

**Table of Contents**

Privative Clause- has the legislation sought to remove JR?	3
Standing – Only if its contentious	5
ADJR Act Sections Below:	6
Jurisdiction	6
Jurisdiction- State Courts	7
Face of the Record	7
Jurisdiction- Federal Courts	8
2a. ADJR ACT- works for High Court or Federal Court .....	8
1. What is a ‘decision’?	9
2. Of an Admin character (as opposed to a legislative one or judicial )	11
3. Made under enactment?	12
Has there been a breach of legislation? (Grounds for the ADJR Act) .....	13
2b. 75(v) of the Constitution gives the High Court Jurisdiction to review OR s39) of the Judiciary Act allows the Federal Court to review.....	16
What is an officer of the Commonwealth	17
What is a Jurisdictional Error? .....	17
2c. 75(iii) of the Constitution gives the high court the ability to grant a remedy even if no jurisdictional error can be shown in a decision. ....	19
Grounds of Review (ADJR) Act & s39(B)	20
Fair Hearing Rule (Procedural Fairness) s5(1)(a) ADJR Act .....	21
Legitimate Expectations Cases	22
Rule Against Bias (Actual or Perceived Bias) s5(1)(a) ADJR Act (Procedural Fairness) .....	22
Consideration Norms	24
Failure to consider Relevant Considerations (s 5(2)(b) ADJR Act) .....	24
Irrelevant Considerations (s 5(2)(a) ADJR Act and Permissible Considerations (can be considered but don’t have to be) .....	24
Norm against Acting for an improper purpose s 5(2)(c ) ADJR Act.....	26
No-fettering norm- Inflexible application of Policy s5(2)(F) ADJR Act.....	26
Considering Policies	26
Norms which require repositories of a power must not act under dictation s 5(2)(e) ADJR Act .....	27
Unlawfully delegate their decision-making authority s 5(1)(c ) ADJR Act .....	27
Norms which condition how decisions-makers must apply the law and determine facts.....	28
No Evidence Rule s5 (1)(h) ADJR Act.....	28
Reasonableness norms S5(2)(g) of the ADJR Act.....	28
Irrationality .....	29
State of Mind Jurisdictional Facts:	29

Jurisdictional Fact- another ground (Non-ADJR Act) .....	30
Legislation Excluding a Ground:.....	31
GO BACK TO Jurisdictional Error if using the ADJR Act	31
AAT	33
Advantages of Merits Review at the AAT	33
Remedies – ADJR Act	34
Remedies – Common Law Remedial Model s75(v) or 39B State or Federal Court	36
Certiorari- Jurisdictional Error or Non-Jurisdictional Error on the Face of the Record .....	37
Mandamus – Jurisdictional Error Only.....	38
Prohibition – Jurisdictional Error Only.....	38
Declaration- Jurisdiction and Non-Jurisdictional (all errors) .....	38
Injunction- Jurisdiction and Non-Jurisdictional (all errors).....	39

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### Key:

- ⚡ Legislation
  - ★ Case
  - 📖 Readings/Journal Articles/Textbook Sources
  - Prewritten Template Sentences [fill in from the facts]
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Heading  
Issue  
Rule  
Application  
Conclusion

## Privative Clause- has the legislation sought to remove JR?

- Go straight to **s75(v)**
  - o **The** case of **Graham** held that statutory provisions cannot deny the courts fundamental judicial review abilities under **s75(v)** of the Constitution.

**Privative** Clauses cannot deprive the High Court of its entrenched minimum provision of Judicial Review jurisdiction under s 75(v) of the Constitution. Kirk extends this to the supervisory jurisdiction of the State Supreme Courts as it held that legislation cannot deprive a state Supreme Court of its jurisdiction to review administrative decisions on the basis that an admin decision-maker has made a Jurisdictional Error.

**Plaintiff s157** crystallised **s75(v)** of the constitution as an entrenched minimum provision of review at the federal level.

- The privative clause does not purport to oust Judicial Review for Jurisdictional Error because JE is not a "decision made under this Act"

**However**, at the state level only review for jurisdictional error was entrenched.

**Kirk** held that state legislation cannot deprive a state Supreme Court of its jurisdiction to review admin decisions on the basis that an admin decision-maker has made a Jurisdictional Error.

- the distinction between Jurisdictional and non-jurisdictional error marks the relevant limit on state legislative powers to exclude judicial review.
- There is only entrenched minimum provision of Judicial Review at the state level in the same way as review of jurisdiction of the High Court under s75(v). (Kirk simplifies the law because it harmonises state and CTh admin law (page 232 text)).

**On** these facts the statute contains provisions which contradict each other [] which used to mean that if no attempt was made to reconcile them the court was tasked with undertaking the process of reconciliation. However, the **Hickman** principle has now fallen into disfavour so [plaintiff] could not seek Judicial Review by showing that one of those provisions was not met such that the decision was not made in good faith for the purposes of the legislation.

### **No Consideration**

a decision-maker does not have a duty to consider whether to exercise a particular power, whether the decision-maker is requested to do so or in any other circumstances.

- o **M61**: No consideration – decision to consider exercise the power, and the decision to exercise the power.
  - **BUT** Since the minister did consider, that decision was able to be reviewed.
- As in the case of Plaintiff m61, if it is accepted that there is no obligation or public duty to even consider the exercise of a power, then mandamus will not be available as a remedy. If mandamus is not available then issuing certiorari to quash any decision which has been made in an exercise of the power will have no utility. (Thus while a no consideration clause does not purport to oust JR or the availability of particular remedies it might be just that in practical effect).
- Declaration may still be available.

**Time-limit clauses**: limit availability of JR through statutory provisions limiting the time in which JR applications may be brought

- Interest is special if it corresponds to one of the interests protected by the statute - You can have special interest if that is considered in the statute
- Neither of the appellants were found to be 'persons aggrieved' under the ADJR Act. They would not suffer 'beyond that of an ordinary member of the public'. Further from this, they would not 'benefit greater than a normal member of the public'.
- Held: it was an emotional concern not a special interest

### Argos

- Commercial Competitors - indirectly affecting your bottom line is not proximate enough
- On the facts: needed not just speculative, needed to actually show that you will suffer economic loss (show how the injury is peculiar to you)
- You maybe challenging an interest which is beyond the interests listed in the legislation (which is why it might be unlawful in the first place!) you should be able to challenge it if it affects your interest and that was not contemplated by the legislation
- The supermarkets had standing to challenge the decision, as they were able to give evidence of financial detriment, but the landlord did not as it did not establish sufficient interest.

### North Coast Environment Council Inc v Minister for Resources (1994) 127 ALR 617.

The following 'factors' were said to suggest standing:

- North Coast was a peak environmental organisation for the affected region.
- Longstanding recognition by the Commonwealth (through the award of financial grants).
- Recognition by the State government, through participation in committees.
- The conduct of projects and conferences on matters of environmental concern relevant to the affected area.
- North Coast had made submissions on issues related to the case to an environmental commission of inquiry.

**Ogle v Strickland:** "Nor are they people who have a mere intellectual or emotional concern... to repel blasphemy is a necessary incident of their vocation."

- ministers of religion's job is to oppose blasphemy and it is of great cultural significance to the appellant as a Christian.

**Onus v Alcoa** (Stephen J) Importance of the interest (weight of the interest) to the plaintiff can be considered. (Case was about Aboriginal people vs conservationists' interest).

### ADJR Act Sections Below:

#### 5 Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

### Jurisdiction

**Futuris:** a judge might not grant remedy since haven't gone through the statutory right to go through the AAT

- The personally circumstances of the candidate were not to be taken into account, the decisions are made based on the public interest rather than the individual
- The powers were exercised is an overall scheme (an overall process of decision-making ) so the individuals have had an opportunity to be heard in the regulation obligations of the migration act - its not as if they never got to put their case

If the affected person has already been given an opportunity to be heard, consider:

- whether some additional procedure was necessary for an affected person to have a *fair opportunity to put their case*.
  - There is a need to *make an argument*, not merely state a conclusion here.
    - E.g. Timely Notice, Disclose adverse info

**Gageler and Gordon JJ in WZARH** asked ‘What is the opportunity a reasonable administrator ought fairly to have given?’ and considered whether some additional procedure was necessary for the affected person to have a fair opportunity to put their case.

### Legitimate Expectations Cases

The mere fact that []’s legitimate expectation of [] is not fulfilled does not breach the fair hearing rule unless it can form part of a broader unfairness or practical injustice (**WZARH and Kioa Brenna J**)

Since the case of **WZARH**, Administrative law has changed with respect to procedural fairness, Legitimate expectations of the applicants are not relevant to the threshold test of whether a breach of fairness was so fundamental that it deprived the possibility of a fair outcome.

### Rule Against Bias (Actual or Perceived Bias) s5(1)(a) ADJR Act (Procedural Fairness)

**Actual** bias arises if a decision maker’s mind is closed to persuasion and they have established state of mind which render them unwilling to undertake any proper evaluation of material relevant to the decision before them (**Jia**)( **s5(1)(a) ADJR Act**).

Apparent Bias arises as a ground of review if an “informed and fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision to be made,” (**Isbestser**)( **s5(1)(a) ADJR Act**).

**Procedural** fairness rules presumptively apply unless there is irresistibly clear manifestation of statutory intent to exclude (Kioa, Saeed).

**However**, Parliament can exclude procedural fairness with plain words of necessary intentment (Miah).

**Apparent Bias**: does not require applicant to establish the actual state of mind or the attitude of the decision maker whereas **actual bias** is only established where the decision-maker can be shown to have had a closed mind that was not open to persuasion