

Administrative Law Scaffold 2025

1. Does the Court have Jurisdiction?

Exercise of power under the Commonwealth Statute

Common Law Jurisdictions

- Is there an exercise of public power?

- Judicial review at common law is only available where:

- There is an exercise of public power, whether by a public or private entity
 - Public powers are those:
 - Conferred by statute (*NEAT Domestic*)
 - Under prerogative power (*Peko-Wallsend*)
 - Private powers are not subject to judicial review, even if exercised by a public body
 - Powers derived from contract
 - Powers derived from consent or voluntary association
 - That power affects rights, obligations or interests by force of the statute or prerogative

- Australian courts have moved away from the UK approach, focusing on an institutional approach (*NEAT Domestic*)

- The conduct of a non-government entity who performs 'public' function despite no statutory or prerogative powers involved is reviewable under the UK position in *Datafin*
 - However, it is unlikely that this will apply in Australia

- Available jurisdictions

- High Court

- *Constitution S75(iii)*: Matters in which the Commonwealth is a party
 - *Constitution S75(v)*: Matters in which mandamus, prohibition or an injunction is sought against an officer of the commonwealth
 - Entrenched minimum jurisdiction (*Plaintiff s157*)
 - Is mandamus, prohibition or injunction being sought?
 - Is the complaint against an officer of the Cth?
 - Public servants, DPP, police, ministers, members of AAT, federal judges
 - Does not include bodies corporate such as Australia Post
 - Where the government has outsourced its functions to private entities, it is unsettled whether those contractors qualify as an officer of the Commonwealth (*Plaintiff M61*)

- Federal Court

- Federal Court has jurisdiction to hear applications for review under the *ADJR Act*
 - *S39B Judiciary Act* inserted to confer jurisdiction in s75(v) matters to Federal Court
 - Hear matters in which:
 - Matters in which mandamus, prohibition or injunction sought against an officer of the Commonwealth (*Judiciary Act s39B(1)*)
 - Matters arising under Commonwealth legislation (*Judiciary Act s39B(1A)*)

ADJR Act

- Matters remitted from the High Court (*Judiciary Act s44*)

- An application for review of a decision under the *ADJR Act* may be made to the Federal Court or Federal Circuit Court (*s 5*)

• Comparison between ADJR Act and Common Law

- *ADJR Act* is preferred over common law remedial model given its simpler procedures, liberal test for standing and broader grounds of review
- Jurisdiction under the *ADJR Act* may not be available even though there is jurisdiction at common law as:
 - Excluded by privative clauses
 - Decision affects interests not legal rights
 - Decision is legislative or judicial in nature
 - Decision is made under non-statutory power

• Is the decision reviewable under the ADJR Act?

- *s3(1) ADJR Act*: requires the decision to be “a decision of an administrative character made under an enactment, other than a decision by the G-G or decisions in Schedule 1”

○ Decision

- A **reviewable decision** is one in which a statute requires or authorises rather than a “step taken in the course of reasoning on the way to the making of the ultimate decision” – Mason J in *Australian Broadcasting Tribunal (ABT) v Bond*
 - Must be resolving substantial issues, not procedural ones as this could transfer *ADJR Act* reviews into merits review
 - Risk of premature judicial review can pose badly to efficient administration
- **Examples of what may constitute a decision given in s3(2)** and include the ‘doing or refusing to do any act or thing’
 - e.g. Granting of licenses, awards, making orders or determinations
 - *s3(3)* – reports or recommendations required by the statute before a decision is made to exercise a power
- **Includes failure to make a decision** with required or reasonable time (*s 7*):
 - Breach of a duty to make a decision required by statute within a prescribed time
 - If there is no prescribed time, an unreasonable delay in making the decision
- **Does not include:**
 - The making of delegated legislation, as this is not a decision of an administrative character
 - A decision made by the Governor General (*s3(1)(c)*)
 - A decision included in Schedule 1 (*s3(1)(d)*)
 - State judicial review matters (*Re Wakim*)

○ Of an administrative character

- Decisions of an administrative character is one that is not of legislative or judicial character (*Roche Products – Branson J*)
- **To do the above, consider:**
 - Nature of the rule
 - Whether it involves the formulation of rules of general application
-> suggests legislative

- Whether it involves the application of rules to a particular case -> suggests administrative
- Other factors suggesting legislative
 - Decision involving broad questions of public policy
 - Decision has binding legal effect
 - Decision is independent of any executive variation or control
 - Parliamentary supervision of the decision
 - Public notification of making of the regulation
 - Public consultation
- Other factors suggesting administrative:
 - Merits review is available for the decision

○ Under an enactment

- What constitutes an enactment?
 - Enactment includes:
 - Cth Acts and instruments made under the Acts (*s3(1)(a)*)
 - Decisions made pursuant to rules, regulations or by-laws (*s3(1)(c)*)
 - Prevents review of prerogative or non-statutory powers
 - Does not include the making of delegated legislation
- Two-part test for being made under an enactment (*Griffith Uni v Tang [2005] HCA 7*)
 - Decision must be expressly or impliedly required or authorised by the enactment
 - Decision itself must confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment
 - Must be derived from statute
- Decisions made under contract or according to consensual arrangements are private and not made under an enactment (*General Newspapers v Telstra*)
 - The fact that statute conferred the capacity to contract is insufficient
 - Decisions may be reviewable if the contracts entered into are specifically authorised or required by an enactment
- Exercise of statutory power by non-government entities will not be under an enactment if it is capable of being made in a private interest (*NEAT Domestic Trading*)

Exercise of power under the NSW Statute

Common Law Jurisdictions

- Inherent jurisdiction in the Supreme Court

- The exercise of public powers is amenable to judicial review under the inherent supervisory jurisdiction of the Supreme Court at common law (Each state Supreme Court inherited supervisory jurisdictions from the superior courts of England), as affirmed by *Constitution s73* and *Supreme Court Act s69*
- This includes jurisdiction to:
 - Issue certiorari, mandamus or prohibition for jurisdictional error
 - Entrenched minimum jurisdiction (*Kirk*)
 - Issue certiorari for error of law on the face of the record
- Is there an exercise of a public power?
 - This inherent jurisdiction extends only to the public powers of the State (*Chase Oyster Bar*)
 - It arises when the decision is being challenged is empowered by NSW legislation or executive power

