

Table of Contents

T2 Jurisdiction to conduct judicial review	3
T3 Standing	9
T4 Reasons for decisions	13
T5 Grounds for judicial review 1 – acting beyond power	14
T6 Grounds for judicial review 2 – procedural fairness	25
T7 Jurisdictional error	30
T8 Remedies	31
T9 Restrictions on judicial review: privative or ouster clauses	33
T10 Tribunals and merits review	36

Topic 2: JURISDICTION TO CONDUCT JUDICIAL REVIEW

ADJR ACT

- In order for the court to have jurisdiction, an application for review must be brought with regard to a decision (s 5) / conduct in relation to a decision (s 6) / or a failure to make a decision (s 7), which is a 'decision of an administrative kind made under an enactment' (s 3)
- **If delegated decision:** Per s 3(8), this includes decisions made by a delegate

Definition of the elements of ADJR jurisdiction	
Part A: 'Decision' (s 5) / 'Conduct related to a decision' (s 6) / 'Failure to decide' (s 7)	s 5: This must be a decision in the Bond sense s 6: Refer to the definition of 'conduct' in s6 s 7: Refer to the definition of 'failure to decide' in s7
Part B: 'Administrative kind'	Decisions which involve applying general statutory provisions to a specific case → This is satisfied through the application of [section of the Act] to the specific case of [decision]
Part C: 'Made under an enactment'	Per Tang, there are two limbs for showing that a decision was made 'under an enactment'.
Part D: Exceptions	Some decisions are expressly excluded by the First Schedule of the Act, and the decisions of the Governor-General are not reviewable

Choose one of 1.2A (decision), 1.2B (conduct in relation to a decision) or 1.2C (failure to make a decision) – no need to go through all if not relevant

1.1A ADJR Act Jurisdiction – 'Decision' (s 5)

- **TEST:** A "decision" means "a decision of an *administrative* character made, proposed to be made, or required to be made *under an enactment*" (s 3(1))
 - 1. 'Decision'
 - **TEST:** A reviewable decision, for the purposes of the AD(JR) Act, will be a decision for which provision is made under [the relevant section of the statute] (**Mason CJ in Bond**), **OR** an intermediate decision (which leads to a 'final' decision) that is required by the statute (**Mason CJ in Bond**)
 - **Intermediate decisions:**
 - A conclusion that is merely reached as a step along the way in the course of reasoning leading to an ultimate decision will not ordinarily be a reviewable decision in itself unless the statute

provided for the making of a finding on that particular point (**Mason CJ in Bond**)

- Nonetheless, any breaches of the grounds of judicial review that are made in the making of intermediate decisions (i.e. necessary decisions to form a larger decision) – with these intermediate decisions being unreviewable – will flow into, take root in, the decision to which the intermediate decisions lead, which is reviewable. When the person brings an application for review of a decision that is reviewable, they can rely upon those breaches of the rounds of judicial review that have occurred in the making of the earlier decisions (i.e. where there are errors in process for decisions that are not reviewable, these errors will nonetheless flow into – take root in – the reviewable decision and courts can consider those errors there) (**Mason CJ in Bond**)
 - i.e. Intermediate (stepping stone decisions) that are not provided for in an enactment are not reviewable, but may be reviewable if they lead to a later decision that is reviewable
- **Examples of ‘decisions’**: Refer to **s 3(2) ADJR Act** for examples of ‘decisions’
 - (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 licence, 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;
 - (g) doing or refusing to do any other act or thing.
 - 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, the making of such a report or recommendation shall itself be deemed to be the making of a decision (**s 3(3)**)

1.1B ADJR Act Jurisdiction – ‘Conduct related to a decision’ (s 6)

- **TEST**: Conduct related to a decision is activity, of a *procedural nature*, taken in relation to a reviewable decision (**Bond**)
- Conduct is **procedural in nature** and not substantive (**Bond**). This includes taking evidence or holding an inquiry/investigation (**s 3(5) ADJR Act**)
- Once a final decision (**per s 5 definition**) has been made; then **s 6** can no longer be used

1.1C ADJR Act Jurisdiction – ‘Failure to decide’ (s 7)

- Decision-maker has a duty to make a decision but: (2) failed to make that decision within the prescribed time; or (1) where there is no prescribed time period, made with unreasonable delay

1.2 ADJR Act Jurisdiction – ‘Administrative Character’

- **TEST:** Legislative acts are concerned with the creation or formulation of new rules of law having *general application*, while administrative acts are concerned with the application of those general rules to *particular cases*

1.3 ADJR Act Jurisdiction – ‘Made under an enactment’

- A decision will have been made under an enactment if the two limbs of **Tang** are satisfied:
 - 1. The decision was expressly or impliedly required or authorised by the enactment (**Tang**); **AND**
 - If it is a decision in the **Bond** sense then this will be satisfied
 - “Enactment” includes an Act, and also, amongst other things, an instrument (including rules, regulations or by-laws) made under an Act (s 3)
 - 2. The decision itself confers, alters or otherwise affects legal rights or obligations (**Tang**)
 - **Interpretation 1 (narrow):** The plurality in **Tang** meant that the decision had to affect the legal rights of the **applicant** in order for the decision to be made under an enactment
 - **Interpretation 2 (broad):** The plurality meant that the decision had to affect **someone’s** legal rights. The decision will then be ‘made under an enactment’. Otherwise, **Tang** would eviscerate public interest standing and there is no indication in the language of **Tang** that the judges intended that

1.4 ADJR Act Jurisdiction – Exceptions

- Some decisions are expressly excluded by **Schedule 1 of the ADJR Act**
- Decisions of the **Governor-General** are not reviewable (s 3)
- While not an exclusion per se, if there is a **privative clause**:
 - Prima facie the court has jurisdiction but the privative clause may be effective to preclude the court from having jurisdiction to conduct judicial review under the ADJR Act
 - Appropriately worded privative clauses may **defeat the ADJR Act under the normal rules of statutory interpretation**
 - **If relevant: go through privative clauses**

S75(V) OF THE CONSTITUTION

- The HCA has original jurisdiction to hear judicial review applications pursuant to s 75(v)

- It is advisable that [plaintiff] seeks judicial review in the Federal Court, pursuant to **s 39B of the Judiciary Act**, as it may be remitted back to the Federal Court if first brought in HCA (**s 44 Judiciary Act**)

2.1 S75(v) Jurisdiction – ‘Matter’

- A “matter” is “a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled” (***Re McBain; Ex parte Australian Catholic Bishops***)
- To be ‘justiciable’, a ‘matter’ needs to fulfil both of the following conditions:
 - **1. An actual dispute:** There must be an actual dispute about a legal issue – i.e. this is shown on the facts because [plaintiff] thinks that [decision-maker]’s [decision] was illegal
 - **2. Justiciability:** Courts will consider whether the controversy is amenable to judicial review (i.e. whether the court *can* resolve the case), and will consider whether they *should* resolve the controversy – courts are hesitant to become involved in cases that involve competing policy considerations – e.g. [decision] not of such a high concern of politics that the court should not review it (***Hicks***), given even cabinet decisions can be reviewed (***O’Shea***).

2.2 S75(v) Jurisdiction – ‘Officer of the Commonwealth’

- The decision must be made by an officer of the Cth
- If the decision-maker is employed in the office of a Cth department, this will be satisfied
- Officer is broadly interpreted – includes all officers appointed by the Crown, including ministers, public servants, statutory office holders etc.
 - It is generally accepted that a Cth government minister or an employee of a government department will be an officer of the Cth – but beyond this, it is uncertain (i.e. if a private entity were granted certain power to run detention centres for example, it is unsure whether they would be an officer of the Cth)

2.3 S75(v) Jurisdiction – ‘An available remedy’

- The plaintiff must bring a claim for one of the named remedies in **s 75(v)** of the Constitution (the prerogative writs) in order to gain access to the court’s jurisdiction (i.e. (1) Mandamus, (2) injunction or (3) prohibition) even if these are not their first preference/most desirable remedies
- If the court has the ability to grant any of these 3 remedies (prerogative writs) (see *requirements* below), then the court may also grant any other remedy sought by plaintiff (i.e. certiorari or declaration)

Available remedy	Requirements
Certiorari	Certiorari is an order quashing a defective decision that has been made. In order for certiorari to operate:

	<ol style="list-style-type: none"> 1. Certiorari requires the decision to have legal effect as it operates only to quash the legal effects or the legal consequences of the decision under review (Hot Holdings v Creasy) – [refer to any impact on <i>legal rights</i>] <ol style="list-style-type: none"> a. Decisions which are a legal pre-condition for subsequent decisions (i.e. intermediate decisions) may be sufficient to have legal effects (Hot Holdings v Creasy) 2. Decision has to be made pursuant to exercise of <i>public power</i> <ol style="list-style-type: none"> a. Power exercised pursuant to statute is public for the purposes of certiorari b. However, even if power is not exercised pursuant to statute, it may nevertheless be public <ol style="list-style-type: none"> i. TEST: A body, in carrying out a particular function, exercises public power if, in the absence of a private body carrying out the function, the government would invariably carry out the function (Datafin)
Writ of Mandamus (prerogative writ)	<p>Mandamus is an order requiring a decision-maker to exercise a discretion in accordance with the law.</p> <ul style="list-style-type: none"> • A writ of mandamus would return the decision back to [decision maker] • Mandamus will lie only in respect of a public duty to exercise a discretion, not when it is merely permissive (WA Field and Game Association v Minister for State Conservation) • The court, in granting an order for mandamus, will never order that the decision-maker comes to a particular decision – it will merely order that the decision-maker exercise their discretion • For the purposes of Mandamus, with any piece of legislation, if there is a decision making power, you can assume that the decision maker is under a public duty to exercise that discretion, <u>UNLESS</u> there is a significant discrepancy between the actual provision and what it provides for, and the purpose of the legislation <ul style="list-style-type: none"> ○ WA Field: Under the legislation, the court said, it was up to the Minister whether or not he wanted to consider the issue of declaring an open hunting season. Given the concern of the Act – to preserve wildlife – the Minister would not even have to consider whether to declare an open season if he didn't want to. If it were a hunting Act, where the express purpose was to permit the hunting of animals, then the Minister would probably have to

	consider whether to declare an open season. Thus, such a discrepancy existed here
Injunction (prerogative writ)	<p>Injunction is an order by the court that the respondent refrains from undertaking a particular act (prohibitory injunction), or undertake a particular act (mandatory injunction).</p> <ul style="list-style-type: none"> Injunctions may be issued against any person, including the Crown (Crown Proceedings Act s 25; Cth Constitution ss 75(v), 78; Judiciary Act ss 60, 63, 64)
Writ of prohibition (prerogative writ)	<p>Prohibition is an order prohibiting a person from taking a proposed or making a proposed decision.</p> <p>In order for Prohibition to operate:</p> <ol style="list-style-type: none"> Decision has to be made pursuant to exercise of public power <ol style="list-style-type: none"> Power exercised pursuant to statute is public for the purposes of prohibition However, even if power is not exercised pursuant to statute, it may nevertheless be public <ol style="list-style-type: none"> TEST: A body, in carrying out a particular function, exercises public power if, in the absence of a private body carrying out the function, the government would invariably carry out the function (Datafin)
Declaration	<p>Declaration is an order by the court which has no coercive effect but which merely declares the parties' legal rights and liabilities.</p> <ul style="list-style-type: none"> There are no adverse consequences for someone breaching a declaration (i.e. a breach of a declaration is not a contempt of court) A declaration may be sought against the Crown (FAI)

2.4 S75(v) Jurisdiction – Privative clauses (Exception)

- While not an exclusion per se, if the Act under which the decision is made contains a **privative clause**:
 - [Write] Prima facie the court has jurisdiction but will the privative clause be effective to preclude the court from having jurisdiction to conduct judicial review under the ADJR Act?
- If relevant: go through privative clauses**
- Privative clauses **will generally not defeat s 75(v)** of the Constitution as it will be **unconstitutional (UNLESS it is a no invalidity clause)**
 - If it is a no invalidity clause, discuss later as part of topic 7