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Trigger words to look out for

- Regulations → **delegated legislation**
- Must/may → make sure to address in a **ground of review**
- If X, then Y → subjective or objective **jurisdictional fact**
- Superior forcing someone → acting under **dictation**
- Guidelines, ministerial policy, procedure manuals, internal memoranda, established practices, departmental conventions, "rule of thumb" approaches → **inflexible application of policy / soft law**
- “A decision shall not be challenged, appealed, reviewed etc in any court” → **privative clause**, must consider JE
- Breaching X will not render the decision invalid → **‘no invalidity’ clause**

JURISDICTION

Note: in the final exam, there will be one question that deals with a State matter, and one that deals with a Commonwealth matter.

Jurisdiction for State courts

Given that the [decision/legislation] falls within State jurisdiction, it can be heard in the Supreme Court of NSW.

The NSW Supreme Court has inherent and broad jurisdiction to review the legality of State administrative decisions under *Supreme Court Act 1970 (NSW) s 23*, as well as the ability to grant writs and equitable remedies under *s 69* (see *Kirk*).

- Includes statutory supervisory jurisdiction which can be used to challenge the **validity of delegated legislation**.

Public/private distinction

- Even if a non-governmental (private) body or individual is exercising a power, this will still be subject to judicial review if authorised by statute. It is not the public/private distinction that matters in Australia, but the fact that the decision-maker is exercising a statutory power: *Chase Oyster Bar; Neat Domestic Trading; Tang; Plaintiff M61/2010E*

The *ADJR Act* does NOT apply to decisions made under State laws: *Tang*

Jurisdiction for Federal courts (*ADJR Act*)

The [decision/legislation] falls within Commonwealth jurisdiction. As such, the *ADJR Act* may apply if it can be shown that [XX] is a "decision" of an "administrative character" made or proposed/required to be made "under an enactment."

- NB: The *ADJR Act* expressly excludes judicial review of decisions made by the Governor General: *ADJR Act s 3(1)(c)*

Decisions to which the *ADJR Act* applies:

- *Making, failing to make, or conduct relating to making "a decision"*
 - o Does not have to be made by an officer of the Commonwealth (cf constitutional writs under *s 75(v)*)
 - Even if a non-governmental (private) body or individual is exercising a power, this will still be subject to judicial review if authorised by statute. It is not the public/private distinction that matters in Australia, but the fact that the decision-maker is exercising a statutory power: *Chase Oyster Bar; Neat Domestic Trading; Tang; Plaintiff M61/2010E*
 - o A decision must be final and operative (cf an intermediate step in reasoning): *ABT v Bond*
 - (e.g. finding that a *director* of a company was not a fit and proper person = not a final decision, because the statutory question was whether the *company* was fit and proper: *ABT v Bond*)
 - o Includes the failure or refusal to exercise a substantive power: *ABT v Bond*
 - o Where the legislation provides for the making of a report or recommendation prior to a decision, the making of the report or recommendation is deemed to be the decision: *ADJR Act s 3(3)*
- *"of an administrative character"*
 - o It needs to be administrative, not legislative.
 - o Things that suggest it is legislative in character, not administrative: *Roche Products v National Drugs and Poisons Schedule Committee*
 - It creates a binding legal rule of general application (not individualised to specific cases)
 - It involves broad policy considerations and has public interest implications
 - There is Parliamentary control of the decision
 - There is a binding effect with no provision for merits review
- *"under an enactment"*
 - o Only applies to decisions made under a Commonwealth statute/regulation (not State): *Tang*
 - o According to the *Tang* test, there are two limbs (*Fuller v Lawrence*):
 1. The decision must be authorised (expressly or impliedly) by the statute; and

Statutory requirement or procedure

(IF RELEVANT): One of the grounds of review under **ADJR Act s 5(1)(b)** is the failure to observe procedures that were required by law to be observed.

If a statute specifies a condition precedent to power (e.g. filing a certain application, undertaking an inquiry, following a certain procedure), the failure to do so WILL render the purported exercise of power unlawful, and MAY render it invalid.

On the facts, [the Act] uses the word ‘must’ / ‘may’ / ‘require’, which suggests that [decision-maker] [was / was not] bound to comply with [the procedure]. It is clear that [decision-maker] did not comply with this procedure, thereby rendering the exercise of power unlawful.

(IF RELEVANT): It will later become necessary to establish whether this breach amounts to jurisdictional error for the purposes of [remedies and/or privity clause]. This will be addressed later in this response.

Objective jurisdictional facts

At common law, an error of fact will be reviewable if it is an essential condition of the exercise of power that a certain event or requirement “objectively” occurred (and it has not in fact occurred, but the administrator exercised the power anyway).

Examples of objective jurisdictional facts:

- That a certain development is a “non-complying development” under an Act, such that the development approval requires council concurrence: *Enfield*
- That a certain development is “likely to significantly affect threatened species, populations or ecological communities, or their habitats,” such that it requires a Species Impact Statement: *Timbarra*

It is the role of the Court to decide independently whether the objective jurisdictional fact has been met: *Enfield*.

NB: after establishing that an objective jurisdictional fact exists, use the grounds of review to justify how it has been breached (e.g. unreasonableness, requirement for probative basis for finding of fact, etc.)

Subjective jurisdictional facts

‘Subjective jurisdictional facts’ are states of mind that decision-makers are required to reach as a precondition to power. Given that [the Act] refers to an ‘opinion’, ‘belief’, or ‘satisfaction,’ then this is likely a subjective jurisdictional fact: Spiegelman CJ in *Timbarra* (cf ‘likely to’, which is objective)

Examples of subjective jurisdictional facts:

- That the Industrial Authority is “satisfied that the rates ... are anomalous”, such that they can alter rates with ministerial approval: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*
- That the Minister is satisfied that a refugee applicant has a well-founded fear of persecution under the Refugee Convention: *SZMDS*
 - o Illogicality and irrationality is a relatively high standard.
 - o In this case, the decision was upheld. The Minister was not satisfied that he had a well-founded fear of persecution on the basis of his homosexuality, because he was married with four children, had previously returned to Pakistan, and failed to seek asylum in the UK in the past.

This is a more difficult test to satisfy than objective jurisdictional facts. Need to prove that:

1. The opinion or satisfaction was “unreasonable”: *R v Connell* (consider the *Wednesbury unreasonableness* test);
or
2. The opinion or satisfaction was seriously illogical or irrational: *SZMDS*
 - o Unreasonableness is the more traditional test, whereas illogicality and irrationality are more recent.

NB: after establishing that a subjective jurisdictional fact exists, use the grounds of review to justify how it has been breached (e.g. unreasonableness, requirement for probative basis for finding of fact, etc.)