

- (1) *[there was actual failure of the requirement]* → ____ [e.g., no report was made, no hearing was provided, no further inquiries were made, there was no impact statement]
- (2) *[there was an actual report made, but it is invalid]* → ____ the s ____ [no. 1] ____ [e.g., report] relied upon was unauthorised because ____ [e.g., the subjective/objective jurisdictional fact did not exist, OR there was some other jurisdictional error].

CASE FACTS:

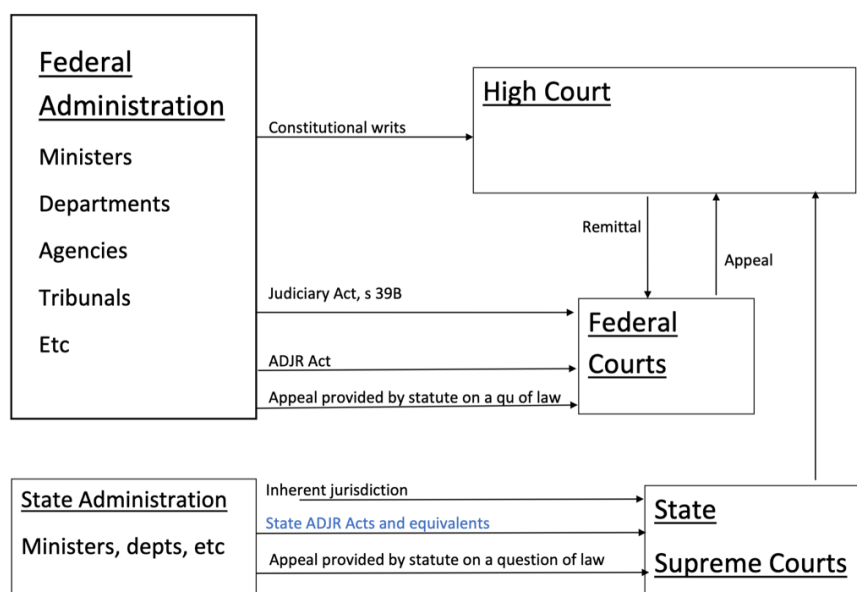
- **Brian Lawlor (1979):** Revocation of licence. “Decision” by COC – BL’s was not a fit and proper person to hold the licence. **ISSUE:** Argued by COC that this was not a “legally effective, or legally valid decision” thus cannot be appealed to the AAT. **HELD:** This is an actual decision and AAT has jurisdiction.
- **Drake:** Appeal to federal court on the grounds that the AAT did not make independent judgement. AAT applied Minister’s deportation policy statement and affirmed the decision to deport Drake. **HELD:** AAT placed too much weight on the policy and failed to make independent judgement.
- **Drake (No 2):** rehearing of Drake’s application – a merit review thus not a precedent.
- **Shi:** Shi applied to review MARA’s decision to cancel Shi’s registration as a migration agent. AAT set aside MARA’s decision by considering materials after MARA’s decision. **HELD by HC:** appropriate to consider all materials.
- **MZZZW:** Decision to reject applicant’s protection visa. 2nd RRT reviewer provided reasons very similar to 1st review and copied a paragraph. **HELD:** fail to “consider for itself” with fresh eyes.

PART 2: JUDICIAL REVIEW

1. Jurisdiction

SUMMARY:

- **Issue:** Does the court have jurisdiction to engage in judicial review of the decision or act?



1. Is the decision made under a Commonwealth Act or a State (NSW) Act?

[1] Commonwealth/Federal Decision

- **RULE:** The decision was made under a Commonwealth Act. Hence, ____ [applicant] must bring the claim for judicial review in the Federal Court under the *Administrative Decisions (Judicial Review) Act* ('ADJR Act') or the

Judiciary Act, s 39B, or in the High Court under its inherent jurisdiction. →

- **[A] Federal Court**
- **[B] High Court**

[A] Federal Court

- The Federal Court has jurisdiction to engage in judicial review of administrative decisions under four sources:
 - **(1)** The ADJR Act
 - **(2)** The Judiciary Act, s 39B
 - **(3)** Appeal on a question of law [e.g., AAT Act, s 44]
 - **(4)** Matters remitted from HCA (Judiciary Act, s 44)

Option (1): ADJR Act [FEDERAL]

STEP 1: Identify the impugned decision.

- **Issue:** Is it a **decision** (s 5), **conduct** for the purpose of making a decision (s 6), or a **failure** to make a decision (s 7)?
- **RULE:** ____ [applicant] can make an application under the **ADJR Act** for judicial review of ____'s [the decision-maker – e.g., the Minister]:
 - **'decision'** to ____ [e.g., cancel a license] (s 5)
 - **'conduct'** of ____ [e.g., making investigations] because it was **engaged in for the purpose** of making a **decision** to ____ [e.g., cancel a license] (s 6), and is **'procedural'** conduct rather than substantive (**Bond**)
 - **s 3(5)** expressly provides that 'conduct' satisfying s 6 includes acts that are preparatory to the making of the decision, such as gathering evidence and holding an inquiry or investigation.
 - **'Failure to make a decision'** to ____ [e.g., cancel a license], because ____ [decision-maker] had a **duty to make that decision** under the Act (s 7)

STEP 2: Is the decision a 'decision to which this Act applies' for a review under s 5; s 6; s 7?

- **RULE:** The Federal Court has jurisdiction to review this application if that **'decision'** is of an **'administrative character'**, and is made under an **'enactment'** (s 3(1))
 - **[1]** Decision
 - **[2]** Administrative character
 - **[3]** Made under an enactment
- **Exclusion in s 3(1):**
 - a decision of the Governor-General (s 3(1)(c))
 - decisions excluded in **Schedule 1 (s 3(1)(d))** – e.g., certain decisions made in diverse areas – such as tax assessments, criminal process, employment, migration, security and defence

[1] 'Decision'

- **RULE:** To be reviewable, the "decision" must be the **final and operative** decision that resolves an actual **'substantive'** issue, rather than a step in the reasoning process (**Bond**)
- **Not Reviewable:**
 - **Procedural Decisions:** Decision that determines 'procedural' matters, such as a decision to not adjourn, is not a reviewable decision under s 5 (**Bond**)
 - **Finding of Fact:** A **finding of fact** is not a reviewable decision because it is a step along the way (**Bond**)
- **Reviewable – Intermediate Decision Required by the Act:** However, if the intermediate decision, such as the making of a report or recommendations, is required or permitted by the Act, then it is a reviewable decision (**Bond; s 3(3)**)
 - **Scope of Provision:** the reviewable decisions are strictly limited to the part of decision covered by the scope of provision (**Bond:** the decision that the company was not fit and proper person to hold the licence is reviewable (as company is the licensee in provision), but the decision that Bond (owner of company) was not fit and proper is out of scope of provision and not reviewable)
- **[YES]**
 - **抄:** ____'s [decision-maker] decision to ____ [e.g., cancel a licence] is a reviewable decision, because it is the **final and operative decision**, and not a step along the way (**Bond**)
 - **[Examples of 'decisions' – s 5; 6; 7]**
 - A 'decision' within the meaning of s 3(1) includes [s 3(2)]:
 - making, suspending, revoking or refusing to make an order, award or determination (s 3(2)(a))
 - giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission (s 3(2)(b))
 - issuing, suspending, revoking or refusing to issue a licence, authority or other instrument (s 3(2)(c))

- imposing a condition or restriction (**s 3(2)(d)**)
- making a declaration, demand or requirement (**s 3(2)(e)**)
- retaining, or refusing to deliver up, an article (**s 3(2)(f)**)
- doing or refusing to do any other act or thing (**s 3(2)(g)**)
- A 'decision' within the meaning of **s 3(1)** also includes:
 - The making of a report or recommendation prior to a final decision, if such report or recommendation is required or permitted to be made under the enactment (**Bond**; **s 3(3)**)
 - **[Examples of 'conduct' – s6]**
- 'Conduct' that satisfies s 6 refers to 'procedural', not substantive conduct (**Bond**), and includes **[s 3(5)]**:
 - Doing any act that is preparatory to the making of the decision, such as:
 - gathering evidence
 - holding an inquiry or investigation
- **[NO] – Finding of Facts**
 - **Finding of Facts:** ____ [*decision-maker*] has only made a finding of fact, as opposed to a final decision to ____ [e.g., cancel a licence]. Since a finding of fact is only a step along the way, rather than the final and operative decision, it is not a reviewable decision (**Bond**)
 - **Note:** Had the final decision been made, the court could review the reasons for the decision to the extent that they expose a permissible grounds of review (**Bond**)
 - **Intermediate Decisions without Permission by Act:** Although intermediate decisions, such as the making of a report or recommendation, is a reviewable decision if it is required or permitted by the Act (**Bond**; **s 3(3)**), here the Act has not made any provision for such report or recommendation. Hence, the finding of fact is not a reviewable decision.
 - **Bond:**
 - The statute made provisions for findings of facts (that the licensee was not a 'fit and proper person to hold the licence') as a step to the decision to revoke licence
 - Only the finding of facts that the licensee companies (owned by Mr. Bond) was not 'fit and proper' – was a reviewable decision
 - Findings of facts that Mr. Bond (owner of the licensee company) was not 'fit and proper' – was not a reviewable decision → because the Act had not made provisions for findings of facts relating to the owners of licensee companies
 - The finding of fact is also not reviewable under **s 6**, since 'conduct' engaged in for the purpose of making a decision refers to 'procedural' conduct, which would not capture a finding of fact because such finding is an intermediate conclusion reached as a step to the final, substantive decision (**Bond**).
- [2] 'Administrative Character'**

Legislative decisions and judicial decisions are not decisions of an 'administrative character'

 - **Application of Law:** The central distinction between legislative and administrative decisions is that legislative decisions determine the content of the law, whilst administrative decisions involve the application of the law (**Roche**, [29])
 - **Indications of "Legislative" (**Roche**, [29])**
 - **Decision determining the content of rules** – which have general application [*features of the decision*]
 - has a rule-like quality (instead of general quality)
 - has a binding legal effect – cannot be varied, there is no power of executive variation or control
 - or raises questions of policy – imposes broad policy considerations
 - **Parliamentary control** and oversight of the decision [*supervision of the decision*]
 - **Public opinions**– Public consultation and public notification requirements [*production of the decision*]
 - **Creates new rules** – Decision creates new rules with general application
 - **Indications of "Administrative" (**Roche**, [29])**
 - **Applying rules:** Decision is applying general rules to particular cases
 - Provision for merits review
 - **Can be varied** by the executive decision-maker
 - **[YES] = Administrative**
 - The decision has an 'administrative character', and was not a 'legislative' decision because this decision did not determine the content of rules, but instead was applying the general rule to the particular case of ____ [*the applicant*] (**Roche**, [29])
 - There is also ____ [***** *insert from list*], which are indications of an 'administrative' decision

- (**Roche**, [29]):
 - * A provision for merits review
 - * It had no binding effect, because ____ [*decision-maker*] could vary the decision
 - * There is no mechanism for parliamentary control over the decision
 - * There is no requirement for public consultation or notification

- **[NO] = Legislative**

- The decision does not have an 'administrative character', and is instead a 'legislative' decision because this decision determined the content of rules as it ____ [e.g., created new rules governing the management of fisheries] which would have general application and had a binding legal effect (**Roche**, [29])
- Furthermore, the 'legislative' character of this decision is indicated by (**Roche**, [29]):
- The fact that it was not applying general rules to the particular case of ____ [*the applicant*]
 - It concerns broad policy considerations of ____ [e.g., public health]
 - There were public consultation and public notification requirements
 - There was a mechanism for parliamentary control over the decision, as Parliament could overturn that decision
 - E.g., decision required majority vote by nominated representatives in the different States
 - There was no provision for merits review
- Hence, the legislative decision is not reviewable.
- [If there is a legislative decision, and a final administrative decision made under that legislative decision – the **ADJR Act** is not applicable to the legislative decision] The person affected should be advised to use the **Judiciary Act** to challenge the legislative decision (see below).
 - Alternatively, while there is no HCA authority, C&M suggests that if the aggrieved person challenges the administrative decision under the **ADJR Act**, the court may review the lawfulness of the legislative decision to determine whether there was legal authority for the making of the administrative decision (**C&M**, p.46)

[Examples of 'legislative']

- E.g., fisheries management plans, 'statements of principles' for determining if injury is war-caused, policies
- **Roche** - decision to remove a drug from the Poisons Standard = legislative decision:
 - 1) The change in the Poisons Standards determined the future lawfulness of conduct in relation to that drug – and hence determined the content of rules of general application
 - 2) This decision will apply to the drug in general, not merely to the drug when manufactured or supplied by that sponsor
 - 3) Public consultation is important in the process of the decision under this Act
 - 4) The decision required majority vote by nominated representatives in the different States parliamentary control
 - 5) The decision includes broad policy considerations concerning public health
 - 6) No merits review provision
 - 7) Decision is not amenable to executive variation - so has binding effect
- **Subordinate Legislation (Regulations)**
 - Subordinate legislations are 'legislative', rather than 'administrative', so is not directly reviewable under the **ADJR Act** – it is also excluded under **s 3(1)(c)** – since the Governor-General has formal powers to make regulation
 - ____ [*applicant*] should apply for judicial review of the subordinate legislation under the **Judiciary Act** (**Bond**)
 - Alternatively, while there is no HCA authority, **C&M** suggests that if a decision has been made under the subordinate legislation, that decision can be challenged under the **ADJR Act** on the basis that there was no legal authority for it – that is, because the subordinate legislation was itself not lawful (**C&M**, p. 46)

[3] 'Made under an Enactment'

- For the decision to be 'made under an enactment' (**Tang**, [89]):
 - **[A]** The decision must be 'expressly or impliedly required or authorised' by an 'enactment' within the meaning of s 3(1), and
 - **[B]** The decision itself must 'confer, alter or otherwise affect legal rights or obligations'
 - The decision need not alter existing rights or obligations
 - It is sufficient that the enactment requires or authorises decisions which give rise to new rights or obligations
- Here, the decision to ____ [e.g., cancel a license] was made pursuant to the ____ [e.g., name of statute, or