

TOPIC ONE – JURISIDCTION

ADJR ACT

1. IS IT A DECISION OR CONDUCT?

DECISION

Start → Pursuant to section 5 of the AD(JR) Act, [X] may seek JR in respect of a decision to which the ADJR Act applies. This requires [X], as an aggrieved applicant, to establish that [DM] [DM's act] was a decision, made by an officer of the Commonwealth, that was administrative in nature, and was made under an enactment (ss 3(1), 5 ADJR Act).

Test: If the legislation expressly makes provision for the making of the decision it will be reviewable for the purposes of the ADJR Act (**Bond**).

CONDUCT

Start → Pursuant to section 6 of the AD(JR) Act, [X] may seek JR in respect of conduct to which the ADJR Act applies. This requires [X], as an aggrieved applicant, to establish that [DM] [conduct] for the purpose of making a decision to which the ADJR Act applies, was made by an officer of the Commonwealth, that was administrative in nature, and was made under an enactment (ss 3(1), 6 ADJR Act).

Test: Where legislation expressly provides for the making of ancillary decision they will be reviewable decisions for the purposes of the ADJR Act despite not being the final and determinative decision (**Bond**)

Pursuant to **s3(5) ADJR**, conduct includes anything preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation.

- Deciding to investigate a matter;
- Assembling facts;
- Interviewing a witness;
- Reading a report, or other secondary-source material;
- Engaging an expert consultant;
- Drafting a preliminary decision (but not the final one)

EXAM TIP: consider whether all the ancillary decisions made along the way can each by the subject of their own separate review

FAILURE TO MAKE DECISION

Start → Pursuant to s 7 ADJR Act, a person aggrieved by a person who has a duty to make a decision to which this act applies that has failed to make that decision may apply to the FC for an order of review to make the decision on the ground there has been unreasonable delay in making the decision.

2. ADMINISTRATIVE CHARACTER

Start → In order for the decision to be administrative in character it must be concerned with the application of general rules set out in the legislation to a particular case.

Administrative acts are concerned with the application of the **general rules** set out in legislation to **particular cases**.

- Whereas legislative acts are concerned with the creation or formulation of new rules of law having general application.
 - *i.e. if someone applies for a licence to be a butcher under the Butcher's Licenses Act and the relevant administrative body had regard to the Act and then said 'no you can't have your licence' this is administrative as they are making a decision based on legislation.*

Preliminary conclusion → Given the above it is [likely/unlikely] the court will declare the decision administrative in nature and therefore will/will not be heard under the ADJR.

- **Note:** However, if I am wrong the next step would be to determine if it is made under an enactment.

3. MADE UNDER AN ENACTMENT

S3(1) of the ADJR defines made under an 'enactment' to include:

- **An Act** **OR** an instrument – including rules, regulations or by-laws (i.e. subordinate legislation) made under an Act.
 - *Regulations and by-laws are very finely detailed rules pursuant to statute.*
- Decisions made by the G-G are **not** made under an enactment for the purposes of the ADJR Act.

Requirements set out in Tang:

1. Decision must be **expressly or impliedly required or authorised by the enactment; and**
 - *Here you are looking at the source/power to make the decision*
2. The decision must itself **confer, alter or otherwise affect legal rights or obligations** and in that sense the **decision must derive from the enactment**.
 - *Here we are looking at the consequence/impact of the decision*
 - *It **does not** have to be the applicant's legal rights which are affected in order for a decision to be made under an enactment.*

COMMON LAW s75(v)

Start → Pursuant to s 75(v) of *The Constitution*, the HCA has original jurisdiction to hear JR applications where [X] seeks a prerogative writ against an officer of the Cth.

- **Note:** The FC has original jurisdiction under s39B of the *Judiciary Act (JA)*
- **Note:** HCA can pass proceedings and remit the matter to the FC under s44(2A) JA

1. ESSENTIAL REQUIREMENTS

Start → In order for [X] to have jurisdiction to seek JR there must be a 'matter', 'against an officer of the Cth' and must establish an 'entitlement to a remedy'.

1. A matter:

- A matter involves a 'controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled' (*Re McBain*)
 - Therefore, the court cannot answer hypothetical questions (*Re McBain*)

2. Against an officer of the Cth:

- Cth ministers, public servants, statutory office holders, judges and tribunal members are all 'officers of the Cth'.
- No recent analysis of this phrase from the HCA – very little authority as to what constitutes an officer of the Cth
- Of particular interest is whether a contractor can be an 'officer of the Cth' → it is unclear at this stage and would depend on the view of the court.

3. An entitlement to a remedy is sought:

- **Must** be entitled to a mandamus, prohibition, certiorari, injunction or declaration
 - **Note:** while certiorari is not included in the provision it is accepted to be included
 - **Most common combination of writs sought is certiorari and mandamus**
 - **EXAM NOTE:** don't have to run through remedy requirements here can wait until the end of the question if appropriate

Jurisdictional Requirements for Prerogative Writs	
Certiorari	<p>Definition: an order quashing a defective decision that has been made.</p> <p>Requirements: The decision sought to be challenged is made pursuant to the exercise of public power.</p> <ul style="list-style-type: none">- Power conferred by statute is considered to be a public power. <p>Test for whether non-statutory body is exercising public power:</p> <ul style="list-style-type: none">- a non-statutory body exercises public power, if in the absence of a private body carrying out the function the government would invariably carry out the function – <i>Datfin</i>

	<p>- Highly criticized judgment as no criteria to determine when gov would step in and take over a particular function.</p> <p>Note: only operates to quash the legal effects or the legal consequences of the decision under review (<i>Hot Holdings v Creasy</i>)</p>
Mandamus	<p>Definition: an order requiring a DM to exercise a discretion in accordance with the law.</p> <p>Requirements: An order for mandamus will lie only in respect of a public duty to exercise a discretion (<i>Western Australian Field and Game</i>)</p> <p>- Note: A DM will be taken to have a duty to exercise a discretion unless the provision is in strong conflict with the purpose of the act (<i>Western Australian Field and Game</i>)</p> <p>- Court will never order a DM to arrive at a particular decision, it will simply order the DM to exercise their discretion</p>
Prohibition	<p>Definition: To prohibit a DM from further unlawful activity prohibits a person from taking a proposed course of action or making a proposed decision.</p> <p>Requirements: The decision sought to be challenged is made pursuant to the exercise of public power.</p> <p>- Power conferred by statute is considered to be a public power.</p> <p>Test for whether non-statutory body is exercising public power:</p> <p>- a non-statutory body exercises public power, if in the absence of a private body carrying out the function the government would invariably carry out the function – <i>Datafin</i></p>
Injunction	<p>Definition: order by the court the respondent refrains from undertaking a particular act, or undertakes a particular act.</p>

2. JUSTICIABILITY AT COMMON LAW

Start → Despite the [HCA/FC] having PF jurisdiction to conduct judicial review at CL the court can refuse to hear and determine [the matter] if it is **non-justiciable**.

Two possibilities:

A matter will be **non-justiciable** if the court feels that:

- 1) It **could not** resolve the issue; **OR**
 - *Whether a decision or controversy is amenable to judicial determination*
 - *Rarely arises now but may occur where a case involves competing policy considerations*
- 2) It **should not** resolve the issue (more common)
 - *i.e. where a court would have to consider the competing merits of many claimants for a limited resource such as a limited number of fishing licences.*

Factors the court will look at →

Factors the court will look at:

In determining whether a matter is non-justiciable the court will have regard to:

- 1) The **source** of power (constitutional, prerogative or statutory)
 - Prerogative power is justiciable (***Peko-Wallsend***)
- 2) The **status** of the decision-maker (PM, cabinet or departmental officer)
 - A high-status decision-maker does not exclude review (***FAI Insurances***)
 - Cabinet decisions may be immune but depends on the particulars of the case (***Peko-Wallsend***)
 - Where the subject matter of the decision involves complex policy questions in conjunction with a treaty it may place the decision beyond the review of the court (***Peko-Wallsend***)
- 3) The **nature** of the decision-making power (i.e relating to national security v individual application for mining license)
 - National security is the responsibility of the executive government, the actions needed to protect interests of national security **is not for the courts of justice** to have the last word on (**Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service***).
 - ***Hicks v Ruddock*** where it was justiciable despite involving international relations as it involved such serious issues of deprivation of liberty & detention which counter-balanced non-justiciability.
- 4) Whether the issue for determination is **real or hypothetical**
 - Hypothetical questions give rise to no matter within the meaning of *The Constitution* (**Hayne J in *Re McBain***)