

## INTRODUCTION

1. What decision?
2. Who is decision maker (DM)?
3. Under what Act + Section? (SA or Cth?)
4. Who will seek review?

All the merits review avenues are exhausted, hence the party proceeds to judicial review. In *Attorney-General (NSW) v Quin*, the High Court held that judicial review focuses on legality, not the merits of decisions. Courts lack policy expertise, and their adversarial nature doesn't represent community interests. Deciding merits could favour the powerful and risk judicial impartiality, as Parliament entrusted decision-making to administrators, not the courts.

SA

CTH

## PRELIMINARIES / LIMITS ON JR

### FORUM

JR by South Australian Supreme Court.	Supreme Court Act s 17	<p>Is ADJR available under s 5?</p> <p>(1) 'decision'</p> <p>(i) final or operative and determinative &amp; (ii) substantial (cf procedural)</p> <p>- Exception: intermediate D req'd by statute</p> <p>(2) 'of an administrative character'</p> <p>- Leg = create rules having general app'n</p> <p>(3) 'made under enactment'</p> <p>- D's capacity to affect legal rights / obls is derived from statute</p> <p>NB: Not Governor-general or Schedule 1</p> <p>-If ADJR → Statutory JR by FCA / FCFCOA</p> <p>-If NOT ADJR → JR by FCA, or, otherwise, by HCA</p>	<p>ADJR s 3</p> <p><i>ABT v Bond</i></p> <p><i>Tooheys</i></p> <p><i>Griffith v Tang</i></p> <p>Judiciary Act s39B</p> <p>Constitution s 75(v)</p>
<b>Supreme Court Act s 17</b>		<p>The Supreme Court of South Australia has judicial review powers under the Supreme Court Act 1935 (SA), based on common law principles, to review administrative decisions for legality. Procedures are regulated by the Uniform Civil Rules. Importantly, the court's power to review for jurisdictional error is constitutionally protected, meaning that state laws cannot remove this core function, as per <i>Kirk</i>.</p>	
<b>ADJR Act s5 and s3</b>		<p>s5: 'a person who aggrieved by a decision to which this applies... may apply...'</p> <p>s3: "decision to which this Act applies" means a decision of an administrative character made, proposed to be made, or required to be made... under an enactment – other than a decision by the Governor-General or a decision include in Schedule 1.</p>	
<b>ADJR Act – 'Decision'</b> citing <i>Australian Broadcasting Tribunal v Bond (1990)</i> ('ABT')		<p><b>Final or Operative and Determinative Decision</b></p> <p>1. A decision under the ADJR Act must be "final or operative and determinative" of the issue or dispute at hand. This means that the decision</p> <p>(i) Concludes a particular issue or step in the process and has an immediate, practical impact.</p> <p>(ii) Resolves an issue in a way that determines the rights, obligations, or legal position of the parties involved.</p> <p>2. Example: If a tribunal cancels a broadcasting license, this would be a final decision, as it conclusively affects the broadcaster's rights.</p> <p><b>Substantive Decision</b></p> <p>1. The decision must be substantive in nature rather than procedural. A substantive decision has a direct impact on the parties' legal rights, obligations, or interests, while a procedural decision refers to steps taken in the process that don't resolve the core issue.</p>	

	<p>2. Substantive decisions are generally reviewable because they directly affect the rights or obligations of a party.</p> <p>3. Procedural decisions, like determining how a hearing will be conducted or scheduling a meeting, are not reviewable because they don't directly affect rights or obligations.</p> <p><b>Exception – Intermediate decisions</b></p> <p>1. The court also established exception for intermediate decisions:</p> <ul style="list-style-type: none"> <li>- If a conclusion or finding is made as a "step along the way" in a broader process towards a final decision, it generally won't be considered a reviewable decision unless the statute specifically requires that intermediate decision.</li> <li>- If the statute requires that a particular intermediate step be taken, then it becomes reviewable as an "intermediate decision".</li> </ul> <p>2. Example: A tribunal's finding that someone is "unsuitable" to hold a license might not be a final decision, but if the statute requires that this specific determination be made before revoking the license, then it could be reviewable.</p> <p><b>Facts</b></p> <p>In the <i>Bond</i> case, some of the tribunal's findings were not considered final or substantive decisions, as they were only steps leading to the ultimate decision about Bond's suitability to hold a broadcasting license. Therefore, these findings were not reviewable unless specifically required by statute.</p>
<p><b>ADJR Act – 'Administrative character'</b> Citing <i>Tooheys</i></p>	<p><b>Principles - Tooheys</b></p> <p>1. Legislative decisions (creating new laws or policies) are generally not subject to review under the ADJR Act, while administrative decisions (applying existing laws in particular cases) are.</p> <p>2. Legislative Power: Involves the creation or formulation of new rules of law that have general application. This means that the decision establishes rules or policies that apply broadly and generally, rather than to specific cases or individuals.</p> <p>3. Administrative Power: Involves the application of general rules or laws to particular cases or situations. This means the decision is about implementing or enforcing existing laws in a specific context.</p>
<p><b>ADJR Act – 'made under enactment'</b> Citing <i>Griffith University v Tang (2005)</i></p>	<p><b>Principles</b></p> <p>A decision is considered "made under an enactment" if its capacity to affect legal rights or obligations is derived from a statute (legislation), rather than from the general law (such as common law or contract).</p> <p><b>Facts</b></p> <p>In <i>Griffith University v Tang</i>, the decision to exclude a student from a PhD program was found not to be made under an enactment because it was based on the university's internal regulations and policies, which did not have the force of law derived from a statute. Therefore, the decision was not reviewable under the ADJR Act.</p>
<p><b>Judiciary Act s 39B (1) – Federal Court</b></p>	<p>1. Confers on the <b>Federal Court</b> the same judicial review jurisdiction as <b>s 75(v) of the Constitution</b>.</p> <p>2. It derives its <b>substantive content from common law</b>.</p> <p>3. It is <b>not constitutionally entrenched</b>, meaning it can be <b>amended or repealed</b> by Parliament</p>
<p><b>Constitution s 75 (v) – High Court</b></p>	<p>Section 75: High Court has original jurisdiction 'in all matters': (v) 'in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'</p> <p>High Court has focused primarily on s 75 (v) as entrenching the High Court's jurisdiction to review decisions by Commonwealth DMs for jurisdictional error.</p>
<p><b>PRIVATIVE CLAUSES</b></p>	

<p>PC can only excluded JR for non-jurisdictional error</p> <p>NB: no-invalidity clause affects whether there is reviewable error going to jurisdiction</p>	<p><b>Kirk</b></p> <p><b>Futuris; Graham</b></p>	<p>- IF ADJR → see Sch 1 - IF CL JR → PC can only JR for non-jurisdictional error</p> <p>NB: no-invalidity clause affects whether there is a reviewable error going to jurisdiction</p>	<p>ADJR Sch 1 <b>Plaintiff s157</b></p> <p><b>Futuris; Graham</b></p>
<p><b>Plaintiff s157</b></p>	<p><b>Principles</b></p> <ol style="list-style-type: none"> <li>1. Interpretation: A privative clause offers protection to certain decisions but must be interpreted on its terms. Courts attempt to reconcile the privative clause with other provisions to ensure they work together without undermining the statute's limits on power.</li> <li>2. Constitutional Constraints: If a privative clause conflicts with s 75(v) of the Constitution, which guarantees judicial review for jurisdictional error, the clause must be interpreted to remain consistent with this requirement.</li> <li>3. Judicial Review: There is a presumption that Parliament does not intend to limit the jurisdiction of courts to review decisions for jurisdictional error. Privative clauses do not protect decisions that are unlawful or made without jurisdiction.</li> </ol>		
<p><b>Kirk</b></p>	<p><b>Principles</b></p> <ol style="list-style-type: none"> <li>1. Constitutional Limits: Section 75(v) of the Constitution provides the minimum standard of judicial review for Commonwealth officers by the High Court, but state supreme courts are also protected under Chapter III. State parliaments cannot alter the fundamental character of state courts by removing judicial review for jurisdictional error.</li> <li>2. Judicial Review and State Supreme Courts: Judicial review (such as the power to grant certiorari) has been a defining characteristic of state supreme courts since federation. Removing this power would fundamentally change the character of these courts, which state parliaments cannot constitutionally do.</li> <li>3. Interpretation of Privative Clause: In cases involving privative clauses, courts can interpret the term "decision" narrowly, meaning only decisions made within jurisdiction, thereby preserving the state supreme courts' ability to review jurisdictional error.</li> </ol>		
<p><b>Futuris</b></p>	<p><b>Facts</b></p> <ol style="list-style-type: none"> <li>1. In this case, Futuris Corporation challenged a tax assessment made by the Commissioner of Taxation, arguing that the assessment was invalid due to non-compliance with the enabling legislation under the Income Tax Assessment Act.</li> <li>2. The Commissioner relied on a no-invalidity clause within the legislation, which stated that a tax assessment would remain valid despite non-compliance with certain procedural requirements.</li> </ol> <p><b>Principles</b></p> <ol style="list-style-type: none"> <li>1. The High Court held that the no-invalidity clause meant that the tax assessment was valid, even if there had been errors or non-compliance with statutory requirements. The clause effectively brought these errors within jurisdiction.</li> <li>2. The no-invalidity clause ensured that the tax assessment could not be challenged on the basis of jurisdictional error. As a result, constitutional writs (like certiorari or prohibition) could not be issued to invalidate the assessment.</li> <li>3. The Court also noted that equitable remedies, such as injunctions or declarations for unlawful actions, were not available due to the operation of the no-invalidity clause.</li> </ol> <p><b>Limits</b></p>		

	<p>1. Despite the SS broad scope of the no-invalidity clause, the Court recognized limits. Some errors may still be jurisdictional if:</p> <ul style="list-style-type: none"> <li>- The assessment did not reasonably meet the statutory definition of "assessment."</li> <li>- The decision involved conscious maladministration, such as bad faith or an improper purpose.</li> </ul>
<b>Graham</b>	The statute was read down to remove the unconstitutional element, allowing the court to continue exercising its review function under s 75(v). This means no-invalidity clauses cannot be used to shield unlawful decisions from review or restrict the court's access to essential information for assessing legality.

## JUSTICIABILITY

Introduction - A justiciable matter is subject to judicial review, while non-justiciable decisions are not reviewable by courts.

<p>Factors relevant to (non)-justiciability:</p> <ul style="list-style-type: none"> <li>• Polycentricity</li> <li>• Effect to individual rights / obligations</li> <li>• Subject matter</li> <li>• Status of DM</li> <li>• Source of power (eg prerogative power)</li> </ul>	<b>Peko-Wallsend</b>	<p>"for CL JR only</p> <p>NOT a distinct issue for ADJR . (No need to discuss justiciability if seeking review under the ADJR Act)</p>	
--	----------------------	--	--

<b>Peko-Wallsend</b>	<p><b>Principles</b></p> <ol style="list-style-type: none"> <li>1. The decision involves Cabinet exercising prerogative power under an international treaty.</li> <li>2. The decision is polycentric, involving international relations and multiple competing interests.</li> <li>3. The area covered is vast, affecting many people and interests.</li> <li>4. Courts are hesitant to intervene in non-justiciable matters due to the high threshold.</li> <li>5. Even if deemed non-justiciable, it's assumed as justiciable for argument's sake to proceed.</li> </ol> <p><b>Facts</b></p> <p>The Federal Cabinet nominated Kakadu National Park for the World Heritage List under the executive's prerogative power related to international treaties (World Heritage Convention). Mining companies with leases on the land sought judicial review, but the Full Federal Court ruled the decision was non-justiciable.</p> <p><b>Judges</b></p> <p>Both <b>Wilcox J</b> and <b>Bowen CJ</b> agree that Cabinet decisions, including those exercising prerogative power, can be subject to judicial review if they affect individual rights or interests. However, such decisions are not justiciable when they are <b>polycentric</b>, meaning they involve balancing multiple competing interests, as in the case of nominating Kakadu National Park for World Heritage listing, which also involves international relations.</p>		
----------------------	---	--	--

## STANDING

Introduction - A person must have standing (locus standi) for judicial review, requiring sufficient interest to bring the case, ensuring efficient judicial resource use and preventing abuse of the legal process.

<p>(1) Which test?</p> <p>(i) 'special interest' = mandamus, injunction, declaration</p> <p>(ii) 'person aggrieved' = certiorari, prohibition</p> <p>NB: a person who has a special 'interest' will also be a 'person aggrieved'</p>	<b>Ogle v Strickland</b>	<p>(ii) 'person aggrieved' = ... + ADJR</p> <p>NB for ADJR: CL cases are applicable</p>	<p>ADJR s5 (1): 'A person who is aggrieved by a decision....may'</p> <p><b>Argos</b></p>
<p>(2) 'Special interest' test:</p> <p>(i) special interest over public at large</p> <p>(ii) not mere intellectual or emotional concern</p>	<b>ACF</b>	"	
<p>(3) 'Person aggrieved' test:</p> <p>(i) interests are adversely affected</p>	<b>Argos</b>	"	<p>See also ADJR, s 3(4): defines a person aggrieved as 'a person whose interests are adversely affected by the decision'</p>

<p>(4) Examples:</p> <ul style="list-style-type: none"> <li>(i) public interest groups</li> <li>(ii) indirect &amp; non-material interests</li> <li>(iii) vocational interests</li> <li>(iv) commercial competition</li> </ul>	<p><b>NCEC; cf ACF</b>  <b>Onus v Alcoa</b>  <b>Ogle v Strickland</b>  <b>Argos</b></p>	<p>"</p>	
<p><b>Ogle v Strickland</b></p>	<p><b>Principles</b></p> <ol style="list-style-type: none"> <li>1. A person who has special interest will also be a person aggrieved.</li> <li>2. It is still important to always use the applicable test.</li> </ol> <p><b>Vocational interests</b></p> <p>Priests are teachers and their vocation may give them a more special interest than other/ordinary Christians on matters of blasphemy.</p>		
<p><b>Argos</b></p>	<p><b>Principles</b></p> <ol style="list-style-type: none"> <li>1. A 'person aggrieved' is a person whose interests are adversely affected by the decision</li> <li>2. How is one interest adversely affected by the decision in practical term. For example, preventing the construction of a project will affect the business interest and lead to loss of potential profit. Thus, it is useful to point out evidence to be provided on how someone interest would be adversely affected.</li> </ol> <p><b>Facts</b></p> <ol style="list-style-type: none"> <li>1. The ACT Planning and Land Authority approved a development application for a supermarket and retail outlets in a Canberra suburb.</li> <li>2. Argos Pty Ltd and another company, both owners of competing nearby businesses, sought judicial review of the approval, arguing it would negatively affect their commercial interests.</li> <li>3. The issue was whether they were "persons aggrieved" under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act), which grants standing to those whose interests are adversely affected by a decision.</li> <li>4. The High Court found that Argos Pty Ltd, as an affected business competing in the same market as the development, had a sufficient "special interest" and was therefore a person aggrieved, satisfying the standing requirement for judicial review.</li> </ol> <p><b>Standing for ADJR Act</b></p> <ol style="list-style-type: none"> <li>1. Common law cases on standing are equally application to standing under the ADJR Act.</li> </ol>		
<p><b>NCEC</b> and <b>ACF</b></p>	<p><b>Principles</b></p> <ol style="list-style-type: none"> <li>1. ACF was about environment interest and too broad. It does not seem to be connected to any area, and does not have the same kind of status as NCEC/</li> <li>2. NCEC was concerned with specific region.</li> <li>3. For example, an institution does care about the economy, but does not care about economy more than us, this is a scenario that is more like ACF.</li> </ol> <p><b>Australian Conservation Foundation v Cth ('ACF')</b></p> <ol style="list-style-type: none"> <li>1. A '<b>special interest</b>' requires an interest beyond that of the general public, which cannot be merely intellectual or emotional. The person must stand to gain a tangible advantage or suffer a disadvantage from the outcome of the litigation.</li> <li>2. The <b>Australian Conservation Foundation (ACF)</b> sought to challenge a decision by the Commonwealth to approve a resort development in central Queensland, claiming it would cause environmental harm.</li> <li>3. The ACF argued it had a <b>special interest</b> in protecting the environment and thus had standing to bring the case.</li> <li>4. The High Court ruled that the <b>ACF</b> did not have a special interest because its concerns were general and shared with the public, being more of an <b>intellectual or emotional concern</b> rather than a specific legal or financial interest. The ACF did not stand to gain or suffer directly from the decision, so it lacked standing</li> </ol> <p><b>North Coast Environment Council Inc v Minister for Resources ('NCEC')</b></p> <ol style="list-style-type: none"> <li>1. The Federal Court held that the <b>NCEC</b> had a <b>special interest</b> in the matter, given its significant involvement in environmental advocacy in the region, its recognition by the government, and its active participation in studies and submissions. This gave the NCEC a direct, tangible interest beyond that of the general public, satisfying the standing requirement.</li> <li>2. The <b>North Coast Environment Council Inc (NCEC)</b>, an environmental advocacy group, sought to challenge a decision by the Minister to grant export licenses for woodchips in the region, arguing environmental harm.</li> <li>3. The NCEC was a <b>peak body</b> on environmental issues in the region, with <b>government recognition</b>, including receiving regular grants, membership in advisory committees, and being consulted by the government on relevant environmental issues.</li> <li>4. The Council had also <b>made submissions</b> and <b>funded studies</b> related to the environmental impact of logging and woodchip export in the region.</li> </ol>		

**Onus v Alcoa of Australia Ltd (1981)**

**Facts**

1. The Gunditjmara community were the traditional custodians of relics located on a parcel of land proposed for development by Alcoa.
2. The relics held cultural and spiritual significance to the Gunditjmara people.
3. The community sought to prevent the destruction of these relics due to the proposed development, arguing they would be directly affected.

**Decision – Direct and Indirect Material Interest Held**

1. The Gunditjmara had a direct material interest in the case because the relics on the land had cultural and spiritual significance unique to their community. This distinguished them from other First Nations groups and Australians.
2. They would be more affected by the potential destruction of the relics than other groups, which gave them a special interest in the matter, meeting the standing requirement for judicial review.