

## Administrative Law Notes

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## Part II Judicial Review

### 1. Jurisdiction of the Courts

#### 1.1 High Court

##### *The Constitution*

- a) **Original jurisdiction:** to hear all ‘matters’ in which:
- i. **s 75(v):** “a writ of **Mandamus or prohibition or an injunction** is sought against **an officer of the Cth**”
    - Available for **jurisdictional error** only (**Ainsworth**); it is constitutionally entrenched. Thus a **back-up jurisdiction** when JR is unavailable in other courts.
    - **Certiorari** (to quash a decision on the ground of **jurisdictional error**, or error **on the face of the record**) is available under s 75(v) as ‘ancillary’ remedies if necessary: **Aala**
    - ‘**Officer of the Cth**’ requires an **institutional nexus** between DM and Cth
      - Current approach is that decisions by **outsourced functionaries** are exempt from s 75(v): **Plaintiff M61** [HCA found jurisdiction in s 75(iii) as the Cth is being sued]
      - Obiter in **Plaintiff M61** [offshore independent contractor assessing asylum seeker] that it **may** take a ‘**functional approach**’ in the **future** so as to include private DMs.
  - ii. **s 75(iii):** “the **Cth**, or a person suing or being sued **on behalf of the Cth**, is a party”
    - No need for jurisdictional error, but a less secure foundation for review than s 75(v), as remedies are constitutionally entrenched thus vulnerable to privative clauses:
    - ‘**The Cth**’ = Available more broadly than s 75(v) even if DM not considered an officer. e.g. the outsourced offshore processing DM in **Plaintiff M61**
- b) **Appellate jurisdiction:** to ‘hear and determine appeals from ... (including cases heard by Federal Court, or court exercising federal jurisdiction, or State Supreme Courts under *ADJR Act*): **s 73**

#### 1.2 Federal Court

*NB. Not an inherent jurisdiction.*

- a) **Common law jurisdiction:** **Judiciary Act**
- **s 39B** Original jurisdiction to hear ‘**matters**’ in which a writ of **mandamus, prohibition, injunction** [or certiorari as an ancillary remedy: **Aala**] is sought against **an officer of the Cth**.
    - **Including regulation making.**

<ul style="list-style-type: none"> <li>• <b>s 44 AAT Act</b>: Appeals to FCA from decisions of the Administrative Appeals Tribunal on a question of law</li> </ul>
<p>b) <b>Remittal of matters from HCA:</b></p> <ul style="list-style-type: none"> <li>• <b>s 44 Judiciary Act</b>: HCA may remit matters arising under s 75(iii) to FCA</li> </ul>
<p>c) <b>Statutory jurisdiction: ADJR Act</b>  <b>Per s 5(1), ADJR Act applies if:</b>  A person who is <u>aggrieved</u> by a decision to which the ADJR Act applies  – per <b>s 3(1)</b> this means that must be a:</p> <ul style="list-style-type: none"> <li>• <b>Decision:</b> <ul style="list-style-type: none"> <li>○ Not delegated legislation.</li> <li>○ Must be a <b>substantive determination that is ‘final and operative decision, not a step along the way’</b> OR <b>an intermediary finding authorised by statute: Bond</b> [finding of fact that Bond is an improper person is not final] <ul style="list-style-type: none"> <li>▪ <b>Reports and Recommendations</b> can be ‘decisions’ if provided by statute <b>s 3(3); Bond</b> <ul style="list-style-type: none"> <li>• However, if the <b>report</b> has no legal effect in quashing the decision, mandamus/certiorari are not available: <b>Ainsworth</b></li> </ul> </li> </ul> </li> <li>○ <b>NOT an excluded decision:</b> <ul style="list-style-type: none"> <li>▪ made by Governor General: <b>s 3(1)(c)</b></li> <li>▪ listed in <b>schedule 1</b> (e.g. migration, tax, CRL, employment, security and defence): <b>s 3(1)(d)</b></li> </ul> </li> </ul> </li> <li>• <b>Of an administrative character:</b> <ul style="list-style-type: none"> <li>○ Not of a legislative/ judicial character. Indicia from <b>Roche</b>: <ul style="list-style-type: none"> <li>▪ Creating rule of general application (legislative) vs. Merely applying rule to particular case (administrative) <ul style="list-style-type: none"> <li>• [Roche – listing of substance determined future lawfulness of advertising].</li> </ul> </li> <li>▪ Parliamentary control of the decision (legislative) vs. Executive control/variation (administrative)</li> <li>▪ Public consultation / notification such as published in Gazette (legislative)</li> <li>▪ Binding legal effect (legislative) vs. Questions of broad policy (administrative)</li> <li>▪ Parliamentary oversight (parliament reviews subordinate legislation — legislative) vs. Provision of merits review (administrative)</li> </ul> </li> </ul> </li> <li>• <b>Made under an enactment</b> (enactment includes regulations pursuant to Cth Acts s 3(1) etc). <i>Test per Griffith v Tang</i>: <ol style="list-style-type: none"> <li>1. Is the decision <b>expressly or implied required or authorised by the enactment?</b> (consider if words of enactment are too broad) <ul style="list-style-type: none"> <li>▪ Decisions made by statutory corporations under capacity to contract is NOT under the enactment: <b>General Newspapers v Telstra</b></li> <li>▪ Decision made by a <b>private monopoly company</b> as a condition precedent is NOT a decision made under an enactment: <b>NEAT</b> [AWBI considers its <b>private benefit</b>; distinguish <b>Chase Oyster Bar</b> where adjudicator concerns only matters under the Act]</li> </ul> </li> </ol> </li> </ul>

2. Does the decision itself **confer, alter or otherwise affect rights/obligations?**

- NOT consensual/voluntary relationships, but legal relationships: *Griffith v Tang* [Tang had no legal rights under *Griffith University Act* excluding her from Uni is not derived from the enactment].
- *s 6(1) ADJR Act* **Conduct** (*s 3(5)*) engaged to the making of decision is also reviewable.
- *s 7(1) ADJR Act* applies where persons aggrieved by **a failure to make a required decision** to which ADJR Act applies.

### 1.3 NSW Supreme Court

#### *Supreme Court Act*

- a) Judicial review may be brought in NSWSC under *s 23 Supreme Court Act* with relief sought under: *s 69(1)*, including:
- **Order any person to fulfil any duty:** *s 65 SCA*
  - **Quash** the ultimate determination of a court or tribunal in any proceedings if that decision has been made on the basis of an error that appears **on the face of the record** of the proceedings: *s 69(3) SCA*
  - The face of the record includes **the reasons** expressed by the court or tribunal for its ultimate determination: *s 69(4) SCA*
- b) Supreme Court's **inherent** supervision jurisdiction in respect to **jurisdictional error** cannot be removed and is entrenched by *s 73(ii)* of the Constitution: *Kirk*

### 1.4 Public vs Private Distinction

#### **Review of private decision-making:**

**Principle:** decisions of private bodies MAY be subject to JR jurisdiction if decision is 'public in nature' (not relevant under ADJR Act):

- 1) **UK approach** – if exercising a **public function** then reviewable: *Datafin*. Factors per *Datafin* include:
  - Panel performed a public duty – government limited legislation and used Panel's **code** as preferred form of regulation
  - Rights of citizens were indirectly affected by Panel's decisions
  - Panel had a duty to act judicially
  - Panel's source of power was only partly based on moral persuasion and assent of members
  - Woven into the fabric of government regulation.
- 2) **HCA:** *Datafin* was **rejected** in *NEAT* [a corporation which has power to consent or veto wheat export], which in most senses was exercising public function (besides its profit motive).
  - *Forbes* - willing to exert JR over private bodies engaging in a **public activity** and its powers affect individuals' **livelihood** significantly: *Forbes* [trotting club subject to JR re its decision to exclude member from races] but some interpreted in as limited in PF proceedings.