

SCAFFOLD

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I. Which court has jurisdiction? Can the court adjudicate the decision?

Does the State Supreme Court have jurisdiction? (note Act is NSW here)

1. Common Law Remedial Model - *Supreme Court Act 1970 (NSW) ss 23, 65*
 - a. The NSWSC has **all jurisdiction** which is **necessary for the administration of justice in NSW s 23**.
 - b. The NSWSC can make any order to fulfil any duty in which the **person seeking the order is personally interested s 65**.
 - c. **s 69: (1)** Court has jurisdiction to grant any relief or remedy by way of **writ, whether of prohibition, mandamus, certiorari** or of any other description. **(3)** Supreme Court has inherent jurisdiction to issue **certiorari** for an **error of law on the face of the record** – i.e. any error apparent from the record of the proceedings.
 - d. Inherent jurisdiction
 - e. Essential characteristic of a state SC, inherent/entrenched and cannot be removed by ordinary legislation: *Kirk v Industrial Relations Commissioner (2010)*

Does the High Court have jurisdiction?

1. Matters in which the Cth is sued - **s 75(iii) Constitution**
 - a. View of 'the Cth' as an organisation or institution of government 'in accordance with the conceptions of ordinary life': *Deputy Commissioner of Taxation v State Bank of NSW (1992)*.
2. Matters in which **mandamus, prohibition or injunction** is sought against an 'officer of the Cth' - **s 75 Constitution**
 - a. **Officers of the Commonwealth under s 75(v):**
 - i. Although a *broad* approach, there is a concern that it does not extend to government corporations, or private actors exercising Cth powers.
 1. In *Plaintiff M61 (2010)*, whether an "independent contractor" such as the Wizard People Pl who conducted the Independent Merits Review was an "officer of the Cth" was left undecided
 2. **However**, in these matters, jurisdiction of the court is found in **s 75(iii) (matters in which the Cth, or a person being sued on behalf of the Cth, is a party)** – here, Cth, Minister and the person who conducted the Independent MR were defendants – note the broad application of 'on behalf of the Cth'.
 - ii. An officer is 'a person appointed by the Cth to an identifiable office who is paid by the Cth for the performance of their functions under their office and who is responsible to and removable by the Cth concerning the office': *Broadbent v Medical Board of Queensland (2011)*.
 - iii. Need appointment to a **tenured office** by the Cth.
 - b. Although *certiorari* is not mentioned, it is available as an ancillary to *mandamus* or *prohibition* *Plaintiff S157/2002*.
3. Appellate jurisdiction from FCA & State SCs
 - a. **S 73(ii) Constitution** HCA has jurisdiction to hear and determine appeals from all judgements, inter alia, **of any other federal court** or court exercising federal jurisdiction, or of the **Supreme Court of any State**.

Does the Federal Court have jurisdiction?

1. **Judiciary Act 1903 (Cth)** - common law remedial model
 - a. *Original Jurisdiction*
 - i. **S 39B(1)**
 1. Original jurisdiction of FCA includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or injunction is sought against an officer or officers of the Cth – confers the equivalent s 75(v) jurisdiction upon Federal Court.
 - ii. **s 39B(1A)(c):**
 1. Original jurisdiction of FCA includes jurisdiction in any matter **arising under any laws made by the Parliament**, other than a criminal matter.
 - a. Very broad – involves situations where the Cth law is the source of the power to make a decision, or the source of rights/liabilities affected by the decision.
 - iii. **(1A)(a):** matters where Cth is seeking an injunction or a declaration, or **(b)** arising under the Constitution, or involving its interpretation.
 - b. *Remittal from the High Court*
 - i. **s 44(2A):** where Cth or a person suing or being sued on behalf of the Cth is a party in the High Court, the High Court may, upon application of a party or of its own motion, **remit** the matter back to the FCA.
2. **ADJR Act 1977 (Cth)** – simplified remedial model (see below).
3. Appeals provided by statute on a question of law

Does the *ADJR Act 1977 (Cth)* confer the Federal Court jurisdiction?

1. A person who is *aggrieved by a decision* may apply to the Federal Court for an order of review in respect of the decision on listed grounds – *s 5(1) ADJR Act*
 - a. Includes the **making of a report or recommendation**, the provision of which is made *under an Act* – *s 3(3)*
 - b. 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 – *s 3(5)*
 - c. Where a person has engaged, is **engaging, or proposes to engage, in conduct for the purpose of making a decision** to which this Act applies, a person who is aggrieved by the conduct may apply to the FC – *s 6(1)*
 - d. **Failure to make a decision** per statutory duty due to unreasonable delay – *s 7*
2. Is it a *decision* of an *administrative character made under an enactment* – *s 3 ADJR Act*
 - a. *S 3(2)*: In this Act, a reference to the **making of decision** includes reference to:
 - i. making, suspending, revoking or refusing to make an order, award or determination;
 - ii. giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - iii. issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - iv. imposing a condition or restriction;
 - v. making a declaration, demand or requirement;
 - vi. retaining, or refusing to deliver up, an article; or
 - vii. doing or refusing to do any other act or thing;and reference to a failure to make a decision shall be construed accordingly
3. **A ‘decision’?**
 - a. **[Principle]:** A ‘decision’ is a *final* or *operative decision*, rather than a *step along the way* to making a decision, which would not be a reviewable decision: *Bond*
 - i. **[Exception]:** Something that is a step along the way to making the decision could be determined as decisions themselves as decisions for the purpose of the Act (this must be **prescribed in the Act**) – an **essential preliminary**
 - b. Reviewable decision must be a **substantive**, rather than **procedural** determination.
 - c. **[Example]:**
 - i. In *Bond*, a Tribunal could suspend or revoke a commercial licence if satisfied that the licensee is no longer a fit and proper person to hold the licence - Tribunal found that Bond was not a fit & proper person.
 - ii. However, Bond was not the licensee, rather, he was the **controller** of the licensees
 1. Their consideration of what Bond did was a ‘step along the way’ to determine whether the *licensees* themselves were fit and proper.
 - d. **Decision** as distinct from **Conduct**
 - i. Mason CJ in *Bond*: ‘conduct is **essentially procedural and not substantive** in character.’
4. **‘Of an administrative character’**
 - a. What constitutes a decision ‘of an administrative character’ admits no ready answer – though it excludes decisions of a ‘legislative’ or ‘judicial’ character: *Griffith v Tang*
 - i. Typically, **administrative** – applying rules to particular cases, **legislative** – determining content of rules, enlivening rules, creation of new rules with general application.
 - b. A list of relevant factors per *Visa International*, cited in *Roche*:
 - i. Whether the decisions determined **rules of general application** or whether there was an application of rules to **particular cases**.
 - ii. Whether there was *parliamentary control* of the decision.
 - iii. Whether there was *public notification* of the making of the regulation.
 - iv. Whether there has been *public consultation* and the extent of any such consultation.
 - v. Whether there were broad policy considerations imposed.
 - vi. Whether the regulations could be **varied**.
 - vii. Whether there was power of executive variation or control.
 - viii. Whether provision exists for merits review.
 - ix. Binding effect.

- c. In *Roche*, the decision made was to include “Orlisat”, a type of drug, on the Therapeutic Goods Register and Poisons Standard. The Committee’s decision was not administrative for the following factors:
 - i. ‘[T]he inclusion of a substance in a particular schedule of the Poisons Standard, or an appendix thereto, determines the *future lawfulness of conduct* in relation to that substance’.
 - 1. Thus, ‘a decision under s 52D determines the content of rules of **general application**’ rather than a specific application affecting one person, as an administrative decision might..
 - ii. ‘[A]ny decision made under the subsection will apply to the substance **in general**’.
 - iii. Public consultation was involved in the process of determination.
 - iv. The ‘Poisons Standard is an important element of a national system of controls’ and forms a uniform framework for all the States and Territories.
 - v. No provision is made for merits review of the decision.
 - vi. The decisions are required to be published, and are ‘not amenable to executive variation or control’.

5. **‘Made under an enactment’**

- a. **[Principle]:** “A decision “made ... under an enactment” involves two criteria: *Griffith University v Tang*
 - i. the decision must be **expressly** or **impliedly** required or authorised by the enactment;
 - ii. the decision must itself **confer, alter or otherwise affect legal rights or obligations**, and in that sense the decision must **derive from the enactment**.
- b. **Summary of examples:**
 - i. Decisions made under contracts or according to consensual arrangements are not made “under an enactment”, as they derive powers from **general law** (*General Newspapers; Griffith v Tang*)
 - ii. Decisions made under legislation by companies may not be regarded as “made under an enactment” (*NEAT Domestic*)
- c. **[Example]:** In *Tang*, a decision to exclude Ms Tang from a PhD program in accordance with a university policy was **NOT** one made ‘under an enactment’ as the Act did not regulate the legal rights and obligations of the parties; there was no legal document that defined the legal relationship between the university and student.
 - i. S 5 of the Act merely gave the university general capacity and the obligation to have management, but the specific decision was not required under the Act – it was a **consensual non-legal arrangement**.
 - ii. Mere ‘expectation’ to enter a PhD degree is also **not a ‘right’**.
- d. **[Example]:** In *General Newspapers v Telstra (1993)*, Telstra’s decision to enter a contract with McPhersons was impugned. The relevant Act merely set up Telstra with the ordinary “powers of a natural person” but did not make specific provision for the entering of such contracts – the Act did not control the making of a decision.
 - i. The validity of the contracts and of the acts done was governed entirely by the law of contract, not by the statutes. Thus, the ADJR Act had no application to the conduct or to the alleged decisions.
- e. **[Example]:** In *NEAT Domestic Trading v AWB*, the Wheat Marketing Act provided that a person shall not export without express written consent of the Wheat Export Authority, who must not give such consent without express written consent of AWBI.
 - i. AWBI’s decision to deny NEAT’s application for consent was NOT held to be a decision made “under an enactment”, as AWBI’s authority to give authority was not originated from the Wheat Marketing Act which merely recognises the authority otherwise derived from the Corporations Act.

Do Courts have jurisdiction to judicially review decisions of private organisations?

- 1. In *Datafin (1987)*, it was held that the **Court’s jurisdiction extended to the Takeover Panel** despite it being a private organisation as the **Panel was a powerful organisation which performed a public duty and had no other visible means of review**. Further factors included:
 - a. Government used the panel as a **preferred regulator over mergers and takeover**
 - b. Rights of citizens were indirectly affected by the Panel’s decisions
 - c. Panel had a duty to act judicially & with procedural fairness
- 2. In *Chase Oyster Bar (2010)*, the Building Adjudicator’s decision was amenable to judicial review as although the Adjudicators were not government officials, they **exercised relatively public powers** under statute & were appointed by an “authorised nominating authority” (s 17 Act), which itself is appointed by a Minister of the Crown (s 28)
 - a. Adjudication not mere **consensual arbitration**, but a public (statutory) dispute resolution process.