

W2 – Jurisdiction

Jurisdiction

Which Court is Used?

An administrative decision made pursuant to Commonwealth legislation is subject to judicial review if jurisdictional requirements are met.

There two avenues for judicial review are:

- Common Law: Section 75 of the Australian Constitution and Section 39B of the Judiciary Act 1903 (Cth); and
 - High Court when AC is used.
 - Federal Court when JA Act is used.
- Statute Law: The Administrative Decisions (Judicial Review) Act 1977 (Cth).
 - Federal Court when AD(JR) Act is used.

Jurisdictional Requirements for Judicial Review – Australian Constitution (AC) and Judiciary Act (JA) (First Avenue for Judicial Review)

The first avenue for challenging an administrative decision is using section 75 of the AC and 39B of the JA.

Section 75(v) of the AC states that the High Court shall have original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

- Grants the High Court original jurisdiction.
 - Original jurisdiction refers to hearing a legal action that can be initiated in that Court.
 - A judicial review application can be initiated in the High Court, so no requirement to go to a lower Court first.
- However, the High Court was not expected to deal with routine matters and they should not be putting resources towards hearing day-to-day legal matters.
- Therefore, section 44 of the JA was introduced and says that where the High Court has jurisdiction to conduct judicial review, they can either:
 - Conduct judicial review itself; or
 - Remit that matter to the Federal Court of Australia. However, the Federal Court must have jurisdiction to deal with that matter. That jurisdiction is granted to the High Court by section 39B of the JA.

Without jurisdiction, there cannot be judicial review. Each of the elements for jurisdiction must be analysed.

The requirements, under section 75(v) of the AC and section 39B of the JA, for a Court to have jurisdiction to conduct a judicial review are:

1. There Must Be a 'Matter'

A matter is a real and existing controversy about legal rights, duties or liabilities which will, by the application of judicial power, be quelled (Re McBain; Ex parte Australian Catholic Bishops Conference; Fencott v Muller).

Public Interest Model of Standing

Organisations concerned with public matters may be granted standing in various matters.

The Court has established a multi-factorial test for establishing standing pursuant to the public interest model.

Citation	North Coast Environmental Council v Minister for Resources
Facts	The North Coast Environmental Council was the peak organisation for environment protection in NSW. A Minister granted an export license to a private company to export woodchips. The Council sought reasons from the Minister for this decision (this was not a judicial review, but rather, the applicant was seeking reasons for a decision from a Minister under the AD(JR) Act). Under section 12 of the AD(JR) Act, a person who has standing in a matter can seek reasons from a decision maker.
Issue	Whether the Council had standing.
Held	<p>Yes, the Council had standing because it:</p> <ul style="list-style-type: none">- Is the peak organisation for environmental protection in the North Coast region of NSW.- Had been recognised by the Commonwealth Government, as made apparent through Government Funding, as a significant and responsible environmental organisation.- Had been recognised by the NSW Government as a body that should represent environmental concerns on advisory committees.- Had conducted or co-ordinated projects and conferences on matters of environmental concern.- Had made submissions on forestry management issues to a body called the Resource Assessment Commission. <p>The Court adopted a multi-factorial approach in ascertaining whether the applicant had standing.</p>

The below case confirmed the multi-factorial approach for standing for the public interest model. An applicant can have standing despite not being based in Australia.

Citation	Animals' Angels v Secretary, Department of Agriculture
Facts	Animals' Angels (AA) was an animal rights group based in Germany. They sought judicial review through their Australian representative for various decisions made by the Department of Agriculture regarding live export.
Issue	Did AA have standing to seek a judicial review?
Held	<p>Yes, AA had standing from a multi-factorial perspective, considering:</p> <ul style="list-style-type: none">- AA's Australian representative was involved in, and had appeared before, various Government committees that operated with regard to live animal export.- AA engaged in research and lobbying in Australia through its representative, with regard to live animal exports.- AA had spent its own money engaging in its research and lobbying activities.- AA's activities had alerted the Department to many potential breaches of the law concerning live animal exports.- Such was AA's involvement in Australia with regard to live animal exports, and its recognition by the Government that it did not matter that it was based in Germany and only had an Australian representative.

W6 – Third Ground of Review: Procedural Fairness

Introduction

Procedural fairness ensures fair processes in making decisions.

The Two Basic Obligations of Procedural Fairness:

1. The Hearing Rule – when a decision maker makes a decision, then the applicant should be given a hearing.
2. The Rule Against Bias – disqualifies a decision maker if they make a decision in circumstances where a fair-minded law observer can reasonably apprehend that a decision maker is unlikely to bring an impartial mind in order to make a decision.

Rationale for Procedural Fairness

- Instrumental benefits: practical, tangible benefits.
 - For example, when you allow an applicant to have a hearing, that gives them an opportunity to present their arguments and case.
 - It affects the decision-making process because the decision maker gets to see more aspects of the decision that they may not have otherwise seen.
 - It allows for informed decision making.
 - For example, the rule against bias means that a decision can be made impartially.
 - Without prejudice or bias.
- Non-instrumental benefits: non-tangible benefits.
 - The applicant feels more dignified in that they are made a part of the decision-making process.
 - Even if a decision is not made in their favour, the fact that they could have fully presented their case gives them the satisfaction that they were heard in their issues and arguments.
 - More likely to have trust and faith in decision making process because of this requirement for procedural fairness.

This ground of review is available under section 5(1)(a) of the AD(JR) Act which states that a person may seek judicial review of a decision on the ground that a breach of the rules of natural justice occurred in connection with the making of the decision.

Natural justice means –

- Applicant must receive a hearing; and
- The decision maker must not be biased in their decision making.

The Hearing Rule

The General Rule for the Hearing Rule

The first issue is whether D [decision maker] was under a prima facie legal obligation to provide A [applicant to JR, eg. not necessarily the person's whose permit was suspended] with a hearing.

However, a person may have standing to challenge a decision (on other grounds) after a decision is made, yet not have a right to procedural fairness before the decision is made (Botany Bay City Council). The decision must have a direct and immediate effect on the person or group's rights or interests (Kioa).

- For example, a shareholder in a project, which cannot go ahead per a decision, would have the right to a hearing because they have an immediate and direct financial interest.

W8 – Consequences of Unlawful Action and Crown Immunity; Judicial Review at State Level; Collateral Challenge; Privative Clauses and No Invalidity Clauses

Consequences of Unlawful Action and Crown Immunity

Consequences of Unlawful Action

If a decision is declared to be unlawful, a range of remedies may be available. The primary remedy a Court will grant is referring the decision back to the original decision maker for the decision to be made again.

Remedies Under Common Law Judicial Review (Section 75(v) AC and Section 39B JA)

- Prerogative Writs
 - Prohibition – an order prohibiting a person from taking a proposed course of action or making a proposed decision.
 - Mandamus – an order requiring a decision maker to exercise a discretion in accordance with the law.
 - Certiorari – an order quashing a defective decision that has been made. And certiorari carries with it an implied power to send the quashing decision back to be re-made.
- These are available where there is a jurisdictional error, with one exception for certiorari. Certiorari is ancillary.
- These remedies have their own jurisdictional requirements as per W2.

Remedies Under Statutory Judicial Review (Section 16 of the AD(JR) Act)

- An order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the Court specifies (section 16(1)(a) AD(JR) Act).
 - Similar to certiorari.
- An order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit (section 16(1)(b) AD(JR) Act).
 - Similar to mandamus.
- An order declaring the rights of the parties in respect of any matter to which the decision relates (section 16(1)(c) AD(JR) Act).
 - Similar to declaration.

Nature of Remedies

Discretionary Nature of Relief

- All remedies for a successful judicial review are discretionary in nature, whether judicial review is sought under common or statute law (section 16(1) AD(JR) Act). The Court can always exercise its discretion whether or not to grant a remedy, even if an applicant successfully establishes jurisdiction, justiciability, standing, and a successful ground of review. A Court may still decide that they are not going to issue a remedy (Ozone Theatres).

Citation	R v Commonwealth Court of Conciliation and Arbitration; ex p Ozone Theatres
Held	<p>Bases on which the Court may not grant a remedy include:</p> <ul style="list-style-type: none">- Where granting of a remedy would be of no practical benefit to the applicant (Fairfield Primary School).- If the Court forms the view that the decision maker would have come to the same conclusion even if it had not made an error (similar to materiality).- If there are alternate avenues of redress that the applicant could have pursued, including especially appeal to a body like the AAT.

