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JURISDICTION: CTH

The decision is an exercise of statutory power by a Commonwealth official that affects **[rights/liabilities/obligations]**. As such, it is a matter reviewable under the common law remedial model by the HCA per *s 75* of the *Constitution* and Federal Court per *s 39B* of the *Judiciary Act*.

If not an officer of the Commonwealth:

Though **[decision maker]** is not an officer of the Commonwealth, the decision may still be reviewable. The court in *Plaintiff M61* left the question of whether independent contractors could be described as officers of the Commonwealth, as the court's jurisdiction was there able to be established under *s 75(iii)* of the *Constitution*. It was stated in obiter that the court may take a 'functional approach' in the future so as to include such decision makers as officers of the Commonwealth, which is more similar to the approach taken in the UK in *Datafin*.

[Applicant name] should go to the Federal Court rather than the High Court, as under *s 44* of the *Judiciary Act* the matter could simply be remitted back to the Federal Court. Additionally, **[applicant name]** is likely to get a quicker hearing when applying to the Federal Court.

The decision is also reviewable under the *ADJR Act*, because it is a decision (being final and operative per *Bond*), it is of an administrative character (it does not determine the content of the law per *Roche*), and was made under an enactment (it was expressly or impliedly required or authorised by an Act/Regulation per *Griffith v Tang*).

If there are issues with whether it is a decision:

Per *s 3(2)* of the *ADJR Act*, 'making 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 up, an article; or
- (g) doing or refusing to do any other act or thing;

Per *s 3(3)*, where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation is also the making of a decision

Per *Bond*, a decision must be more than a mere step taken in the course of reasoning on the way to making a final decision.

A finding of fact is not normally a decision under the *ADJR Act*, but will be if it is an essential preliminary fact that the Statute specified must exist before the decision-maker makes their ultimate determination, per *Bond*.

A decision not to do something can be a decision per *Right to Life*

If something is a preparatory act amounting to conduct engaged in for the purposes of making a decision (*s 3(5)*), it will be reviewable under *s 6*. (Examples include gathering evidence, holding an inquiry or investigation)

If there are issues with whether it is of administrative character:

- Per *Roche*, decisions of an administrative character do not determine the content of the law and involve the application of law. If merits review is available, it is administrative.
- *Roche* factors to determine whether something is an administrative or legislative decision
 - o If creating a rule of general application → legislative
 - If merely applying a rule to a particular case → administrative
 - o Parliamentary control of the decision → legislative
 - Executive control/variation → administrative
 - o If there was public consultation/notification → legislative
 - No public consultation/notification → administrative
 - o Broad policy → legislative
- **If it is a regulation:** Regulations cannot be directly challenged under the *ADJR Act* because they are not of administrative character, and are excluded under *s 3(1)(c)* as the power to make regulations is formally vested in the Governor General. However, it is possible for [applicant name] to indirectly challenge the regulations under the *ADJR Act* by challenging the decision made under the regulation for lack of statutory authority on the basis that the regulations are invalid.

If there are issues with whether it was made under an enactment:

- For a decision to be under an enactment, it must (a) be expressly or impliedly required or authorised by the enactment, and (b) the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. – *Tang*
- (b) of the *Tang* test is capable of encompassing decisions which derive legal force in whole or in part from the enactment – *Fuller v Lawrence*
- Decisions ‘under an enactment’ does not include decisions made under contract law, even where an Act confers upon one of the parties the power to enter into contracts as this merely gives them the capacity to act (*Telstra*). This may however be different if the statute made a specific provision for such contracts
- To determine if a decision was made under an enactment, look to the source of the authority to make the decision (*Telstra*)
- Decisions of private persons given effect under statute are not under an enactment - *NEAT*

If conduct in the process of making a decision to which the *ADJR Act* applies or a failure to make a decision to which *ADJR Act* applies:

ADJR Act will still apply per *s 6(1)* and *s 7(1)* respectively

Proceeding under the *ADJR Act* is preferable because it has a flexible remedial structure and wider grounds of review for a *s 16* order, which is available for all errors of law, even if not jurisdictional or on the face of the record.

If there is a privative clause:

The privative clause in [section number] is not effective to exclude judicial review for jurisdictional error under the High Court's inherent jurisdiction, because it is an entrenched minimum provision of judicial review per *Plaintiff s157*. A decision tainted with jurisdictional error is 'regarded in law as no decision at all' and is thus not protected by the privative clause per *Bhardwaj* and *Plaintiff S157*.

The privative clause in [section number] can exclude the [Federal Court/*ADJR Act*]. However...

If there is a time limit clause:

[If strict and not allowing the court to consider vitiating factors]

[Section number] imposes a time limit of [number of days] to commence an application for judicial review, which has already expired. This time limit clause is however likely to be invalid because it has the practical effect of curtailing the right to seek relief under *s 75(v)* since it imposed a strict time limit of [number of days] and does not allow the court to consider the factors that prevented an applicant from making the application in time, and exercise flexibility and discretion to depart from the time limit clause based on vitiating circumstances that warrant departure (*Bodruddaza*). Thus the court is not prevented from engaging in its review jurisdiction for jurisdictional error.

[if unreasonably short]

[Section number] imposes a time limit of [number of days] to commence an application for judicial review, which has already expired. This time limit clause is however likely to be invalid because it has the substantive effect of curtailing the right to seek relief under *s 75(v)*. It imposes an unreasonably short limitation period of only [number of days] days, which is likely to be interpreted as in substance a prohibition on the right to seek judicial review (*Plaintiff S157*, *Bodruddaza*). Furthermore, the clause also has the practical effect of curtailing the right to seek relief under *s 75(v)* since it imposed a strict time limit of [number of days] and does not allow the court to consider the factors that prevented an applicant from making the application in time, and exercise flexibility and discretion to depart from the time limit clause based on vitiating circumstances that warrant departure (*Bodruddaza*). Thus the court is not prevented from engaging in its review jurisdiction for jurisdictional error.

[if valid]

This time limit clause is valid because it does not have the practical or substantive effect of curtailing the right to seek relief under *s 75(v)* (*Bodruddaza*). It does not impose a strict time limit, because the clause allows the court to depart from the time period based on the individual's circumstances, and the court retains discretion as to whether to enforce the statutory limits of the decision-maker's power (*Bodruddaza*). Here, the court is likely to exercise that discretion, since there was [days of delay, reasons for delay] which was not the applicant's fault, as in *Bodruddaza*.

BREACH OF GROUND OF REVIEW: IMPROPER PURPOSE*ADJR Act s 5(2)(c)*

The facts suggest that [decision maker] exercised the [section number] [power/discretion] to [facts] for the purpose of [facts].

If it was done for a single purpose:**If not within purpose:**

The Act expressly states that the power is to be exercised for the purpose of [facts], and the scope and provisions of the Act, and the nature of the power (*Toohey*) would not imply a purpose of [facts]. Hence, the power has been impermissibly exercised for an unauthorised purpose (*Toohey*), which amounts to a jurisdictional error (*Craig*) because it is a material breach of a statutory condition on the exercise of the power, as there is a realistic possibility that the decision made could have been different had the improper purpose not been pursued (*Hossain*).

If within purpose:

The express purpose of the Act is to [facts], and [facts] would be consistent with that purpose. The scope of the Act (*Toohey*) extends to [facts], and would imply that a purpose of the power was to [facts]. Hence, the decision was not made for an improper purpose.

If it was done for multiple purposes:

The facts indicate that [decision maker name] exercised the [section number] [power/discretion] to [facts] for multiple purposes; to [first purpose] and [second purpose]. [First purpose] is an express purpose of the Act. However, [second purpose] is likely an improper purpose because it is not expressly stated in the Act, and the scope and provisions of the Act, and the nature of the power (*Toohey*) would not imply a purpose of [second purpose]. The decision is considered to have been made for an improper purpose if the unauthorised purpose was significant and motivating, per *Samrein*.

If unauthorised purpose was substantial:

The unauthorised purpose of [second purpose] was clearly the significant and motivating purpose for the decision to [decision], because there would have been no attempt to exercise the power if the unauthorised purpose did not exist (*Samrein*). Hence, the power has been impermissibly exercised for an unauthorised purpose, which amounts to a jurisdictional error (*Craig*), because it is a material breach of a statutory condition on the exercise of the power, because there is a realistic possibility that the decision made could have been different had the improper purpose not been pursued (*Hossain*).

If the unauthorised purpose was not substantial:

The unauthorised purpose of [second purpose] was not the substantial purpose for the decision to [facts], because, like in *Samrein*, the power would have been exercised regardless of whether the unauthorised purpose had existed. Hence, the decision was not made for an improper purpose.

If the power was exercised for the purpose of another power:

The facts indicate that [decision maker] exercised the [section] [power/discretion] to [facts] to achieve the purpose of [a different power], and not for the [section] power. Hence, the decision has been made for an improper purpose because the statutory power has not been exercised for the purpose it was conferred, but for the purpose of another power, even though it would achieve the same effect (*Schlieske*). Hence, the power has been impermissibly exercised for an unauthorised purpose, which amounts to a jurisdictional error (*Craig*), because it is a material breach of a statutory condition on the exercise of the power, as there is a realistic possibility that the decision made could have been different had the improper purpose not been pursued (*Hossain*).