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Related grounds – to be used together

1	<i>Error of Law</i>	<i>Jurisdictional error</i>
2	<i>Jurisdictional error</i>	<i>Error of law, procedural fairness, relevant/irrelevant consideration</i>
3	<i>Procedural fairness</i>	<i>Jurisdictional error (when deciding whether legislation excluded/included right to fair hearing stipulation) *if bias then relevant/irrelevant consideration</i>
4	<i>Procedural error</i>	<i>May overlap with procedural fairness</i>
5	<i>Relevant/ irrelevant consideration</i>	<i>Can be invoked with improper purpose (Peko Wallsend, Tickner v Chapman)</i>
6	<i>Improper purpose</i>	<i>Bad faith (just add intention)</i>
7	<i>Inflexible policies</i>	<i>Irrelevant consideration</i>
8	<i>JE & non JE</i>	<i>Privative clause</i>

DELEGATED LEGISLATION

- Actual legislation made by the parliament empowers an executive to make their own delegated or 'subordinate' legislation
 - **Identify the Legislative instrument: The Act giving power to an authority for delegated legislation.** Delegates power to a governor, a minister, or a statutory authority to make rules supplement to the act.
 - always **subordinate to the real legislation** under which it was made, and to other Acts (**unless there is an override clause**).
 - deal with **specific details**, whereas the Act provides the general framework.
- Examples of DL: regulations, statutory rules, by laws, ordinances
- Pro: delegated legislation = **convenience and expediency**. The executive agencies are also usually better equipped than the parliament since they have expertise at the area at hand.
- Con: vests a legislative power with the executive branch of government. Goes against separation of power.
- Accountability of delegated legislation:
 1. Judicial review → courts to examine whether subordinate legislation was validly made considering separation of power.
 2. Non- judicial accountability: *Legislative Instruments Act 2003* (Cth)

JUDICIAL REVIEW PROCESS

- **JR is concerned with the lawfulness of decisions made by the executive**, not whether their decision was fair. (i.e. legality/merits distinction)
- *If* the decision/fact was based on question of law, and *if* the DM has breached that law or misapplied it in some way, it must be **judicially reviewed**. **BUT** general fact, with no question of law arises then no JR.

Law/Fact distinction: *Collector of Customs v Agfa Gevaert Ltd* (1996) → JR only for issues of law

- Issue: Did this involve 'question of law'? '*Pozzolanic*' principles applied:
 - Whether a word or phrase in a statute is to be **given its ordinary meaning or some technical or other meaning**
 - The **ordinary meaning of a word or its non-legal technical meaning** is a question of fact.
 - The **meaning of a technical legal term** is a question of law.
 - The **effect or construction** of a term whose interpretation is (judicially) established is a question of law.
 - **Whether facts fall within the provision of a statute** is generally a question of law (*Hope v Bathurst*).
- Court determining whether decision/action has been done legally:
 - Court must have **jurisdiction** to conduct JR
 - Court must accept issues are **justiciable**
 - Applicant must have **standing**
 - There must be a **ground of judicial review**
 - * Court must have power to grant a **remedy**
 - Legislature must not have validly excluded the court's review jurisdiction – **punitive clauses**
- Remember Tribunals do not have judicial power as members do not have formal legal training.

JURISDICTION TO CONDUCT JR

Steps to determine jurisdiction

- 1) Who is the DM?
- 2) Statute/act giving power to the DM?
- 3) Is there more than one decision-maker? More than one decision?
- 4) whether this is a CTH act or a State Act?
- 5) If it's a CTH act then
We can have Common Law jurisdiction through s 75(v) of Constitution in the High Court or s39B of the Judiciary Act in the Federal Court
&
Statutory jurisdiction through ADJR in the Federal Court or the Federal Circuit Court.
- 6) To establish statutory JR under the **ADJR** we must establish:
 - A decision
 - Of an administrative character
 - Made under an enactment (further defined in s3(1))

Decision

- A decision must be the final or operative decision which is determinative of the issue for consideration. **Interim decisions if allowed by the statute are also decisions** - *ABT v Bond* (1990)

Griffith v Tang (2005)

The decision itself must confer, alter or otherwise affect legal rights or obligations

Of Administrative Character

In *Griffith v Tang* it was established that “of administrative character”: excludes decision of ‘legislative’ or ‘judicial’ character.’ - Gummow, Callinan and Heydon JJ

Administrative character: application of general rule to a particular case

- Furthermore, the decision is not legislative in character as it does not fall under the factors laid down in Tang.
- Factors for legislative character decision:
 - Creates new rules of general application
 - Has binding legal effect
 - Has to be publicly notified in gazette
 - Made after wide consultation
 - Incorporates or has regard to wide policy considerations
 - Cant be varied or amended by executive
 - Can be reviewed by parliament

Aerolinas Argentinas [1997] FCA 723

~~Determination under a statute to impose a landing charge for large aircraft landing at major city airports was a decision of administrative character per the Full Federal Court~~

Made under an enactment

- Under Section 3(1)(a) of the ADJR Act if it is an Act then it is an enactment
And
Statute/regulation gives the decision-maker power to make the decision

Griffith University v Tang (2005)

The decision is **expressly or impliedly required or authorised by the enactment**

(In ____ case, the ____ Act gave the Pastures Protection Board the authority to make a decision.)

According to the test, we have satisfied all the elements therefore we have ADJR jurisdiction in Federal Court and Federal Circuit Court

For jurisdiction in the HC by s.75(v) of the Constitution, there is a matter which creates a controversy which has an immediate effect on ____ (*Re McBain* (2002)) and the officer of the Cth being ____ made the decision.

If the review is available under the ADJR act, an applicant can also invoke the court’s s 39B Judiciary Act Jurisdiction and seek review under both ADJR Act and s 39B jurisdiction. As **under r 031.01 of the *Federal Court Rules 2011 (Cth)* can combine S39B and ADJR applications.**

We also have the option of the High Court’s Original Jurisdiction under s 75(v) of the Constitution but it is only used when JR options under other jurisdictions is not available.

COURT MUST ACCEPT ISSUES ARE JUSTICIABLE

- Justiciability is about the appropriateness and suitability of a question for judicial review of particular administrative decision (Chris Finn in Federal Law Review 9 of 2002)
- As the issues are not re **prerogative power** or **national security policy & defence** thus is justiciable (*Peko Wallsend* (1986))
- ~~Justiciability is a concept that forecloses the exercise of jurisdiction.~~

STANDING

- CL and ADJR standing test is same
- Common law:
 - For individuals → *Edwards v Santos ltd* (2011)
 - Heydon J : A **private or financial interest**
Not ‘a mere intellectual or emotional concern’
 - For groups → ‘special interest’, courts have emphasised factors: *Northcoast* (1994):
 - prior involvement in the particular matter?
 - group recognized or funded by government?
 - whether group represents a significant strand of public opinion?
 - expertise of the organization?
- ADJR
 - **Section 3(4)**: ‘person aggrieved’ *includes* ‘person whose interests are (or would be) adversely affected by the decision’
 - ___ ‘a person aggrieved’ because ___
 - **Cane and McDonald notes: the “special interest” test for groups at common law applicable to ADJR**

- Original jurisdiction of Federal Court of Australia.
- s39B(1) and (1A) of the *Judiciary Act*, which gives identical original jurisdiction to the Federal Court as enjoyed by the HC - *Evans v NSW*
- Due to 39B(1A)(c) FC now has JR jurisdiction in **all matters ‘arising under any laws made by the parliament’**

Therefore, under 39B

- plugs gaps under the ADJR re non-statutory executive powers
- **can review legality of delegated legislation** (not reviewable under the ADJR)
- does not matter whether the ADM is ‘an officer of the Cth’ (that limit is on s 75 (v) only)
- Discuss jurisdictional error
- **s44(1) of the *Judiciary Act* means HC can also remit matters to the FC**
- **O31.01 of the *Federal Court Rules 2011 (Cth)*: can however combine S39B and ADJR applications**

ADJR Jurisdiction

- **Do not need jurisdictional error for this**
- ADJR Act jurisdiction applies to Federal Court & Federal Circuit Court BUT NOT TO High Court; NSW Supreme Court
- **Sections 5 – 7 ADJR (decision, conduct)**
 - ‘**decision**’ v’s ‘**conduct**’
 - *ABT v Bond* (1990)
The terms ‘decision’ and ‘conduct’ should be read restrictively. ‘Decision’ refers to administrative activity that is substantive and final or operative and ‘conduct’ refers to administrative activity preceding a decision that reveals a flawed procedural processes, as opposed to substantive issues.
 - ‘Conduct’ said to be ‘an essentially procedural concept which focuses on actual conduct of proceedings and NOT on ‘intermediate conclusions reached en route to final substantive decisions.
- **Section 3 ADJR (definition) of an enactment**
- An application can be made review in circumstances where:
 - ‘**a decision to which this Act applies**’ (s 5(1));
 - proposed and actual conduct engaged in for the purpose of making ‘**a decision to which this Act applies**’ (s 6(1)), and
 - a failure to make a ‘**decision to which this Act applies**’ (s 7(1)).
- **TEST** for ADJR Act for jurisdiction