

Judicial Review

1. What was the decision?

- What is the ‘decision’ your client has a problem with?
- Are there multiple ‘decisions’, or steps along the way to making a decision? If so, what is it that your client really wants to challenge, and can they do so?
- Where did the decision-maker’s power to make that decision come from?
- Did the decision-maker’s power come from **Commonwealth** or **State** law?
- What are the limits on the decision-maker’s authority?

2. Determine the jurisdiction

- Which courts have jurisdiction to review the decision?
- May be difficult to determine which courts have jurisdiction to hear a JR matter: consider the jurisdiction, and whether the law is based upon common law or statute law
- When considering the jurisdiction, note the remedy that they may seek → this forms some of the jurisdictional tests as required under the legislation

Court	Source of jurisdiction	Limitations
HCA	s 75(v) of Constitution - writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth <ul style="list-style-type: none"> - Same requirements as s39B(1) of the Judiciary Act 	Must seek a writ of Mandamus or prohibition or an injunction, must be sought against an officer of 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) and 6 (conduct) of <i>ADJR Act 1977</i> (Cth) <i>ADJR Act s5(1)</i> Person who is aggrieved by a decision to which this Act applies can apply to the FC or the Federal Circuit Court (also s8) <ul style="list-style-type: none"> - A <u>decision</u> (<i>Bond</i>) - of an <u>administrative character</u> (<i>Roache</i>) - Made <u>under an enactment</u> (<i>Tang</i>) - <u>Not excluded by Sch 1</u> of the ADJR Act *less technical than some of the Constitutional avenues of achieving JR *if review is available under the ADJR Act, then individual is able to elect to commence	Must be review of a <u>reviewable decision</u> , must be made <u>under an enactment</u> and <u>not excluded under Sch 1&2 of ADJR Act 1977</u> Definitions (s3) ‘Decision to which this Act applies’: administrative character made: <ul style="list-style-type: none"> (a) Under an enactment (b) By a Commonwealth authority or an officer of the Commonwealth under an enactment (c) NOT a decision by the GG (d) NOT a decision included in Sch 1 classes <i>ABT v Bond</i> → decision to be final and substantive

	<p>proceedings and invoke s39B of the Judiciary Act (FC) *if not available: choose between Judiciary Act s39B or Constitution s75(v) FC preferable ⇒ HC will likely remit the matter to the FC under Judiciary Act s44</p>	<p>‘Under an enactment’ → affecting legal rights, identity statutory empowerment to make a particular decision ‘Administrative character’ → character of the decision, rather than the person making the decision</p>
	<p>s 39B of the <i>Judiciary Act</i> 1903 (Cth) - replicates s 75(v) of the Constitution and gives similar power to FCA</p>	<p>Limited by legislation - <u>Must seek a writ of Mandamus or prohibition or an injunction</u>, must be sought against an officer of the Commonwealth - Needs to be a real matter (specifically apply to you, not hypothetical) (McBain) - Bringing action needs to have standing</p>
	<p>s 71 Constitution conferred federal jurisdiction on the FCA</p>	<p>s 75 and 76 of Constitution - HCA has exclusive jurisdiction</p>
	<p>Migration Act 1958 - limited class of Migration decisions</p>	
State Supreme Courts	<p>Common law - s 69 Supreme Court Act 1970 (NSW) recognises inherent jurisdiction</p> <p><u>*Do not consider this if the decision involved was one that was made by a Cth officer under Cth legislation</u></p> <p><u>Cannot review Cth decision-maker’s decisions s9(d) of the AJDR Act Cth</u></p> <p>S23 → confined to <u>justiciable matters, must be suitable for judicial assessment</u></p> <ul style="list-style-type: none"> - SSC has a supervisory power over common law decision-making - Constitutionally entrenched - Approach in the same way as approaching legal errors in the HC (same grounds of review) <p>Common law standing test also applies here!</p>	
	<p>Statutory - some states/ territories have an equivalent to the ADJR Act (not NSW)</p> <p>QLD → has an equivalent of the NSW ADJR Act</p>	
	<p>s 71 of Constitution can confer federal jurisdiction on State Supreme Courts</p>	

3. Statutory Restrictions of entrenched jurisdiction/ avenues of judicial review?

- Has Parliament sought to oust or restrict review of an entrenched jurisdiction?
- May be helpful to note any **privative clauses** here
 - Note the wording of the PC: is it excluding access to JR both decisions and purported decisions (*Bodruddaza*), or ONLY decisions (*Plaintiff S157*)
 - Consider the Constitutional protection provided ⇒ a *Bodruddaza* privative clauses would likely only be effective in preventing JR under the *ADJR Act*, although *s75(v)* would still be protected as under the Constitution
- How do we determine what effect of the clause is:
 - Statutory interpretation: to reconcile conflicting manifestations of legislative intent (*Plaintiff s157*)
 - Apply interpretive presumptions (*Plaintiff s157*):
 - Constitutionally valid
 - No ouster of review of JE
- If the clause **cannot** be reconciled with constitutionally entrenched minimum of jurisdictional review (**JR**) for jurisdictional errors (**JE**):
 - It is invalid to the point of inconsistency – Parliament cannot oust HCA’s or NSWSC’s authority to review for JE (*Plaintiff S157*; *Kirk*); or do so in substance (*Budruddaza*)
 - But **it can oust the FCA’s jurisdiction under s 39B of the Judiciary Act.**
- If clause **can** be reconciled with constitutionally entrenched minimum of JR:
 - Then it has whatever effect the reconciled interpretation requires (eg. *Plaintiff S157* did not oust review for JE, therefore did not oust review under either *s75(v)* or *s39B* for JE)
 - Both *Futuris* and *M61* are examples of statutory restrictions which were not inconsistent with constitutionally entrenched minimum.

4. Finalise the jurisdiction

- Assume that review is available under the *ADJR Act*, *s39B* of the *Judiciary Act* and *s75(v)* of the *Constitution*. What court do you apply to?
 - Apply to the Federal Court under BOTH the *ADJR Act* and *s39B* of the *Judiciary Act*. Make your arguments in the alternative.
 - Only where you can't seek review in the FCA, would you apply directly to the HCA in its original jurisdiction.
 - FC preferable ⇒ HC will likely remit the matter to the FC under *Judiciary Act s44*

5. Standing - Standing means the right to be heard

- Does the statute say anything about standing? (eg *Truth about Motorways*)
- If not: **Common law test**: private right (interference of private right or suffers special damage - *Boyce v Paddington* or ‘special interest’ → “special interest in the subject matter of the action” - *ACF v Cth* - no longer exclusive (*Onus v Alcoa*))