of decisions (5), conduct related to making of decisions (6) or make an application in respect of failures to make decisions (7). The ADJR claims jurisdiction on a person's application through (section 5,6 or 7) as it states a decision to which this Act applies.

S. 5 – A reviewable “decision” is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense. **(Bond)**

S. 6 - the word “conduct” points to action taken, rather than a decision made, for the purpose of making a reviewable decision. **(Bond)**

A decision to which this Act applies is defined under s 3 to mean a decision of an administrative character made, proposed to be made, or required to be made under an enactment or by a commonwealth authority **(3)(a)** or an officer of the commonwealth **((3)(b))**.

The Act does not apply to a decision by the governor-General **(3)(c)** or a decision set under schedule 1 **(3)(d)**.

The ADJR ACT does not apply to any decisions made by the governor-General **(3)(c)** or a decision set under schedule 1 of the Act **(3)(d)**. – The National Sports Fund Act 2013 (cth) is not apart of Schedule one and therefore, the ADJR applies.

### (2) Was the decision of an administrative character?

- Administrative character is not defined by legislation.
- If not ‘legislative’ or ‘judicial’ then likely to be ‘administrative’ (*Griffith University v Tang*).
- Should not be interpreted narrowly or in a strictly analytical manner (*Evans v Friemann*).

As a result, the Federal Court in R G Capital Radio provided relevant factors to determine what is characterised as an administrative character. These factors were approved in the Central Queensland Land Council Aboriginals corp case. However, one factor is not conclusive and therefore a judgment must be made taking into account all relevant considerations **(Roche)**

Consider the Relevant Factors – Next Page

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## 5. *ADJR REMEDIES*

Remedies the ADJR allows the court to order. However, section 16 uses the word may and thus the courts have general discretion to refuse relief (**Lamb**)

- Certiorari (s 16(1)(a))
- Prohibition (s 16(1)(b))
- Mandamus (s 16(1)(c))
- Injunction (s 16(1)(d))
- Declaration (16 (2)(a))
- Injunction (s 16(2)(b))
- Make the decision maker to come to a decision (s16(3))

**\*NOTE\* - Explanations of each on page 11.**

ADJR remedies should not be subject to narrow or restrictive construction. Therefore, it should receive the liberal construction normally given to remedial legislation (**Conyngham**)

Courts may refuse relief as it has already been sought, or other mechanism more suitable (s 10(2)). Reasons to refuse relief include (**Essendon Football Club**)

- Delay
- Action commenced for a collateral/ulterior motive
- Waiver
- Prejudice to respondent / third parties
- Remedy would be futile/ ineffective
- Failure to utilise a statutory appeal / review process first
- Not in the public interest

Middleton J stated in **Essendon Football Club** that he does not consider that the discretion to refuse relief should be described as rare where a public body has acted unlawfully.