

Topic 2: Jurisdiction

State: “[APPLICANT] will seek judicial review by applying for an ‘order of review’ (s11) in the Federal Court or Federal Circuit Court (s8) for the decision. The ADJR Act codifies and clarifies the procedures, grounds and remedies of judicial review, and provides a single standing test in sections 5-7 ADJR”

Avenues for judicial review

1. Common Law

- Section 75(v) – *Commonwealth Constitution* (High Court)
 - Grants the HC a general right to issue specific remedies against an ‘officer of the Cth’ – a Constitutional jurisdiction
- Section 39B – *Judiciary Act 1903* (Cth) (Federal Court)

2. Statutory

- *Administrative Decisions (Judicial Review) Act 1977* (Cth) (Federal Court/Federal Circuit Court)

ADJR Act

- The grounds of review have been codified in ss. 5 (conduct) and 6 (decision)
- Fed Court is given jurisdiction to hear appeals under ADJR Act under s8 and 9 ADJR
- Single remedy (an “order of review”) issued under s. 16
- ADJR allows a ‘person aggrieved’ by a
 - Decision (s.5);
 - Conduct in relation to a decision (s.6); and
 - Failure to make a Decision (s.7)
 - to seek review of decision ‘to which this Act applies’

S 5(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... (see same phrase in s 6(1) for conduct, 7(1) for failure)

S 3(1) "**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 ;

There are 3 requirements for jurisdiction under ADJR:

- Decision (s 5) or ‘conduct for the purpose of making a decision (s 6) (or failure to make decision (s 7)) (*Bond*)
- ‘Of an administrative character’: (*Toohey; Blewett*)
- ‘Under an enactment’: (*ANU v Burns; Tang*)

1. Decision

- A decision is amenable to judicial review if it is a decision of an administrative character made under an enactment to which the Act applies (s3(1) ADJR Act)

- A person aggrieved by a decision (s5 ADJR Act), or conduct in connection with the making of a decision (s6 ADJR Act) or a failure to make a decision when they have a duty to do so (s7 ADJR Act) may make an application for judicial review
- If a report or recommendation is required before a decision is made, the making of such report or recommendation is *deemed* to be a decision (s3(3) ADJR Act)
 - Construed narrowly. Applies only where 'there is a provision in an enactment that a particular report or recommendation be made as a condition precedent to the making of a decision under that enactment' (***Edelsten v Health Insurance Commission***)
- (a) Decision (s5)
 - 'Decision' generally entails a decision that is substantive (final and operative) (Mason CJ, ***Bond***)
 - An interim decision can be reviewable if it is a finding expressly required under the Act, but must be a decision which is substantive decision rather than procedural decision (***Bond***)
 - Is NOT: a conclusion reached as a step along the way in a course of reasoning that leads to the ultimate decisions is not normally a decision, unless the Act provides for some sort of making of a finding or ruling on that issue
 - Ordinarily, a finding of fact, including an inference drawn from primary facts, will not constitute a reviewable decision because it will be no more than a step along the way
 - ADJR can't review the following decisions: Decisions made by the Governor General (legislative), making of regulations under the ADJR Act (but you can challenge decisions made pursuant to regulations (administrative))
- (b) Conduct for the purposes of making a decision (s6)
 - Includes the doing of any act or thing preparatory to making a decision, taking evidence, holding inquiry or investigation (s3(5) ADJR Act), or a fatal and obvious error in decision-making process
 - Conduct is procedural rather than substantive (***Bond***)
- *Note: At this point, you need to choose whether it's the 'decision' or the 'conduct'

A reviewable decision under the ADJR Act should generally be a:

- Final or operative decision determinative of all issues
- Made by or under statute
- Substantive determination not a procedural one

ABT v Bond

Facts:

- Broadcasting Act 1942 (Cth) gave power to the ABT to conduct an inquiry into whether the holder of a broadcasting licence was a fit and proper person to hold licence
- Bond controlled a number of companies, which held broadcasting licences
- He made comments on TV suggesting he'd made an overly generous payment to settle a defamation action by the Qld Premier against one of his companies.
- Allegations that he'd threatened to broadcast damaging info about a business competitor
- ABC reviewed B's licenses in light of allegation to determine whether B and his people were fit and proper to hold a license
- ABC held that Bond and other licensees were not fit and proper – an interim finding before ultimate decision to revoke a license
- B commenced proceedings under the ADJR Act referring to 11 separate decisions and 7 instances of conduct by the tribunal allegedly in breach of the ADJR Act

Issues:

- Whether finding that people were not fit and proper could be made under the ADJR Act

Decision:

- Majority held: A reviewable decision is one that is provided for by statute.

-Will generally be 'final and operative' and conduct refers to administrative activity proceeding a decision that reveals a flawed administrative process (read terms narrowly)

Arguments for narrower interpretation:

-Would prevent the fragmentation of the administrative process and impairment of efficient administration of judgment

-If too wide an interpretation, what is the point in having conduct in relation to the decision?

-A conclusion reached as a step along the way will not be a reviewable decision, unless the Act provides for some kind of ruling on that issue.

-Decision does not include procedural determinations, so there was a decision here

-S. 5 doesn't say it needs to be a final decision

-S 3 may point to a decision having limited meaning

-Must be a substantive determination: interim findings could not be challenged under ADJR
This is because finding that Bond would not be found to be a fit and proper person to hold a license was not procedural and was no more than a step in the Tribunal's process of reasoning so did not amount to conduct – there was no reviewable conduct (Brennan and Deane JJ agreed with Mason CJ)

2. Of an administrative character (only ADJR requirement)

A decision is amenable to judicial review if it is a decision of an administrative character

- Defined in the context of it being either legislative, executive/administrative or judicial. If not 'legislative' or 'judicial' then likely to be 'administrative' (*Griffith v Tang*)
This is a hard distinction as shown in cases – not defined in ADJR Act
- In *Min for Industry and Commerce v Tooheys*, held that legislative creates new laws and rules, whereas administrative decisions apply a general rule to a particular case
 - The more individualised a decision, more likely it is administrative
 - A by-law can be either legislative or administrative (look at content)
 - Customs duty laws in this case were clearly administrative
- In *Qld Med Laboratory v Blewett*, establishing a new table for pathology service was legislative as it involved 'changing the content of a law as a rule of conduct of power'
 - The line between legislative and administrative is hard to draw but as a general rule, 'legislative' determines the content of a law while 'executive' applies the law in a particular case
- (a) Factors:
 - *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* per Branson J: 'the task ultimately is an evaluative one...no single consideration is likely to be decisive'
 - If determining the content of general rules rather than application = legislative
 - If Parliament has control (can review, approve/disprove the legislative decision) of relevant decision = legislative, whereas if the decision is made by bureaucrats outside of parliament = administrative *Not a decisive factor
 - If there is a requirement for public consultation = legislative, whereas if decision requires a specific individual to approve/determine e.g. the Governor General = administrative
 - If there is a provision for review of the decision on the merits = administrative
 - If the decision is legally binding on many people = legislative and if it applies to a particular case, single person or small group of people = administrative
 - If broad policy considerations are imposed = legislative
 - If decision has binding legal effect, directly affecting the operation of other statutory provisions = legislative
 - **If Administrative decision, go to step (iii). If Legislative, ADJR test fails

Roche Products v National Drugs and Poisons Schedule Committee (2007)

Facts:

- NDPSC has power to decide what drugs can be listed on the Poisons Standard.
- Drugs listed on Appendix H of the Poisons Standard don't need a prescription.
- Roche challenged the NDPSC's decision to remove its weight control drug from Appendix H

Issues:

- Whether the decision to amend the standard was reviewable

Decision:

- Branson J held: the decision to amend the standard was legislative non administrative and accordingly was not reviewable under the ADJR Act
- “The task ultimately is an evaluative one... no single consideration is likely to be decisive”
- Factors pointing to the decision being legislative in character (no single factor determinative)
- Rules of general application
- Applied to a substance, not a particular company
- Public consultation, part of national system of drug control
- Broad policy considerations, no merits review, publication in Gazette

3. Under an enactment

- The interpretation of 'under an enactment' is not entirely clear
- Excludes review under ADJR Act of non-statutory decision
- Includes a Cth Act and an instrument made under such an act, including statutes and subordinate laws (as per s. 3(1)) but unsure if it extends to policies, reports, ect

Two requirements under *Griffith University v Tang*:

- 1. The source of decision-making power must be statutory, in that decision is expressly or impliedly authorised under the Act
 - The actual decision must be made pursuant to statute in that the decision was given force or effect by the statute (Gleeson CJ, Tang)
- 2. Decision must affect, alter or confer legal rights or interests established or governed by the enactment (Gummow, Callinan and Heydon JJ, Tang)
 - Refers to decisions that are derived from a capacity to bind under contract (Tang)

Griffith University v Tang (2005) 221 CLR 99

Facts:

- Tang was a PhD student at Griffith University.
- Griffith Uni is established by statute - *Griffith University Act 1998* (Qld).
- Academic Committee decided to exclude her from PhD program for academic misconduct (non-compliance with ethical requirements). The finding was made by an Assessment Board, sub-committees of the Research and Post-Grad Studies Committee
- She sought judicial review of the committee's decision
- High Court dismissed her application because decision was not made 'under an enactment'

Issues:

- Whether decision to exclude Tang was a decision to which the Judicial Review Act applied

Decision:

- A 4:1 majority held that the Griffith Uni governing body is a council who is given powers to determine uni affairs, and this could be delegated to an appropriate committee
- The Act allowed the Uni Council to make uni statutes which may cover the admission, enrolment and disciplining of students
- There was no entitlement to review – the decision to exclude wasn't made under Act
- Terminating is a private relationship only – could do this without recourse to statutory power
- The decision did not take legal force or effect from the Act – it occurred under general law and under terms which the Uni had been willing to enter into the contract under
- Gleeson CJ** (separate opinion): nothing in the Uni Act which dealt specifically with matters of admission or exclusion from research programs. He believed the questioned turned on the legal force/effect of decision

- Gummow, Callinan and Heydon JJ**: Adopted a narrow view of what is under an enactment
- The presence in the ADJR Act of the words “whether in the exercise of a discretion or not” indicate that the decision must be either required or authorised by the enactment
- As per the two limb test, the decisions were authorised by the enactment but not required – the decision to exclude made by committee delegated – doesn’t mean the decision is made under that enactment. Tang enjoyed no legal rights under the statute
- Kirby J (dissent)**: talked about employment of public power – he believed that the key question is whether the employment is undertaken by a public or private body
- Majority had adopted an “unduly narrow approach” – erosion of ADJR Act
- Griffith Uni receives substantial funds under the Higher Education Funding Act so the Uni is amenable to public law requirements
- Tang had clear “interests” affected by the Uni decisions

These cases concerned a contract of employment (*Burns*) and a ‘consensual’ relationship (*Griffith*). Decisions made pursuant to prerogative powers will not ordinarily be held to be made under enactment (non-statutory).

4. To which this Act applies

- If judicial review under the ADJR Act is excluded, use **common law judicial review** [*SEE TOPIC BEFORE MERITS REVIEW*]:
 - A decision made by the Governor-General cannot be reviewed (s3(1) ADJR Act)
 - Certain types of other decisions are excluded (see Schedule 1 ADJR Act)

5. Privative clauses

- Privative clauses in existence prior to the enactment of the Act (pre-1980) do not restrict judicial review under the Act (s4 ADJR Act) and operate alongside the common law (s10 ADJR Act)
- If a privative clause is enacted after the ADJR Act, it may be effective in respect to the operation of the ADJR Act but not with reference to the CL
- Apply Hickman test/Reconciliation approach [see **Common Law Judicial Review**]