



# LAWS3002 – ADMIN LAW

COURSE NOTES – 20S2

## JUDICIAL REVIEW ON A PAGE

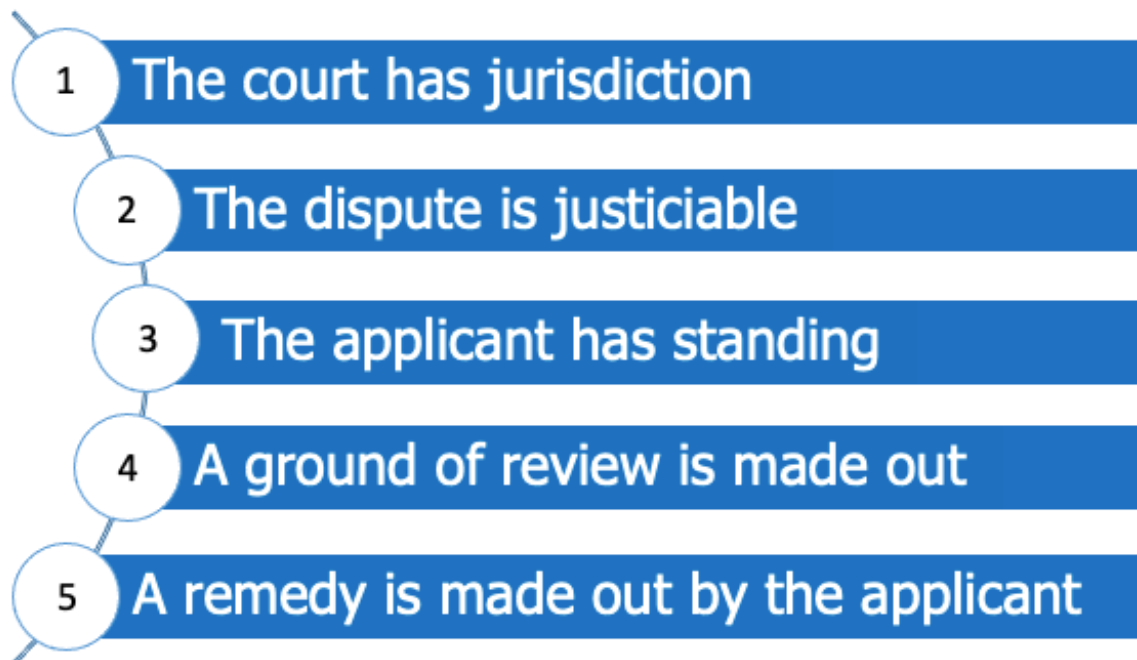
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**Judicial review = solely concerned with errors of Law** – superior courts identify legal errors in decision-making of inferior courts and administrators, and remit those decisions back to their original decision-maker to be redecided according to law.

**The object of judicial review is not** to ensure that **the correct or preferable decision** has been made, but **instead to ensure** that the **decision has been made with correct legal reasoning** and has **followed correct legal procedures**

It is examining what decision should have been made, but how the decision/non-decision was reached

5 step process:



\*Be careful with distinction between common law judicial review requirements and statutory judicial review requirements\*

# 1. JURISDICTION – THE COURT HAS JURISDICTION

## INTRODUCTORY PRINCIPLES

This topic works together with the topic of justiciability to define the circumstances in which a court can properly undertake judicial review proceedings

- Jurisdiction – asks *when* can a court undertake judicial review of an administrative decision
- Justiciability – concerned with circumstances when the court does have jurisdiction and asks whether the court *should* properly entertain an application for judicial review
  - There are certain circumstances where it is not appropriate for a court to hear and determine an application

In general applications concerning unlawful Cth administrative decisions → made to court with Federal jurisdiction

**In what circumstances would application concerning an unlawful Cth administrative decision be made to court with State jurisdiction?**

Applications concerning unlawful State administrative decisions → **must** be made to SCWA

In both State and Federal cases, the procedures vary according to the type of review (i.e. common law or statutory) and the remedy being sought.

## COMMONWEALTH LEVEL

- At the **Commonwealth** level, there are three (3) sources of judicial review jurisdiction:
  - the High Court's original jurisdiction under s75 of the *Constitution*;
  - the Federal Court's jurisdiction under s39B of the *Judiciary Act 1903* (Cth); and
  - the jurisdiction of the Federal Court and Federal Circuit Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act).

## STATE LEVEL

- We're not looking at statutory judicial review mechanisms for State – has not enacted a statutory judicial review machine
- As a general rule
  - a State court has **very limited jurisdiction** to hear a Commonwealth administrative law dispute
  - a Commonwealth court has **no jurisdiction** to decide a State administrative law dispute.

## COMMON LAW JUDICIAL REVIEW MECHANISM

3 courts have common law judicial review mechanisms - called so because they do not themselves establish a comprehensive judicial review regime and therefore we are required to look to the common law

1. WASC
2. HCA
3. FCA – has a statutory judicial review mechanism as well (look to see if requirements are met)

### WESTERN AUSTRALIA SUPREME COURT

- Section 16 of the *Supreme Court Act 1935 (WA)* confirms that the WASC is:
  - a superior court of record;
  - with inherent jurisdiction inherited from the superior English Courts; and
  - having general and unlimited jurisdiction in relation to jurisdiction for the administration of justice in WA.
- Therefore, in addition to having the supervisory jurisdiction over WA courts, the WASC also has jurisdiction to undertake common law judicial review of State administrative law disputes.
- Order 56 and 57 of the *Rules of the Supreme Court 1971 (WA)* prescribe the procedures by which the remedies may be sought; but, as common law remedies, you also need to be mindful that the right to prerogative relief is subject to ancient and limiting procedures and technicalities which govern the remedies.
  - Extends to all persons exercising public power in a manner that affects, defeats, or prejudices a person's rights, interests or legitimate expectations
- In *Kirk v Industrial Court (NSW) (2010) 239 CLR 531, 580-1*, the HCA said that, upon Federation, the inherent judicial review jurisdiction of each State Supreme Court has become constitutionally entrenched. The immediate result being that the judicial review jurisdiction of the NSW Supreme Court fell beyond the reach of any privative clause.

## HIGHT COURT OF AUSTRALIA

- Common law jurisdiction is derived from its *Constitution*
- The HCA is a superior court of record, pursuant to s5 of the *High Court of Australia Act 1979 (Cth)*. However, unlike the WASC, it does not have inherent jurisdiction; instead, its jurisdiction is expressly conferred by the *Constitution*
- Relevantly, s75(v) provides:  
“In all matters:...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.”
- Section 75(v) achieves this goal by empowering the HCA to grant prerogative writs.
- Section 75(v) does not specifying the grounds for review that empower the Court to grant a remedy. The assumption being that the grounds recognised by the common law apply: *Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82*. A litigant who seeks relief has to establish that the officer has acted or is about to act without lawful power, either authorised by statute or common law.
- *Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 363 (Dixon J)* - On the importance of Section 75 - “it was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power”
  - members of the executive properly perform their function – maintaining a strong separation of powers
- On the basis of s75(v) of the *Constitution*, the following **jurisdictional requirements** must be met in order for the High Court to be able to exercise its power to undertake judicial review:
  - (A) there must be a ‘**matter**’;
  - (B) an ‘**officer of the Commonwealth**’ must be a party to the dispute.
    - Therefore, the HCA has no jurisdiction to hear at first instance a State dispute; and
  - (C) the applicant must be **seeking and entitled to either the remedy of mandamus, prohibition or an injunction.**

### Other constitutional authority for HCA judicial review

- You should note that s75(v) fails to mention declaratory relief or *certiorari*, which are remedies typically associated with judicial review.
- The HCA otherwise possesses the power to grant these remedies.
- For example, see s75(iii) of the *Constitution* which provides: ‘In all matters...in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; the High Court shall have original jurisdiction.’
- You should note that there are no mention of remedies in s75(iii) when it invests the HCA with original jurisdiction in all matters in which one of the parties is the Commonwealth, or a person suing or being sued on the Commonwealth’s behalf. This means that there is no limitation on the court’s power to grant certain remedies.
- The court takes a practical view as to whether a party is the Commonwealth: *ASIC v Edensor Nominees Pty Ltd (2001) 204 CLR 559, 580-2; Commonwealth v Westwood (2007) 163 FCR 71, 81-2; Plaintiff M68-2015 v Minister for Immigration (2016) 257 CLR 42, [124]*.

### *R v Bowen; Ex parte Federated Clerks Union (1984) 154 CLR 207, 211*

untenable to read s 75 as implied conferring jurisdiction writ of certiorari of declaratory relief... - in a case in which the court does not otherwise possess original jurisdiction

The HCA otherwise possesses the power to grant these remedies.

### *Plaintiff M68-2015 v Minister for Immigration (2016) 257 CLR 42, [124]*

*The purpose of s75(iii) was to ensure political organisation called into existence under the name of the commonwealth and armed with the enumerated powers and authorities fell in every way within a jurisdiction in which it could be impleaded and invoked*

## (A) 'Matter' Requirement

As outlined above, s75 of the *Constitution* (and, as outlined below, in relation to s39B of the *Judiciary Act 1903* (Cth) and the FCA's common law jurisdiction to undertake judicial review) require the existence of a 'matter'.

As this is under the common law judicial review mechanism, there is no precise definition of 'matter'. Therefore, we must look to case law

### CASE LAW

Summary:

- Requires some dispute between the parties to the action
- Mere dissatisfaction of a decision is not enough
- Need controversy about an immediate right, duty or liability
- Person with theoretical interest will not give rise to a matter

### *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265

'matter' has a narrower meaning than legal proceeding – what's required is the decision of the court to create or effect some right, duty or liability of the parties before the court

### *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 395, 406, 460

Doctor McBain sued State of Victoria

Bishops conference was not a party of dispute – commenced proceedings in original jurisdiction of HC seeking order to quash for legal flaw

Did this constitute a matter? Majority held NO -

395 (Gleeson CJ): parties were bound by decision – it was these parties' immediate rights, duties or liabilities affected – others may not be happy with the decision but does not give rise to a matter: their concern with the original decision did not impact upon the bishop conference's immediate rights, duties or liabilities

406 (Gaudron, Gummow JJ): no controversy apparent to be quelled between the parties – they are not seeking any orders against Doctor McBain

460: application will quell no controversy of the parties' immediate rights, duties or liabilities

In summary, for it to be a 'matter' the decision of the administrator must be one that either affects or creates some right, duty or liability – the party seeking review needs to be a party to the proceedings