The AD(JR) Act:
This statute simplified how one could go about getting judicial review. It was a federal statute – each state has it's own version.
Establishment of the Administrative Appeals Tribunal:

- This was a form of merit review.
- It was a body of the executive created to appeal/review decisions. They have the ability to change a decision.
- This form of review is cheaper and more efficient than going to the courts. This was a Commonwealth Tribunal – State Tribunals were later introduced (aka VCAT in Victoria).

Establishment of the Ombudsman:

- Investigates public bodies.

Establishment of the Freedom of Information Legislation (FOI):

- This legislation enables confidential government documents to be viewed through an application and approval process by members of the public.

Current Day:
The aim of the above reforms was to make reviews easier – but this has not necessarily been the case.

- In the current day, a lot of judicial review has reverted back to constitutional judicial review rather than the AD(JR).
    - One major reason for this is that the AD(JR) does not apply to all positions – there are restrictions as to jurisdiction.
    - Another issue is parliament – they introduced the AD(JR) and have limited its applicability. Parliament keeps making it harder and harder to use – yes it is simpler but parliament has taken away its effectiveness.

## SOURCES OF JUDICIAL REVIEW AND STANDING

The general principle of judicial review is that judges can review errors of law and that decision makers has made and not errors of fact.

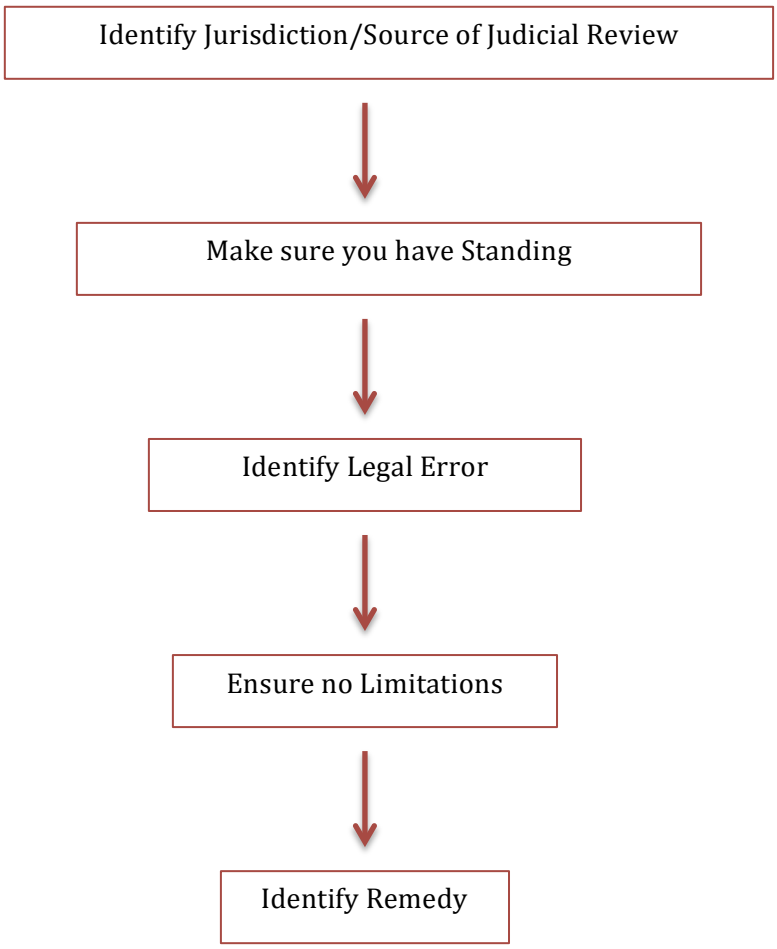
- A judge can only review legality – determining whether there has been an legal error.
- Merits

Review vs. Appeals:
In courts, an important difference between appeals ad reviews is that an appeal is granted by statute: there is no common law right to appeal. A statutory appeal may be by way of re-hearing. In a re-hearing, issues of fact and law are considered again if a legal, factual or discretionary error can be established.

When talking about a review/appeal to another executive body, there is no real difference. In relation to courts:

- Review – only refers to judicial review;
- Appeal – no common law right to appeal.
    - 'As of right' – you can definitely get an appeal
    - 'Special leave' – court you are appealing to can decide if they want to hear your case.

- De Novo – starting the case from scratch. This normally occurs when a tribunal decision is appealed to a court.




Constitutional Considerations:
Judicial review is entrenched in s 75(v) of the Constitution. It grants the High Court original jurisdiction in matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

**NOTE** – Separation of Powers:
The High Court has implied a strict, formal separation of powers between judicial power and executive power at Commonwealth level (*Bolermakers*). This means that the Commonwealth executive cannot exercise judicial power and the Commonwealth judiciary cannot exercise executive power. At state level, there is no formal separation of powers. Therefore, state executives can exercise judicial power and state tribunals that are not courts may exercise judicial power.

- However, state courts cannot be given powers that impair their institutional integrity (*Kable*).

Fact and Law Distinguished:
A court in judicial review may review errors of law, but not errors of fact. Questions of fact are for the decision-makers who have been granted the power and discretion to determine

In order to succeed on a judicial review, an applicant must make out a 'ground of review'. The grounds are a number of ways in which a decision-maker may fall into error that is reviewable by the courts.

Pros and Cons of Judicial Review:

*Praise:*

- Judicial review can provide an open and rational process for individual to address grievances against government, providing an additional layer of accountability.
- Public debate can become polarised when claims are made that a court – and particularly the High Court – is actively pursuing a particular political agenda.

*Criticism:*

- The judicial review process exposes pubic authorities to unwarranted litigation that delays or frustrates the proper workings of government.
- Idea that under the Separation of Powers the braches of government and power are supposed to be equal, so why does the court get to decide what is legal?
- Undemocratic – judges are not elected by the people.

**Judicial Review**

In Australia, there are three separate sources of judicial review jurisdiction: the common law, the Constitution, and statutory schemes of judicial review. An applicant must first determine whether theirs is a state or Commonwealth matter. Within that jurisdiction, it will be necessary to establish whether the court's power to undertake judicial review is based upon statute or common law.

At common law, the state and territory Supreme Courts have inherent jurisdiction to undertake judicial review of the decisions of inferior courts, administrative tribunals, and other administrative decision-makers exercising public power. This means that these courts can conduct judicial review even if there is no statute expressly conferring that jurisdiction.

**Common Law Judicial Review**

Prerogative Writs and Equitable Remedies:

- Writ = written order/instruction.
- Prerogative writ = writs by the court attributed to the royal prerogative of the King:
    - *Certiorari* = quashing an unlawful decision (getting rid of the decision, no longer valid).
    - *Mandamus* = order an official to exercise some power (mandatory exercise of power).
    - *Prohibition* = prohibit an official from exercising some power.
- Injunction = forces a person to take action or refrain from doing so.
- Declaration = a statement about the lawfulness of the decision. No binding force.

Superior and Inferior Courts:

Superior courts are higher court sin the hierarchy and have the widest (traditionally unlimited) jurisdiction: inferior courts have limited jurisdiction and are the lower courts in the hierarchy.

In the Australian context, the State Supreme Courts are the superior courts with inherent judicial review jurisdiction, whereas magistrate's courts are an example of inferior courts.

1. Jurisdictional Error needs to be shown:

*(i) Defining Jurisdictional Error:*

A jurisdictional error involves a misunderstanding of the nature, scope or existence of a decision-maker's jurisdiction, but it extends to an error made while exercising a power if that error leads a decision-maker to exceed his or her authority.

*Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82:

**Facts:**

- Mr Aala was born in Iran, and claimed that he had worked for the secret police of the Shah of Iran for six months. Subsequently he commenced a real estate business in that country. The Shah was deposed of in February 1979. A high-ranking military officer who was a cousin of the prosecutor's father and a member of the Shah's cabinet was executed by the new regime.
- Mr Aala made an application for an order of review of the decision of the Refugee Review Tribunal upon being denied a protection visa to Australia.

**Held:**

- "There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks the power to do" – Hayne J.
- "Incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction [this is something described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly]". – Hayne J
- "The difficulty of drawing a bright line between jurisdictional error and error in the presence of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of law." – Hayne J.

*Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531:

**Facts:**

- Mr Kirk directed a company that owned a farm. He employed Mr Palmer to manage the farm and had given him an all-terrain vehicle to use. Mr Palmer was using the vehicle to deliver steel to contract works and, whilst travelling off-road down a steep slope, he crashed and was killed.
- He had been trained to use the vehicle and it was more of a bizarre accident, considering that Mr Palmer had always previously used the road available. Mr Kirk and the company were convicted in the Industrial Court of NSW under the OH&S Act.
- The Court did not have evidence to convict Mr Kirk and even called him as a witness for the prosecution. He was also not told specifically what he was charged with.
- The Court of Appeal held that there was no jurisdictional error to overcome the privative clause in the legislation and dismissed the application for appeal. The High Court granted special leave to appeal.

**Issue:**

- Application of s 75(v) of the Constitution – judicial officers as 'officers of the commonwealth'.

**Held:**

- The High Court found in favour of Mr Kirk. Privative clauses are beneficial where they promote finality but not where they clash with the Constitution.
- s 71 of the Constitution is part of an appellate structure, of which the High Court sits at the top. The Australian legal system is whole and it must be internally coherent; therefore the Supreme Courts must fit into the Commonwealth Constitutional model. Only where privative clauses seek to exclude jurisdictional error will they be ineffective.
- "It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error".
- "Frist...an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or power in a case where it correctly recognises that jurisdiction does exist".
- "Secondly…jurisdictional error "is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers"

Non-Jurisdictional Error:

A non-jurisdictional error is a basis for a certiorari if the error is apparent on the face of the record. The distinction between jurisdictional and non-jurisdictional errors can be difficult to make, but must be made in the common law and constitutional jurisdictional review jurisdictions.

**Power versus how you exercise that power**

- Power = jurisdictional error
- Exercise of the power = non-jurisdictional error.

Why do we have a distinction?

- Balance between rule of law and efficiency.
- We want to control the executive somewhat and make sure that they cannot make bad mistakes, but we also cannot control every single thing, which is why we can allow non-jurisdictional error to go un-remedied.

*(ii) Problems with Jurisdictional Error:*

Often in statutes it clearly states what the power is and how you exercise it. However it can often be difficult to distinguish between the power and the exercise of the power (jurisdictional and non-jurisdictional error).

- Functional approach – Louis Jaffe – "[the term jurisdictional] is almost entirely functional: it is used to validate review when review is felt to be necessary…if it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a words and for which use of the hallowed word is justified'.
  - Idea that if it is not serious then it is not a jurisdictional error.
  - How does seriousness match up to whether something is legal or not? Also how does one define seriousness?
- "Twilight does not invalidate the distinction between night and day" – Gleeson J
  - We can still have jurisdictional and non-jurisdictional error whilst remaining unsure of what the actual distinction is.

*(iii) How to Identify Jurisdictional Error?*

- Look at the purpose of the statute and look to the language used to determine whether a breach should be invalid.

*Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355:

**Facts:**

- Under the Broadcasting Services Act 1992 (Cth) s 160, the Australian Broadcasting Authority (ABA) was given authority to develop codes and practice and program standards. The ABA implemented a local content standard ensuring that television would have a minimum percentage of shows produced in Australia.
- Project Blue Sky, a New Zealand company, challenged the validity of the standard on the basis that the ABA had not performed it obligations under a trade protocol which provided that New Zealand producers would not be treated in a manner less favourable than Australian producers.

**Held:**

- The High Court held that the standard was in breach of the protocol, but that it was not invalid.
- "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. … In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute"
- "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition."

- "The fact that s 160 regulates the exercise of functions already conferred on the ABA rather than imposes essential preliminaries to the exercise of its functions strongly indicates that it was not a purpose of the Act that a breach of s 160 was intended to invalidate any act done in breach of that section."
- Protocols are often more aptly described as "goals to be achieved rather than rules to be obeyed."
- "Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act."

2. Exceptions to Jurisdictional Error Needing to be shown: *Certiorari* on the face of the record:

The record is confided to the formal documents initiating and defining the matter in the inferior court – for example, a statement of claim and pleadings and the record of the court's order that evidences the outcome – but does not extend to the transcript of proceedings and reasons for the decision.

*Administrative Law Act 1978* (Vic):

**s 10: Reasons to be part of the record:**

Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under s 8, of its reasons for a decision shall be taken to form part of the decisions and accordingly be incorporated in the record.

*Craig v South Australia* (1995) 184 CLR 163:

**Facts:**

- The Crown sought judicial review of a decision given in oral reasons for judgment by a District Court judge to stay the proceedings in a criminal trial.

**Held:**

- The High Court held that there was no jurisdictional error in the District Court judge's decision. This left open the question of whether certiorari could be granted for non-jurisdictional error on the face of the record.
- The High Court held that neither the transcript of proceedings nor the reasons for decision were part of the record available to the Supreme Court and so no error of law could be identified on the face of the record for the purposes of certiorari.
- The concern was that 'the transcript of proceedings and reasons for decision could be scoured and analysed in a search for some internal error'. Expanding the record, and so the availability of judicial review, was inappropriate when the review was of courts.

*R v Northumberland Compensation Tribunal ex parte Shaw* [1952] 1 KB 338:

**Facts:**

- A tribunal had wrongly calculated 'service' when assessing the applicant's compensation for loss of office as clerk to the Hospital Board. There was no right of appeal against its decisions.
- The Attorney General had argued that certiorari would only lie to prevent a tribunal exceeding its jurisdiction. The Divisional Court disagreed.

**Held:**

- The Attorney General's appeal failed. The court had not aggregated to itself any appellate function not been given to it.
- The court had 'an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal, which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again.' and 'A tribunal may often decide a point of law wrongly whilst keeping well within its jurisdiction'. – Lord Denning
- Singleton LJ regretted the lack of a right of appeal on a point of law, which he thought would save a great deal of time and trouble in deciding whether certiorari would lie.

**Constitutional Judicial Review**

The High Court's judicial review at Commonwealth level is conferred by two subsections of the Constitution: s 75(iii) and (v).

> 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 has never determined conclusively the extent to which the jurisdiction conferred by s 75(v) overlaps with the broader jurisdiction conferred by s 75(iii). What's the difference?

1. s 75(iii) might not require jurisdictional error;
    - s 75(v) requires jurisdictional error. In s 75(iii) you might not need it – there is no authority yet on this point.
2. s 75(iii) might cover more writs;
3. So far the courts have only said that s 75(v) protects against private clauses;
    - Private clauses are where parliament says that the court cannot get involved in that issue/have judicial review.
    - s 75(v) is a guarantee that you can get judicial review – so private clauses don't work in certain circumstances.
4. "Officer of the Commonwealth" versus "Commonwealth is a party"
    - s 75(v) only applies to officers of the Commonwealth. In most cases it may not made a difference, but on some it could – there is no authority on this point.

*Offshore Processing Case*
*Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319:

**Facts:**

- The plaintiffs were offshore entry persons under the *Migration Act 1958* (Cth) and so were precluded from making valid visa applications unless the Minister decided it was in the public interest to allow them to make an application or to grant a visa in the absence of a valid application.
- In 2008 the Minister announced that the government would enhance the Refugee Status Assessment ("assessment") process, including the introduction of Independent Merits Review ("review"). The purpose of the processes was that officers of the Department of Immigration and Citizenship and independent contractors called Wizard People, could advise the Minister whether Australia's protection obligations under the Refugees Convention were engaged.
- The processes were applied to all unlawful non-citizens who entered Australia at an excised offshore place and who raised claims that prima facie engaged Australia's protection obligations. Each plaintiff was subject to an assessment by a departmental officer and subsequent review by Wizard People, both of whom concluded that each plaintiff was not a person to whom Australia had protection obligations.

**Issue:**

1. In respect of Constitutional judicial review, do Wizard People count as an officer of the Commonwealth under s 75(v)?
2. What power was exercised when the relevant person conducted the assessment or review?
3. Are persons who conduct assessments and reviews bound to afford procedural fairness?

**Held:**

1. The High Court held that under s 75(iii), the Commonwealth is a party, and under s 75(v) they are an officer of the Commonwealth. Whether Wizard People count, as an officer doesn't really matter as they will fall underneath s 75(iii) as they are still linked to the Minister in some way.
2. The Minister's decision to implement enhanced assessment and review procedures was a decision to consider exercising the powers under ss 46A or 195A in respect of every offshore entry person who claimed that Australia owed them protection obligations. The assessment and review processes were steps taken in consequence of that ministerial direction and thus had statutory foundation in the *Migration Act*.
3. The Court held that persons who conduct assessments and reviews, must afford procedural fairness to the person whose rights and interests to freedom from detention are directly affected. This is because the assessment and review processes are steps taken under and for the purposes of the *Migration Act*. Here, in recommending to the Minister that each plaintiff was not a person to whom Australia had protection obligations, the reviewer failed to observe the requirements of procedural fairness by failing to address a claimed basis for protection; and failing to put before the plaintiff for his consideration and comment the substance of "country information" that the reviewer knew of and considered may bear upon whether to accept the claim.

**Statutory Judicial Review**

The first federal judicial review statute was the *Administrative Decisions (Judicial Review) Act.* This Act has been a model for the development of the state statutes that have enacted similar lists of grounds and key concepts and definitions. The *AD(JR) Act* aimed to codify the existing common law grounds and simplified judicial review procedures and remedies.

Unlike the inherent common law jurisdiction of the state Supreme Courts and the constitutional jurisdiction of the High Court, statutory judicial review jurisdiction can always be curtailed. Parliamentary sovereignty means that what parliament gives, parliament can take away.

<u>What Actions does the AD(JR) Apply to?</u>

- Decisions – s 5;
- Conduct for the purpose of making a decision – s 6;
- Failure to make a decision – s 7
- Does not apply to Schedule 1.

**s 5 - Applications for Review of Decisions**

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:
    a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
    b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
    c) that the person who purported to make the decision did not have jurisdiction to make the decision;
    d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;
    e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
    f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
    g) that the decision was induced or affected by fraud;
    h) that there was no evidence or other material to justify the making of the decision;
    j) that the decision was otherwise contrary to law.
2. The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including reference to:
    a) taking an irrelevant consideration into account in the exercise of power;
    b) failing to take a relevant consideration into account in the exercise of power;
    c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
    d) an exercise of discretionary power in bad faith;
    e) an exercise of a personal discretionary power at the direction or behest of another person;
    f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
    g) an exercise of power that is so unreasonable that no reasonable person could have so exercised the power;
    h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
    j) any other exercise of a power in a way that constitutes abuse of power.
3. The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
    a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice from which he or she could reasonably be satisfied that the matter was established; or
    b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

**s 6 – Applications for Review of Conduct Related to Making of Decisions:**

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 or the Federal Circuit Court for an order of review in respect of the conduct on any one or more of the following grounds:
    a) that a breach of the rules of natural justice has occurred, is occurring, or is likely to occur in connection with the conduct;
    b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;
    c) that the person who has engaged, is engaging, or proposes to engage, in conduct does not have jurisdiction to make the proposed decision;
    d) that the enactment in pursuance of which the decision is proposed to be made does not authorise the making of the proposed decision;
    e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;
    f) that an error of law had been, is being, or is likely to be, committed in the course of the conduct or is likely to be committed in the making of the proposed decision;
    g) that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;
    h) that there is no evidence or other material to justify the making of the proposed decision;
    j) that the making of the proposed decision would be otherwise contrary to law.

2. The reference in paragraph (1)(e) to an improper exercise of power shall be construed as including a reference to:
    a) taking an irrelevant consideration into account in the exercise of a power;
    b) failing to take a relevant consideration into account in the exercise of power;
    c) an exercise of power for a purpose other than a purpose for which the power is conferred;
    d) an exercise of a discretionary power in bad faith;
    e) an exercise of a personal discretionary power at the direction or behest of another person;
    f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
    g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.
    h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
    j) any other exercise of a power in a way that constitutes an abuse of the power.
3. The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
    a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he or she is entitled to take notice) from which he or she can reasonably be satisfied that the matter is established; or
    b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.

***Under s 6 – where the executive is engaged in conduct leading up to a decision, and you as an applicant have been aggrieved by their conduct, you can apply for judicial review.***

**s 7 –Applications in respect of failures to make decisions:**

1. Where:
    a) a person has a duty to make a decision to which this Act applies;
    b) there is no law that prescribes a period within which the person is required to make that decision; and
    c) the person has failed to make that decision;

    a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.
2. Where:
    a) a person ahs a duty to make a decision to which this Act applies;
    b) a law prescribes a period within which the person is required to make that decision; and
    c) the person failed to make that decision before the expiration of that period;

    a person who is aggrieved by the failure of the first-mentioned person to make the decision within that period may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision within that period on the grounds that the first-mentioned person has a duty to make the decision notwithstanding the expiration of that period.

<u>Decisions:</u>

You can get judicial review for a decision, a conduct leading up to a decision, or a failure to make a decision. A decision for ss 5, 6 and 7:

- A decision of an administrative character made, proposed to be made, or required to be made;
    - Under an enactment referred to in paragraph (a), (b), (c), or (d) of the definition of enactment; or
    - By Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of enactment; other than:
        - A decision by the Governor-General; or
        - A decision included in any of the classes of decisions set out in schedule 1.

*Under an Enactment:*

Judicial review under the *AD(JR)* is confined to decisions made under an enactment. 'Enactment' is provided for in s 3. These are Commonwealth Acts and instruments (including rules, regulations or by-laws) made under those Acts and also ordinances of a territory other than the ACT or NT.

*Griffith University v Tang* (2005) 221 CLR 99:

**Facts:**

- Ms Tang was a PhD candidate at Griffith University and was accused of academic misconduct by falsifying her results of her research and was consequently excluded from the University.
- Ms Tang sought judicial review of that decision.

**Held:**

- The High Court held that the *Griffith University Act 1998* (Qld) gave the University the powers needed to administer its affairs, but it did not follow that any administrative decision made in the exercise of those powers was a decision made under that enactment.
- To be reviewable, the decision must derive from the enactment and, in this case the decision to exclude derived from the relationship between the University and the student.
- 'Does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?' – Gummow, Hayne and Callinan JJ.

*Decisions of Administrative Character:*

Confining *AD(JR)* review to decisions of administrative character excludes decisions of legislative or judicial nature. Administrative is understood in opposition to judicial and legislative, precluding *AD(JR)* review of courts, but common law judicial review and constitutional writs are still available in relation to courts.

*Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451:

**Facts:**

- The Committee initially decided that a drug for treatment of excessive body weight could be supplied to consumers by a healthcare professional such as a pharmacist without a prescription and that the drug could be advertised directly to consumers.
- However, after complaints about the advertising, the Committee reconsidered that decision and reclassified the rug so that it could no longer be advertised directly to consumers.
- There were particular concerns about advertising the drug to people under the age of 18. The pharmaceutical company Roche sought review of the Committee's decision under both the *AD(JR)* and s 39B of the *Judiciary Act 1903* (Cth).

**Held:**

- Branson J found that six matters suggested the power exercised by the Committee was legislative in character. Firstly, the inclusion of a substance in a particular schedule of the Poisons Standard 'determined the future lawfulness of conduct in relation to that substance'. It was therefore a decision that 'determined the content of the rules and general application'.
- Secondly, any decision made would apply to the substance in general, not just to the substance manufactured by the applicant. Thirdly, public consultation was an important element in the decision-making process.
- Fourthly, the Poisons Standard was an important element of a national system of regulation of therapeutic goods and the Committee's decisions about the content of the Standard included broad public health policy considerations.
- Fifthly, there was no provision for merits review of the Committee's decision. Finally, decisions were not required to be published in the *Gazette* and, with some specific exceptions, could not be varied or controlled by the executive.
- Branson J cited *Minister for Industry and Commerce v Toohey* – 'The distinction is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases'.

*What is a Decision?*

- Substantive = reviewable decision;
- Procedural = non-reviewable – it is simply conduct. If you have a procedural finding/conclusion this is about conduct, not a reviewable decision.

*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321:

**Facts:**

- The ABT was considering whether to revoke or suspend a broadcast licences held by companies that were effectively controlled by Mr Alan Bond through shareholdings.
- At the time, the relevant legislation allowed the ABT to revoke the licence if they no longer believe a) the licensee is not a fit and proper person to hold the licence, and b) the licensee no longer has the financial, technical and management capacities necessary to provide adequate services pursuant to the licence.
- The ABT had not yet decided whether it would revoke any licences, but had rather published findings that Mr Bond, and as he controlled them, his companies, were not fit and proper persons to hold licences. The ABT indicated that it was going to consider whether the licences should be revoked. Mr Bond sought review of the various findings and rulings by the ATB.

**Held:**

- 'A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point' – Mason J.
- The findings that the licensees were not fit and proper persons were held to be intermediate decisions made on the way to an ultimate decision. These intermediate decisions concerned matters of substances that the statute set out as essential preliminaries to the making of the ultimate decision and so were reviewable under the *AD(JR)*.
- The finding that Mr Bond was not a fit and proper person was also held to be an essential step in the reasoning process and a substantive determination, but not one expressly required under the statute and so not separately reviewable as an *AD(JR)* 'decision', although it would be relevant in the review of the ultimate determination.
- 'Another essential quality of a reviewable decision is that it must be a substantive determination. If a 'decision' were to embrace procedural determinations, then there would be little scope for review of 'conduct', a concept which appears to be essentially procedural in character' – Mason J.

*What is Conduct?*

Judicial review of conduct is treated separately in s 6(1) of the *AD(JR)*. To be reviewable under the *AD(JR)*, the conduct must be the procedure undertaken for the purpose of making, or leading up to making, a reviewable decision. See *Australian Broadcasting Tribunal v Bond* (1990).

*Miller v Goldfields Land and Sea Council Aboriginal Corporation* (2014) 219 FCR 153:

**Facts:**

- Goldfields were a representative body for the purposes of the *Native Title Act 1993* (Cth). As such its functions included the provision of facilitation and assistance in relation to native title claims. s 203BB(2) provided 'a representative body must not perform its facilitation and assistance functions in relation to a particular matter unless it is requested to do so'.
- Mr Miller's solicitors wrote to Goldfields foreshadowing his intention to apply for fundraising assistance in relation to a native title claim. The letter stated that Goldfields had a conflict of interest and that Miller's application for funding should be determined by an independent body.
- The Chief Executive Officer of Goldfields informed Miller that he did not believe there was a conflict of interest and intended to determine Miller's application himself. Miller commenced an application under the *AD(JR)*.

**Held:**

- Miller's application failed. The court held that there had been no reviewable 'decision' because Miller had not yet applied for assistance and, therefore, Goldfields had not taken any action that was 'required or authorised' by the enactment.
- As there was not yet even the prospect of a reviewable decision, it followed that the Chief Executive Officer's formation of an intention to determine the application himself was not reviewable 'conduct'.

Decision and Conduct: Summary:

| Character of the Finding | Conditions |
|---|---|
| Reviewable decision (s 5 okay) | 1. Ultimate conclusion, unless expressly stated for; and<br>2. Substantive conclusion. |
| Unreviewable decision (cannot use the *AD(JR)*). | 1. Intermediate conclusion; and<br>2. Substantive conclusion. |
| Conduct (s 6 okay) | 1. Intermediate conclusion; and<br>2. Procedural conclusion |

**Standing**

Standing means the right to be heard. When individuals initiate proceedings, an early question to ask is 'who is entitled?'.

Attorney General:

Traditionally, the Attorney General represented the public in public law matters and commenced actions in his or her own name. The Attorney General can also grant individuals leave to commence relator actions. Relator actions have been rare in Australia because the Attorney General is a politician with a direct interest in the survival of the government and little incentive to challenge its actions.

*Re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372:

**Facts:**

- Dr McBain, a gynaecologist, obtained a declaration from the Federal Court that enabled him to offer in-vitro fertilisation treatment to a single woman on the basis that provisions in the *Infertility Treatment Act 1995* (Vic) that excluded single women were inconsistent with the *Sex Discrimination act 1984* (Cth) and therefore inoperative due to s 109 of the Constitution.
- The parties in the Federal Court proceedings did not wish to appeal that decision. The Australian Catholic Bishops Conference was involved in the Federal Court proceedings as amicus curiae but was not a party and could not appeal the decision that they strongly disagreed with and believed involved a legal error.
- The Commonwealth Attorney General granted the Bishops Conference a fiat, which allowed it to bring the case before the High Court in a relator action. The Attorney General sought to intervene in the proceedings because he and the relator disagreed on some points.

**Held:**

- The High Court held that the Attorney General was unable to intervene in the proceedings. Although the action was brought on relation of private interest, it was nevertheless very much the Attorney General's own action.
- The Bishops Conference did not succeed in the High Court. The Federal Court decision that provision of the *Infertility Treatment Act 1995* (Vic) excluding single women were inconsistent with the *Sex Discrimination Act 1984* (Cth) stood and could be relied upon by Dr McBain.

Special Interest Test:

Declaration, Injunction, Mandamus:

The law of standing has slowly evolved to the point that an individual who has suffered some kind of special damage arising from an exercise of public power will have standing in his or her own right without the involvement of the Attorney General. Standing requires applicants to have a special interest in the decision that is beyond the interests of the general public. A mere belief or intellectual or emotional concern is not sufficient.

*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR:

**Facts:**

- The Australian Conservation Foundation (ACF) sued the Commonwealth and some of its Ministers for declarations, injunctions and other orders to challenge the validity of decisions concerning a proposal by a company to establish and operate a resort and tourist area in central Queensland and exchange control transactions connected with the proposal.
- Approvals for the development had been given under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) (EPA) and administrative procedures under it and under the Banking (Foreign Exchange) Regulations.
- The ACF asserted the right to sue because of its well-known interest in the preservation and conservation of the environment and because it had lodged a submission pursuant to the administrative procedures under the EPA. The defendants applied for orders to strike out the statement of claim and dismiss the action on the ground that the ACF had not standing to bring the action.

**Held:**

- The ACF had no standing to maintain the action and that the action should be dismissed. In cases which do not concern constitutional validity a person who has no special interest in the subject matter of an action over and above that enjoyed by the public generally, has no locus standi to sue for an injunction or declaration to prevent the violation of a public right or to enforce the performance of a public duty.
- 'I would not deny that a person might have a special interest in the preservation of a particular environment. However an interest…does not mean a mere intellectual or emotional concern…A person is not interested within the meaning of a the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle of winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails'. - Gibbs J

- Definitely have special interest if you have a legal right.
- If it is merely some emotional or intellectual concern you do not have a special interest.
- As standing is so contextual you can use that to your/your client's benefit.

<u>Person's Aggrieved Test:</u>
Certiorari, Prohibition, *AD(JR):*

*Common Law:*
A person aggrieved does not include a mere busybody who is interfering in things, which do not concern them. Includes a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

*Ogle v Strickland* (1987) 71 ALR 41:

**Facts:**

- A film was imported into Australia which religious bodies believed to be blasphemous and against their faith.

**Issue:**

- Did they have standing?

**Held:**

- 'The importance of not giving the expression "a person who is aggrieved" a narrow meaning is readily perceived when regard is had to the wide range of decisions under Commonwealth enactments which are susceptible to review under the Judicial Review Act and to the continually expanding field of Commonwealth law' – Lockhart J
- '[T]he appellants do stand in a different position from other members of the community who profess the Christian faith…The vocation and professional calling of the appellants being more than an intellectual or emotional concern…' – Fisher J
- 'It is true that the appellants have no special interests in the subject matter of the decision in the sense of legal or equitable rights or proprietary or pecuniary interests; but they are persons aggrieved because to repel blasphemy is a necessary incident of their vocation. To deny them standing would deny an important class in the community an effective means and procedure for challenging decisions of the kind involved in this case' - Lockhart J

*Statute: AD(JR):*
The *AD(JR)* provides that proceedings can be instituted by 'a person who is aggrieved by a reviewable decision or conduct' (ss 5 and 6). The term 'person aggrieved' is defined as including a reference to a person 'whose interest are adversely affected' by the decision or conduct (s 3(4)).

The *AD(JR)* test of standing is heavily influence by (often indistinguishable from) the test of special interest. However, some observations about its scope are of note:

- The meaning of a "person aggrieved" is not encased in any technical rules and much depends upon the nature of the particular decision and the extent to which the interest of the applicant rises above that of an ordinary member of the public.
- A countervailing consideration to a liberal interpretation of the test stems from the fact that s 13 provides that a "person aggrieved" is to be provided with a written statement of the reasons for a decision. Therefore the burden placed on government agencies could be extensive if "person aggrieved" is given a broad meaning.

**NOTE:** if you have a special interest, you are person's aggrieved. But, person's aggrieved (might) cover more than just special interest.

Indirect Interests:
Where the individual is not quite directly affected – do they still get standing?

*Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund* [1998] HCA 49:
**Facts:**

- The BBLALC sought an order restraining the ACBF from carrying on or advertising that they carry on or are willing to carry on a contributory funeral fund business in New South Wales. It was held that the BBLALC did not have standing to maintain the proceedings.

**Held:**

- Kirby J held that the test of whether a party has "sufficient material interest in the subject matter" of the action "is to be construed as an enabling, not a restive, procedural stipulation."
- The standing conferred in this case was solely on the basis of the organisation's economic interest.

*Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27:
**Facts:**

- The Victorian Relics Act made it an offence to damage or endanger an Aboriginal relic. The plaintiffs, who were members of the Gournditch-jmara Aboriginal people, claimed that Aboriginal relics would be destroyed by the construction by Alcoa of an aluminium smelter.
- The Supreme Court of Victoria held that the plaintiffs did not have standing to seek declaratory and injunctive relief, as their interest was no more than emotional or intellectual concern. The High Court reversed this decision.

**Held:**

- The Act does not confer private rights on Aboriginals or any class of them because it is aimed at the conservation of relics that are regarded as being of value not only to them, but also to archaeologists, anthropologists and the Australian public generally.
- The plaintiffs do have an interest, which is greater than other members of the public and other people of Aboriginal descent who are not members of the Gournditch-jmara people. They would be more particularly affected by the destruction of the relics.
- It was immaterial that the relics were located on land owned by Alcoa to which the plaintiffs had no right of access.
- Brennan J said that "To deny standing would be to deny an important category of modern public statutory duties an effective procedure for curial enforcement..."

*North Coast Environmental Council v Minister for Resources* (1994) 36 ALD 30:

**Facts:**

- NCEC (non-profit association) represented 44 environmental organisations. NCEC had no pain employees, and received small government grants and larger grants for specific projects. They regularly made submissions to government bodies on environmental matters including forestry issues.
- NCEC played a consistent role in opposing renewal of export licences for woodchips on the ground that there was no proper EIS under the *Environment Protection (Impact of Proposals) Act 1974* (Cth). The Minister for Resources granted a licence pursuant to *Export Control (Unprocessed Wood) Regulations 1986* (Cth), allowing a company to export.
- NCEC requested that the Minister provide them with a statement of reasons, which the Minister subsequently refused to do on the basis that NCEC were not a 'person's aggrieved'.

**Held:**

The court held NCEC were entitled to a statement of reasons because:

- Peak environmental organisation in the region.
- Has been recognised by the Commonwealth as a significant environmental organisation.
- NCEC was recognised by the New South Wales government as being an advisory body for environmental issues.
- NCEC has conducted projects relating to environmental concern matters, which has gotten Commonwealth funding.
- It has previously made submission on other matters.

*Right to Life Association (NSW) Inc. v Secretary, Department of Human Services and Health* (1995) 56 FCR 50:

**Facts:**

- The Full Federal Court held that the association did not have standing as a person aggrieved to challenge the failure of the secretary to take action under the *Therapeutic Goods Act 1989* (Cth) to stop the clinical trial of an abortion drug.

**Issue:**

- Standing of an organisation in a case brought to correct an alleged public wrong rather than to assert a private right.

**Held:**

- The applicant must be able to prove a greater advantage or disadvantage created by the decision than ordinary members of the public.
- "A corporation cannot be placed in any better position than the individual and this applies even in the case where the corporation has included in its members those who would themselves have an interest in the subject matter of the litigation..."
- The right to speak and influence the opinions of the public does not translate to a right of standing. The Therapeutic Goods Act does not address the important and deep moral questions, which concern the association. The applicant only had an intellectual, philosophical and emotional concern.
- It will usually be necessary for a person to point to an interest different to that of other members of the public, however, it is possible that a person will gain standing even though their interest is similar to that of a large segment of the population.
- "The grievance of the appellant does not travel beyond that which any person has as an ordinary member of the public. Here there is only an intellectual, philosophical and emotional concern…There is no advantage likely to be gained by the appellant if successful in the proceeding nor disadvantage likely to be suffered if it fails".

*Summary:*

- Standing due to their vocation – *Ogle v Strickland.*
- Standing due to commercial interests – entering into the same market means competing against each other – *Bateman's Bay.*
- Standing due to cultural reasons – *Onus v Alcoa.*
- Public interest groups – *NCEC* and *Right to Life*.