

JURISDICTION

Step 1: Introduction

- To judicially challenge the [decision], jurisdiction (JD) is required under the Constitution, the Judiciary Act (common law) [Step 2], and/or the *ADJR Act* (Statutory review) [Step 3].
- All statutory provisions refer to the *ADJR Act* unless otherwise stated. The requirements of each will be reviewed below.

Step 2: Common Law Jurisdiction

- [X] will argue the High Court of Australia (HCA) has original JD in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the commonwealth (s 75(v) Constitution).
- The Federal Court (FC) has the same power as s 75 Constitution catching all writs for matters arising under any laws made by parliament (s 39B Judiciary Act).
 - HCA can remit matter or part of it to FC (s44(2A) Judiciary Act).
- The required elements are considered below [Go to Step 2A-2E]:

- HCA has original JD over all matters in which the Cth, or person suing/being sued on behalf of the Cth is a party (s 75(iii) Consti).
 - NOT confined to jurisdictional error: CL action such as contract/tort brought against the Cth.
 - Broader than 'Officer of the Cth' in s 75(v).
- **HCA per s 75(v) Constitution:** Use if privative clause / **FC per s 39B Judiciary Act:** No privative clause.

Step 2A: Matter

- A 'matter' under s 75 Constitution exists because [decision] under s [n] of the [Drone Act] creates a controversy affecting [X]'s [immediate right / duty / liability] which is not a mere hypothetical or theoretical interest (*Re McBain*).

Step 2B: Remedy

- The matter must be able to be remedied by the court (*Re McBain*; s 75(v) Consti). For [X], the most relevant remedy is:
 - **Prohibition:** Prohibit [decision maker] from taking a proposed course of action or making a proposed decision.
 - **Mandamus:** Require [decision maker] to exercise a discretion in accordance with the law.
 - **Injunction:** Refrain from undertaking a particular act or undertake a particular act.
 - **Certiorari (Ancillary):** Quash a defective decision that has been made.
 - **Declaration (Ancillary):** Declare legal rights and liabilities of the parties.

Step 2C: Officer of the Cth

- JD requires the matter and remedy to be sought against an Officer of the Cth (s 75(v) Consti).
- The decision made by [DM], who is a Cth [Minister / public official / statutory officeholder / lower court judge / tribunal] appointed under s [n] Drone Act]. The [Drone Act] is enacted by the Cth legislation and the [DM] who is purporting to exercise power act under s [n] of the [Drone Act], therefore the [DM] is an officer of the Cth.
 - **Authority and power created by statute:** Institutional nexus between authority and govt (*NEAT v AWB*).
 - **Authority not created by statute:** Problematic now with privatisation.
 - Public law remedies may be available for private bodies (*Datafin* (UK)). No HC authority yet.

- Power exercised by non-gov body depends on whether exercising a public power or public function.
- Unincorporated non-statutory body administering city code on mergers and takeovers was reviewable.
- Body carrying a particular function, exercises public power where in the absence of the non-gov body, the gov would invariably step in and carry out that function.
- Private body's decision cannot be reviewed (*NEAT v AWB*).

Step 2D: Justiciability

- Even if court has prima facie JD to conduct judicial review, the court may refuse to hear and determine the [matter] based on non-justiciability (*Re McBain*).

Key Factors for Justiciability

- Statutory nature of the power (s [n] of the Drone Act).
- Source of power (constitutional / prerogative v statutory).
 - Justiciable even if involves foreign government (*Ruddock*).
 - Justiciable even if made by higher-up / prerogative (*Ruddock*).
- Status of the DM (Prime Minister / Cabinet vs. Dept. Officer) (*Peko-Wallsend*).
- Nature of decision-making power (National security vs Individual's application for a licence).

If National Security is Relevant

- Broad policy considerations [national security] render the decisions non-justiciable. Must have evidence (*CCSU*).

Non-Justiciable Cases

- Religious organisations and their internal affairs. Consent orders were also signed when decision was decided in earlier case. Court should not hear matter twice (*Re McBain*).
- Parliamentary sovereignty, national security (*CCSU*).
- Too many policy Q: cabinet decisions should not be reviewed (*Peko-Wallsend*).
- Foreign policy/national security (repatriation/detention of Aussie overseas) (*Ruddock*).
- Merits of legislative decisions made by democratically elected parliament, legislative process (*FAI Insurances*).

Step 2E: Conclude CL Jurisdiction

- It [is / is not] likely the court has common law jurisdiction.

Step 3: Statutory Jurisdiction

- For [X] to invoke JD in [federal court / Federal Circuit Court] under the ADJR Act, there must be a **person aggrieved** by a [decision / conduct / failure to decide] under an act to which the ADJR applies (s 5 / s 6 / s 7).
- The required elements are considered below [Go to Step 3A-3E]:
 - Sch 1 of the ADJR excludes certain acts from being reviewable.
 - Decisions made by the Governor-General are not reviewable (s3(1)(c)).
 - A privative clause will likely defeat any ADJR Act application, if present, use CL jurisdiction.

Step 3A: Decision / Conduct

Decision

- For JD, there must be a decision to which the ADJR Act applies that is substantive and determinative (ss 3, 5; *Bond*).
- [Explain how the decision is determinative].
- Types of decisions (s 3(2)):
 - (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.
 - (g) doing / refusing to do any other act or thing, and a reference to a failure to make a decision.
- Intermediate decision leading to final decision is a decision if the act states it must be made before the final decision (s 3(3)).

Conduct

- For JD, there must be conduct to which the ADJR Act applies that is anything preparatory to the making of a reviewable decision (ss 3(5), 6; *Bond*) (Taking evidence / Holding inquiry / Investigation).

Step 3B: Administrative Character

- A decision under the ADJR Act must be of an administrative character (s3).
 - Made by [minister / public servant / gov agency / others] to execute law.
 - Not of judicial character: Not deciding whose right or wrong, just managing administrative matters.
 - Not of legislative character [because]. Not about making or changing laws (*Tooheys*).
- The decision to [decision] relates to applying rules and not making of them, the character is administrative (*Tooheys*).

Step 3C: Made Under an Enactment

- The decision must be made under an enactment and satisfy the **authorisation** and **substantive rights** test (s 3; *Tang*):
 - **Authorisation:** The [decision] is [expressly / impliedly] authorised because the [decision] was made pursuant to and given effect by [s [n] Drone Act / instrument under Drone Act].
 - **Substantive rights:** The decision [confers / alters / affects] the [legal right / obligation] of [X] in the sense that it is derived from the Drone Act (*Tang*).
 - [DM] may argue these [decisions] are a unilateral exercise of rights like the consensual relationship (*Tang*). Contrast this case if it were a contractual relationship.
 - [X] will argue it is dissimilar to *Tang* because the [purpose of the decision is] and it confers [substantive right] to engage in [sanctionable conduct] to which [X] is entitled until [circumstance].

Step 3D: Person Aggrieved

- JD for judicial review needs to be made by “a person who is aggrieved” by a [Decision (s 5(1) / Conduct (s 6(1))]. A **person aggrieved** means a person whose interest is adversely affected (s 3(4)). The ADJR Act test is flexible (*Alcoa*).

Step 3E: Conclude ADJR Jurisdiction

- It [is / is not] likely the court has statutory jurisdiction.

STANDING

Step 1: Standing Test

- There are CL and statutory standing tests which are equivalent to each other (*Tooheys*).
- [X] has standing at CL (s 75(v) Constitution) to judicially challenge a decision if they have a special interest in the subject matter of the action (*ACF*; *Boyce*).
- The statutory standing test is that an application for judicial review needs to be made by “a person who is aggrieved” by a [Decision (s 5(1) / Conduct (s 6(1))]. A **person aggrieved** means a person whose interest is adversely affected (s 3(4)). The *ADJR Act* test is flexible (*Alcoa*).

Attorney-General's Fiat

- A-G historically has a fiat to grant standing to decisions affecting public rights (*McBain*). If A-G refuses to grant it, it cannot be subject to judicial review (*Gouriet*). Unlikely to seek this due to being in same party as DM.

Step 2A: Individual Standing

- [X]'s individual interest in the matter is [their deportation / commercial interest in licence] and results in them suffering damage so they likely have standing (*ACF*).
 - **If Public Right:** [X]'s interest in [state interest] confirms their standing to prevent the violation of a [public right] because their interest goes beyond that of any other member of the public [state why] (*Alcoa*).
- Their interest is special to them because it relates to their [financial / reputational] interest and not a mere intellectual or emotional concern (*ACF*).
 - Loss of sales/inability to operate a business (*Argos*), rather than a lower probability of leasing the land (*Argos*).
 - Can be ‘actual’ or ‘apprehended’ (*ACF*).
 - Interests can be cultural/spiritual in nature (*Alcoa*).
 - Organisations can have standing if enough parties are affected (*Shop Distributive*).

Step 2B: Public Interest Group Standing

- [Interest Group] may have standing so long as they have more than a ‘mere intellectual or emotional concern’ beyond that of a member of the general public or a mere busy body (*North Coast*; *ACF*).
- [Interest Group]'s interest is in [public interest body / union].
 - [DM] may argue a diverse group of individuals associated by common opinion on enviro issues may equally concern any other person (*ACF*).
 - [Interest Group] may argue they have a vested interest above ordinary members of public in [explain] and so they will suffer more if [decision] remains valid.
- Unions can get standing if most of its members can get standing. (*Shop Distributive*). Factors:
 - The union has many members who are employed as shop assistants.
 - Members of the [union / organisation] have a different and greater interest than that of other members of the public, because [how they are affected] / [terms and conditions].
 - Its objects intersected with the purposes of the Act.

Step 2BA: Multifactorial Approach

- [Interest Group] may apply the multi-factorial approach arguing a cumulative effect of matters grant them standing:

- (1) Peak body in Aus (*North Coast*).
 - But non-peak enviro bodies have established standing (*Environmental East Gippsland v Vic Forests*).
 - A sufficient presence in Australia is adequate. Having no Aust. Members is not fatal (*Animals Angels*).
- (2) Formal recognition.
 - **Cth gov:** Grants / state gov advisory committees (*North Coast*).
 - **Enviro orgs:** Respected and responsible environmental body.
- (3) Responsible body.
 - Large income / paid staff (**strong indicators**) (*North Coast*).
 - BUT not the only indicators: avoid financial emphasis over other forms of commitment to enviro issues like part-time organisational activities, research and consultation (*North Coast*).
- (4) Regular submissions to govt on [issue relating to decision] (*North Coast*).
- (5) Funds for conference (*North Coast*).
- (6) Concern with and close relation to subject matter (*North Coast*).
 - Interest in activity and opposition to other activities over many years: strong commitment to values it regards under threat (*North Coast*).
 - Decision directly impacts [issue central to X's org] (*Animals Angels*).
- (7) Commercial gain is purely economic interest - no standing (*Alphapharm*).
- [DM] may make comparisons to *North Coast* that are against standing, [X] says comparisons are a 'barren exercise' (*N Queensland Conservation Council*).

No Standing

- **use only if interest coincides with legislation. If it doesn't, say its overruled by Argos. Clinical trials of abortion drug challenged by R2L. Inform ppl/gov on sanctity of human life. TGA ≠ resolve abortion debate. Intellectual / philosophical / emotional concern (*Right to Life*).
 - Overruled by Argos - standing test must not be applied by reference to the decisional Act's scope or purpose (*Argos*). Alignment of objects is relevant but not determinative (*Argos*).
- TGA: can't import unless registered. Secretary approves application, minister can review. Object: national quality/safety control, efficacy, timely. A's patent near expiry. B applies for generic, approved. **Interest:** patent holder, distributor, manufacturer, ppl w/medical condition, representative orgs. Act does not recognise competitor's interest in delaying drug on market (*Alphapharm*).
- Environmental concern genuine but not a legal interest. Uranium mining political (enviro/economic/national security). No interest unless likely to gain advantage other than satisfaction of righting a wrong, upholding a principle or winning a contest or disadvantage beyond grievance or debt for costs (*ACF*).

Standing

- **Public interest groups operating outside Aust. Animal welfare org (Germany) challenge decision not to revoke Aus livestock exporter's licence. Aus reps + in govt committees. Research and lobbying in Aus, spent its own money to do so. Alerted dept to many potential breaches of law. Didn't matter it was based in Germany (*Animals' Angels*).
- Union represented employees. Rights/interests affected by decision: trading/work hours (*Shop Distributive*).

REASONS

Step 1: Common Law Reasons

- In Australia, there is no general duty to give reasons for decisions at CL (*Osmond*). There does not appear to be any special circumstances that would suggest deviation.

Step 2: Statutory Reasons

- [X] can request written statement from [DM] which includes findings on material facts, supporting E and reasons (s 13(1); s 25D AIA). [DM] must give this within 28 days of receipt of request (s 13(2)). If statement given is inadequate, can order further particulars (s 13(7)).
- [X] can apply for 'better' reasons but the standard imposed on [DM] is less strict (*Wu Shan Liang*). The use of a verbal formula/template doesn't invalidate reasons (*Wu Shan Liang*).
- [DM] may argue the request is invalid and may give written notice of opinion to [X] **OR** apply to Federal Court to declare requester isn't entitled to request (s 13(3)).
 - [DM] need not comply with request unless court declares [X] entitled (s 13(4)(a)), but if their application is rejected, they must give statement within 28 days of the [decision] (s 13(4)(b)). If [DM] or [X] receives invalid notice, court can declare their entitlement (s 13(4A)).
- [DM] may refuse statement if [decision] was recorded in writing and request wasn't made on/before 28 days after it (s 13(5)(a)) **OR** request wasn't made in a reasonable time after decision (s 13(5)(b)). [X] can apply to court to declare that they made a request w/in reasonable time (s 13(6)). [DM] must tell [X] in writing that they won't give statement and why, within 14 days of receiving request (s 13(5)).
- [DM] argues [Act] doesn't apply to [decision] because: [s 268 AAT Act applies (a) / decision set out finding of facts, evidence and reasons (b) / or decision is listed in Sch 2 (c)] (s 13(11)).

Exemptions

- [DM] may to exclude certain information from a statement of written reasons (s 13A):
 - Information relates to the personal affairs / business affairs of a 3P / Confidential information / trade secrets.
 - Info obtained by the decision-maker from a 3P that was under a statutory obligation to supply that info.
 - Info not permitted to be disclosed by reason of some other express statutory prohibition to disclose the info.

Step 3: Freedom of Information Act (FOI Act)

- No standing is required for FOI as every person has a right to access docs in accordance with the FOI Act. Access can be denied on practical grounds if doc does not exist or generates too great of a burden (s 11 FOI Act).
- The objects of the FOI Act are (s 3 FOI Act):
 - Give access to information held by government / Increase representative democracy through public participation.
 - Recognise government documents are an accessible national resource.

Step 3A: Making Request

- [X] may make a request, and it must be in writing, stating relevant Act, including enough info on identity, and give detail for sending notice to applicant (s 15(2) FOI Act). [X] must send request by [delivering to officer at central/regional address / pre-paid postage / e-comm to specified address] (s 15(2A) FOI Act). The [DM] must tell [X] of receipt w/in 14 days and of decision w/in 30 days (s 15(5) FOI Act).
- **Errors:** If [X's] request is non-compliant, [agency] must help send compliant one (s 15(3) FOI Act). If [X] sends to wrong [agency], they must help them send it to the [right agency] (s 15(4) FOI Act).

- **Other:** [DM] must consider Information Commissioner's guidelines (if applicable) (s 15(5A) FOI Act). If they need a 30-day extension, they must notify [person] asap (s 15(6) FOI Act). If they need to consult foreign entity they can extend for 30 more days and notify applicant asap (s 15(7) FOI Act).

Step 3B: Cabinet Documents

- [DM] will argue [doc] is exempt because:
 - It was submitted/proposed to be submitted to Cabinet for consideration **AND** made for dominant purpose of consideration (s 34(1)(a) FOI Act). **OR**
 - It is an official Cabinet record (s 34(1)(b) FOI Act). **OR**
 - It was made for the dominant purpose of briefing a minister (s 34(1)(c) FOI Act). **OR**
 - It is a draft doc for any of the above (s 34(1)(d) FOI Act).
- [Doc] is exempt if it is a [copy / part / extract] of above (s 34(2) FOI Act).
- [Doc] exempt if it would reveal Cabinet deliberation/decision (s 34(3) FOI Act).
- [Doc] is not exempt if it's an officially published Cabinet doc (s 34(5) FOI Act).
- [Doc] with purely factual material is not exempt unless it would reveal decision **AND** existence of decision isn't officially disclosed (s 34(6) FOI Act).