

# 1. Introductory Issues

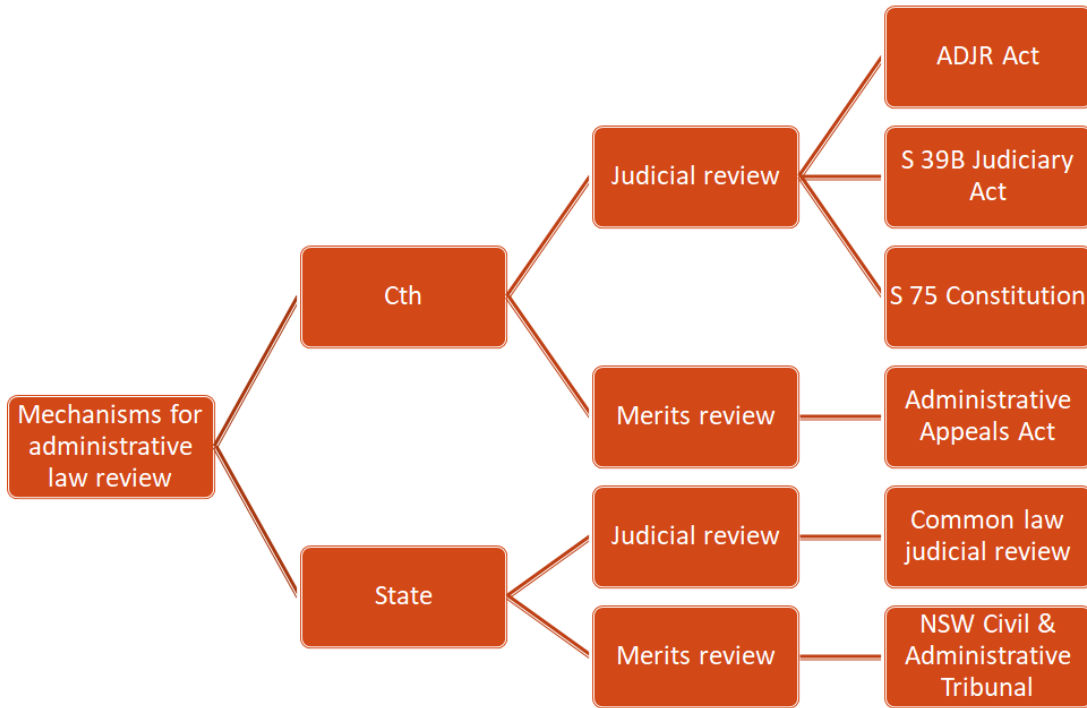
## 1.1 Separation of Powers

- Judicial, legislative and executive power. Underlying principles:
  1. Those who exercise power should be subject to checks and balances. Each institution should specialise in the task for which it is best suited.
- The executive (those who administer laws) have become increasingly privatised.
  - Sitting members of Parliament who make up the government of the day (incl. Ministers)
  - Government departments e.g public service (*Public Service Act 1999* (Cth))
  - Public service includes agencies set up to conduct oversight of other agencies
  - Statutory corporations and other government owned business
  - Tribunals and other oversight agencies
- How are decisions of the Executive regulated? **Rule of law**
  - Power exercised by government over citizens is constrained by clear rules of law
  - Those laws are applied and enforced by a judiciary that is independent to government
  - The same rules constrain the government as the citizens
  - Executive action is constrained by statute usually, and judicial oversight. When a court engages in judicial review, it is assessing **whether the administrator acted properly within the power conferred (usually by statute)**.

## 1.2 Administrative Law

- **Accountability:** Admin law is a body of principles and procedures which control and supervise government decision-making.
- **Exercise of authority:** Admin law addresses the conduct of those who hold public office or exercise public power (or public authority) through different forms of review of their decisions
- It is also about the exercise of public authority and power. **How can or should public power be exercised?** Overtime, public ideals of the practice and duties of good conduct have been translated into forms of executive and government accountability.
  - *Both the exercise of public authority, and practices of accountability, underpin the purpose and scope of admin law practice.*
- Admin law governs admin decision-making and conduct including government activities such as environmental policy, tax law, migration law, employment law. Central question is 'the decision'.
- **Reviewing admin decisions:** Both MR & JR review government decision-making or action. We therefore focus on the 'decision'. What is an administrative decision? Who is the original decision maker? Is there more than one decision maker? More than one decision?
  - In MR, tribunal (executive) reviews the decision exercising executive power and in JR, the Court reviews the decision exercising judicial power.
- In JR, the judiciary reviews the executive by:
  - **Determination of law:** Was the decision lawful?
    - Were procedures not followed?
    - Was the decision so irrational as to be a failure to exercise lawful functions?

- Decision can be quashed and remitted to original decision-maker.



## 2. Introduction to Judicial Review

## 2.1 What is Judicial Review?

- JR is about how **Courts can supervise the boundaries** of an administrator's legal powers. In the process of supervising, Courts cannot exercise those executive powers.
  - Concerned with the **lawfulness of decisions made by the executive, not whether their decisions are wise and fair** (i.e legality and merits distinction).
  - **Threshold issues:** Jurisdiction, Justiciability, Standing and Remedies.

To successfully bring a JR application:

1. Court must have **jurisdiction** to conduct JR
2. Court must accept issues are **justiciable**
3. Applicant must have **standing** to be heard
4. Court must have **power to grant a remedy**
5. There must be a **ground of review**. Must identify a way to attack decision (DM bias, irrational, failed to take into account relevant consideration, took irrelevant consideration into account).
6. Legislature must **not have validly excluded** the Court's review jurisdiction (i.e privative clauses). Often try to push back JR and will do this by inserting a privative clause in the Act.

**Must consider three distinctions:**

1. Judicial Review v Merits Review
2. Common law v ADJR
3. Jurisdiction v Justiciability (having the right to be heard).

## 2.2 Jurisdiction

- Fundamental concept in law, both in relation to the power of a state to enforce its laws and legislate, and the power or authority of Courts to exercise judgement.
- Also means the territory/terrain over which power is exercised. Jurisdictional questions are central and relate to:
  1. The scope of a decision makers power to decide
  2. The scope and authority of Court(s) to interfere with those decisions.
- A court can only hear a matter if it has jurisdiction to do so. **What authority and scope is govern to different courts to review the decisions of an ADM?** Two classes of Courts:
  - Superior courts of record of general jurisdiction
  - Courts of limited jurisdiction (Local Court)
- NSW and Cth jurisdiction is very different. This is important.
  - **NSW:** Common law Jurisdiction
  - **Commonwealth:** Common law and ADJR jurisdiction. **ADJR can only be heard in the Federal Court. If Cth Act, always argue as if you're going before the FC first.**
    - Argue CL in NSW problem q, argue ADJR jurisdiction only if in Cth.

### 2.2.1 Jurisdiction: High Court (Commonwealth Constitution)

**Commonwealth of Australia Constitution Act: Section 75, Original jurisdiction of High Court**  
In all matters:

(iii) in which the Cth, 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.

- Constitution specifically vests authority and jurisdiction in HC to exercise JR via s 75(v).
  - Confers JR jurisdiction on HC as part of its original jurisdiction
  - **Remedies:** Gives power to HC to issue injunctions, and writs mandamus and prohibition
- S 75(iii) is less significant for JR in practice, but remains relevant and of growing importance.
- **Three key elements:** Matter, writs/remedies present, Officer of the Cth

#### 2.2.1.1 Section 75(v): Matter

##### *Re McBain; Ex parte Australian Catholic Bishops Conference (2002) HCA 16, Hayne J:*

- 'Matter' is more than a legal proceeding. Must be an immediate right, duty or liability to be established by the Court's determination. Hypothetical questions **do not** give rise to a matter
- Federal judicial power has a core duty to be exercised to 'quell' matters.

Matter must involve rights, duties and liabilities. A person must have more than a theoretical interest in its resolutions, must be of immediate direct effect upon them (standing and matter intertwined).

#### 2.2.1.2 Section 75(v): Writs

- HC has original jurisdiction under the Constitution, which derives from common law.
- Writs form part of the common law authority vested in the Crown, a form of pleading asking a court for a particular remedy. Writs are a form of **prerogative review and remedy for unauthorised actions**. Basic functions of these remedies is to:
  - **Quash** (deprive of legal effect) invalid or unlawful admin decisions (writ of **certiorari**)
  - **Prevent** illegal admin acts or decisions (**prohibition**)
  - **Require** performance of a duty by an ADM (**mandamus**)
- Writs did not operate as responses to grounds for review. They were a formula that required certain elements that would or would not enable a Court to grant a remedy
- The way remedies operated therefore created the jurisdiction for courts to exercise JR.

##### 2.2.1.2.1 Limits

- No direct mention of grounds for review in s 75(v) - reflects 'old' CL approach (shifted in ADJR)
- Access to remedies, and therefore HC's jurisdiction, is dependent upon fulfilment of the technical requirements of writs
- Certiorari not mentioned in s 75(v) although injunctions (a non-prerogative) are
- All writs mentioned in s 75(v) need a certain kind of error to be present before the remedy can be invoked - jurisdictional errors.

#### 2.2.1.3 Section 75(v): Officer of the Commonwealth

##### *NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277*

- Whether a decision by a private company that had statutory effect was a decision reviewable under ADJR. **Officer of the Cth does not extend to government owned corporations, but can use s 75(iii) as seen in *Project Blue Sky*.**
- Court found jurisdiction under s 39B not available as the company was not 'an officer of Cth'.
  - Decisions made by private corporations are not subject to JR under ADJR as they are not made "under an enactment" but rather flow from the corporations law.

### ***R v Panel on Take-Overs and Mergers, Ex Parte Datafin (1987) 1 QB 815 (UK)***

- UK decision which determined justiciability through the governmental nature of power exercised, rather than the source of the power (i.e statutory authority)
- CA held that the courts had jurisdiction to undertake JR, but dismissed the proceedings on the ground that no legal error had been committed by the panel.
  - Source of power should not be the sole test of whether a body is subject to JR.
  - Nature of the power is also significant. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then this may be sufficient to bring the body within the reach of JR.
  - The panel operates wholly in the public domain and performs an important public duty and therefore should be subject to administrative law and judicial review.

### **2.2.2 Jurisdiction: Federal Court (*Judiciary Act, ADJR Act*)**

- Today, Federal Court has two sources of JR Jurisdiction: ADJR Act and Judiciary Act.
- Interpretation of threshold questions to open up jurisdiction under the ADJR meant not all decisions can be reviewed through the ADJR (jurisdictional limits to ADJR).
- As a result, some cases were not able to invoke FC jurisdiction for JR, and thus could still only be reviewed under s 75(v) jurisdiction of HC.

#### ***Judiciary Act 1903 (Cth): Section 39B***

#### **Original jurisdiction of Federal Court of Australia: Scope of original jurisdiction**

(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.

- To avoid overburdening HC, in 1983 the *Judiciary Act* was amended to broaden JR jurisdiction of the FC. Introduced s 39B(1) and (1A), giving identical original jurisdiction to the FC (*Evans v NSW*)
- S 44(1) means HC can also remit matters to FC.
  - O31.01 *Federal Court Rules 2011* (Cth) can combine s 39B and ADJR applications

- **Federal Circuit Court has same ADJR jurisdiction as Federal Court, does not have the Federal Court Judiciary Act Jurisdiction.**
- Can argue ADJR argument and CL argument simultaneously, if problem q, argue at FC.
- **Section 39B(1A)(c):** Further broadened in 1997. As a result, FC now has JR jurisdiction in all matters 'arising under laws made by Parliament'. This is important because:
  - Plugs gaps under the ADJR regarding non-statutory executive powers
  - Can review legality of subordinate legislation (not reviewable under ADJR)
  - Does not matter whether the ADM is 'an officer of the Cth' (limit is on s 75(v) only).

#### 2.2.4 Constitutional Judicial Review

- In 1990s, Parliament tried to limit JR powers of FC (in context of migration). S 75(v) remained untouched, therefore HC was flooded with migration cases. While FC jurisdiction now restored and *Migration Act* amended, an important result:
  - HC has 'rebadged' s 75(v) remedies: No longer 'common law' avenue through prerogative writs, now 'constitutional writs' and 'constitutional injunction' (*Refugee Review Tribunal; Ex Parte Aala* [2000] 204 CLR 82)
- Another key broadening of JR jurisdiction is s 75(iii). HC has been prepared to hear JR application under this section (as opposed to s 75(v)), and grant remedies although **no jurisdictional error** was shown (i.e requirement for s 75(v)).
- Key case is *Project Blue Sky*, and one of the core reasons was the way the Court read 'the Cth under s 75(iii) to include government owned corporations (avoiding limits of 'officer' in s 75(v)).
  - *Plaintiff S157/2002 v Cth* (2003): 'Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. **But it cannot deprive this court of its Constitutional jurisdiction to enforce the law so enacted**' (Gleeson CJ) → Enforcing SOP and pushing back against privative clauses
- S 75(v) controls jurisdictional error (*Aala*) with the writs of mandamus and prohibition.
- Court found 'constitutional writ' term is more preferable than "prerogative writs" (*Aala, S157*). S 75(v) also provides for the grant of injunctive relief that may go beyond the grounds of JE (*S157*).
- Under s 75(v), JR can be sought against Cth officers, including Cth ministers (*Jia*), their delegates (*Carter*), officers of statutory bodies, and federal public servants. Cth officers also include members of FC, military service tribunals and other tribunals, no HC judges (*Re Carmody*)
- Another determination under Ch III is that there must be a matter (s 39B JA grants jurisdiction with respect to 'matters', s 75 Constitution grants original jurisdiction to HC in 'matters') for determination (controversy to decide).
- S 75(v) specifies mandamus, prohibition and injunctions but certiorari is not mentioned. Although not expressly listed, HC has held that certiorari is available as an ancillary remedy to the constitutional writs of mandamus and prohibition (*S157*).

#### 2.3 Jurisdictional Error

- Establishing JE is a prerequisite to obtaining common law prerogative writs. JR for JE is a defining characteristic of Australian superior courts and is constitutionally entrenched (*Plaintiff S157*).

- The remedies of prohibition and mandamus are available for JE. JE is one of the bases for certiorari, along with breaches of procedural fairness (*Aala, Li*) and non-jurisdictional errors of law on the face of the record.
- JE is a misunderstanding of the nature, scope, or existence of a DM's jurisdiction, extending to an error made while exercising a power if that error leads a DM to exceed his/her authority.

#### 2.4 Non-jurisdictional errors of law on the face of the record

- Along with JE and breaches of PF, a non-jurisdictional error is a basis for certiorari if the error is apparent on the face of the record. This is a 'separate and distinct basis on a Supreme Court can make an order in the nature of certiorari'.
- Distinction between jurisdictional and non-jurisdictional errors can be difficult to make (*Kirk, Re McBain*), but must be made in the common law and constitutional JR jurisdictions (*Kerr*).
- Hayne J in *Re Refugee Tribunal; Ex parte Aala*: There is a JE if the DM makes a decision **outside** the limits of the functions and powers conferred on him or her, or does something which he or she **lacks** power to do. By contrast, **incorrectly** deciding something which the DM is **authorised** to **decide** is an **error within jurisdiction**. The former kind of error concerns departures from limits upon the exercise of power. The latter does not (163).
- Non-jurisdictional errors of law will not be grounds for the grant of certiorari unless they are apparent upon the face of the record. But what is the record?
  - Moves to expand the record for the purposes of non-JE was rejected by HC in *Craig v SA*.

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

- Crown sought JR of a decision given in oral reasons for judgement by a District Court judge to stay the proceedings in a criminal trial.
- HC held that there was no jurisdictional error in the District Court's decision. Left open the question whether certiorari could be granted for non-JE on the face of the record.
- In this case, the suggested error could only be ascertained by inspecting the transcript of proceedings, including the exhibits. HC held that neither the transcript of proceedings nor the reasons for the decision were part of the record available to SC and so no error of law could be identified on the face of the record for the purposes of certiorari.