

Scope of Judicial Review

Scope	Notes
Reviewable decisions	Section 3(1) of the ADJR Act requires that a reviewable decision be ‘of an administrative character made under an enactment. A “decision” must be: • final, operative, determinative (<i>Bond</i>) • of an administrative character (ADJR Act s 3(1)) • made under an enactment (<i>Tang</i>) • by a public authority (<i>NEAT</i>) Issue: Is this a reviewable decision under the ADJR Act? ☐ Step 1: Is there a “decision”? (<i>Bond</i>) ○ A “decision” must be: ■ Final, operative, determinative (<i>Bond</i>) ■ NOT merely a step along the way ■ UNLESS the statute makes the finding a condition precedent to power ☐ Step 2: Is it “of an administrative character”? (ADJR s3(1)) ○ Ask whether the decision is: ■ executive/administrative ☐ Step 3: Is it “made under an enactment”? (<i>Tang</i>) ○ Apply the two-limb Tang test: ■ Limb 1: Statute must confer or authorise the power ■ Limb 2: the decision must itself have statutory LEGAL effect ☐ Step 4: Is the decision made by a “public authority”? (<i>NEAT</i>) ○ Is the decision-maker a public body exercising public power or a private corporation acting under private obligations?

- ☐ **Step 5: Does the decision affect legal rights or obligations? (*Plaintiff M61*)**
 - Does the decision affect the applicants:
 - legal position
 - determine eligibility, status or statutory entitlements
 - Is the decision part of a statutory scheme even if labelled “non-statutory”

Reviewable conduct

Issue: Is this conduct reviewable under the ADJR Act?

- ☐ **Step 1: Is this “conduct for the purpose of making a decision”? (ADJR s6)**
 - Conduct is reviewable if it is:
 - Procedural conduct
 - Conduct engaged in for the purpose of making a decision
 - Conduct that affects how the final decision will be made
 - Examples: failing to give a hearing, refusing to consider evidence, applying an inflexible policy, acting under dictation, failing to inquire into a jurisdictional fact, failing to engage in active intellectual engagement
- ☐ **Step 2: Does the conduct affect the exercise of statutory power?**
 - Ask whether the conduct:
 - Affects **how** the statutory power will be exercised
 - Affects **whether** the statutory power can be exercised
 - Effects **the fairness** of the statutory process
 - Effects **the legality** of the final decision
 - *Ainsworth*: PF breach is reviewable conduct
 - *Plaintiff M61*: statutory process must be lawful
 - *Kioa, Saeed, VEAL*: conduct denying PF is reviewable
 - *Tickner, Li*: no active intellectual engagement = unlawful conduct
- ☐ **Step 3: Is the conduct “of an administrative character”? (ADJR s 3(1))**
 - Conduct must be administrative

- ☐ **Step 4: Is the conduct “under an enactment”? (*Tang*)**
 - Apply the two-limb Tang test:
 - Limb 1: Statute must confer or authorise the power
 - Statutory duty to: hear, consider submissions, inquire and follow a procedure
 - Limb 2: the decision must itself have statutory LEGAL effect
 - Conduct affects legal rights if it affects the: fairness and validity of the decision, ability to exercise statutory rights and applicants legal position
- ☐ **Step 4: Is the decision made by a “public authority”? (*NEAT*)**
 - Is the decision-maker a public body exercising public power or a private corporation acting under private obligations?

Remedies and Jurisdictional Error

Type of error	Notes
Jurisdictional	A jurisdictional error occurs when a decision-maker exceeds the limits of the authority conferred by statute. It is the error that invalidates a decision and triggers constitutional writs. <i>Kirk</i> entrenches jurisdictional error constitutionally. <i>Kirk</i> holds that State Parliaments cannot remove or limit the State Supreme Courts’ supervisory jurisdiction to review jurisdictional error. Issue: Is this a jurisdictional error? ☐ Step 1: Identify the error ○ The decision-maker failed to consider X / misconstrued Y / denied procedural fairness. A jurisdictional error arises where the decision-maker: ● significant breaches of administrative law norms ● exceeds the limits of their statutory power ○ A licensing authority is empowered to suspend licences only for safety breaches. They suspend a licence because the applicant “has a bad attitude” and “should not be in the industry.” ● misunderstands the nature of their function

- A tribunal tasked with conducting a **merits review** mistakenly believes it is limited to reviewing **only legal errors**, like an appellate court.
- **misconstrues the statute**
 - A migration officer interprets “compelling circumstances” as meaning “**life-threatening circumstances only**”, even though the statute clearly contemplates broader humanitarian factors.
- **fails to comply with essential procedural requirements**
 - A disciplinary board relies on a confidential complaint but **does not disclose** the substance of the allegations to the affected person.
 - A statute requires the decision-maker to **hold a hearing**, but they decide the matter “on the papers” to save time.
- **makes a material legal error**
 - A tribunal fails to consider a **mandatory consideration** (e.g., the best interests of a child in a migration decision). Had they considered it, there is a **realistic possibility** the outcome could have differed.
 - Decision-maker applies the wrong legal test (e.g., “balance of probabilities” instead of “reasonable satisfaction”).
- **acts irrationally or without evidence**
 - A parole board refuses parole because the applicant “might commit a terrorist act,” despite **no evidence**, no intelligence reports, and no history of violence.
 - A tribunal finds that a person “is not depressed” despite **uncontradicted medical evidence** from multiple psychiatrists.
- **misunderstands a jurisdictional fact**
 - A statute allows deportation only if a person is “**not an Australian citizen.**” The Minister mistakenly believes the applicant’s citizenship application was refused, when in fact it was **approved**.
- **constructively fails to exercise jurisdiction**
 - A Minister receives a 200-page submission but signs a pre-prepared decision **without reading it**, believing they are required to follow departmental recommendations.

☐ **Step 2: Link to statutory purpose**

- Compliance with this requirement is essential to the exercise of power because the statute requires...

☐ **Step 3: Apply materiality**

- Under *Hossain*, *MZAPC* and *LPDT*, the error is jurisdictional only if it is material — meaning there is a realistic possibility the decision could have been different.

Issue: Would the decision have been different but for the error?

Case	Ratio
<i>Hossain</i>	Not every breach of a statutory condition is a jurisdictional error as there is a ‘threshold for materiality’ . Only material breaches are jurisdictional errors. Materiality turns on whether complying with the statutory condition ‘could realistically have changed the outcome’ (<i>MZAPC</i>).
<i>MZAPC</i>	Applicant must show a ‘realistic possibility’ of a different outcome and this burden is on the applicant.
<i>LPDT</i>	Materiality involves ‘qualitative judicial judgment’ about limits of power as judges make a qualitative assessment of whether compliance could have made a different

☐ **Step 4: Conclusion**

- A court would most likely find that given that the error deprived the decision-maker of relevant information / distorted the statutory task / affected the reasoning process, there is a realistic possibility of a different outcome. The error is therefore material and jurisdictional

Remedies

If a decision is affected by jurisdictional error, it is invalid (*Bhardwaj*), and the constitutional writs — mandamus, prohibition, and certiorari — are available under s 75(v) (Commonwealth) or State Supreme Court supervisory jurisdiction (*Kirk*).

Remedy	Purpose	When Available for Jurisdictional Error	Leading Cases
Certiorari	Quash decision	Decision already made; jurisdictional error	<i>Kirk, Ainsworth, S157</i>
Prohibition	Stops decision maker from acting unlawfully	Before or during decision-making	<i>Kirk, S157</i>
Mandamus	Compel lawful exercise of power	Failure/refusal to act; constructive	<i>Ainsworth, M61</i>

		failure	
Injunction	Stops unlawful conduct by a <i>Commonwealth</i> officer	Against <i>Commonwealth</i> officers	<i>S157</i>
Declaration	State legal position	Flexible; often paired with certiorari	<i>Ainsworth</i>

Non-jurisdictional

A non-jurisdictional error is a legal or factual error made *within* the limits of the decision-maker's statutory authority. The decision remains **valid**, even if wrong (*Kirk*).

A non-jurisdictional error arises when the decision maker:

- **Makes harmless procedural mistakes**
 - A statute requires the decision-maker to “consider submissions within 30 days.” They consider them on day 32, but the delay has **no effect** on the applicant's rights or the outcome.
- **Minor factual mistakes**
 - A visa decision incorrectly states that the applicant worked 2 years instead of 3, but the statutory threshold is **1 year**, which the applicant clearly meets.
- **Misweighing factors (but still considering the right ones)**
 - A planning authority gives “significant weight” to traffic concerns and “moderate weight” to environmental concerns, even though a court might have balanced them differently.
 - Weighing factors is a merits issue not JR
- **Errors in reasoning that do not affect the outcome**
 - A tribunal gives one incorrect reason among several correct reasons, but the correct reasons independently justify the decision.
- **Incorrect emphasis on evidence**
 - A disciplinary board places “too much emphasis” on one witness's testimony but still considers all relevant evidence and applies the correct statutory test.
- **Minor misunderstandings of policy**
 - A migration officer slightly misstates the purpose of a departmental policy but still applies the correct statutory criteria and

reaches the same outcome.

- **Trivial breaches of procedure**
 - A licensing authority forgets to stamp a form or uses the wrong letterhead but otherwise follows the statutory process (administrative mistakes)
- **Errors that do not affect legal rights or obligations**
 - A tribunal misstates the applicant's age (e.g., 42 instead of 43) but age is irrelevant to the statutory criteria.

Materiality

An error is non-jurisdictional if it is ***not material*** to the outcome.

Consequences

- The decision remains valid (*Kirk*)
- Constitutional writs are not available (*source*)
- Only limited remedies may be available
 - Appeal on the question of law if statute allows
 - Merits review if applicable
 - Political or administrative accountability

Privative clauses

Privative clauses are statutory provisions that attempt to limit, restrict, or exclude judicial review of administrative decisions.

They usually say things like the below in the legislation:

- "This decision is final and conclusive."
- "This decision cannot be appealed or reviewed in this court or Tribunal"
- "No court may question this decision."

Case	Ratio
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Plaintiff S157

Privative clauses cannot oust review for jurisdictional error because:

- a jurisdictional error means there is no “decision under the Act” so there is no decision to protect
- Section 75(v) of the Constitution *guarantees* judicial review of Commonwealth officers for jurisdictional error

Privative clauses protect non-jurisdictional error

- They are still **valid** decisions and they are errors made within power
- Parliament can make such errors unreviewable

Kirk

Extended *S157* logic to the States:

- State Parliaments cannot remove Supreme Courts’ power to review for jurisdictional error
- Privative clauses cannot protect jurisdictional error at State level either
- Privative clauses cannot protect jurisdictional error (*Kirk*) because they are **invalid** and the Constitution entrenches review (*Kirk; S157*)

This entrenches the minimum supervisory jurisdiction.