

# JURISDICTION

## COMMON LAW

### STEP 1: Introduction

To seek review under [section 75(v) of the Constitution (in the High Court of Australia) and/or section 39B of the Judiciary Act (in the Federal Courts)], [P] must establish that there is a justiciable 'matter' and that a constitutional writ or other available remedy can be sought in relation to a decision made by a Commonwealth officer.

- [P] may wish to apply directly to the Federal court as s44 JA permits the HCA to remit the issue to the Federal Court to hear under its s39B jurisdiction

### STEP 2: Matter

As Hayne J explained in *McBain*, a 'matter' requires a live legal controversy concerning an immediate right, duty, or liability. The issue raised by [P], being [issue], [involves/does not involve] a legal question, [rather than/instead it involves] a hypothetical one.

- **ANALOGY - Hypothetical matter:** Similar to the situation in *McBain*, this does not seem to constitute a genuine 'matter'. Rather, it presents a hypothetical query/philosophical dispute, as the proceedings will not resolve any immediate right or liability concerning [P]
  - *McBain* is a case about IVF in Victoria, challenged by the Catholic Priests. Held that there was not actually a matter but rather a merely hypothetical questions as to the validity of the legislative/ruling of lower court
- **Example of when there is no a matter:** Public interest group merely disagreeing with the law
- **Examples of when there is a matter:** Public interest group discriminated against due to the law

### *McBain*

- *McBain* won a court case regarding giving an unmarried woman IVF. Bishops sought judicial review of the decision.
  - CBC was unsuccessful. The HCA (High Court of Australia) stated that there will only be a "matter" if substantive proceedings would determine an immediate right or liability of the applicant for review.
  - On the facts (OTF), determining whether the judge was correct or not in holding the provision invalid would not determine the right, duty, or liability of the Bishops.
  - When an application is brought by a public interest group, it might not constitute a "matter". Simply disagreeing with a decision may not be sufficient.

On balance, there [is/is not] a matter.

### STEP 3: Justiciable matter

[P]'s matter must be justiciable, meaning it must be suitable for judicial determination. Courts will generally be reluctant to get involved in political decisions, thus the matter must be appropriate for the courts to resolve. To determine justiciability the court may consider:

#### 3.1 Source of the Power Exercised (e.g., constitutional, prerogative, or statutory power)

- The key focus is on the nature of the power being exercised, rather than its source (*CCSU*)

- Prerogative powers can be reviewed (*CCSU; Peko*), but:
  - *CCSU*: The power was not reviewable since it concerned national security.
  - *Peko*: The decision was tied to complex political issues and policy, so the court declined to intervene, respecting the separation of powers doctrine.

### 3.2 Nature of the Power and How It Is Exercised (e.g., national security vs license or approval)

- **Complex policy questions** are generally not subject to judicial review (*Peko*, per Bowen CJ)
  - However, **political matters** are not automatically non-justiciable (*Hicks*)
  - *Hicks*: **The serious deprivation of liberty and detention** in this case outweighed any non-justiciable arguments related to politics.
- **Cabinet decisions** should not be interfered with:
  - *Peko*: The decision was deeply **political**, so the court was reluctant to intervene.
- **International relations** are also deemed **non-justiciable** (*Hicks*)
- **National security** is non-justiciable, as it is the responsibility of the **executive branch** (*CCSU*, per Lord Diplock).
- **The court requires a clear legal issue involving rights or interests to intervene** (*McBain; Peko*)
- **The issue should be personally relevant to the applicant** (*Peko*, per Wilcox J).

### 3.3 Status of the Decision-Maker (e.g., Governor-General, Ministers, or public servants)

- A decision made by the **executive council** does not automatically exclude it from judicial review (*FAI*).
- Decisions by an **administrator** (such as a **State Governor**) may still be reviewed by the courts (*Toohy*).
- Seniority of the decision maker (*Winneke*)
- is not a permissive power
- There is a presumption that [DM] has a public duty to decide, unless there is a significant discrepancy between the decision-making provision and the legislation's purpose (*Game Association*).
  - *Game Association*: The Act's broad purpose and permissive language meant the minister had no duty to consider declaring an open season, [DM] appears to have no obligation to [facts].

#### *Game Association*

There was **no obligation** to make a decision declaring an open season for wildlife hunting, as the **purpose of the Act was to conserve wildlife**.

- Cf. if it was a Hunting Act, the Minister must at least consider whether to declare an open season or not.

# REASONS FOR DECISIONS

## ADJR ACT

### STEP 1: Introduction

[P] may request written reasons, including the findings on material questions of fact, referring to the material and evidence on which DM made their decision as he/she was entitled to seek JR of [decision] (has standing & jurisdiction) (s 13(1)).

- **NOTE:** Schedule II lists decisions to which s 13 does not apply i.e. (members of defence force).

### STEP 2: Duty Requirement

Once a request is made for reasons, the [DM] must prepare a statement of reasons as soon as practicable and at least within 28 days of the request (s 13(2)).

### STEP 3: Content of reasons

Reasons will set out findings on material questions of fact, referring to relevant material and evidence (s 13(1); s 25D Acts Interpretation Act).

- DM doesn't need to include information "relating to the personal affairs or business affairs of a person, other than the person making the request," that was supplied to the decision-maker in confidence, or pursuant to a statutory duty (s 13A).
- DMs can use templates in writing reasons so long as the formula shows relevant steps and evidence and is without legal error (*Wu Shan Liang*).

### STEP 4: Follow ups

If the reasons provided are of inadequate quality, an applicant can apply to the Federal Court and the court may order the DM to provide further and better particulars on material questions of fact and other matters specified within the order (s 13(7)).

## COMMON LAW

### STEP 1: Introduction

It should be noted that there is no obligation for DMs to provide reasons for their decisions at common law under [s 75(v)/S 39B] (*Osmond*; affirmed in *Wingfoot*)

### STEP 2: Duty may arise

However, in the case of *Osmond*, the court recognised that a duty may arise in special or exceptional circumstances (*Osmond*)

- A duty can be found in legislation under which decision was made; or
- If duty required by procedural fairness (considering impact on interests) – Gibbs J skeptical of this; or
- Where failure to provide reasons would frustrate the right of appeal.

No general CL right, however, check if the relevant Act requires it, and if any special or exceptional circumstances exist to give an implied right. i.e., if not stated in the act, then Parliament

did not intend to give such reasons and thus, the Court should not construe otherwise.