

NOTES

- Federal matters: Always start with ADJR Act and S39B Judiciary Act
- After identifying grounds of review → relate them to the corresponding provision in s(5)(1) and (2) ADJR Act
- Remedies: Use s16 ADJR Act and under s39 (Constitutional Writs)
 - IF BLOCKED = GO TO S75(V)

JUDICIAL REVIEW

Which Courts have Jurisdiction to Review?

Rule	Notes	Exam style sentences
1. Identify	→ The decision the applicant wishes the challenge → Who made the decision → The source of power that the decision maker relied on	X is advised to challenge ____ [Decision-maker's] decisions exercised under s ____ [section from exam] that ____ [what did they do? E.g. refused a licence].
If CTH ACT	→ HC or FC ADJR review: Administrative Decision (Judicial Review) Act 1977 (Cth) (ADJR Act) There must be a: → 'Decision' → Is the issue related to a decision (s 5) (Bond), s 6(1) applies to conduct for the purpose of making a decision, s (7) is for failure to make a decision ◆ S 3(3): if it's a report/recommendation made before the decision, done in the exercise of a power under the act, the act of making that report/recommendation is deemed a decision • If a recommendation is a precondition for the exercise of power → substantive decision • Carter v Minister for Aboriginal Affairs: no duty to decide → failure to grant a decision v a refusal to grant an applicant something that they have sought → if the	ADJR Act, Judiciary Act s 39B(1) and s 75(v) of the Constitution grant jurisdiction to the FC to conduct review. ADJR Act The ____ [order] is likely a decision under s 5 as it is final and operative and not a 'step in reasoning' (Bond). It was of administrative character as it involved the application of the ____ [ACT] to ____ [decision], and did not involve the making or changing of law or policy considerations, and thus was not legislative nor judicial (Roche). OR The decision was not of an administrative character as it involved [ROCHE CONSIDERATIONS... e.g. general rule affecting several

	decision-maker refuses an application, that refusal will itself be a 'decision' • ADJR ss 3(2)(a), (b), (g): refusing to make an order, refusing to give a certificate, or refusing to do any other act or thing ◆ Was it conduct? (s 6) • Bond: the distinction between reviewable decisions and conduct engaged in for the purpose of making a decision → a 'decision' connotes a determination for which provision is made by or under a statute, one that is generally substantive, final and operative. • S 6 conduct: action taken, rather than a decision made e.g. how proceedings have been conducted rather than decisions made along the way with a view to making a final determination • E.g. continuation of a way that denies natural justice = conduct • TO BE REVIEWABLE: must be part of the procedure undertaken for the purposes of making, or leading up to making a reviewable decision ◆ 'Of an administrative character' - application of the law to a particular set of facts (Roche; <i>legislative instrument under legislation act?</i>) ◆ PROCESS OF ELIMINATION → not legislative and not judicial (Burns) ○ Roche: ■ FACTS: Committee initially decided that a drug for treatment of excessive body weight could be supplied to consumers by a healthcare professional without a prescription however → changed their mind ■ Branson J found combination of factors like inclusion of substance in a particular schedule of the Poisons Standard determined its lawfulness, would apply to	industries/parliamentary scrutiny] (Roche). OR [If future lawfulness is considered] → As analogous to Roche, the inclusion of ____ to the ____ [rule/exceptions etc] under the Order will determine future lawfulness of the conduct, setting a rule (Roche). AND FULL EXPLANATION IN COMPLETED NOTES
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any substance in general, not just one manufacture by the applicant, public consultations element of decision making, Poison Standards were an important element of a national system of regulation of therapeutic goods, published in the *Gazette* and could not be varied by the executive, no provision for merits review → combination of factors = the scheduling of the drug was a decision of legislative character and not reviewable

- Does not possess judicial or legislative character
- Roche list
 - Decision determined rules of general application or whether there was an application of rules to particular cases,
 - Parliamentary control of the decision,
 - Public notification of the making of a regulation,
 - Public consultation and the extent of any such consultation,
 - Broad policy considerations imposed,
 - Regulation could've been varied,
 - Power was executive variation or control,
 - Provisions exists for MR
 - Affects several industries
- ◆ Made under an enactment (*Griffith v Tang* → the decision affects the legal rights and obligations of the applicant and the decision got its capacity to do so from a Commonwealth statute)
 - *Griffith v Tang* → Tang accused of academic misconduct by falsifying results and excluded from the university → decision for Uni to exclude a student was not a decision made under and so was not reviewable under ADJR Act
 - To be reviewable → the decision must be deprived from the enactment → the decision to exclude derived from the relationship between the university and the student

	- Does the decision in question derive from the enactment of the capacity to affect legal rights and obligations? E.g. from a contract then it is not made under enactment - Criteria: must be expressly or impliedly required or authorised by the enactment; and - Decision itself must itself confer, or otherwise affect legal rights or obligations ◆ The decision was 'final and operative' (<i>Bond</i>) e.g. not an interim decision - Making a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, shall be deemed to be making a decision (<i>Bond</i>) <i>Bond</i>: the findings that the licensees were not fit and proper persons to hold their broadcasting licences were held to be intermediate determinations made on the way to an ultimate decision → steps in the process of reasoning to the ultimate substantive decision were not procedural and so were not reviewable as 'conduct' FULL EXPLANATION IN COMPLETED NOTES	
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STATUTORY RESTRICTION OF ENTRENCHED JURISDICTION

Rule	Notes
	ASK: has parliament sought to oust or restrict review of an entrenched ___ will have standing in ___ (all aforementioned courts/FC/HC).

Common law and ADJR tests for standing are analogous and can be used interchangeably.

Privative clauses

- Private clause - statutory provision which purports to exclude the power or jurisdiction of courts to hear and determine JR proceedings, to grant the JR remedies or 'call in question' admin decisions
- Appears to remove the means by which the statutorily-fixed limits on granted powers can be enforced
 - ◆ Supervisory role of courts in judicial review is a constitutionally protected power of the Supreme Courts and part of the original jurisdiction of HC under **s 75(v) of the constitution**
- This can't be removed by privative clauses
- **ADJR Act and Judiciary Act** jurisdiction are creatures of statute, thus, can be removed by Parliament
 - ◆ If these are removed by PC, review is likely still available per the Constitutionally entrenched review jurisdiction of the HC
- PCs are read in the context of **s 75** of the Constitution and the entrenched minimum provision of JR in state courts

Plaintiff S157

- No general rule as to the effect of privative clauses:
 - ◆ Must be ascertained from its terms
 - ◆ Effect will depend entirely on the outcome of its reconciliation with other provisions
 - ◆ Must have regard to whole legislative instrument

Step 1: identify restriction

1. Where a provision purports to **exclude the power of jurisdiction of courts** to hear/determine judicial proceedings, grant remedies etc.
2. E.g. Asserting the finality of decision
 - a. That a decision is 'final and conclusive' or 'final and binding' (*Kirk*)
3. Denying specific remedies
 - a. A decision 'shall not be challenged, appealed against, quashed etc.'

Step 2: determine effect

1. Can the clause be reconciled with the constitutionally entrenched minimum of JR for jurisdictional error in **s 75(v)**?
2. A PC **cannot remove the Constitutionally protected supervisory role of the HC and Supreme Courts to review for jurisdictional error s 75(v)**
 - a. Thus, if a jurisdictional error is found, privative clauses likely have a very limited role, may only be able to prevent judicial review for non-jurisdictional errors
3. A basic presumption of statutory interpretation is that **parliament intended its statutes to be valid**. Provisions will be read in a way that **ensures their constitutional validity** (*Plaintiff s 157*)

Plaintiff s 157 (USE THIS FOR CTH ACTS)

FACTS:

- P challenged decision of RRT on ground that it was made in breach of rules of procedural fairness
- **Privative clause, s474 of Migration act provided that a privative clause decision is final and conclusive; and must not be challenged; and not subject to remedies** → **search for something like this in PQ**
- P argued that this was inconsistent with s 75(v) of the constitution → inconsistency led to invalidity of it
 - a. **Plaintiff s 157**: a **'privative clause' was defined to mean a 'decision of administrative character made...under this Act'**. The court reasoned that a decision affected by JE **was not a decision made** under the act and so s 474 did not protect JE from review. Thus, it did not conflict with s 75(v). **The provision here was read down to only purport to prevent JR of non-jurisdictional error. Purported decisions aren't included and if they were, likely invalid.**
- 4. In cases where the privative clause cannot be read down, then it will be declared as **unconstitutional and thus invalid** in order to preserve the jurisdiction of the HC

Kirk:

- The supervisory role of the Supreme Courts to correct and restrain jurisdictional error through a grant of prohibition, certiorari and mandamus is a constitutionally protected 'defining characteristic' of a SC
- It is beyond the power of a state parliament to remove a defining characteristic of a SC. PC clause at issue in **Kirk** was not held invalid, but was read down to not prevent review for JE
- Held that while this analysis meant that PC cannot prevent review for JE, state legislatures **may still preclude JR for non-jurisdictional error of law on the face of the record because a JE is not a decision** → "cannot seek review for a decision under the act" is only applicable to non JE
- Hence, **legislation which denies the availability of relief for non jurisdictional error of law, appearing on the face of the record is not beyond power**
- **State and federal courts are still constitutionally protected as they have a supervisory role under the constitution**

Bodrudazza

- The application was made **beyond the maximum period of 84 days allowed**
- **HC held:**
 - S 486A of the Migration Act was invalid because it **curtailed or limited the right or ability of the applicant to seek relief under s 75(v)** as to be inconsistent with the place of that provision in the constitutional structure
 - Parliament placed an absolute limit which was inconsistent with the constitution
 - The attempt to **restrict jurisdiction was held to be invalid**

Graham v Minister for Immigration; Te Puia v Minister for Immigration and Border Protection

	● FACTS: Mr Graham and Mr Te Puia's visas were cancelled under s 501(3) of <i>Migration Act</i> ● In deciding to cancel their visas, the Minister took into account information protected under s503A of the Act ● This information was not provided for comment → reluctant to provide sensitive information ● S 503A protected information from 42 Australian government bodies and foreign law enforcement bodies from the public including the court ● s503A(2) is invalid to the extent only that s 503(A)(2)(c) would apply to prevent the Minister from being required to divulge or communicate information to the HC or FC exercising s 75(v) jurisdiction to review a character decision to which the information is relevant STEPS 1. Identify privative clause from legislation 2. Statutory construction - can the statute be construed in a way that does not remove the constitutionally entrenched JR jurisdiction (Plaintiff S 157 (federal); (Kirk) a. Consider <i>whole</i> statute b. Two rules of construction (Plaintiff S 157) 3. If yes - <i>jurisdiction not ousted but clause still valid</i> 4. If no - <i>privative clause is invalid</i>
No-invalidity clauses	FULL EXPLANATION IN COMPLETED NOTES
Broad and non-compellable powers	FULL EXPLANATION IN COMPLETED NOTES
Time limits	FULL EXPLANATION IN COMPLETED NOTES

RIGHT TO REASONS

Rule	Notes	
Right to	<u>Steps</u>	RIGHT

reasons	1. Have reasons already been given? 2. If applying under the ADJR Act: a. Seek reasons under s 13 b. Does an exclusion apply? i. S 13(1) – decisions not covered under the ADJR Act ii. S 13(11) – reasons already given, or applicant has a right to statement of reasons under AAT Act s 28 iii. Schedule 2: • Defence force • Specific <i>Migration Act</i> decisions • National security • Criminal justice 3. If applying at common law • Osmond: no duty to give reasons unless there are special circumstances ◦ Natural justice required reasons to be given ◦ Procedural fair play demand that an administrative decision maker provides rights • Wingfoot: failure to give reasons does not result in invalidity • Zenta: whether a person has a right to demand reasons when he or she is affected by a decision made in the exercise of public power is generally a matter for the legislature to determine 4. What is required in the reasons statement? • <i>Act Interpretation Act s 25D</i> – findings and material questions of fact and refer to the evidence or other material in which those facts were based • Wingfoot – must explain the actual path of reasoning • S 13(1) ADJR – Act grants right to reasons upon request ◦ But there must be a reviewable administrative decision under the AD(JR) Act and the person applying for reasons must have standing	Assuming ADJR applies, ___ can seek reasons (s 13), however based on the facts, it is unlikely that a special circumstance exists to satisfy the common law (Osmond). NO RIGHT As reasons have already been provided by ___ [decision-maker], it is uncontentious as to whether a right to reasons arises (s 13(11)). SPECIAL CIRCUMSTANCES There is no common law right to reasons (Osmond). However, FULL EXPLANATION IN COMPLETED NOTES
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	○ The applicant does not actually have to commence judicial review proceedings to get access to reasons: it is enough that they are a person entitled to do so	
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RELEVANT / IRRELEVANT CONSIDERATIONS

Rule	Notes	Exam style sentences
GROUND 7 Relevant /irrelevant considerations	• Did the decision-maker, in exercising their power, consider the matter in question in accordance with the statute? S (5)(1)(e) • NOTE: If disputing the weight of consideration → seek unreasonableness ○ NOTE: You aren't arguing that too much or too little weight has been placed upon the matter → INSTEAD → arguing that it should not have been considered at all or that it should have been considered but was not ■ Easier to argue irrelevant consideration than acting for improper purpose	
STEP 1 Was the matter relevant or irrelevant? Question statutory construction	• Irrelevant consideration (s (5)(2)(a): has the decision-maker considered a matter it should not have considered at all (Pham) ○ TEST: was the decision-maker 'obliged to disregard' the consideration → Applicant is arguing that the matter should NOT have been considered at all • Relevant consideration (s (5)(2)(b): has the decision-maker not considered a matter that it was legally bound to have considered/taken into account (Peko-Wallsend) ○ Statute can provide an express list of matters to be considered → STRONG indication that these must be considered ■ List may not always be exhaustive	It must be considered if in exercising their power, ____ [decision maker] failed to take into account ____ [identify matter], in accordance with ____ [statute] (Peko-Wallsend). [From the express list/subject matter/scope and purpose of the act] ____ it is apparent that the decision ____ (Peko-Wallsend).

	- Additional factors may be considered re: nature of the power exercised and purpose of the provision (Murphyores) - Was the consideration relevant to the exercise of the minister's power? <u>No express list</u>: facts are to be determined by reference to the 'subject matter, scope and purpose of the act' (Peko Wallsend) - International law only has force to the extent it is applied in legislation (Plaintiff M1/2021)	
STEP 2 Factual inquiry into whether the matter was considered (Tickner)? Whether the Minister was required to consider it personally (Tickner)	FULL EXPLANATION IN COMPLETED NOTES	Yes: Conducting a factual inquiry into whether the matter was given 'proper, genuine and realistic consideration' (Hindi), it is apparent that ____ the Minister personally considered and turned his mind to it NO, Minister did not Conducting a factual inquiry into whether the matter was given 'proper, genuine and realistic consideration', relying on another person's summary of ____ would be insufficient for consideration because they were someone else's view of them. Therefore, the legislation required the Minister to form his own view, consideration to the matter was no given. FULL EXPLANATION IN COMPLETED NOTES
STEP 3: Whether the failure to consider the relevant matter is significant enough to invalidate the decision	FULL EXPLANATION IN COMPLETED NOTES	

Jurisdictional Error	FULL EXPLANATION IN COMPLETED NOTES
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