

TOPIC 2 – Jurisdiction

STEP 1: AVENUE

1 CONSTITUTIONAL JURISDICTION

OPTION [1] (starting point)

S 75(v) AC

HC shall have OJ in all matters...

In which a writ of mandamus, prohibition, or an injunction is sought *against a CTH officer*.

S 39B JA: Grants the FC OJ in certain matters, particularly those that mirror the HC's jurisdiction under s 75 AC

S 44 JA: HC power to remit (transfer) matters that fall within its original jurisdiction to a lower court, such as a **Federal Court** or a **State Supreme Court**, if it deems it appropriate.

ELEMENTS

I. Involve a 'Matter'

a "matter" is "a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled": *[Re McBain]; [Fencott]*

- **HC Does Not have Jurisdiction over hypothetical question**

II. Against a CTH Officer/s

- CTH Minister *[Jia Legeng]* and their delegates *[Carter]*
- Employee or Officer of Government Agency
- Members of Federal Court *[Tramsways]*, military service tribunals *[Haskin]* and other tribunals *[Aala]*
- **Exempt: HC Judges** *[Carmody]*
- Contracted Cth government (executive) function to a private company *[Plaintiff M61]* (**Undetermined**) use **option 2**

III. Remedy Available

- (a) **Writ of Mandamus** (requiring a decision-maker to exercise a discretion in accordance with the law **OR**
 - (b) **Writ of Prohibition** (prohibiting a person from taking a proposed course of action or making a proposed decision) **OR**
 - (c) **injunction** (stopping or mandating an action)
 - (d) **Certiorari** (an order quashing a defective decision that has been made)
- **only available with mandamus or prohibition (Ancillary Remedy)**

Mandamus (Public Duty)

Order for mandamus will lie only in respect of a **public duty** to exercise a discretion *[WA Field]*

'**Shall**' exercise power = public duty

'**May**' exercise power = public duty if there is an alignment between purpose of the Act and the power given to minister/officer *[WA Field]* (cf. permission to hunt in conservation Act)

The court, in granting an order for mandamus, will **never order** that the decision-maker comes to a **particular decision** – it will merely order that the decision-maker exercises his discretion. *[WA Field]*

Prohibition and certiorari (Public Power)

In order for prohibition and certiorari to operate, the **decision** that is sought to be challenged **must be made pursuant to the exercise of public power**.

A private body can exercise public power...

If, in the absence of a private body carrying out the function, the government would invariably carry out the function (**power has a public nature**) *[Datafin]* *[Neat]*.

Non-binding report/advice? → Remedy not available

- **Certiorari** operates only to quash the legal effects or the legal consequences of the decision under review *[Ainsworth]*: **are there illegal effects?**

Injunction – order by the court that the respondent refrains from undertaking a particular act (a "prohibitory" injunction) or undertakes an act (a "mandatory" injunction).

Declaration – order by the court which has no coercive effect, but which merely declares the legal rights and liabilities of the parties.

OPTION [2] (fallback option)

S 75(iii) AC

In all matters...in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party...the High Court shall have original jurisdiction. *[Plaintiff M61]*

2 AD(JR) Act JURISDICTION

AD(JR) Act

S 8 Grants Federal Court and FCFCOA statutory review jurisdiction.

Review may only be sought:

- in respect of a **decision** (s 5);
- **conduct** in relation to a **decision** (s 6);
- the **failure** to make a **decision** (s 7).

A "**decision**" means "a decision of an administrative character made, proposed to be made, or required to be made under an enactment". (s 3)

ELEMENTS

I. **Decision** (S3 Interpretation AD(JR) Act)

EXCLUSION: (if exclusions apply **fall back on Constitutional Review**; s75(v))

- ⇒ **Decisions of the Governor General** are not subject to review. (s 3)
- ⇒ **List in Sch1**
- ⇒ **Privative Clause** (specific prevails over general (AD(JR) Act).

(2) A reference to the making of a decision includes a reference to:

- making, suspending, revoking or refusing to make an **order, award or determination**;
- giving, suspending, revoking or refusing to give a **certificate, direction, approval, consent or permission**;
- issuing, suspending, revoking or refusing to issue a **licence, authority or other instrument**;
- imposing a condition or restriction**
- making a **declaration, demand or requirement**
- retaining, or refusing to deliver up, an article;
- doing or refusing to do **any other act or thing**.

(3) Where provision is made by an enactment for the **making of a report or recommendation before a decision** is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation **shall itself be deemed**, for the purposes of this Act, to be the making of a **decision**.

Report/Recommendation = decision if **required** under statute *[ABT v Bond]*

[ABT v Bond]

A "decision" must be:

- **Provided for by statute:** It must be a decision made under an enactment
- **Final or operative:** It should resolve a substantive issue in a practical sense, not merely be a step in the reasoning process *(unless)*.
- **Substantive, not procedural:** It must determine a core issue, not just a procedural matter like refusing an adjournment.

Intermediate/ Stepping-stone decisions are not reviewable unless the statute explicitly makes them a decision point. **HOWEVER**, they are not ignored in judicial review. They "flow into" the final reviewable decision (and so are treated as if they were made with respect to the reviewable decision).

Conduct in relation to a decision [s 6(1)]

conduct in relation to a decision is activity, of a **procedural nature**, taken in relation to a reviewable decision *[ABT v Bond]*

- ⇒ **S 3(5)**; preparatory act including...
 - **gathering of evidence / inquiry / investigation/ making an appointment**

II. Of an administrative character

Administrative acts are concerned with the application of **general rules to particular cases**. **MUST NOT BE A Legislative acts** (concerned with the creation or formulation of new rules of law having general application) [Grunseit]

Legislative acts [Roche]

- ⇒ Applied to substance in general not just substance manufactured by Roche
- ⇒ Public consultation
- ⇒ Poisons Standard an important element in national system of regulation and incorporated broad public health considerations
- ⇒ Merits review not available to legislative decision

III. Under an enactment

Enactment – includes an Act, and also, amongst other things, an instrument (including rules, regulations or by-laws) made under an Act (s 3).

TEST [Griffith Uni v Tang]

- I. the decision was expressly or impliedly required or authorised by the enactment; **AND**
- II. the decision itself confers, alters or otherwise affects legal rights or obligations

STEP 2: NON-JUSTICIABILITY

Even if jurisdiction exists, is the matter "Non-Justiciable" (i.e., too political for a court to touch)?

1. Status of Decision-Maker (**HISTORIC: No longer a barrier**)

- The fact that a decision is made by a high-level official (Cabinet/Minister) or via Prerogative Power does **not** automatically make it non-justiciable.
- **Authority:** **R v Toohey**

2. Subject Matter (High Policy/Polycentricity)

- Decisions involving complex policy, international relations, or "polycentric" issues (affecting many interacting interests, e.g., economy vs environment vs indigenous rights) may be non-justiciable.
- **Authority:** **Peko Wallsend**

3. The "Merits" Limit (**stricter approach**)

- Non-justiciability arises if, to decide the ground of review, the court would have to "pass judgment on the merits" of a political decision. (**Only that ground is non-justiciable**)
- *Example:* A court can check if a Minister followed the correct procedure (*legality*) but cannot decide if the Minister's policy choice was "good" (*merits*).
- **Authority:** **Aye**

STANDING

Goal: Determine if the applicant is the "right person" to bring the application for judicial review.

STEP 1: Preliminary - The Attorney-General's Fiat

Before analysing the applicant's personal standing, consider if the Attorney-General has intervened.

- **Public Rights:** Traditionally, the Attorney-General (AG) acts as the guardian of public rights and can seek review on their own motion.
- **The Fiat:** The AG can grant a "fiat" to a private citizen to bring the action in the AG's name.
 - *Effect:* If a fiat is granted, standing is automatically satisfied.
 - *Practice:* This is rare.
- **Case Authority: *Re McBain*** (IVF only available to married person. Held as discrimination. Bishops challenged)
 - *Context:* The Catholic Bishops did not have standing themselves, so they sought the AG's fiat (which was granted for the High Court challenge, though the issue in *Re McBain* was complex regarding their later status as *amicus curiae*).

STEP 2: Choose the Test (Jurisdiction)

Which Act or jurisdiction are you in?

- **Common Law (s 75(v) / s 39B):** The test is whether the applicant has a "**Special Interest**".
- **AD(JR) Act (s 5 / s 3):** The test is whether the applicant is a "**Person Aggrieved**".
- **The Convergence:**
 - The "Person Aggrieved" test in the AD(JR) Act is generally interpreted as being the same as the common law "Special Interest" test.
 - AD(JR) s 3(4): Defines "person aggrieved" as a person whose **interests are adversely affected** by the D.

STEP 3: The General Test - "Special Interest" / "Aggrieved"

- **The Rule:** A person has standing if they have a "special interest" in the subject matter of the action.
- **What is NOT enough:**
 - A "**mere intellectual or emotional concern**" is **insufficient**. Must be more than a mere busybody.
 - Just because you care deeply about an issue (e.g., the environment) does not give you standing.
 - You must gain some advantage (more than satisfaction of righting a wrong) if the action succeeds or suffers some disadvantage (other than grievance or debt of costs) if it fails.
- **Case Authority: *ACF Case***
 - *Facts:* ACF challenged a decision to approve a resort in Yeppoon.
 - *Held:* ACF had no standing. They were just a group of people with strong views. They had no property rights or specific "special" interest different from the general public.

STEP 4: Applying the Test to Specific Interests

Does the applicant fall into one of the established categories of "Special Interest"?

A. Cultural and Spiritual Interests

- **Rule:** Non-material interests (like cultural or spiritual connection to land) *can* support standing if they are intense and specific.
- **Case Authority: *Onus v Alcoa***. (expansive approach to private interest standing model)
 - *Facts:* Tribe challenged construction on land containing Aboriginal relics.
 - *Held:* They had standing.
 - *Factors:* They were the custodians of the relics; they used the land; they would be affected in a substantially greater degree OR significantly different manner than the public at large. Look at proximity of the matter.

B. Economic Interests

- **Rule:** Financial loss or competitive detriment often grants standing.
- **Case Authority: *Bateman's Bay***
 - *Held:* A business has standing where a decision made involves a rival and causes "severe" competitive detriment (sufficiently material harm).
- **Indirectly Affected: Case Authority: *Argos v Corbell***.
 - *Facts:* Commercial landlords challenged the approval of a supermarket development nearby (fear of losing tenants/profit).
 - *Held:* A person has standing where a decision affects their interests in a '**not insignificant way**' even if person not most directly affected by the decision. Landlord here had no standing affect insignificant.

STEP 5: Standing for Organisations (The "North Coast" Factors)

If the applicant is an environmental group or public interest organisation (and *ACF v Cth* says "emotional concern" isn't enough), how do they get standing?

- **The Multi-Factorial Test:** The court looks at the organisation's relationship with the subject matter.
- **Case Authority:** *North Coast*
- **The Factors: Commitment and Expertise**
 1. Is it the **peak body** for that area/issue?
 2. Has it been **recognized by the government** (e.g., received grants, invited to committees)?
 3. Has it conducted **research** or projects in the area?
 4. Has it made **submissions** on the specific issue?
 - *Held:* North Coast had standing because it checked these boxes (unlike the ACF in the 1980 case).
- **Application to Foreign Bodies:**
 - **Case Authority:** *Angels*
 - *Facts:* A **Foreign** (German) animal welfare group challenged live export decisions in Australia.
 - *Held:* They had standing.
 - *Factors:* Even though foreign, they had an Australian representative, spent their own money on research/investigation, and alerted the Dept to breaches. This showed more than just "emotional concern".

STEP 6: Limitations (Subject Matter)

Even if the person has an interest, does the *Act* recognise it?

- **The "Scope and Purpose" Test:**
 - The interest asserted by the applicant must be consistent with the **subject matter, scope, and purpose** of the legislation under which the decision was made.
- **Case Authority:** *Right to Life* (**effectively overruled in *Argos***: *Act scope cannot narrow standing*)
 - *Facts:* Right to Life tried to stop clinical trials of an abortion drug.
 - *Held:* **No standing.**
 - *Reasoning:* The *Therapeutic Goods Act* was about the quality/safety of drugs, not the moral/social "sanctity of life". Their interest (opposing abortion) was arguably alien to the purpose of the Act.

STEP 7: Alternative Participation

If standing is denied or shaky, are there other ways to join?

- **1. Joinder (AD(JR) Act s 12):**
 - An interested person can apply to be made a party to existing proceedings. The court has discretion.
 - **2. Amicus Curiae ("Friend of the Court"):**
 - A person (usually an expert or special interest group) applies to help the court by making submissions, but they are **not a party**.
 - *Limitation:* Because they are not a party, they cannot appeal the decision or claim costs.
 - *Example:* *Re McBain* (Catholic Bishops were heard as Amicus but **could not appeal/ judicially review**).
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Procedural Fairness (Topic 6)

STEP 1: Does the Hearing Rule Apply? (The Threshold Test)

You must first establish if the decision-maker was under a common law duty to afford procedural fairness.

- **The General Test:**
 - There is a common law duty to act fairly when an administrative decision affects **rights, interests, and legitimate expectations** in a direct and immediate way [*Kioa v West* (Mason J)]
- **Analyse the "Effect" on the Applicant:**
 - **Rights:** Does it affect legal rights (e.g., property rights, demolition orders)? [*Cooper*]
 - **Interests:** Broadly defined. Includes personal liberty, status, preservation of livelihood, and reputation. *Kioa*
 - *Note:* Need not be a strict legal right or financial interest.
 - **Legitimate Expectations:** **Rejected by HCA in WZARH**
 - *Historical Context:* Expectation that government will act in a particular way based on behaviour/promises (e.g., [*Cole*] - promise regarding resignation/record).
 - *Current Law:* **Do not rely on this.** HCA has rejected "legitimate expectation" as a necessary touchstone. It is "unnecessary and unhelpful." Rely on "Rights and Interests" [*WZARH*]
- **Are there "Policy/Political" Limits?**
 - Decisions affecting general social/political goals may not attract the hearing rule, unlike decisions affecting individuals directly. Especially where multi-stage decision making process exists where issues raised earlier.
 - However, even Cabinet decisions can be subject to the rule if they affect an individual specifically.
 - *Case:* [*O'Shea*]
 - *Outcome:* Procedural fairness applied, but the content was limited. O'Shea was not entitled to be heard on "high level" political matters (public confidence), only on matters personal to him.

STEP 2: Has the Duty Been Excluded?

The legislature can exclude the duty, but the intent must be "clear and manifest". *Kioa*

- **Express Exclusion:**
 - Look for statutory clauses saying a code is an "exhaustive statement" of the natural justice rules.
 - **Rule:** If the statute says it is exhaustive regarding specific subsections, it might not exclude the common law hearing rule for *other* sections (strict construction: offshore vs onshore applicants). [*Saeed*]
- **Implied Exclusion:**
 - Does a right of appeal/review impliedly exclude the hearing rule at the primary stage?
 - *Factors to weigh Ex parte Miah* (McHugh J):
 1. Nature of the appellate body. (i.e. Court = independent vs internal body)
 2. Nature of the decision. (i.e. preliminary = review less likely vs final)
 3. Breadth of the appeal (de novo = review less likely as new hearing can cure defects).
 4. Formalities required for original decision
 5. Public vs private nature (Public = review more likely to rebut any adverse inferences)
 6. Seriousness of the subject matter. (more serious = review more likely)

STEP 3: Was the Hearing Rule Breached?

If the rule applies and hasn't been excluded, what did fairness require in this specific case?

- **Flexibility Principle:**
 - What is fair depends on the circumstances of the case [*Angliss Group*]
- **Requirement 1: Notification:**
 - Was prior notice given? Was the time sufficient to prepare?
- **Requirement 2: Disclosure:**
 - **The Test:** Opportunity must be given to deal with adverse information that is **credible, relevant, and significant**: *Kioa* (Brennan J).
 - **Confidential/Unproven Information:** Even if the decision-maker claims they "ignored" the information, if it was credible/relevant/significant, it should have been disclosed so the applicant could address it.
 - *Case:* [*VEAL*] (The "junk mail" letter case. The Tribunal said they ignored the letter, but the High Court held fairness required disclosing it because it was relevant and not completely lacking credibility).
- **Requirement 3: Opportunity to Respond:**
 - Was the hearing adequate (written vs oral)?
 - **Refusal to Adjourn:** Can constitute a breach if it denies a real opportunity to present a case.
 - *Case:* [*Li*] (Tribunal acted unreasonably by refusing to adjourn pending a skills assessment).

STEP 4: Was the **Rule Against Bias** Breached?

- **Actual Bias:**
 - **Test:** Decision-maker had a state of mind "so committed to a conclusion already formed as to be incapable of alteration". **[Jia Legeng]**
 - *Note:* Very hard to prove. Rarely used.
- **Apprehended Bias (The Main Test):**
 - **Test:** Would a **fair-minded lay observer** reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question?
 - **The Ebner Steps:**
 1. **Identify the Matter:** What specific behaviour/interest suggests bias?
Bias conduct **[Webb v R]**:
 - i. Interest (**Pecuniary** or otherwise).
 - ii. Conduct (Behaviour in/out of court).
 - iii. **Association** (Relationship with a party).
 - iv. Extraneous Information (Knowledge of prejudicial facts).
 2. **Logical Connection:** Link the matter to a feared deviation from deciding on merits.
 3. **Reasonableness:** Is the apprehension reasonable?

STEP 5: Specific Bias Scenarios

- **Ministers and Political Comments:**
 - Ministers are held to a **lower standard** than judges. They are accountable to the electorate and expected to engage in political debate.
 - **Rule:** A fair-minded observer would be slow to find bias just because a Minister expressed strong views publicly (radio interview) before making a decision. **[Jia Legeng]**
- **Pecuniary (Financial) Interest:**
 - **Old Rule:** Automatic disqualification (**Dimes case**).
 - **Current Rule:** Apply the standard **Ebner** test. No automatic disqualification. **[Ebner]**
 - **Application:** A judge owning shares in a bank involved in litigation might not be biased if the outcome won't realistically affect the share price/judge's finances.
- **Previous Involvement (Incompatibility):**
 - Can a prosecutor/accuser later sit as the judge? Or Investigator be a DM?
 - **Authority:** **[Isbester]**
 - **Facts:** Council employee (Hughes) prosecuted a dog owner in court, then sat on the administrative panel deciding to put down the dog.
 - **Held:** This was a breach. A fair-minded observer would apprehend that her interest as the "prosecutor" would carry over to the panel.

STEP 6: Defences to Bias

Even if bias is established, does an exception apply?

- **Exclusion:** Express exception to being biased
- **Waiver:** Did the applicant know of the bias but continue without objection? (Can be express or implied)
- **Necessity:** If no other decision-maker can hear the case (e.g., all magistrates have the same conflict), the biased decision-maker may proceed.

Final Note on the "Trigger"

Practically, courts usually only apply the "Rights/Interests" threshold test to the **Hearing Rule**. They rarely strictly apply it to the Bias rule, though theoretically, it is part of the same framework.

Merits Review (Topic 12)

STEP 1: Jurisdiction (Can the Tribunal hear this?)

Unlike courts, the Tribunal has no general jurisdiction. It needs specific authorization.

- **The Source of Power:**
 - **s12 ART:** D is reviewable if Act/ legislative instrument provides for an application to be made to the Tribunal.
 - **s12(1) Minister decision || s12(2) Delegate/empowered person**
 - *Note:* You must always look for the "enactment" that authorises the review.
- **What if the Original Decision was "Legally Flawed"?**
 - *Scenario:* The government argues the ART cannot review the decision because the original DM (other than the Minister) under **s12(2)** had no power to make it in the first place (i.e., it was a nullity).
 - **Authority:** *Brian Lawlor*
 - *Held:* The Tribunal **can** review a decision even if it was legally flawed or beyond power.
 - *Reasoning:* A "decision" essentially means a "purported decision". If the agency *claimed* to make a decision, the ART has jurisdiction to review it.

STEP 2: Standing (Who can apply?)

- **The Test: s17(1):** An application may be made by "any person... whose **interests are affected** by the decision"
- Application may be **made on behalf** of affected person with jurisdiction (**s35 ART Act**)
- **Defining "Interests Affected":**
 - It is broader than "legal rights". It includes proprietary, financial, and reputation interests: *Control Investment*
 - Apply same **private standing model** under ADJR Act
 - *Key Principle:* The interest must be "genuine" and not merely an intellectual or emotional concern
- **Organisation / Association:** their interests will be affected if the decision relates to matters included in the **object/purpose** of the organisation at the time of the decision (**s15(a) ART Act**)

STEP 3: The Nature of the Review

What is the Tribunal actually doing?

- ▶ **s 54 ART:** "For the purposes of reviewing a reviewable decision, the Tribunal may exercise all the powers and discretions that are conferred on the decision-maker by an Act or an instrument made under an Act."
- **1. "Standing in the Shoes" (De Novo Review)**
 - The Tribunal puts itself in the position of the original DM and exercises the same powers and discretions.
 - It is a "fresh hearing". It is not limited to the materials before the original maker. *[Re Greenham]*
- **2. The Timing of the Facts (The Shi Principle)**
 - **Critical Rule:** The Tribunal decides based on the facts and law **as they exist at the date of the Tribunal's decision**, NOT the date of the original decision.
 - *Example:* If a migration agent was suspended for misconduct but has rehabilitated *during* the waiting period for the review, the Tribunal must consider the rehabilitation. *[Shi]*

STEP 4: The Decision-Making Test

- **The "Correct or Preferable" Test:**
 - The Tribunal must determine what is the "correct or preferable" decision.
 - **Authority:** *Drake (No 1)*
 - *Differentiation:*
 - **Correct:** When there is only one right answer (e.g., calculating a pension entitlement).
 - **Preferable:** When there is a discretion/choice to be made (e.g., granting a visa on compassionate grounds).

STEP 5: Dealing with Government Policy

If the Minister has a strict policy (e.g., "Always deport drug offenders"), must the Tribunal follow it?

- **General Rule:**
 - The Tribunal is **not bound** by government policy (unlike departmental officers).
- **The Exception (Consistency):**
 - The Tribunal *should* generally apply a lawful government policy unless there are "**cogent reasons**" to depart from it in the individual case.
 - **Authority:** *Re Drake (No 2)* (Brennan J).
 - *Reasoning:* Consistency and fairness are important administrative values. If the policy is lawful and fair, it should be applied unless the specific facts justify an exception.

STEP 6: Evidence and Procedure

- **Rules of Evidence:**
 - The Tribunal is **not bound** by the rules of evidence. It may inform itself as it thinks appropriate (**s 52**)
 - Procedure is within the discretion of the Tribunal (**s 49(1)**)
- **BUT - The "Rational Probative Force" Limit: *Re Pochi***
 - Just because rules of evidence don't apply doesn't mean the Tribunal can guess. Decisions must be based on material that has "rational probative force".
 - *Held*: A decision cannot be based on suspicion or speculation.
- **The Onus of Proof: *McDonald***
 - *Held*: Because it is an administrative inquiry, there is **no formal legal onus of proof** on the applicant to prove their case (unlike in a criminal or civil trial).
- **Standard of Proof: *Epeabanka***
 - *Held*: While there is no formal onus, the Tribunal is "more likely to arrive at the correct or preferable decision if its obligation is to determine the existence of facts in accordance with the **civil standard**" (Balance of Probabilities).

STEP 7: Powers and Outcomes

- **s 105 Powers:**
 - The Tribunal can:
 1. **Affirm** the decision: s105(a)
 2. **Vary** the decision: s105(b)
 3. **Set aside** the decision and **substitute** a new one: s105(c)(i)
 4. **Set aside** the decision and **remit** it for reconsideration: s105(c)(ii)
 - **Appeals:**
 - **Section 172**: Appeals from the ART go to the **Federal Court**, but **ONLY** on a **Question of Law**.
-