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JUDICIAL REVIEW – STATUTORY (ADJR ACT)

JURISDICTION

Step 1: Choose which section applies

**** PICK WHICH IS RELEVANT BASED ON FACTS**

SECTION 5: Decision

STATE: As per **s 5**, a **person aggrieved** may apply to the court to have a **decision**, of an **administrative kind**, made **under an enactment** reviewed using JR mechanisms.

- This includes properly delegated decisions – **s 3(8)**.

SECTION 6: Conduct for the purpose of making a decision

STATE: As per **s 6**, 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 aggrieved** may apply to the court for an order of review in respect of the conduct

SECTION 7: Failure to make a decision

STATE: As per **s 7**, where an aggrieved person may apply for judicial review on the ground of unreasonable delay if a decision-maker fails to make a required decision that has no statutory time limit.

Step 2: Define the section

SECTION 5: Decision

Defined under **s 3(1)** – A decision means

1. A decision
2. Of an administrative character
3. Made under an enactment

BUT NOT

1. A decision by the Governor-General; **OR**
2. A decision included in any of the classes specified in Schedule 1 of the ADJR Act

A decision

A reviewable decision requires **TWO** elements:

1. **Finality:** It must be "final or operative and determinative." It resolves the matter (**Bond**)
2. **Substantive:** It must be a substantive determination, not merely procedural (**Bond**)
 - a. **NOTE:** If it is procedural, it may amount to conduct under **s 6**

The Rule on Intermediate Steps

- Standard steps or conclusions reached during the reasoning process toward a final outcome are generally **UNREVIEWABLE**.
- **HOWEVER**, an intermediate decision is **only reviewable** if the authorising statute **specifically provides for that intermediate step to be made**. (Bond)

STATE: [DM]'s decision to [grant/reject/revoke] P's [application/licence] under [section of your relevant Act] is final and operative as it is conclusive and the last step to [granting/rejecting/revoking] a [relevant licence]. Therefore [DM]'s decision is a **Bond** decision, and thus, reviewable

References to decision in ADJR – **s 3(2)**:

These are a bunch of examples to conceptualise what a decision may be

- The Act defines "making a decision" broadly. It includes **doing, suspending, revoking, or refusing** any of the following:
 - a) Formal Outcomes:** Orders, awards, or determinations.
 - b) Approvals:** Certificates, directions, consents, or permissions.
 - c) Documents:** Licences, authorities, or other instruments.
 - d) Conditions:** Imposing conditions or restrictions.
 - e) Demands:** Making declarations, demands, or requirements.
 - f) Goods:** Retaining, or refusing to return, an article.
 - g) Catch-all:** Doing, or refusing to do, *any* other act or thing.

Reports or Recommendations

- **Section 3(3)** extends the scope of "decision" to capture certain reports or recommendations [i.e. it specifies an exception to the characteristic of finality]. (Bond).

Of an administrative character

Expressed in **s 3(2)** – "a decision of an **administrative character**"

Generally, administrative acts are concerned with the **application of general rules to specific situations** (Toohey)

- A. Describes all decisions **which the Executive makes**, namely all decisions which are:
- made by Ministers, public servants, government agencies and others in executing or carrying into effect the laws of the Commonwealth; and
 - not of a judicial character; and (Griffith v Tang)
 - not of a legislative character (Griffith v Tang)

ASK: Did the DM apply the general power granted by legislation to P's specific circumstances? (Tang; Toohey)

Made under an enactment

The decision made must be made under an enactment

S 3(1) - Enactment means

- An Act of the Commonwealth
- Delegated legislation

TEST: Griffith University v Tang

Limb 1

- The decision must be expressly or impliedly required or authorised by the enactment.

Limb 2

- The decision must itself confer, alter, or otherwise affect legal rights or obligations, and that effect must derive from the enactment itself.

The Core Distinction (General vs. Specific Power):

Statutes often give government bodies the general power to operate (e.g., to enter contracts, hire staff, or manage facilities). If an agency makes a decision using these general powers, the decision derives its legal force from general law (like contract or property law), not the statute. This fails Limb 2.

SECTION 6: Conduct related to a Decision

Conduct

ADJR references conduct in **s 3(5)** as:

- the doing of any act or thing preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation

ABT v Bond

- Conduct looks to the way in which proceedings have been conducted, the conduct of proceedings, rather than the decisions made along the way with a view to the making of a final determination.
- Conduct is **procedural and not substantive** in character
 - Taking of evidence, interviewing a witness, engaging an expert (**Bond, Mason CJ**)

STATE: P is challenging [insert conduct here] which would constitute “conduct” engaged in for the purpose of making a decision / anything preparatory to the making of a decision (incl. taking evidence or the holding of an inquiry or investigation) which is allowed under **s 3(5)**

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SECTION 7: Failure

Failure

A failure to make a decision under **s 7** includes:

1. Refusing to make a decision within a prescribed timeframe
2. Making the decision with unreasonable delays

As [DM] was required to make a decision under [Act], and the decision was of administrative nature, the court will likely order [DM] to make a decision

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Step 3: Conclude

Conclude if the applicant has jurisdiction under the ADJR to apply to the Federal Court/Federal Circuit Court.

STANDING

Only a person likely to be personally affected to a **sufficient extent** by administrative conduct has standing, or *locus standi*.

****STANDING FOR ADJR (person aggrieved) IS DETERMINED BY THE COMMON LAW RULES** – there is no practical difference between a person aggrieved and a person with a special interest

Step 1: Introduction

STATE: For an applicant to have standing they must be a ‘**person aggrieved**’ – **s 5(1), 6(1) and 7(1)**.

Section **3(4)(a)** defines person aggrieved as:

- i.** person whose interests are **adversely affected** by the decision
- ii.** in the case of a **decision by way of the making of a report or recommendation**--to a person whose interests would be **adversely affected if** a decision were, or were not, made in accordance with the report or recommendation

To determine a person aggrieved, the test is regarded **AS THE SAME AS THE COMMON LAW TEST** for standing (**Tooheys**)

Step 2: Determine Type of Standing

Attorney-General

Attorney-General has ex officio status to challenge certain actions which affect the public interest.

An individual or organisation may, with the Attorney-General’s consent, obtain his fiat and sue in his name (e.g. **McBain**)

- The resulting action is called a **relator action**, because the plaintiff sues in the Attorney-General’s name (the term ‘relator’ is drawn from the Latin phrase ‘ex relatione Attorney-General’), and has the conduct of the action
- The Attorney-General’s refusal to grant a fiat **cannot be subject to judicial review** (**Gouriet v Union of Post Office Workers**)

Private Interest

Standing is rarely an issue where the complaint relates to a “private” interest of the complainant

- The complainant will **clearly have standing**
- **Think of actions that have a direct and INDIVIDUAL effect.**

STATE: Standing does not require [**Applicant**] to prove that the decision definitively rejected their application or destroyed their business. It only requires that they are not a mere busybody. Because [**Applicant**] is the specific entity subject to the decision, they inherently have 'skin in the game'. The decision to [**insert what the decision did - e.g., refer the application / mandate a report / impose a delay**] directly alters the legal processing of *their* specific [**commercial / proprietary / liberty**] interest. This constitutes a direct and adverse affection of their private interests, granting them standing.

EXAMPLES:

- The personal interest in not being deported
- The commercial interest in having a licence to carry on business
- The personal interest in not having ones house demolished

Public Interest

ASK: When can a public interest group, or “concerned citizen”, challenge an administrative decision where the interests affected are not “private” in the strict sense?

Special Interest TEST:

- Where no private right is interfered with, but the plaintiff, in respect of his public right, suffers **special damage peculiar to himself** from the interference with the public right (ACF)
 - **Applicant must show they have a special interest in the subject matter**
- Compared with the public at large, the applicant **must be affected to a substantially greater degree or in a significantly different manner by the decision (Onus)**

******Not a mechanical application – case by case (Onus)

Special Interest TEST Considerations

- NOT a mere intellectual or emotional concern (ACF)
 - Does not matter how strong the belief is held (ACF)
 - HOWEVER, a special interest can be **accompanied** by such concern (Onus)
- Must **gain some advantage** other than satisfaction or right a wrong, upholding a principle or winning a contest if their action succeeds OR must **suffer some disadvantage**, other than a sense of grievance or a debt for costs, if their action fails (ACF)
- **NOT NECESSARY** to show that the plaintiff is uniquely affected
- Interest must be affected in a **significant way; does not have to impact directly (can be indirect) (Argos)**

Analogue with cases

Australian Conservation Foundation v Commonwealth – NO STANDING

Facts

- Iwasaki planned to build a tourist resort in Queensland.
- The project required Commonwealth foreign exchange approval, which triggered an environmental impact assessment under the EPIP Act 1974 (Cth).
- The Australian Conservation Foundation (ACF), an environmental advocacy corporation, sued the Commonwealth for an injunction and declaration, alleging the government failed to comply with the EPIP Act procedures.

- ACF claimed standing based on its corporate objectives to protect the environment, its submission of public comments regarding the project, and the fact that some of its 6,500 members would lose access to the land.

Issue

- Did the ACF have standing (locus standi) to bring proceedings to enforce a public duty or prevent a public wrong?

Reasons standing was DENIED:

- **No Private Right:** The ACF was not asserting a private right. Enforcing public rights or preventing public wrongs is the responsibility of the Attorney-General, not private citizens.
- **The "Special Interest" Test:** To sue over a public wrong without the Attorney-General, a plaintiff must have a "special interest" in the subject matter. This means they must gain a material advantage if the action succeeds or suffer a material disadvantage if it fails.
- **Emotional or Intellectual Concern is Insufficient:** A mere belief, intellectual interest, or emotional concern in preserving the environment does not constitute a special interest. Allowing this would make the standing rule meaningless, as anyone with a strong opinion could sue.
- **Corporate Objects do not Confer Standing:** Being an incorporated body established specifically for environmental advocacy does not grant standing. A corporation is in no stronger position than a natural person who holds the same beliefs.
- **Members' Interests do not Transfer:** Even if some individual members of the ACF had a special interest (e.g., losing land access), that standing does not transfer to the corporate body.
- **Submitting Comments is Irrelevant:** The fact that the ACF submitted written comments during the environmental assessment process did not grant them legal standing. The statutory scheme was an executive "aid to decision making" and did not confer legal rights on objectors.

Onus v Alcoa of Australia Ltd - STANDING

Facts

- The Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) made damaging Aboriginal relics a criminal offence.
- Alcoa planned to construct an aluminium smelter near Portland, Victoria, which threatened to destroy local Aboriginal relics.
- The plaintiffs were members of the Gournditch-jmara Aboriginal people, the traditional occupants of the area.
- They sought a declaration and injunction to prevent the destruction. The Supreme Court initially denied standing, categorising their interest as merely "emotional or intellectual".

Issue

- Did the plaintiffs possess a "special interest" granting them standing to seek an injunction to enforce a public right under the Relics Act?

Reasons standing was GRANTED:

- **Greater Interest than the Public:** The plaintiffs were affected to a substantially greater degree and in a significantly different manner than the general Australian public or other Aboriginal groups.

- **Cultural and Customary Custodianship:** Their interest went beyond mere belief or opinion. As traditional custodians under their laws and customs, they had an intimate relationship with the relics and actively used them to teach their children.
- **Proximity to the Subject Matter:** The court distinguished a specific, local Aboriginal community protecting its ancestors' relics from a diverse group of citizens united only by a shared opinion on social/environmental policy (distinguishing this from the ACF case).
- **Emotional Concern Does Not Disqualify:** While a purely emotional or intellectual concern is insufficient for standing, having a genuine special interest is not invalidated just because it is accompanied by strong emotional or cultural concern.
- **Non-Material Interests are Valid:** Modern statutes protect non-material interests (culture, heritage). Requiring financial or property damage for standing would make these laws practically unenforceable.
- **Potential for Future Access:** Even though the relics were on Alcoa's private land, preserving them maintained the possibility of future access for the plaintiffs.

Shop Distributive and Allied Employees Association v Minister for Industrial Affairs - **STANDING**

Facts

- The Shop Trading Hours Act 1977 (SA) mandated that shops in Adelaide close on Sundays.
- The Minister used a statutory power to issue certificates exempting specific shops in the Central Shopping District, allowing them to open on Sundays between 11:00 am and 5:00 pm.
- The Trade Union, representing many shop assistants employed in that district, challenged the Minister's decision to issue these certificates.

Issue

- Did the Trade Union have standing (a "special interest") to challenge the Minister's decision regarding public shop trading hours?

Reasons standing was GRANTED:

- **Special Interest Established:** Because the Act conferred no private rights, the Union had to rely on the "special interest" test (applying ACF and Onus). The Court reiterated that this is a flexible rule depending on the subject matter of the litigation.
- **Greater Interest than the Public:** The Minister argued the whole community was affected by Sunday trading. However, the Court found the shop assistants had an interest that was definitively different from, and greater than, ordinary members of the public.
- **Direct Impact on Employment:** Altering trading hours directly and necessarily affects the terms and conditions of the shop assistants' employment. Introducing Sunday trading changes the times they must work and the number of permanent or casual staff required.
- **Legislative Purpose:** The Court noted that laws regulating shop trading hours originally stemmed from a need to protect employees from excessively long work periods, reinforcing the direct connection between the workers and the legislation.

Australian Institute of Marine & Power Engineers v Secretary, Department of Transport - **STANDING**

Facts

- Under the Income Tax Assessment Act 1936 (Cth), the Secretary could issue a "manning notice" specifying the number of crew required to operate a ship safely and efficiently. Compliance gave the shipowner tax concessions.
- The Secretary issued a manning notice for the BP Endeavour Replacement, which had the effect of reducing the number of engineer members required from six to five.
- The Association (a trade union representing the engineers) had participated in the administrative process leading to the notice.
- The Association requested a statement of reasons for the decision under s 13 of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act).
- The Secretary refused the request, arguing the Association lacked standing as it was not a "person aggrieved" by the decision.

Issue

- Did the Association have standing as a "person aggrieved" under the ADJR Act to request a statement of reasons for the manning notice decision?

Reasons standing was **GRANTED**:

- **Flexible Test:** The criterion for a "person aggrieved" is not encased in rigid technical rules. It depends on the nature of the decision and whether the applicant's interest rises above that of an ordinary member of the public.
- **Cumulative Effect:** While the direct legal effect of the notice was on the shipowner, the Association established standing through the cumulative weight of four factors, even if no single factor was sufficient on its own:
 1. **Objects of the Association:** Its formal objects included obtaining and maintaining reasonable conditions of employment and negotiating agreements for its members.
 2. **Prior Participation:** It was invited to participate in the Manning Committee for the ship and made submissions regarding the proposed notice.
 3. **Real Interest in Safety:** It had a non-frivolous, genuine interest in disputing the safety of the reduced crew level, which the court noted as fertile ground for an industrial dispute.
 4. **Practical Effect on Employment:** As a practical matter, the crew scale in the manning notice determined the number of the Association's members that would be employed.

North Coast Environment Council v Minister for Resources - **STANDING**

Facts

- The Minister had the statutory power to grant licences for exporting wood products.
- The Minister granted Sawmillers Exports Pty Ltd a licence to export woodchips from the north coast of New South Wales.
- The North Coast Environment Council (NCEC) requested a statement of reasons for this decision under s 13 of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act).

- The Minister refused the request, arguing the NCEC was not a "person aggrieved" and therefore lacked standing.

Issue

- Did the NCEC have standing as a "person aggrieved" under the ADJR Act to request a statement of reasons for the Minister's decision?

Reasons standing was GRANTED:

- **Beyond Mere Objects:** The court confirmed that having environmental protection as a corporate object or making comments during an environmental impact process is not enough on its own to establish standing.
- **Cumulative Factors:** Standing was established by looking at multiple factors that collectively demonstrated the NCEC's close relationship to the subject matter and the importance of its concern:
 1. **Peak Regional Body:** NCEC was the peak environmental organization for the specific region affected by the woodchipping, acting as an umbrella group for 44 local environmental bodies.
 2. **Commonwealth Recognition:** It had been recognized by the Commonwealth government since 1977 as a responsible environmental body, evidenced by recurrent financial grants.
 3. **State Recognition:** It was recognized by the State government through formal inclusion in official decision-making processes, such as membership on the Forestry Policy Advisory Committee.
 4. **Project Coordination:** It had a history of conducting and coordinating Commonwealth-funded environmental projects and conferences.
 5. **Specific Forestry Involvement:** Independent of this specific dispute, the NCEC had a demonstrated history of researching forestry issues, funding studies on old-growth forests, and making submissions to the Resource Assessment Commission.
- **More than Emotional Concern:** These factors elevated the NCEC's interest far beyond a mere "intellectual or emotional" concern.
- **Not a Mere Busy Body:** The NCEC was not a mere busybody; it was the most well-placed organization to present a conservation viewpoint on this specific issue, with no other body possessing a greater interest.

Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health – NO STANDING

Facts

Under the Therapeutic Goods Act 1989 (Cth), the Secretary granted permission to three medical institutions to import and conduct clinical trials on mifepristone (an abortion drug).

- The trials were to assess the drug's quality, safety, and efficacy for emergency contraception and early pregnancy termination.
- The Right to Life Association (NSW), an incorporated body dedicated to opposing abortion on moral grounds, challenged the Secretary's decision.

- The Secretary argued the Association lacked standing as it was not a "person aggrieved" under the ADJR Act.

Issue

- Did the Right to Life Association have standing as a "person aggrieved" to challenge the administrative decision regarding the clinical trial of an abortion drug?

Reasons standing was DENIED:

- **No Material Advantage or Disadvantage:** The Association could not show that winning the case would give them a benefit greater than an ordinary member of the public, nor that losing would subject them to a greater detriment.
- **Corporate Status is Insufficient:** Merely being an incorporated association with specific moral objectives does not automatically grant standing. A corporation is in no better position than an individual with the same beliefs.
- **Lack of Government Recognition:** Unlike the environmental group in North Coast, the Association was not formally recognized or funded by the government as representing the public interest in the specific subject matter of therapeutic goods.
- **Advocacy Does Not Equal Standing:** The right to speak out, lobby politicians, and influence public opinion does not translate into a legal right to bring court proceedings.
- **Purely Emotional/Intellectual Concern:** The Association's grievance was based on an intellectual, philosophical, and emotional commitment to the sanctity of life. They were not affected beyond the ordinary public, and standing requires more than just the satisfaction of righting a perceived wrong or winning a political contest.
- **Mismatch with Statutory Purpose (Crucial Factor):** The Therapeutic Goods Act is designed to regulate the "quality, safety, efficacy and timely availability" of medical drugs. It is not legislation directed at the broad moral, social, or political debate surrounding abortion. Therefore, the Association's core moral concerns did not align with the legal subject matter of the Act.

Argos Pty Ltd v Corbell, Minister for the Environment – BOTH

Facts

The ACT Minister approved a commercial development that included a new supermarket.

- The proprietors of two existing nearby supermarkets, along with their landlord, sought judicial review of the decision under the ADJR Act, claiming to be "persons aggrieved".
- The lower courts found as a fact that the new supermarket would increase competition and reduce the profitability of the existing supermarkets.
- However, the lower courts denied standing to all applicants, ruling that the adverse economic effects were "too remote" and that mere economic detriment to a business does not grant standing.

Issue

- Can adverse economic impacts resulting from increased competition constitute a sufficient interest to make a business or its landlord a "person aggrieved" under the ADJR Act?

Held

- **The Supermarket Proprietors: YES**

- **The Landlord:** NO

Reasons standing was GRANTED (to the Proprietors):

- **Economic Impact is Sufficient:** A practical, adverse effect on a person's business or profitability is a sufficient interest under the ADJR Act. It elevates their grievance beyond that of an ordinary member of the public.
- **No "Remoteness" Barrier:** Once it is established as a fact (on the balance of probabilities) that a business will suffer a "not insignificant loss of profitability," the inquiry is complete. Courts do not need to apply further tests of "directness" or "remoteness."
- **Unfair Competition:** While traders have no legal right to be protected from lawful "mere competition," if an administrative decision approving a competitor is legally flawed, the resulting competition is "unfair." Traders have a valid interest in challenging unlawful decisions that cause them financial loss.

Reasons standing was DENIED (to the Landlord):

- **Lack of Factual Detriment:** There was no factual finding that the existing supermarkets would actually fail due to the new competition.
- **Ripple Effect Too Weak:** Because there was no proof the businesses would fail, there was no proof the landlord would lose their lease or that the lettable value of the land would decrease. The landlord suffered no demonstrable economic or legal harm.

Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd – NO STANDING

Facts

- SmithKline Beecham held a soon-to-expire patent for a pharmaceutical drug.
- Alphapharm applied to register a generic version of the drug on the Australian Register of Therapeutic Goods under the *Therapeutic Goods Act 1989* (Cth).
- The relevant government delegate approved Alphapharm's registration.
- SmithKline sought a statutory internal review of this decision, claiming its commercial interests were affected by the impending market entry of a competitor.
- The Minister refused the review request, stating SmithKline lacked standing.

Issue

- Did SmithKline Beecham have standing as a "person whose interests are affected" under the *Therapeutic Goods Act* to challenge the registration of a competitor's generic drug?

Reasons standing was DENIED:

- **Incompatibility with Statutory Purpose:** The *Therapeutic Goods Act* regulates the quality, safety, efficacy, and timely availability of medicines for public health. It does not exist to protect the commercial monopolies, intellectual property, or market share of private pharmaceutical companies.
- **The "Zone of Interests" Test:** To qualify as a person whose "interests are affected", the applicant's specific interest must align with the scope and purpose of the empowering Act. SmithKline's purely commercial interest fell entirely outside this zone.
- **Prevention of Statutory Abuse:** Granting standing to a commercial competitor seeking to protect its monopoly would allow the safety review process to be weaponised to delay competitors. This directly contradicts the Act's express objective of ensuring the "timely availability" of therapeutic goods.
- **Clarification of the General Rule:** The Court affirmed the baseline rule that an applicant must have an interest greater than an ordinary member of the public, or someone merely holding a belief that

the law should be observed. However, establishing a *different* interest (such as a financial threat) is insufficient if that interest is legally irrelevant to the statutory framework governing the decision.

Animals' Angels (Full Federal Court) - **STANDING**

Facts

- A government department decided not to exercise statutory powers regarding a live animal export incident.
- Animals' Angels, a public interest group established in Germany to research and investigate live animal exports, sought judicial review of this decision.
- The primary judge held the group lacked standing. The group appealed to the Full Federal Court.

Issue

- Did Animals' Angels have a sufficient interest (standing) to seek judicial review of the department's decision?

Reasons standing was granted:

- **Australian Engagement:** The group had been actively operating in Australia for eight years.
- **Government Recognition:** The department explicitly recognized the group by inviting it to participate in activities reviewing live animal exports.
- **Official Submissions:** The group's investigation reports were published and submitted to relevant government authorities, and an Australian ministerial council had considered one of them.
- **Alignment with Core Objects:** The government decision directly impacted animal welfare, which was the central focus of the group's organizational objects and purposes.
- **International Status is No Bar:** The global nature of the group's operations did not detract from its concrete engagement and established interest within Australia.
- **Clarification of "Sufficient Interest":** The court noted that standing requires a "sufficient" interest, not a unique interest or the strongest interest compared to others who might also be affected.

Step 3: Conclude

On balance, [P] would not have standing.

JUDICIAL REVIEW – COMMON LAW

JURISDICTION

Applicants can apply for judicial review under **s 75(v) of the Constitution** or **s39B of the Judiciary Act 1903**

** Will usually apply under common law due to:

- Privative Clause
- Decision maker was governor-general
- A relevant Act is listed in Schedule 1 of the ADJR Act

Step 1: Introduction

** NOTE: **Sections 75 and 39B(1)** are **phrased identically** and contain three requirements

High Court Jurisdiction

Section 75(v) Constitution:

In all matters--

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

3 REQUIREMENTS:

1. There must be a matter
2. Relief must be sought against an officer of the Commonwealth
3. Remedy of a mandamus, prohibition or injunction must be sought

REMITTANCE

- **Section 44(2A) of the Judiciary Act 1903** allows the High Court to remit any proceedings initiated in its original jurisdiction to the Federal Court for determination

Federal Court Jurisdiction

Identical phraseology to High Court – s 39B of the **Judiciary Act**

S 39B(1) – Subject to **subsections (1B), (1C) and (1EA)**, 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.

****NOTE S39B(1A)(c) (CONFERS BROAD POWER ON FEDERAL COURT)**

S 39B(1A) - The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

- c) arising **under any laws made by the Parliament**, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

Step 2: Define Matter

- A matter is a **real and immediate** about **rights, duties or liabilities** which would be quelled by the application of judicial power (**McBain**)
- There must be an **actual dispute** about a **legal issue** (**McBain**)
- CANNOT be hypothetical (**McBain**)
- CANNOT be an advisory opinion (**McBain**)

Matter must be Justiciable

Even if the High Court or Federal Court appear to have prima facie jurisdiction to conduct judicial review at common law, the court may refuse to hear and determine a matter on the basis it is **non-justiciable**.

Justiciability questions will arise when

- **Subject matter** of the decision concerns
 - national security (**CCSU and Church of Scientology**),
 - international treaty obligations (**Peko- Wallsend**),
 - international relations between Australian and another state (**Peko-Wallsend, Re Ditfort, L v South Australia and Hicks**),
 - complex policy considerations such as matters relating to first nations Australians, environmental considerations and the economy (**Peko-Wallsend and L v South Australia**);

CCSU

Facts

- The Prime Minister banned 4,000 intelligence workers at a government communications agency from being in a trade union.
- She made this rule using an old, unwritten historical power (the "prerogative"), rather than a standard written law passed by parliament.
- She did not consult the workers or the union before making the ban.
- Her justification was that past union strikes had disrupted military communications, creating a risk to national security.

Issues

- Can a judge review a government decision if the government used historical (prerogative) powers instead of a written law?

Held (The Rules)

- **Rule 1: Where the power comes from does not matter.** Judges can review executive decisions made under historical (prerogative) powers. The government does not get an automatic free pass from court scrutiny just because they bypassed a written statute.
- **Rule 2: How the decision affects people matters.** A judge will review the decision if it takes away someone's private rights or deprives them of a "fair expectation" (in this case, the workers had a fair expectation that they would be consulted before losing a major benefit).

- **Rule 3: The National Security Exception.** Judges will not review a decision if it involves national security. The court admitted it is completely unequipped to judge what is necessary to defend the country. The government gets the final word on national security issues.
- **The Final Outcome:** Normally, the Prime Minister's failure to consult the workers would have been legally unfair and invalid. However, because the court accepted that there was a genuine national security risk, the national security exception applied, and the court let the ban stand.

Peko- Wallsend

Facts

- The Commonwealth Cabinet (the highest executive body) made a decision to nominate "Stage 2" of the Kakadu National Park for inclusion on the World Heritage List.
- This decision was made using the Crown's prerogative power regarding international treaties (specifically, the UN Convention for the Protection of the World Cultural and Natural Heritage).
- The Peko group of companies (Peko-EZ) held existing mineral leases in the park. While the Cabinet decision did not immediately stop them from mining, it made it highly likely that future laws or management plans would restrict or ban their mining operations to comply with the World Heritage listing.

Issue

- Is a decision made by the Cabinet under a prerogative power concerning an international treaty justiciable (i.e., subject to review by a court)?

Held

- **Cabinet decisions are theoretically reviewable:** Following GCHQ, the Full Federal Court confirmed that the identity of the decision-maker (even the Cabinet) and the source of the power (even the prerogative) do not provide automatic immunity from judicial review. It is the nature and effect of the decision that matters.
- However, **this specific decision was non-justiciable** for two reasons:
 1. **Direct and Immediate Effect:** For a decision to be justiciable and trigger natural justice, it must have a direct and immediate effect on private rights or legitimate expectations (as per Lord Diplock in GCHQ). The Cabinet decision **only created a speculative future disadvantage** for Peko-EZ. It was a preliminary step; further government action would be needed to actually ban the mining.
 1. **Subject Matter (Complex Policy/International Relations):** The decision involved complex political, economic, environmental, and Aboriginal rights policies. Furthermore, it concerned Australia's international treaty obligations. As Bowen CJ and Wilcox J noted, these are "high policy" matters that belong in the political arena, not the courts. The judicial process is inappropriate for resolving such intense political and international conflicts.

Hicks v Ruddock

Facts

- Mr. Hicks was imprisoned at the Guantanamo Bay military base in Cuba.
- He asked the Australian Minister to formally request his release and return to Australia,
- The Minister refused.
- Hicks asked the court to review the Minister's refusal, arguing the decision was unlawful because it was based on irrelevant considerations.

- The Minister tried to get the case thrown out immediately. The Minister argued the issue was "non-justiciable" (too political for a judge)

Issue

- Is an Australian government decision regarding the protection of a citizen overseas completely immune from court review just because it involves foreign affairs and diplomacy?

Held

- **Foreign affairs are not automatically immune:** The court refused to throw out the case. The judge ruled that just because a government action involves foreign relations does not automatically exclude it from being reviewed by a court.
- **The liberty and human rights exception:** While courts will usually stay out of high-level international disputes (like drawing borders between countries), this case was different because it involved the deprivation of personal liberty and potential human rights infringements.
- **Manageable Legal Standards:** A court can review a political or diplomatic issue if there are clear, legal "manageable standards" to judge it against. Because Hicks was asking the court to check if the Minister relied on "irrelevant considerations," the court had a standard, manageable legal test it could apply.
- **Final Outcome:** The "Act of State" doctrine and political nature of the case did not justify throwing it out. The court allowed the case to proceed to a full hearing (though the government ultimately settled the case and brought Hicks back to Australia).

- **Effect on the applicant** of the decision is not direct and immediate (**CCSU and Peko-Wallsend**);
 - court may determine a matter to be "non-justiciable" because it does not consider the situation to be amenable to judicial intervention
- **Identity** of the decision maker is a **high-level decision maker**, such as Cabinet (**Peko-Wallsend and L v South Australia**)

** Decision **must not be of such high concern of politics** that court should not review it (Hicks). However, this is a high threshold as even cabinet decisions can be reviewed (**O'Shea**)

Step 3: Officer of the Commonwealth

Interpreted broadly to be anyone sitting within the Executive branch of the Cth purporting to administer public power

EXAMPLES:

- Governor-General (**Hopkins v Governor General**)
- Public servants (**R v Commonwealth Court of Conciliation and Arbitration**)

- Community members appointed to a statutory committee (**Tang v Holmes**)
- Statutory office-holders (even though they are independent) (**Plaintiff M68-2105 v Minister for Immigration**)
- Federal judges (**R v Commonwealth Court of Conciliation and Arbitration and the President**)

Step 4: Seeking an express remedy

An applicant must establish an entitlement to one of the **EXPRESS REMEDIES**.

- Cannot seek an ancillary remedy without an express remedy (certiorari and declaration)

Step 5: Conclude

Conclude if the applicant has jurisdiction under common law to apply to the HCA/Federal Court

****CONSIDER AGAIN s 39B(1A)(c) Judiciary Act.**

STANDING

STATE: As the test for standing is the same under **ADJR s3(4)** and the **s75(v) Const** my analysis above can be applied under CL. There has been some suggestion that the test for standing is slightly broader under the common law than the ADJR (Argos), but this is unsettled, with no cases having turned on this point.

Therefore, [P] will/will not have standing under the CL.