

Table of Contents

| | |
|---|-----|
| <i>Class 7 – Judicial Review – Jurisdiction and Justiciability</i> | 2 |
| <i>Class 8 – Standing</i> | 13 |
| <i>Class 9 – Acting Without Power</i> | 22 |
| <i>Module Week 5 Notes - Delegation</i> | 27 |
| <i>Class 10 – Fact Finding Errors</i> | 32 |
| <i>Class 10.5 – Judicial Review and Statutory Interpretation</i> | 38 |
| <i>Class 11 – Procedural Fairness: The Hearing Rule</i> | 46 |
| <i>Module Week 7 Notes – Bias</i> | 55 |
| <i>Class 12 – Discretion and Errors 1: Purpose and Considerations</i> | 63 |
| <i>Class 13 Notes – Discretion and Reasoning Errors 2: Policies</i> | 72 |
| <i>Class 14 – Discretion and Reasoning Errors 3: Unreasonableness</i> | 80 |
| <i>Class 15 – Jurisdictional Error and Statutory Restrictions (Privative Clauses)</i> | 91 |
| <i>Class 16 – Statutory Restrictions</i> | 97 |
| <i>Week 9 Module - Remedies</i> | 101 |

Class 7 – Judicial Review – Jurisdiction and Justiciability

The Framework for Challenging and Controlling Government Action

- Judicial review by courts looks only at whether government decisions are lawfully taken, that is, comply with the limits imposed by law

The Framework for Judicial Review

- Two main aspects of judicial review are:
 - The legal framework for judicial review by courts
 - The types of administrative action that are justiciable (amenable to judicial review)
- Five elements to a successful judicial review challenge
 - The person seeking redress has standing
 - The matter is justiciable (able to be reviewed by the court)
 - That the court has jurisdiction or authority to review the matter
 - That there is an available ground of review
 - That there is an appropriate remedy

Commentaries

- *Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review'*
 - The investing of the ordinary Courts with authority to strike down the Executive's decisions and actions is not a universal mechanism for subjecting the executive branch of Government to legal rules
 - Not all legal systems find it expedient to repose in the Judiciary a power to review the Executive's actions
 - For example, China imposes responsibility on the People's Congress
 - Judicial review inevitably creates inefficiency
- *Sir William Wade, Constitutional Fundamentals*
 - To exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power
 - It is an abuse of parliamentary power
 - Parliament is unduly addicted to this practice
 - The law's delay, alongside its uncertainty and expense, tempts governments to take short cuts by eliminating judicial review

The Judicial Review Framework in Each Australian Jurisdiction

Judicial Review at Common Law

- Available CL remedies for judicial review include:
 - Certiorari: To quash an invalid decision
 - Prohibition: To prohibit further unlawful activity
 - Mandamus: To compel a lawful exercise of power
 - Habeas Corpus: To require the release of a person from unlawful detention
 - Equitably remedy of Declaration and the prohibitory and mandatory injunction: Enables a court to make a declaration of the agency's legal duties, to enjoin unlawful activity and to compel a restoration of the lawful status quo
- Common grounds for review are:
 - Procedural fairness or natural justice;
 - Error of law;
 - Unauthorised purpose;
 - Irrelevant considerations;
 - Unreasonableness;
 - Inflexible application of policy
- Except in its subject to statutory modification by some states, the prerogative writs and equitable remedies can still be granted by the Supreme Courts of the states and territories
 - Also reflected in s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903* (Cth)

Judicial Review under Statutory Schemes

- The ADJR act replaced the technical and antiquated prerogative schemes with a simpler 'application for an order of review', which the Federal Court could grant by making such order as it thought appropriate (ss 11, 16)
- The Act also overrode existing privative clauses (s 4)
- The act applies to Federal Circuit Court

Indirect Judicial Review

- 'Collateral' review of the validity of administrative action
 - Where the legality of government action is raised in the course of criminal and civil law proceedings

- For example, whether evidence can be excluded because it was unlawfully obtained by an officer (*Coco*)

Commonwealth – Federal Court

- The Federal Court of Australia is the most significant venue for judicial review of Cth decisions
 - However, its jurisdiction is limited to areas conferred by Parliament (*Federal Court of Australia Act*)
 - Does not have an inherent CL jurisdiction like state Supreme Courts
 - However, s 39B and the ‘accrued’ and ‘associated’ jurisdiction exercised by court partially substitute for a CL jurisdiction
- This limited jurisdiction mean jurisdictional disputes are common in proceedings against Cth Government agencies
- This limited jurisdiction relates only to the court’s authority to adjudicate, not the substantive law principles which are applied by them
 - For example, a case can have federal jurisdiction whilst applying NSW law

Administrative Decisions (Judicial Review) Act 1977 (Cth)

- The ADJR Act defines the procedure which a person may apply to the Federal Court or Federal Circuit Court:
 - For an order of review (s 11)
 - The grounds of review (ss 5, 6 and 7)
 - The standing to commence proceedings (ss 3(4), 5 and 6)
 - The test for standing for third parties with interest in proceedings (s 12)
 - The relief the courts can give (s 16)
 - The courts’ power to stay the operation of a decision being challenged (ss 15, 15A)
 - The procedure by which a person can obtain a written statement of the reasons for a decision before commencing an action (ss 13, 13A; cf Sch 2)
 - The relief that may be granted (s 16)
- Act is premised on the principle that it enables review of all Commonwealth Government action, although there are exceptions
 - Some categories are expressly excluded from review (Sch 1)
 - There are also certain qualities which an action must have to be reviewable
 - For example, must be ‘a decision of an administrative character made... under an enactment’ (s 3) or ‘conduct for the purpose of making a decision’ (s 6)
- ADJR also provides courts with jurisdiction including decisions made by Cth officers under Cth/state cooperative schemes

Judiciary Act 1903 (Cth)

- Concern about s 39B(1) becoming the preferred standard for federal judicial review
 - This is because it defines the scope of jurisdictional error and contains fewer features than ADJR act

Source of Power

- S 39B(1) was enacted to wider Federal Court’s jurisdiction to match HC’s original jurisdiction under s 75(v) of the *Constitution*
 - Necessary because the limitations on federal judicial review by ADJR effect were directing caseload to HC
 - Most applications for HC judicial review are thus remitted to FC
- As 39B(1) confers CL jurisdiction on FC, this jurisdiction not restricted by ADJR Act
- 39B(1A) also confers FC with jurisdiction to adjudicate constitutional issues and all matters arising under Cth legislation. Its effect was:
 - S 39B(1A)(c) enabled FC to review directly the validity of subordinate legislation
 - FC cannot do this under the ADJR act because the issue is not of an administrative character
 - S 39B(1A)(b) enabled FC to deal with a ‘matter... arising under the Constitution) (*Evans*)
 - S 39B(1A)(c) + *Immigration (Guardianship of Children) Act 1946* (Cth) conferred jurisdiction to supervise minister’s function as guardian of non-citizen children

Limitations

- Actions under s 39B(1) must be against an ‘officer of the Commonwealth’ and must relate to a ‘matter’ (*McBain*)
- Actions under s 39B(1A)(c) must ‘arise under’ a parliament law
- Jurisdiction conferred by s 39B does not reach as far as original jurisdiction of s 75(iii) by *Constitution*
 - This is because the latter embraces ‘any claim against the Cth’
- Example approach to these limitations in judgments (*TCL Air Conditioner*)
 - An application to enforce an arbitral award under Art 35 of the Model Law is a ‘matter... arising under [a law] made by the [Cth] Parliament’ within s 76(ii) of the *Constitution*
 - The Federal Court has original jurisdiction in a matter arising under a law made by the Cth Parliament, defined under s 77(i) of the *Constitution* by s 39B(1A)(c) of the Judiciary Act
 - Therefore Federal Court is a ‘competent court’ to review applications under Art 35 of Model Law

Judicial Review in NSW

- Confined to CL review
 - However, the NSWSC's inherent jurisdiction has been reformed to:
 - Replace complex prerogative writ procedure with simpler procedure of a summons and court order or judgment; and
 - By empowering the court to make the most appropriate order in the circumstances (ss 65, 66, 69, 69B, 69C, 70 and 71 of *Supreme Court Act 1970* (NSW))
- The *Practice Note* SC CL 3 [14]:
 - Permits NSWSC to direct that a statement of reasons be supplied by someone who has applied for review
 - Includes a list of CL grounds of review

Justiciability

- In a statute-based system of judicial review, boundaries are determined by statute that confers jurisdiction on a court
 - An example is s 3 of the ADJR Act
 - 'Decisions of an administrative character made under an enactment' (s 3)
 - Common to refer to these boundaries as '**jurisdictional limitations**'
- At CL, a court is left to define situations in which judicial review is appropriate
 - A 'non-justiciable' conclusion means the question is not considered appropriate or fit for judicial determination or evaluation
 - Reason for conclusion may be because of:
 - The nature of the issue before the court
 - P's standing to commence proceedings
 - The ground of legal error asserted
 - The nature of the relief claimed
 - The time at which proceedings were commenced
 - Whether deference should be accorded to the decision under review

Commentaries

Sir Anthony Mason AC KBE, 'The High Court as Gatekeeper'

- Justiciability not susceptible to a definition
- Non-exercise of discretion invested in a court should be confined to issues that do not involve the exercise of judicial power because:
 - The issue is committed exclusively to a non-judicial agency; or
 - The issue is incapable of resolution by legal criteria or ascertainable objective standards
- Where an issue is committed primarily (but not exclusively) to another branch, that branch's decision should be subject to low judicial scrutiny

Justice James Allsop, 'The Control of the Executive by the Courts'

- Justiciability applies where:
 - Absence of jurisdiction
 - Circumstances where although possessing jurisdiction, the court chooses not to exercise it
 - Circumstances in which court can resolve the case without dealing with the issue
- Difference in approach may be required depending on the nature or basis of review sought
 - For example, different considerations may apply to a cabinet decision depending on whether it is for a denial of natural justice or WU
- More appropriate to determine whether claimant has standing in 'matter' than determine issue is not 'justiciable'
- Value judgments most commonly found (absent rules such as act of state) when decision involves:
 - Political considerations, policy, high policy, or foreign relations;
 - Considerations of matters which the courts have no judicial means of assessment
 - The degree to which a party's rights as to custody or human rights are affected

Idea of Justiciability

- Contemporary idea is that justiciability represents other legal concepts
 - Finn argues that the issue is whether a decision is justiciable on a certain ground of review, rather than a blanket availability/non-availability of review
- Public law principles, other than grounds of review, can also be determinative
 - In *McBain*, the HC determined the issue as non-justiciable because of the constitutional concept that an exercise of federal judicial power must involve a 'matter' as referred to in ss 75 and 76 of the *Constitution*
 - HC also confirmed overlap between justifiability with principles of standing and remedies

Justiciability in Law

- Questions of justiciability have squarely arisen in *McBain*, *CCSU* and *Peko*, in determining whether a government decision is justiciable if:

- It involves an exercise of prerogative power
- Was made by cabinet
- Had a closer relationship to national security
- Was made in the conduct of international relations
- A point emphasised in all three cases - *McBain*, *CCSU* and *Peko* – is that the exercise of judicial power is **restricted** to cases that require a **determination of legal rights and interests of, or claims made by, an individual**
 - Therefore, justiciability does not embrace a purely advisory opinion (*CGU Insurance*)
 - **Another formulation of this requirement** is that judicial ruling must have a **direct and immediate consequence for party's interests and legal rights** (*Peko*)
 - **Hypothetical** issues are **not justiciable** (*McBain*)
 - Justiciability may also depend on whether claim relies on 'legal standards', not 'political considerations' (*Stewart v Ronalds*)
- Trend of justiciability is in expanding the range of government decisions subject to judicial scrutiny
 - Example is that there was doubts about the justiciability of an exercise of statutory power by a vice-regal officer
 - That doubt was reflected in the GG's exclusion of decisions under the ADJR act
 - Despite this, the courts accepted the construction that a registered political party's constitution is a justiciable issue (*Baldwin*)
 - Expansion also reflected by the tentative nature in which the principles were formulated in *CCSU*, *Peko* and *McBain*

Re McBain; Ex parte Australian Catholic Bishops Conference

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| <p>Facts</p> | <ul style="list-style-type: none"> ● FC held that a provision of the <i>Infertility Treatment Act 1995</i> (Vic) was invalid as it was inconsistent with s 22 of the <i>Sex Discrimination Act 1984</i> (Cth) ● The Bishop's conference was granted the fiat by the Cth AG to commence HC proceedings against McBain for a certiorari to quash FC decision <ul style="list-style-type: none"> ○ Fiat was necessary as Bishop's were non-party to FC proceedings and thus could not appeal ● The Cth AG also applied to intervene separately in the HC proceedings ● The HC was unanimous in dismissing both actions on various other grounds |
| <p>Issue</p> | <ul style="list-style-type: none"> ● Whether the proceedings give rise to a 'matter'? |
| <p>Reasoning</p> | <p><u>Gleeson CJ</u></p> <ul style="list-style-type: none"> ● Starting point must be consideration of the nature of the matter which came before the FC, and in respect of which that Court exercised the Cth's judicial power. To do this, it is necessary to: <ul style="list-style-type: none"> ○ Identify the matter with respect to which the FC's jurisdiction was exercised; and ○ Relate that to the proceedings in which the Court's jurisdiction is invoked; ○ Inquire whether the claims made in these proceedings involve a matter ● People not parties to litigation do not have a claim of right to have judicial decisions quashed because they are erroneous ● Whether outcome of FC's action was correct or erroneous, McBain's rights in relation to the effect of s 8 of the <i>Infertility Treatment Act</i> were declared by an exercise of Cth's judicial power <ul style="list-style-type: none"> ○ The parties bound by declaration include: <ul style="list-style-type: none"> ▪ The State of Victoria and the Authority charged with responsibility of administering the act ○ Conversely, these proceedings are not warranted as there is no justiciable issue between: <ul style="list-style-type: none"> ▪ The Bishops or the Cth AG and Dr McBain ▪ The Bishops or the Cth AG and Sundberg J (who was the FC judge) <p><u>Hayne J</u></p> <ul style="list-style-type: none"> ● 'Matter' means more than legal proceeding <ul style="list-style-type: none"> ○ Instead, there can be no matter without an immediate right, duty or liability to be established by the Court's determination ○ Hypothetical questions thus give no rise to a matter ○ Resolving the matter should quell the parties' controversy about some immediate right, duty or liability ● Questions of standing and remedies can only be understood by this above background <ul style="list-style-type: none"> ○ For example, attempts by those with no more than a theoretical interest may be rejected by their lack of standing but it can also be concluded in justiciability as there is no controversy about an immediate right, duty or liability ● If there is no legal remedy for a 'wrong', there can be no 'matter' ● Justiciable controversies may relate to those who hold judicial office (as this is a public office) <ul style="list-style-type: none"> ○ In the present case, the application does not quell a controversy but only enlivens the subject matter of a controversy between others that has already been quelled by judicial power ● There is a precedent of allowing State AGs to bring proceedings challenging the validity of a federal statute (<i>NSW v Brewery Employees Union</i>) <ul style="list-style-type: none"> ○ This allows these types of matters to give rise to a 'matter' |

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| | <ul style="list-style-type: none"> ○ However, in this case, the claim is being made by Cth AG concerning the valid operation of a State statute <ul style="list-style-type: none"> ▪ In this case, Cth AG contends that a State statute is not invalidated by s 109 of the <i>Constitution</i> ▪ However, the Cth AG therefore does not assert any particular right, power or immunity |
| Outcome | <ul style="list-style-type: none"> • Neither proceeding is justiciable |

| | Source of Power (Jurisdiction) | Limitations |
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| High Court | <ol style="list-style-type: none"> 1. Australian Constitution s 75(v) 2. Australian Constitution s 75(iii) 3. Australian Constitution s 73 (from State courts and other federal courts) (not a source of original JR jurisdiction, but relevant) 4. Australian Constitution s 76(i) | <ol style="list-style-type: none"> 1. Must be a 'matter' in which you are seeking prohibition, mandamus or injunction (i.e. certain remedies) against an 'officer of the Commonwealth' 2. Commonwealth/person suing or being sued on behalf of the Commonwealth is a 'party' |
| Federal Court | <ol style="list-style-type: none"> 1. Administrative Decisions (Judicial Review) Act 1977 (Cth) (also Federal Circuit Court) 2. Judiciary Act 1903 (Cth) s 39B(1) (note s 44 Judiciary Act) 3. S 39B(1A)(c) Judiciary Act | <ol style="list-style-type: none"> 1. 'decision' or 'conduct', 'of an administrative character', 'made under an enactment' + not expressly excluded 2. Same scope as s 75(v) Constitution |
| State Supreme Courts | <ol style="list-style-type: none"> 1. Inherent common law jurisdiction enshrined in state laws (now guaranteed – <i>Kirk</i> – later in the course) 2. Some states have ADJR Act equivalents – but NSW does not | <ol style="list-style-type: none"> 1. Must be a matter of state jurisdiction (not federal jurisdiction), otherwise determined by common law principles, eg. Justiciability, legality/merits distinction |

Jurisdictional Limitations on Judicial Review

Jurisdiction under the ADJR Act

- The courts have a role in defining their statutory jurisdiction for judicial review as they interpret the words and phrases in the Act
 - Task undertaken against a backdrop of other public law considerations around the legitimate scope of judicial review
- The ADJR Act confers jurisdiction on Federal and Federal Circuit Court to undertake review of:
 - A decision to which this Act applies (s 3)
 - Conduct for the purpose of making a decision to which this Act applies (s 6)
- The terms 'decision' and 'conduct' are further defined by s 3
 - The matter is justiciable (able to be reviewed by the court)
 - That the court has jurisdiction or authority to review the matter
 - That there is an available ground of review
 - That there is an appropriate remedy

3. (1) In this Act, unless the contrary intention appears: ...

'decision to which this Act applies' means a decision of an **administrative character** made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) **under an enactment**, **other than** a decision by the GG or a decision included in any of the classes of decisions set out in **Schedule 1**;

(2) In this Act, a **reference to the making of a decision includes** a reference to:

- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a license, authority or other instrument;
 - (d) imposing a condition or restriction
 - (e) making a declaration, demand or requirement
 - (f) retaining or refusing to deliver up, an article, or
 - (g) doing or refusing to do any other act or thing;
- And a reference to a failure to make a decision shall be construed accordingly

(3) Where provision is made by an enactment for the **making of a report or recommendation before a decision** is made in the exercise of a power under that enactment or under another law, the **making of such a report or recommendation** shall itself be deemed, for the purposes of this Act, to be the **making of a decision**

(5) A reference to this Act to **conduct engaged in for the purpose of making a decision** includes:

- A reference to doing of **any act or thing preparatory to the making of a decision**
 - This includes the **taking of evidence** or the **holding of an inquiry** or investigation

- Schedule 1 refers to categories of decisions excluded from review under the Act
 - Most notable litigation on the scope of these exclusions was *Thongchua*
 - It noted that the immunity to decisions of the GG also applies to prior advice received from a minister

- However, does not apply if this advice was a discrete statutory step that is reviewable in its own right (*Attorney-General (NT) v Minister for Aboriginal Affairs*)
- Instead, the most litigated terms are ‘decision’, ‘conduct’, ‘administrative character’ and ‘under an enactment’
- Significance of ADJR’s jurisdictional features in delineating scope of federal judicial review reduced due to expansion of Federal Court’s general jurisdiction under s 39B of the *Judiciary Act 1903* (Cth)
 - Despite this, the ADJR offers procedural advantages not found in s 39B, such as:
 - The right to a statement of reasons (s 13)
 - Flexible remedies (s 16)
 - Simpler procedure for commencing an action (s 11)
 - Procedure for a stay of proceedings (ss 15 and 15A)
 - An identified list of grounds
 - Avoidance of jurisdictional complexities associated with s 39B

‘Decision’ and ‘Conduct’

- *Bond* departed from historical approach of giving wide construction to words, such as ‘decision’ and ‘conduct’
- The majority read both terms restrictively, holding:
 - ‘Decision’ refers to administrative activity that is substantive and final or operative;
 - ‘Conduct’ refers to administrative activity preceding a decision that reveals a flawed administrative process

Australian Broadcasting Tribunal v Bond

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| Facts | <ul style="list-style-type: none"> • The <i>Broadcasting Act 1942</i> (Cth) ss 85, 88 conferred power on the Australian Broadcasting Tribunal to conduct inquiries on whether commercial broadcasting license holders are fit and proper • Bond held shareholdings in a number of broadcasting companies • The tribunal conducted an inquiry into whether, by reason of Bond’s certain conduct, those licensees were fit and reasonable persons to hold their licenses • In the course of their inquiry, they concluded the allegations against Bond were proved and that he had given misleading evidence to tribunal • Tribunal foreshadowed they would next decide whether to take action against the licensees <ul style="list-style-type: none"> ○ Before this, Bond and the licensee companies commenced proceedings under ADJR Act, referring to separate ‘decisions’ and instances of conduct that allegedly breaches ss 5 and 6 of the ADJR Act |
| Issue | <ul style="list-style-type: none"> • Whether Tribunal’s decisions are reviewable? |
| Reasoning | <p><u>Mason CJ</u></p> <ul style="list-style-type: none"> • Review concerns the jurisdictional limits of the FC under the ADJR to review conclusions, including findings of fact <ul style="list-style-type: none"> ○ These conclusions are elements in the decision’s chain of reasoning • Meaning of ‘Decision’ <ul style="list-style-type: none"> • In the context of judicial or administrative proceedings, decision ordinarily refers to an announced or public ruling or adjudication (<i>Chaney</i>) • Factors favouring a broad approach include: <ul style="list-style-type: none"> ○ ADJR Act is a remedial statute providing for a review of administration action, not appeal from final decisions ○ S 5 does not speak of ‘final decision’ ○ FC’s jurisdiction to grant declaratory relief not confined to only ultimate decisions • Factors favouring a narrow approach include: <ul style="list-style-type: none"> ○ ‘A decision to an administrative character made... under an enactment’ indicates a reviewable decision is one that a statute requires or authorises, rather than a step taken in the reasoning of an ultimate decision ○ The examples in s 3(2)’s extended definition of ‘decision’ indicates that decisions having the character or quality of finality ○ S 3(3)’s extension of the ‘decision’ concept to include the making of a report or recommendation before a decision is made in the exercise of power further qualifies the characteristic of finality <ul style="list-style-type: none"> ▪ Such a provision would be unnecessary if Parliament intended that ‘decision’ comprehend every decision, or every substantive decision, made in the course of reaching a conclusive determination ○ S 3(5) suggests acts done preparatory to making a ‘decision’ are not regarded as ‘decisions’ also as there would be no point for judicial review of ‘conduct’ if they were • Relevant policy considerations are also competing <ul style="list-style-type: none"> ○ Purpose of AD(JR) Act are to allow persons aggrieved by administrative decision-making processes a convenient and effective means of redress and to enhance those processes ○ However, extending the concept of ‘definition’ increases the risk that efficient administration of government will be impaired <ul style="list-style-type: none"> ▪ Consequently, this policy argument should prevail • Therefore, a conclusion reached as a step along the way in reasoning the ultimate decision does not ordinarily amount to a reviewable decision |

- Exception to this is where the relevant statute provides for the making of a finding or a ruling on the intermediate decision
- Another essential quality of a reviewable decision is that it is a substantive determination
 - S 3(2)(g): 'doing or refusing to do any other act or thing' should thus be read as referring to the exercise or refusal to exercise a substantive power

Was there a Reviewable Decision?

- It would ordinarily follow that FC had jurisdiction under s 3(1) of ADJR to review Tribunal's finding about licensees
 - Although the decision was an intermediate determination made in deciding whether to revoke or suspend the licenses or impose conditions on them, it was a decision on a matter of substance for which statute provided as an essential preliminary to the making of the ultimate decision
- **HOWEVER**, Tribunal's conclusion was not a determination for which the ADJR Act provided and was no more than a step in the Tribunal's reasoning
 - Although it was an essential step in the final determination, this is not enough to invest the conclusion with characteristics qualifying it as a reviewable decision
- In ordinary circumstances, a finding of fact, including an inference drawn from primary facts, will not independently constitute a reviewable decision as it is a step to the ultimate decision
 - However, if the statute requires the determination of an issue of fact as an essential preliminary to the taking of the ultimate decision or the making of an ultimate order, it would be a reviewable decision
- Therefore, FC did not have jurisdiction to review six findings of fact, which respondent alleged were reviewable decisions

Meaning of 'Conduct'

- To understand distinction with 'conduct', it is necessary to define decision as:
 - Determinations for which provision is made by or under a statute that is generally substantive, final and operative
- Conduct therefore looks at how proceedings have been conducted, rather than decisions made along the way with a view to the making of a final determination
 - Thus, conduct is essentially procedural and not substantive in character
- Two examples of conduct are 'the taking of evidence or the holding of an inquiry or investigation' (s 3(5))
 - Another example of 'conduct' is the continuation of proceedings in such a way as to involve a denial of natural justice
- A challenge to conduct is an attack upon the proceedings engaged in before the making of a decision
 - Complaints therefore state the process of decision-making was flawed
 - Comparatively, complaints about 'decisions' are that the actual decision was erroneous
- Ordinarily, an error of law made in the course of conduct for the purpose of making a decision would be an error of law involved in the decision itself (*Chan Yee Kim*)
 - Consequently, substantive decisions, findings of fact and inferences from findings of fact are generally not capable of review as 'conduct' unless what is alleged is a breach of procedural requirements in the course of the conduct involved in reaching the relevant conclusion

Was there Reviewable Conduct?

- Finding that Bond was not a fit and proper person to hold a license was not procedural and no more than a step in the Tribunal's reasoning process, thus meaning the finding did not amount to 'conduct'
- Making of findings of fact was not 'conduct' for similar reasons
- Only the FC's ruling that the Tribunal was unable to make a finding about whether the Premier threatened Bond's interest could possibly give rise to 'conduct'
 - However, not necessary to examine this as its correctness as a matter of law can be considered as an element in the challenge to the decision that the licensees were no longer fit and proper persons

Toohey and Gaudron JJ (DISSENT)

- Although they agreed Tribunal's finding that Bond was not fit or proper was not a 'decision', they noted finding provided foundation for similar finding against the licensees
- They additionally took a different approach regarding scope of administrative action reviewable under ADJR Act
 - Firstly, they held s 3(2)(g) was 'not confined to acts involving the exercise or refusal to exercise a substantive power'
 - Secondly, they held that a finding would not satisfy s 3(2)(g) unless it is 'required by an enactment' and 'not merely bear[ing] upon some issue for determination or some issue relevant to exercise of discretion'
 - Thirdly, they believed there was no point at looking at 'conduct' upon finding that a reviewable decision was made

Outcome

- HC found that majority of decisions were not reviewable as a 'decision' or 'conduct'
 - Alternatively, HC held per curiam that there was no legal error

'[D]ecision... of an Administrative Character'

- 'Administrative character' is not defined by ADJR Act