

Jurisdiction

State & Territory Courts

Supreme Court Act NSW	
s 23	The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.
s 65	(1) The Court may order any person to fulfil any duty in the fulfilment of which the person seeking the order is personally interested.
s 69	Maintains the common law remedies, but removes the procedural requirements previously attaching to those remedies.

High Court

Commonwealth Constitution	
s 75	— High Court has original jurisdiction, in all matters: <ul style="list-style-type: none">(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.
Judiciary Act 1903 (Cth)	
s 44	— the High Court may remit matters where the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, to the Federal Court; and Federal Court will have jurisdiction.

• *Plaintiff M61* — discussion of remedies:

- **Injunction:** unnecessary - no danger of being removed prior to determination
- **Mandamus:** not possible; as the Minister had no duty to consider the exercise of the power
- **Certiorari:** ineffective where Mandamus unavailable
 - ***Certiorari and mandamus are usually granted together***
- **Declaration:** usually inappropriate where certiorari and mandamus are not available
 - But here declaration could be granted because it was directed to determining a legal controversy

Federal Court

Original Jurisdiction

Judiciary Act	
s 39B	(1) FC original jurisdiction extends to any matter where a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth. (1) A — FC's original jurisdiction also includes jurisdiction in any matter: <ul style="list-style-type: none">(a) in which the Commonwealth is seeking an injunction or a declaration; or(b) arising under the Constitution, or involving its interpretation; or(c) arising under any laws made by the Parliament (except criminal law)

The ADJR Act — Decisions Subject to Review

ADJR Act 1977	
s 3(1)	<p>(1) "decision to which this Act applies" means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):</p> <ul style="list-style-type: none"> (a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of enactment (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of enactment other than: <ul style="list-style-type: none"> (c) a decision by the Governor-General; or (d) a decision included in any of the classes of decisions set out in Schedule 1

- The key elements that enliven the application of the ADJR Act are thus:

- i. a **decision**
- ii. of an **administrative character**
- iii. made under an **enactment**

- Subject to exclusions

- Migration Act
- Decision by GG

A. "Decision"

- **Section 3(2)** provides a list of examples
- **Section 3(3) — reports & recommendations where required under enactment ✓**
- **Section 3(5) — conduct:**
 - Includes a reference to **the doing of any act or thing preparatory to the making of the decision**, including the taking of evidence or the holding of an inquiry or investigation.
 - See **section 6 for conduct forming a ground of review**

<i>Australian Broadcasting Tribunal v Bond (1990)</i>	
Facts	<ul style="list-style-type: none"> • Bond attempted to stall the administrative process by challenging every step of the process as a 'decision' or 'conduct'.
Issue	What amounts to a decision under the ADJR Act?
Outcome	<ul style="list-style-type: none"> • 'Decision' refers to administrative activity that is substantive and final, operative or determinative <ul style="list-style-type: none"> • Where a statute specifically provides for the making of a decision which is a step in reaching a final decision, this is reviewable — see s 3(3) • The requirement of finality does not put intermediate decisions out of reach; it just means that they will likely be reviewed as part of the ultimate decision • 'Conduct' refers to the actual conduct of proceedings, and does not focus on intermediate conclusions reached en route to final, substantive decisions

B. "Administrative Character"

- This is designed to exclude from review decisions that are "legislative" or "judicial" in character
- Subordinate legislation is not directly reviewable — not a decision of an administrative character

<i>Roche Products v National Drugs and Poisons Schedule Committee (2007)</i>	
Facts	Drug company seeking review of decision to remove their drug from a schedule to an Act which allowed it to be advertised and obtained without a prescription.
Outcome	<ul style="list-style-type: none">• The decision was legislative and thus not subject to review• Legislative decisions usually involve:<ul style="list-style-type: none">• Formulation of general rules• Changing the content and future operation of the law• Broad questions of policy — public consultation & notification• Being subject to parliamentary oversight• Administrative decisions usually involve:<ul style="list-style-type: none">• Application of the law or rule to a particular case• Being subject to merits review

C. "Under an Enactment"

- Section 3(1) provides that "enactment " means:
 - (a) an Act, other than...
 - (b) ...
 - (c) an **instrument (including rules, regulations or by-laws) made under such an Act**

<i>General Newspapers Pty Ltd v Telstra (1993)</i>	
Facts	<ul style="list-style-type: none">• Telstra was state-owned, another company sought ADJR Act review of their conduct
Outcome	<ul style="list-style-type: none">• ADJR Act applies to a decision taken under an enactment which by virtue of the statute affects rights or obligations• The decision itself must have been authorised by an enactment• Day-to-day operations of a company not amenable to review under ADJR

<i>Griffith University v Tang [2005]</i>	
Facts	<ul style="list-style-type: none">• Involved a PHD student who was excluded from Griffith University• Griffith University established under an Act of Parliament
Issue	Can public universities' decisions be reviewed under ADJR Act?
Outcome	<ul style="list-style-type: none">• The decisions are not being made under an enactment, but rather, being made by bodies created under an enactment<ol style="list-style-type: none">1. The decision must be expressly or impliedly required or authorised by the enactment2. The decision must itself confer or otherwise alter legal rights or obligations• A decision will only be made under an enactment if both these criteria are met• Even if the legal capacity to decide is attributable to legislation, if the legal force of the decision does not come from statute, then the decision is not made under an enactment

NEAT Domestic Trading v AWB (2003)

Facts	<ul style="list-style-type: none"> • AWB (a private corporation owned by wheat growers) had been granted a monopoly over the export of wheat in Australia • No other company could export wheat in bulk without the AWB's consent • NEAT claimed that AWB was acting in accordance with a rule or policy without regard to the merits of the case, thereby invoking s 5(2)(f) and s 6(2)(f) of the ADJR
Outcome	<ul style="list-style-type: none"> • Must have regard to the identity and nature of the repository of power • The company was under no duty imposed by the Act to consider “public” considerations when making decisions to grant or refuse export approval • It was impossible to impose public law obligations on AWB and allow it to pursue its private interests • Kirby J dissented

The Public/Private Distinction

- Different avenues of review determine whether private decision-makers can be subject to judicial review:
 - **Constitutional writs** — traditionally applied to public decision-makers
 - **ADJR** — “decision of an administrative character... **made under an enactment**”
 - **Declarations and injunctions** — public and private decisions

Datafin (1987) — UK ‘Public Function’ Test

Outcome	<ul style="list-style-type: none"> • The powers exercised by the Takeovers Panel (regulating take-overs and enforcing a code of conduct on them) were essentially in the domain of public law • Panel performed a public duty; the role would otherwise be performed by government
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Forbes v NSW Trotting Club (1979)

Outcome	<ul style="list-style-type: none"> • If the public are invited to attend private premises for the purpose of partaking in a public activity, the owner should not act arbitrarily and capriciously • The functions were qualitatively different to an ordinary householder • When rights are such that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power • In such a case, requirements of due process are imposed and arbitrary and unreasonable conduct is not permitted
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Ansett Transport Industries (Operations) Pty Ltd v Cth (1977)

Facts	<ul style="list-style-type: none"> • Government contracted with Ansett that only Ansett and ANA could operate airlines • Ansett argued that the Cth’s proposed issue of import permits to other airlines would constitute a breach of contract
Outcome	<ul style="list-style-type: none"> • It is a quintessential function of government to make policy, and it is beyond the province of the court to limit the creation of policy • You can contract with a government and hold them to account on a contract, but it is the province of government to make policy, and <u>you cannot use a current contract to fetter the government’s future capacity to make policy</u>