

ADMIN NOTES

SOURCE OF LAW	ADJR	Common Law
Level of gov	Commonwealth	Commonwealth (HCA/FCA) OR State (NSWSC)
Jurisdiction	<u>FCA / FCMCA (ADJR)</u> : Decision, Administrative character, Under an enactment ADJR excluded by <u>privative clause</u>?	<u>HCA (s 75(v)) / FCA (s 39B)</u> : "Matter", Relevant writ, "Officer of the Cth" NSWSC (ss 23, 69) : Inherent common law jurisdiction FOR BOTH : Is the decision <u>justiciable</u> ?
Standing	Use <u>this</u>	Use <u>this</u> <ul style="list-style-type: none"> <u>Public interest group</u>? <u>Competing business</u>?
Is there a relevant ground of review?	<p>Preliminary Error</p> <ul style="list-style-type: none"> Errors in delegation of power: NONE Breach of statutory requirements: <u>s 5(1)(b)</u> (e.g. publication, consultation) <p>Failure to afford procedural fairness</p> <ul style="list-style-type: none"> Hearing rule: <u>s 5(1)(a)</u> Rule against bias: <u>s 5(1)(a)</u> <p>Fact-finding error beyond power</p> <ul style="list-style-type: none"> No evidence: ss 5(1)(h), 5(3)(a)-(b) Error of jurisdictional fact: s 5(1)(c)-(d) <p>Error in exercise of discretion</p> <ul style="list-style-type: none"> Considerations grounds: ss 5(1)(e), 5(2)(a)-(b) Improper purpose: ss 5(1)(e), 5(2)(c) Fettering discretion <ul style="list-style-type: none"> Inflexible: ss 5(1)(e), 5(2)(f) Dictation: ss 5(1)(e), 5(2)(e) Unreasonableness: ss 5(1)(e), 5(2)(g) Bad faith: ss 5(1)(e), 5(2)(d) <p>Was there <u>jurisdictional error</u>?</p>	<p>Preliminary Error</p> <ul style="list-style-type: none"> <u>Errors in delegation of power (subdelegation)</u> <u>Breach of statutory requirements (e.g. publication, consultation)</u> <p>Failure to afford procedural fairness</p> <ul style="list-style-type: none"> <u>Hearing rule</u> <u>Rule against bias</u> <p>Fact-finding error beyond power</p> <ul style="list-style-type: none"> <u>No evidence</u> <u>Error of jurisdictional fact</u> <p>Error in exercise of discretion</p> <ul style="list-style-type: none"> <u>Considerations grounds</u> (irrelevant vs relevant factors) <u>Improper purpose</u> <u>Fettering discretion</u> <ul style="list-style-type: none"> <u>inflexible application</u> <u>acting under dictation</u> <u>Unreasonableness and irrationality</u> <u>Bad faith</u> <p>Was there <u>jurisdictional error</u>?</p>
Delegated legislation	<p>Can't do under ADJR. Also note that executive APPLICATION of delegated legislation may be subject to judicial review.</p> <ul style="list-style-type: none"> <u>Identify as delegated legislation</u> <u>Non-judicial review mechanisms</u> paragraph <ul style="list-style-type: none"> Consultation, registration, tabling, parliamentary scrutiny, disallowance, sunseting, uncertainty (kinda) If none, 'it appears the regulation has been passed in line with relevant formal requirements' <u>Judicial review of delegated legislation</u> paragraph <ul style="list-style-type: none"> <u>Ground of review – Failure to comply with formal requirements</u> <u>Ground of review – Exceeds the scope of the primary Act</u> ('necessary/convenient', 'regulate') <u>Ground of review – Inconsistency</u> (with primary act or other sources) <u>Ground of review – Improper purpose</u> <u>Ground of review – Unreasonableness and proportionality</u> <u>Ground of review – Subdelegation of legislative power</u> 	

<p>What remedy is relevant/available?</p>	<ul style="list-style-type: none"> • Orders in s 16 • Are any remedies excluded by a privative clause? • Remedial discretion 	<p>1. Access to remedies</p> <ul style="list-style-type: none"> • Does a privative clause need to be 'read down' so the court can assess jurisdictional error? <p>2. Selecting relevant remedies</p> <ul style="list-style-type: none"> • Which court? (locate appropriate source) • Is the remedy restricted to jurisdictional error? • Go through specific requirements of each relevant remedy <p>3. Remedial discretion</p>
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1: UNDERSTANDING ADMINISTRATIVE LAW _____ ERROR! BOOKMARK NOT DEFINED.

2: ACCOUNTABILITY MECHANISMS _____ **4**

Introduction _____ Error! Bookmark not defined.

Representative and responsible government _____ Error! Bookmark not defined.

Parliamentary committees _____ Error! Bookmark not defined.

Auditor-General _____ Error! Bookmark not defined.

Royal Commissions _____ Error! Bookmark not defined.

Integrity Commissions _____ Error! Bookmark not defined.

Ombudsman _____ Error! Bookmark not defined.

3B: LEGALITY-MERITS DISTINCTION _____ ERROR! BOOKMARK NOT DEFINED.

The separation of powers _____ Error! Bookmark not defined.

Distinguishing legality and merits _____ Error! Bookmark not defined.

Merits Review Mechanisms _____ Error! Bookmark not defined.

4: TRIBUNALS _____ ERROR! BOOKMARK NOT DEFINED.

Categories of tribunal _____ Error! Bookmark not defined.

Guiding principles – AAT _____ Error! Bookmark not defined.

Tribunal procedure _____ Error! Bookmark not defined.

Membership and constitutional issues _____ Error! Bookmark not defined.

Access to reasons from government _____ Error! Bookmark not defined.

Abolishment of the AAT _____ Error! Bookmark not defined.

Jurisdiction in tribunals _____ Error! Bookmark not defined.

Tribunal decision-making _____ Error! Bookmark not defined.

Outcomes in tribunal review _____ Error! Bookmark not defined.

5: JUDICIAL REVIEW JURISDICTION _____ ERROR! BOOKMARK NOT DEFINED.

Sources of jurisdiction _____ Error! Bookmark not defined.

Where to commence? _____ Error! Bookmark not defined.

Constitutional Jurisdiction _____ Error! Bookmark not defined.

ADJR Act Jurisdiction _____ Error! Bookmark not defined.

Amenability to judicial review _____ Error! Bookmark not defined.

6.1: REMEDIES	ERROR! BOOKMARK NOT DEFINED.
Public law remedies – summary	Error! Bookmark not defined.
Public law remedies – sources	Error! Bookmark not defined.
Public law remedies – jurisdictional error	Error! Bookmark not defined.
Public law remedies – criteria	Error! Bookmark not defined.
ADJR Act Remedies	Error! Bookmark not defined.
Discretion to refuse remedies	Error! Bookmark not defined.
6.2: STANDING	ERROR! BOOKMARK NOT DEFINED.
Specific contexts	Error! Bookmark not defined.
7A: JURISDICTIONAL ERROR	ERROR! BOOKMARK NOT DEFINED.
Why is it important?	Error! Bookmark not defined.
Identifying jurisdictional error	Error! Bookmark not defined.
Privative clauses	Error! Bookmark not defined.
7B: PRELIMINARY ERRORS	ERROR! BOOKMARK NOT DEFINED.
Errors in delegation of power	Error! Bookmark not defined.
Breach of statutory requirements	Error! Bookmark not defined.
8A: PROCEDURAL FAIRNESS (AKA NATURAL JUSTICE)	ERROR! BOOKMARK NOT DEFINED.
What is it and when does it apply?	Error! Bookmark not defined.
Hearing rule	Error! Bookmark not defined.
Rule against bias	Error! Bookmark not defined.
8B: FACT-FINDING ERRORS	ERROR! BOOKMARK NOT DEFINED.
No evidence	Error! Bookmark not defined.
Jurisdictional fact-finding	Error! Bookmark not defined.
9: ERRORS IN EXERCISE OF DISCRETION	ERROR! BOOKMARK NOT DEFINED.
Considerations grounds	Error! Bookmark not defined.
Improper purpose	Error! Bookmark not defined.
Fettering discretion	Error! Bookmark not defined.
Unreasonableness, irrationality and bad faith	Error! Bookmark not defined.
SUMMARY: Grounds of review & jurisdictional error	Error! Bookmark not defined.
10: DELEGATED LEGISLATION	5
What is delegated legislation?	Error! Bookmark not defined.
Non-judicial review mechanisms	5
Judicial review of delegated legislation	Error! Bookmark not defined.

2: Accountability mechanisms

NOTE: This is only a sample of the topic 2 content.

Body	Duration	Executive or Parliament?	Function	Example	Exam Trigger
<u>Standing Committee</u>	Life of a Parliament	Parliament	Ongoing review of government policy, departments, and legislation	Senate Legal and Constitutional Affairs Committee (reviews bills for legal/const. issues)	Ongoing scrutiny of a policy or department
<u>Select Committee</u>	Temporary		Short-term inquiry into a specific issue	Senate <u>Select Committee on Adopting Artificial Intelligence (AI)</u>	Parliament reviewing or investigating a specific event or concern (e.g. budget response, policy failure)
<u>Joint Committee</u>	Permanent		MPs from both houses investigate cross-cutting issues	Foreign Affairs, Defence and Trade	If the issue spans both houses or concerns a major public matter
<u>Auditor-General</u>	Permanent	Independent (Reports to Parliament)	Audits public spending and agency performance	N/A	When there's wasteful spending or mismanagement
<u>Royal Commission</u>	Temporary	Executive (established by Gov/GG)	Deep investigation into a systemic issue	2022-23 Royal Commission into the Robodebt Scheme	When a major failure or scandal needs formal inquiry (e.g. Robodebt, Aged Care)
<u>Integrity / Standing Commission</u>	Permanent	Independent Executive Body	Investigates corruption and misconduct in public service	ICAC (NSW), NACC (Cth)	If integrity or corruption is at issue
<u>Ombudsman</u>	Permanent	Independent Executive Body	Handles public complaints about poor administration	<div> Commonwealth Ombudsman <ul style="list-style-type: none"> • Defence Force Ombudsman • Postal Industry Ombudsman • Overseas Students Ombudsman • Private Health Insurance Ombudsman • Student Loans Ombudsman </div>	When individuals face unfair treatment or administrative issues

10: Delegated legislation

NOTE: This is only a sample of the topic 10 content.

Non-judicial review mechanisms

Which instruments?

Commonwealth

Delegated legislation = "Legislative instrument"

Legislation Act 2003 (Cth) s 8(4)

An instrument is a legislative instrument if:

- (a) the instrument is made under a power delegated by the Parliament; and
- (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law ... is to apply, or is not to apply; and
 - (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

NSW

Delegated legislation = "Statutory rule"

Subordinate Legislation Act 1989 (NSW) s 3

statutory rule means a regulation, by-law, rule or ordinance:

- (a) that is made by the Governor, or
- (b) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, but does not include any instruments specified or described in Schedule 4 [ie standing rules and orders of parliament, Court rules, university by- laws etc]

Mechanisms – Consultation

Requirement

Commonwealth (Legislation Act 2003 (Cth))	NSW (Subordinate Legislation Act 1989 (NSW))
<ul style="list-style-type: none">Must be satisfied that there has been appropriate consultation as is <i>reasonably practicable</i>: s 17(1)May include consultation with <i>persons affected</i> and persons with <i>relevant expertise</i>	<ul style="list-style-type: none">Must ensure consultation with <i>appropriate representatives</i> of persons likely to be <i>affected</i>: s 5Must not present a rule for registration without a Regulatory Impact Statement (RIS): ss 5-7RIS highlights legislative objectives, weighs costs-benefits and confirms consultation: Sch 2

Consequence

Commonwealth (Legislation Act 2003 (Cth))	NSW (Subordinate Legislation Act 1989 (NSW))
Failure to comply <u>does not affect validity</u> : s 19	Failure to comply <u>does not affect validity</u> : s 9

Mechanisms – Registration (i.e. obligation to publish)

Requirement

Commonwealth (Legislation Act 2003 (Cth))	NSW (Interpretation Act 1987 (NSW))
Legislative instruments must be lodged for registration: s 15G	Statutory rules must be published on the NSW legislation website: s 39

Consequence

Commonwealth (Legislation Act 2003 (Cth))	NSW (Interpretation Act 1987 (NSW))
Legislative instrument “ not enforceable by or against any person” unless registered: s 15K(1)	Failure to publish does not affect validity , but does affect commencement date : s 39(2A) → same effect as Cth (not enforceable until registered)

Mechanisms – Tabling

Requirement

Commonwealth (Legislation Act 2003 (Cth))	NSW (Interpretation Act 1987 (NSW))
Registered legislative instruments must be tabled before each House within 6 sitting days of registration: s 38(1)	Notice of a statutory rule must be tabled before each House within 14 sitting days of publication: s 40(1)

NOTE: if problem question doesn't tell you when Parliament sat, note this in your answer.

Consequence

Commonwealth (Legislation Act 2003 (Cth))	NSW (Interpretation Act 1987 (NSW))
Instrument is treated as repealed if not tabled: s 38(3)	Failure to lay notice does not affect validity (but must still be done): s 40(4)

Mechanisms – Parliamentary scrutiny

Requirement

Commonwealth	NSW
Senate Standing Committee for the Scrutiny of Delegated Legislation Senate Order 23 : Scrutinise all legislative instruments: <ul style="list-style-type: none">• In accordance with statute?• Constitutionally valid?• Lack of consultation?• Unduly trespasses on personal rights /liberties?• Excludes independent review?• More appropriate for legislation?	NSW Legislative Council Regulation Committee Legislation Review Act 1987 (NSW) s 9 : Scrutinise all instruments subject to disallowance: <ul style="list-style-type: none">• Unduly trespasses on personal rights/liberties?• Adverse impact on business?• Not within statutory objects or spirit of the Act?• Consultation requirements (eg RIS) not complied with?• Form or intention should be clarified?

Impact

Commonwealth	NSW
<ul style="list-style-type: none"> • Raise concerns directly with the Executive (eg Minister might directly amend the instrument) • Parliament can call on the relevant Minister during question time • Inform Parliament's choice to disallow the instrument 	

Mechanisms – Disallowance

If the Executive makes a rule that Parliament doesn't agree with, Parliament can disallow it:

Commonwealth (Legislation Act 2003 (Cth))	NSW (Interpretation Act 1987 (NSW))
<ul style="list-style-type: none"> • Notice of motion to disallow a legislative instrument may be put before either House <u>within 15 sitting days of tabling</u>: s 42 • Instrument is disallowed if: (a) the motion is passed, or (b) the motion has not been called on: s 42 	<ul style="list-style-type: none"> • Either House may disallow a statutory rule before tabling or <u>within 15 sitting days of tabling</u>: s 41(1) • The rule is disallowed if the resolution is passed: s 41(2)

Mechanisms – Sunsetting

Delegated legislation is automatically terminated after specific period unless reviewed & renewed.

Commonwealth (Legislation Act 2003 (Cth))	NSW (Subordinate Legislation Act 1989 (NSW))
A legislative instrument is repealed on "1 April or 1 October falling on or after the <u>tenth anniversary of registration</u> ": s 50(1)	A statutory rule is repealed on "1 September following the <u>fifth anniversary</u> of the date on which it was published": s 10(2)

Uncertainty

NOTE: Although not a ground in and of itself, uncertainty may lead to invalidity through lack of connection:

"[There is no] doctrine that certainty is a separate requirement which all forms of subordinate legislation must fulfil, so that an instrument made under a statutory power of a legislative nature, though it is directed to the objects of the power, deals only with the subject of the power and observes its limitations, will yet be invalid unless it is certain." - [King Gee Clothing Co Pty Ltd v Commonwealth \(1945\) 71 CLR 184, 194](#)