Jurisdiction

High Court	**Constitution s 75(v)** ● 'Matter' (*McBain*) ● In which listed remedy sought ● Against 'officer of Cth'
Federal Court	**ADJR Act** ● 'Decision' (*Bond*) ● 'Of an administrative character' (*Roche;* legislative instrument under *Legislation Act*) ● Made under an enactment (*Griffith v Tang*) ● Not excluded by sch 1
	Judiciary Act s 39B(1) ● 'Matter' (*McBain*) ● In which listed remedy sought Against 'officer of Cth'

Court	**Source of jurisdiction**	**Limitations**
HCA	S 75(V) of Constitution - entrenches original jurisdiction 'in all matters in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.' - Same requirements as s 39B(1) of the Judiciary Act *entrenched jurisdiction - cannot be removed by statute.	Matter *(*not hypothetical) *(McBain*) Must seek a writ of Mandamus or prohibition, or an injunction, must be sought against an officer of the Commonwealth.
	S 75(iii) of Constitution - original jurisdiction in which the Commonwealth, or person suing/being sued on behalf of the Commonwealth, is a party.	Commonwealth must be a party, or a person sued on behalf of the Commonwealth.
	S 73(ii) - Appellate jurisdiction of High court	Must be hearing an appeal
FCA (original jurisdiction)	ss 5 (decision 'to which this Act applies') & 6 (conduct) of *ADJR Act 1977* (Cth)	s 3 – 'decision to which this Act applies: - A decision (*Bond* – final & substantive) - Of administrative character (*Roache*) - Made <u>under an enactment</u> (*Tang* – affecting legal rights, identify statutory empowerment to make a particular decision) - Not excluded by Sch 1 ADJR
	S 39B of the *Judiciary Act* 1903 (Cth) – replicates s 75(v) of the Constitution and gives similar power to FCA	Can be Limited by legislation. Same other criteria as s 75(v).

Constitution s 75(v)

Original jurisdiction under s 75(v) of the constitution 'in all matters in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.'

1. 'Matter'	*McBain* – **real legal controversy** capable of resolution by courts. Not hypothetical (i.e. has some effect on parties rights/ duties/ obligations). ● Hayne J: "At the heart of the constitutional conception of a "matter" is a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled. The controversy must be real and immediate."
2.listed remedy sought	Writ of **mandamus, prohibition or injunction** must be sought. **Note which listed remedy is being sought but leave the likelihood of success to remedies.
3. Against 'officer of the commonwealth'	Includes: Ministers, delegates, federal public servants, tribunal members, statutory office holders, federal judges, departmental officers etc. (all commonwealth officers). Not: state officials, not HC judges ● I.e. someone appointed to an office created under Commonwealth legislation

Plaintiff M61 (Offshore Processing Case) – Unresolved: contractors performing 'public functions'	
Facts	Asylum seekers had undergone an independent Merits review undertaken by an independent contractor (no express statutory basis, no direct legal effect). Contractors' role: provide recommendation to Minister under *Migration Act*.
Held	Private contractors in this case were not accepted to be officers of the Commonwealth. By court avoided directly grappling with the issue.

S 39B *Judiciary Act*

Overview	Confers jurisdiction on the Federal Court in the same terms as the HC's s 75(v) jurisdiction. ● I.e. in most cases where judicial review is available in HC, it is also available in Fed Court. ● Key difference = Parliament may exclude Fed Court's jurisdiction under *Judiciary Act*, but cannot remove the jurisdiction of the HC under s 75(v) of the Constitution. Content of jurisdiction: determined by common law (standing, justiciability, grounds of review).

39B(1) Original jurisdiction of Federal Court of Australia
The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any **matter** in which a writ of **mandamus** or **prohibition** or an **injunction** is sought against an **officer** or **officers of the Commonwealth**.

39B(1A) → expansion giving Fed Court broad JR power over actions under Commonwealth Laws
(1A) the original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
(a) In which the Commonwealth is seeking an injunction or a declaration; or
(b) Arising under the constitution, or involving its interpretation; or
(c) Arising under any laws made by Parliament, other than a matter in respect of which a criminal prosecution is **instituted** or any other criminal matter.

AD(JR) Jurisdiction

- ADJR Act grants Fed Court and FCFCOA statutory judicial review jurisdiction.
- S 5 grants a right of JR in respect of '***decisions** to which this act applies'*, whereas s 6(1) applies to ***conduct*** for the purpose of making a decision, and s 7(1) to a ***failure to make a decision*** when a person has a duty to do so.
- S 3 defines the phrase 'decision to which this act applies' as a:
    1. Decision
    2. Of administrative character
    3. Made under an enactment
    4. **Excluding** decisions made by the **G-G** and decisions listed **under schedule 1**.

1. Decision (s 5) / conduct (s 6)

Decision = defined broadly in s 3(2) including

(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;

And a reference to a failure to make a decision shall be construed accordingly.

Australian Broadcasting Tribunal v Bond → '*Bond*' – includes any substantive decision authorised/ required by statute - not necessary to be the final decision i.e. **preconditions meet the definition**	
Facts	ABT considering whether to revoke licences held by companies controlled by Bond. ABT found bond & his companies were *not fit and proper* but had not yet revoked licences. Bond sought review of these findings → question of whether not fit/proper was a 'decision'.
Held	The finding was not separately reviewable as a 'decision'
Ratio	• A reviewable 'decision' = a final or operative & determinative. Not just a step along the way **unless** statute requires an **intermediate decision** as an essential preliminary. • Must be a substantive determination, not purely procedural.

** If a reviewable decision has been made – no point in separately seeking a review of conduct that led to it.

S 3(5) provides: A reference in this Act to **conduct** engaged in **for the purpose of making a decision** includes a reference to the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation.

ABT v Bond

- **Decision** = substantive, final, operative determination under statute.
- **Conduct** = action taken in the course of proceedings towards making a decision – i.e. claim the *process* was flawed – relates to procedural fairness. E.g. refusal of adjournment, directions etc.

Miller v Goldfields → conduct must be **associated with a decision as recognised in ADJR Act**	
Facts	Miller intended to seek funding but hadn't yet applied – Alleged conflict of interest & sought review when CEO said he would determine funding himself.
Held	Action failed; no reviewable decision or conduct. Conduct is reviewable only if it is undertaken *for the purpose of making* a decision to which the act applies → requires a **proper nexus between conduct and a statutory decision**.

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<tr><td></td><td>- Here no application had been made yet so no statutory function yet discharged.</td></tr>
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<tr><td>2. ‘Of an administrative character’</td><td>Distinguish between the executive’s exercise of legislative and administrative power
● Legislative = formulating new general rules of future application (policy oriented, public, general)
○ E.g. via delegated legislation/ enabling provisions.
● Administrative = applying existing general rules to particular individuals/cases

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<tr><td colspan="2">Roche Products v National Drugs & Poisons Schedule Committee → ‘Roche’</td></tr>
<tr><td>Facts</td><td>Committee reclassified Roche’s drug, prohibiting direct advertising after public concerns.</td></tr>
<tr><td>Held</td><td>ADJR review unavailable – decision was legislative in character:
- Decision created rules of general application, applied broadly, involved public consultation and public health policy, lacked merits review, and required publication in Gazette.
- Inclusion of a substance in the schedule ‘determined the future lawfulness of conduct in relation to that substance.’ It was therefore a decision that determined the content of rules of general application.</td></tr>
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<tr><td>3. Made under an enactment</td><td>‘Enactment’ is defined in s 3 – including commonwealth Acts and instruments (including rules, regulations or by-laws) made under those acts.

The decision must be:
1. authorised/ required by enactment (i.e. statute) &
2. Derive its legal effect/ given force or effect by the enactment (affects, rights/ liabilities by statute, not by contract/common law) – not merely background statutory power.

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<tr><td colspan="2">Griffith University v Tang</td></tr>
<tr><td>Facts</td><td>Tang was excluded for academic misconduct. Sought judicial review.</td></tr>
<tr><td>Held</td><td>Decision not reviewable under ADJR Act. Statute gave Griffith general administrative powers but did not make student exclusion decisions statutory in character
● It did not follow that any administrative decision made in the exercise of those powers was a decision ‘made under that enactment’. Rights/Liabilities arose from contractual relationship, not statute.
● To be reviewable, the force of the decision must derive from the enactment.</td></tr>
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<tr><td colspan="2">4. Not excluded by sch 1.
Sch1 includes a long list of decisions exempt from ADJR review.</td></tr>
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CHOOSING	
AD(JR) available	● AD(JR) = more straightforward & less technical than the constitutional avenues of JR ● If review is available under the AD(JR) Act, an applicant may apply to the Federal Court under BOTH the *Ad(JR) Act* and s 39B of the *Judiciary Act*. Make your arguments in the alternative.
AD(JR) not available	Applicant should seek review in Federal Court (s 39B Judiciary Act) – preferred option. Only where you cannot seek review in the FCA, would you apply directly to the HCA in its original jurisdiction (s 75(v) Constitution). Only used when other avenues are foreclosed as HC can **remit matter to Fed Court** under *Judiciary Act* s 44.