

Administrative Law Exam Scaffolds

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1) JURISDICTION

What court has jurisdiction?

Federal vs HC: It is preferable to seek jurisdiction in the Federal Court over the High Court, as the High Court can remit matters to it and the Federal Court is more practical in terms of cost, access, and procedure.

Judiciary Act vs ADJR: The ADJR Act offers an easier path to remedies than the Judiciary Act as there is no need to establish jurisdictional error, so jurisdiction under the ADJR Act is preferential

A. State Jurisdiction

SAY: As this is a NSW matter, the Supreme Court retains entrenched supervisory jurisdiction to review executive decisions for legal error, based on [s 73\(ii\) of the Australian Constitution](#), as affirmed in [Kirk v Industrial Court \(NSW\) \(2010\)](#), and under [ss 23, 65 and 69 of the Supreme Court Act 1970 \(NSW\)](#).

Note – following are available: [Supreme Court Act 1970 \(NSW\)](#)

1. Certiorari
 - To quash decisions for jurisdictional error → [s 69\(1\)\(a\)](#)
 - And on face of the record → [s 69\(2\)](#)
2. Mandamus – to compel a public body to perform a duty → [s 69\(1\)\(a\)](#)
 - And Statutory order to fulfil duty → [s65](#)
3. Prohibition – to prevent unlawful exercise of power → [s 69\(1\)\(a\)](#)
4. Declaration – clarify legal rights or invalidity of a decision → Inherent jurisdiction; [s 23](#)
5. Injunction – restrain unlawful action or compel lawful action → [69\(1\)\(d\)](#)

Appeals: Go to High Court

- Jurisdiction of High Court to hear appeals from State Courts is constitutionally protected and cannot be taken away by parliament → [s 73 \(ii\) Constitution](#)

B. Federal Jurisdiction

1) High Court jurisdiction

SAY: As this is a Commonwealth Act, the High Court has original jurisdiction under [s 75\(v\) of the Australian Constitution](#) where judicial review remedies (mandamus, prohibition, injunction) are sought against an officer of the Commonwealth.

Officer of the Commonwealth:

An Officer of the Commonwealth refers to an individual appointed to a tenured office by the Commonwealth, usually receiving a salary from the Commonwealth: [R v Murray and Cormie; Ex parte Cth \(1916\) 22 CLR 437](#).

- **Includes:**
 - a. Officers in the Public Service
 - b. Ministers and delegates
 - c. Federal judges
 - d. Individuals appointed to a tenured office by the Commonwealth

- **Does not include**
 - Private contractors outsourced by the government to perform administrative functions (e.g. corporations)
 - Law firms/ lawyers which represent the Commonwealth
 - **Leerdam v Noori (2009)** → solicitor of a law firm supplying legal services to a department (ie. representing it in a Tribunal) NOT “an officer of the Commonwealth”.

IF s75(v) NOT engaged

Section 75(iii) of the Constitution may nonetheless vest jurisdiction in the High Court in matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

Who counts as “Commonwealth”?

- Ministers, delegates, Commonwealth officers
- Government agencies and instrumentalities
- Even private actors acting on behalf of the Cth

2) Federal Court

(1) **ADJR: Can you use the Administrative Decisions (Judicial Review) Act 1977 (Cth):**

Under section 5 of the ADJR Act, an aggrieved person may apply to the Federal Court for an order of review in relation to certain Commonwealth administrative **decisions**.

A. Are there any relevant exclusions?

- ADJR Act contains **express exclusions** under Schedule 1, including:
 - Decisions of the Governor-General (s 3(1)).
 - Criminal prosecutions and military discipline decisions.
 - Matters involving national security intelligence services.
 - Certain taxation assessments.
 - Decisions relating to industrial arbitration.
 - Decisions under the Migration Act that are covered by privative clauses
- **Cross-vesting** of judicial review jurisdiction from State courts to the Federal Court is constitutionally impermissible (see **Re Wakim; Ex parte McNally (1999) 198 CLR 511**).
- Decisions under **non-statutory executive power**.
- **Delegated legislation**

B. Are you seeking review of a decision, conduct or a failure to make a decision ?

The ADJR Act 1977 (Cth) allows judicial review of:

- s 5: decisions
- s 6: conduct
- s 7: failure to decide

DECISIONS → Section 5

For [decision] to be reviewable in line with section 5, it must be classified as a valid decision for the purpose of the Act.

Decision → a substantive determination or an essential preliminary, provided for in the statute, which resolves a legal issue or has legal consequences. – **ABT v Bond (1990)**

Statute – S 3(2): A ‘decision’ includes:

- a. Making, suspending, revoking or refusing to make an order, award or determination,
- b. Giving, suspending, revoking or refusing to give a certificate, direction, approval consent or permission,
- c. Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument,
- d. Imposing a condition or restriction,
- e. Making a declaration, demand or requirement
- f. Retaining, or refusing to deliver an article; or
- g. Doing or refusing to do any act or thing

Common law: A ‘decision’ includes → **ABT v Bond 1990**

a. A final or determinative substantive decision, or

- Does not include procedural determinations → this is part of ‘conduct’ of decision making (below)

b. An essential preliminary substantive decision

- Needs to be a decision made as a step required by statute
- Includes reports/recommendations which have to be made prior to decision → s 3(3)
- **Findings of Fact** = generally not a ‘decision’ → **ABT v Bond 1990**
 - Exception: If a fact is an *essential preliminary* that must exist under statute before the decision maker can make their ultimate determination (*ie jurisdictional fact*)

Example: ABT v Bond (1990) → In finding that some companies were not fit and proper to have a licence, Court used the fact that their owner, Bond, was not fit and proper.

- a. Finding that Bond was not a “fit and proper person” = **not a decision**
 - It was an intermediate step in the reasoning process.
- b. Finding that companies owned by Bond were not fit and proper = **decision**
 - It was a substantive determination under Broadcasting Act 1942 (Cth) s 88(2).

CONDUCT → Section 6

Issue spotting: Use s where administrative procedural steps taint the decision-making process

Section 6 of the ADJR Act enables an aggrieved person to review ‘conduct’ engaged in for the purpose of making a decision.

Conduct → includes the doing of any act/thing preparatory to the making of the decision e.g. the taking of evidence and investigations S 3(5)

- It does not include intermediate findings of fact or reasoning stages (**ABT v Bond**).
 - E.g. The finding about Mr Bond’s character was not procedural; it was part of the Tribunal’s mental reasoning.

FAILURE TO MAKE A DECISION → Section 7

- A decision to refrain from exercising a power (or to not act) can be reviewable if it is a final determination made under statute – *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health (1995) 56 FCR 50* → s 7

C. Is the decision/conduct of an administrative character?

ADJR does not cover decisions of a legislative or judicial nature

Important distinction:

- Legislative Decisions:** Determining the content of rules which apply generally – declarations of rights, powers and duties (usually by parliament)
- Administrative Decisions:** Apply rules to particular cases (usually by Executive)

Test: Need to weigh various factors to determine whether administrative or legislative. No single factor will be determinative → *Roche Products 2007*

Following factors suggest legislative rather than administrative: → *Roche 2007*

- The decision determines general rules which are to change rights/duties going forward?
- There is parliamentary control of the decision
- The decision is subject to public notification/consultation
- The decision is made with regard to broad policy considerations (rather than commercial considerations)
- There is no provisions for merit review of the decision

Note: Making of regulations not covered by ADJR – even though this is by Executive, it is legislative in nature

Roche Products 2007 → decision to remove a medicine from the Poisons Standard appendix on advertising was not of an administrative character, but instead legislative in nature, as it determined rules of general application, followed public consultation, and was based on broad policy rather than individualised considerations.

D. Was the decision/conduct made under an enactment?

Per *Section 3(1) of ADJR*, an Enactment is an **Act** or an **instrument** (*i.e. regs/by-laws etc*)

2-STAGE TEST

Griffith University v Tang 2005 has established a 2-stage test to determine whether a decision is made under an enactment (affirmed in *Fuller v Lawrence 2024*):

1. The decision must be expressly or impliedly required or authorised by the enactment

- Source of the power to make the decision must have been statute rather than general law
 - **NOT** general powers of private bodies as legal persons (e.g. right to enter contracts etc) → *NEAT Domestic Trading 2003*
 - Note: If statute establishes a legal person it does not mean that the statute is the source of that person's natural powers. These are from the common law → *General Newspapers v Telstra 1993*

- **Examples:**
 - **NEAT:** Act made AWBI's approval a precondition to statutory export. BUT their refusal to approve NEAT's wheat export came from its corporate constitution NOT from the act itself.
 - **General Newspapers v Telstra 1993** → Legislation gave Telstra "all the powers of a natural person" including to contract BUT their decision to contract with a third party was not made under an enactment. Authority came from general power of natural person
- 2. The decision must affect the legal rights or obligations derived from the statute**
- Must be legal rights or obligations which are found in the statute itself
 - **NOT Consensual relationship:** ie a contract or policy which they agreed to → **Tang 2005**
 - **Multiple sources:** (ie both statute and a judicial order), it is sufficient that the effect is partly due to statute → **Fuller v Lawrence 2024**
 - **Examples:**
 - **Fueller** → A corrective services officer restricted in-person contact under a Supervision Order made by a court, but the power to give that direction and its enforceability came from the Act = Yes under enactment
 - decision only had legal force because it was authorised by the Act
 - **Griffith University v Tang 2005** → excluding a student from a PhD program under a university policy was not a decision made under an enactment, because although the power was authorised by statute, it was not mandated by it. The decision derived legal effect from private law, not public law obligations

(2) Judiciary Act 1903 (Cth):

SAY: Where a decision does not fall within the ADJR Act, Federal Court may instead have jurisdiction under the **Judiciary Act 1903** as it gives Federal Court original jurisdiction of High Court (ie jurisdiction over matters within the High Court's jurisdiction)

- **s39B(1)** → jurisdiction for writ of mandamus or prohibition or an injunction is sought against an **officer of the Commonwealth**
- **s 39B(1A)** → Commonwealth is seeking an injunction or declaration

S 44 → permits the High Court to remit matters to the Federal Court, allowing the Federal Court to determine them as if it had original jurisdiction.

(3) Administrative Review Tribunal Act:

Section 172 Administrative Review Tribunal Act 2024 → A party to a proceeding in the Tribunal may appeal to the Federal Court on a **question of law** from the decision of the Tribunal in the proceeding

- "Question of law" includes anything which would fall within a **ground of judicial review** → **Haritos v Commissioner of Taxation 2015**

Who is making a decision?

Check who is making the decision – courts jurisdiction is restricted to statute

- a. Is it a private body? – if so does their power come directly from the statute
- b. Is it some officers/corporations filtering out applications for the Minister's non-compellable power? If so, is their power statutory and nonetheless reviewable?

A. Private Actor Making a Decision

Sate Level : Under s 69 of the [Supreme Court Act 1970 \(NSW\)](#), courts can review exercises of statutory power, even by private actors — but only where the power derives directly from statute or a statutory framework ([Chase Oyster Bar \[2010\]](#), [Spigelman CJ at \[3\]](#)). This is stricter than the UK's broader "public function" test from [Datafin \(1987\)](#).

Cth Level: Private actors are not 'officers of the court' and as such the court does not have jurisdiction to grant mandamus, certiorari or prohibition under [\[s75\(v\) Constitution/ s39B Judiciary Act\]](#). However, if the [private actor]'s powers where the power derives directly from statute or a statutory framework ([Chase Oyster Bar \[2010\]](#), [Spigelman CJ at \[3\]](#)), then the court has jurisdiction to grant equitable remedies or certiorari on the face of the record under [\[s75\(iii\) Constitution/ s39B\(1A\) Judiciary Act\]](#)

ADJR: ADJR gives federal court jurisdiction to review any administrative decision made "under an enactment". This therefore covers the exercise of statutory functions by private bodies.

Assessing if power derives from the statute

1) Note that the body is private actor

- Panel on Take-overs and Mergers in [Dafting](#) was a non-statutory, self-regulatory body → accepted in [Daftin](#) but likely no jurisdiction in Aus
- External non-governmental adjudicator prescribed by the Act in [Oyster Bar](#) → jurisdiction

2) Examine whether statute empower the body

- Need to determine whether the source of the power to make the decision (not just the source of the effect of the decision) is found in statute
 - [NEAT Holdings 2003](#): Power of a company to grant/refuse approval to another body was derived from its legal personality. The fact that statute established an effect for this decision did not make the decision an exercise of statutory power. No judicial review
 - [Chase Oyster Bar 2010](#): Power of private adjudicator to review disputes and to determine rights to payments was granted by statute. Decisions were therefore subject to judicial review
- **Factors considered in [Chase Oyster Bar 2010](#)**
 - a. The statutory scheme was very prescriptive.
 - b. The statute gave the arbitrator the power to decide – it wasn't a resolution process entered into consensually (ie. **wasn't contractual**)
 - c. Arbitrator was exercising a statutory function, was not acting in self interest or making the decision based on personal interests ([Basten \[70\]](#))
 - d. It was a public, that is statutory, dispute resolution process ([Spigelman \[5\]](#))