

General Introduction

📌 Jurisdiction

- Federal Level -
  - HC – ‘original’ judicial review jurisdiction derives from the Constitution.
  - FC
    - Share ‘constitutional’ jurisdiction
    - Also has further sources of jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and under the Judiciary Act 1903 (Cth)
- State Level
  - SC – ‘inherent’ or ‘supervisory’ judiciary review jurisdiction.
    - ‘Kirk’ – controversial – whether this aspect of jurisdiction is derived and protected by the federal Constitution.

📌 Elements to succeed a judicial review application

- The court must have jurisdiction to judicially review the impugned act or decision and it must accept that the application raises ‘justiciable’ issues;
- Is the application for judicial review justiciable?
  - The following issues are not justiciable:
    - Politics
    - Policy
    - International relations.
- The applicant must be an appropriate person to bring the application, i.e., the applicant must have ‘standing’;
- There must be a breach of an administrative law norm, i.e., a ‘ground of review’ must be available;
- The court must also have power to grant an appropriate remedy.
- The legislature has not validly excluded or diminished the court’s review jurisdiction.

Appeal vs. Review

Appeal	Review
Appeal courts can typically substitute their own decision for that of the original decision-maker	In most circumstances, the court will remit the decision to the original decision-maker to be made in accordance with the law. <a href="#">Minister for Immigration and Ethnic Affairs v Guo (1997)</a>
A creation of statute.	A creation of the common law.
The appellate body can consider all aspects of a decision (law, fact, and policy).	The standard remedies are connected with conclusions about the legality (validity), and not the correctness of decisions.

Judicial Review vs Merits Review

📌 Consider whether or not a particular ground of judicial review is available in a given case;

- if it is not, then judges cannot interfere with the ‘merits’ of the decision.

📌 Separation of Power

- Legislature → make law → give rights to appeal
  - no rights to appeal, consider review
    - Judicial review: look at lawfulness of the decision-making process.
    - Irrelevant to lawfulness, then merits review → tribunal
- Judiciary → The executive is subject to judicial review.

**Attorney-General (NSW) v Quin (1990) 170 CLR 1**

- Brennan J described the purpose of judicial review – ‘to set aside administrative acts and decisions which are unjust or otherwise inappropriate’.

## Introduction to Administrative Law

- Brannan J outlined the limited scope of judicial review of administrative decision-making, being solely concerned with its legality rather than its merits – ‘the duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power.’
- Brennan J acknowledged the consequent weakness of a judicial review of administrative decision-making – ‘if, in so doing, the court avoids administrative justice or error, so be it, but the court has no jurisdiction simply to cure administrative injustice or error’.
- Brennan J justified his argument in terms of the law / merits distinction – ‘the merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone’.
- So a judicial review of administrative decision-making cannot impact upon its merits – otherwise, ‘the function of the courts would be exceeded’ and ‘it would put its own legitimacy at risk’.
- According to Brannan J, this even applied to Wednesbury unreasonableness, which allows for judicial review of a decision that is ‘so unreasonable that no reasonable authority could even have come to it’, in the words of Lord Greene MR – ‘properly applied, [it] leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power.’

## The grounds of Judicial Review

📌 **Rationale:** to keep administrative decision-makers within the legal boundaries of their powers.

### • Difficulties

- Where administrative powers are conferred by statute, the meaning of the statute may be unclear due to the ‘open texture’ of the legislation’s language, structure and purposes. → Statutory interpretation
- Administrative law norms remain sufficiently abstract to be capable of different interpretations and applications.

📌 **ADJR Act grounds of review**

- Can only be applied in relation to the exercise of statutory powers, i.e., where the impugned administrative decision or conduct is ‘made under an enactment’.
- Non-statutory powers, i.e., the common law or prerogative powers of executive government are not reviewable under the Act.

## Classifying the grounds of review

📌 **procedural grounds of review.**

- Focus on the conduct of the decision-maker, rather than the decision-maker’s reasoning processes or the content of the decision reached.
- Focus on the reasoning processes of decision-making.
- Focus on the decision itself, i.e., what was actually decided as opposed to the procedures or reasoning processes through which the decision was reached.

## Judicial Review: Jurisdiction of the Courts

### State and Territory Courts

- ♦ The Supreme Court of New South Wales has jurisdiction over that “which may be necessary for the administration of justice in New South Wales”, as provided by [Supreme Court Act 1970 \(NSW\), s 23](#): this is statutory support for the inherent ‘supervisory’ jurisdiction of State Supreme Courts.
  - ♦ The Supreme Court may order any person to fulfil any duty “in the fulfilment of which the person seeking the order is personally interested”, as provided by [Supreme Court Act 1970 \(NSW\), s 65\(1\)](#).
  - ♦ The Supreme Court has jurisdiction to grant relief or remedy of prohibition, mandamus, certiorari and others by a judgment or order, rather than a writ, as provided by [Supreme Court Act 1970 \(NSW\), s 69\(1\)](#) (but no application to the writ of habeas corpus ad subjiciendum: [s 69\(2\)](#))
  - ♦ The Supreme Court also has jurisdiction to quash the ultimate determination of a court or tribunal if it has been made on the basis of **an error of law**, in regards to the writ of certiorari, as provided by [Supreme Court Act 1970 \(NSW\), s 69\(3\)](#).
- Appeal is a creature of statute. All the conditions are set in the legislation.
  - Usually, if a case is available for appeal, Courts prefer you to use appeal rather than judicial review.

### High Court

#### **Constitutional writs: s 75(iii) of the Constitution -- original jurisdiction**

- ♦ s 75(iii) of the Constitution provides that the High Court has original jurisdictional in all matters “in which the **Commonwealth**, or a person suing or being sued on behalf of the Commonwealth, **is a party**”
  - The section does not constitutionally entrench the availability of particular remedies, so the Commonwealth Parliament can legislate to prevent relief for non-judicial errors

#### **Constitutional writs: s 75(v) of the Constitution -- original jurisdiction**

- ♦ s 75(v) of the Constitution provides that the High Court has original jurisdiction “in which a Mandamus or prohibition or an injunction is sought against **an officer of the Commonwealth**”
  - This is constitutionally entrenched, so the Commonwealth Parliament cannot mobilise ‘privative clauses’ to exclude the High Court’s jurisdiction to grant remedies for jurisdictional errors
  - Key requirement that the relief is sought “against an officer of the Commonwealth”- this means that there an institutional nexus between the decision-maker and the government must be established
    - ✓ The orthodox definition of an “officer of the Commonwealth” was stated by the Federal Court in [Broadbent v Medical Board of Queensland \(2011\)](#), [Plaintiff M61/2010E v Commonwealth of Australia \(2010\)](#): “a person appointed by the Commonwealth to an identifiable office who is **paid by the Commonwealth** for the performance of their functions under the office and who **is responsible to and removable by the Commonwealth** concerning the office”
    - ✓ an “officer of the Commonwealth” includes:
      - Public servants
      - The Commonwealth Director of Public Prosecutions
      - The police force
      - Ministers
      - Members of the Administrative Appeals Tribunal
      - Federal judges (but not those on the High Court)

#### **Appellate jurisdiction of HC**

- ♦ The High Court also has appellate jurisdiction, hearing appeals from the federal courts and State Supreme Courts, as provided by s 73(ii) of the Constitution.
- Office of commonwealth is a limiting function
    - Parliament 1970s made a lot of company, made them agent – not recognised by HC
    - Migration registration authority, Post Authority → not officers of the commonwealth.
  - Principle of Plaintiff M 61: Even it is a company or agency, we are able to take them into the jurisdiction of judicial review.

*Federal Court*

**Original jurisdiction of the Federal Court: s 39B of the Judiciary Act 1903 (Cth)**

- ♦ s 39B(1) provides that the original jurisdiction of the Federal Court includes “jurisdiction with respect to matters in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth”.
  - It is identical to s 75(v) of the Constitution- it was inserted to confer an identical jurisdiction upon the Federal Court and thus avoid overburdening the High Court
- ♦ s 39B(1A) provides that the original jurisdiction of the Federal Court also includes:
  - a) Matters in which the Commonwealth is seeking an injunction or a declaration
  - b) Matters arising under the Constitution or involving its interpretation
  - c) Matters arising under any laws made by the Parliament, except criminal matters (allows for judicial review of delegated legislation at federal level)

**Section 44 of the Judiciary Act 1903 (Cth)**

- ♦ As provided by s 44(1), the High Court can remit “pending” matters to any federal court, State court or Territory court that has jurisdiction with respect to the subject-matter and the parties, upon the application of a party or by the High Court’s own motion.
- ♦ As provided by s 44(3), where the High Court remits a matter or part of a matter to a court, that court has jurisdiction in the matter and further proceedings in the matter are directed by that court.

**ADJR Act**

♦ **Decision subject to review**

- As provided by s 3(1), a “decision to which this Act applies” means “a decision of an administrative character made, proposed to be made, or required to be made”: a) **Under an enactment**; b) By a Commonwealth authority or an officer of the Commonwealth under an enactment; c) Other than a decision by the Governor-General; d) Other than a decision set out in Schedule 1
  - An “enactment” is further defined in s 3(1) as
    - (a) an Act, other than:
      - (i) the Commonwealth Places (Application of Laws) Act 1970 ; or
      - (ii) the Northern Territory (Self-Government) Act 1978 ; or
      - (iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or
    - (b) an Ordinance of a Territory other than the Australian Capital Territory or the Northern Territory; or
    - (c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A; or
- Schedule 1 sets out ‘Classes of decisions that are not decisions to which this Act applies’, including:
  - Fair Work Act 2009 (Cth)
  - Workplace Relations Act 1996 (Cth)
  - Building and Construction Industry Improvement Act 2005 (Cth)
  - Australian Security Intelligence Organisation Act 1956 (Cth)
  - Intelligence Services Act 2001 (Cth)
  - Telecommunications (Interception and Access) Act 1979 (Cth)
  - Customs Act 1901 (Cth)
  - Excise Act 1901 (Cth)
  - Foreign Acquisitions and Takeovers Act 1975 (Cth)
  - Defence Force Discipline Act 1982 (Cth)

♦ **What a decision**

- s 3(2) provides that a reference to the making of a decision includes a reference to:
  - a) Making, suspending, revoking or refusing to make an order, award or determination
  - b) Giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission
  - c) Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument
  - d) Imposing a condition or restriction
  - e) Making a declaration, demand or requirement
  - f) Retaining or refusing to deliver up an article

## Judicial Review: Jurisdiction of the Courts

- g) Doing or refusing to do any other act or thing
- The making of a report or recommendation is deemed to be the making of a decision, 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 another law, as provided by s 3(3)
- Conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of the decision (like taking evidence or holding an inquiry), as provided by s 3(5)
- ♦ **Grounds of review:**
  - Application for **review of decision**
    - ✓ According to **s 5(1)** of the ADJR Act, a person who is aggrieved by a decision to which this Act applies may rely on the following grounds to apply a FC or Federal Circuit Court review the decision:
      - (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
      - (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
      - (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
      - (d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;
      - (e) that the making of the decision was an **improper exercise of the power** conferred by the enactment in pursuance of which it was purported to be made;
        - ★ Explanation of improper exercise of the power: **[s 5(2)]** → shall be construed as including a reference to:
          - (a) taking an irrelevant consideration into account in the exercise of a power;
          - (b) failing to take a relevant consideration into account in the exercise of a power;
          - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
          - (d) an exercise of a discretionary power in bad faith;
          - (e) an exercise of a personal discretionary power at the direction or behest of another person;
          - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
          - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
          - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
          - (i) any other exercise of a power in a way that constitutes abuse of the power.
      - (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
      - (g) that the decision was induced or affected by fraud;
      - (h) that there was no evidence or other material to justify the making of the decision;
        - ★ Only under the following scenarios, the applicants can rely on s 5(1)(h) to apply for the JR: **[s 5(3)]**
          - (a) the person who made the decision was required by law to reach that decision **only if a particular matter was established**, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
          - (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.
        - (i) that the decision was otherwise contrary to law.
  - Application for **review of conduct** related to making of decisions.
    - ✓ According to **s 6(1)** of the ADJR Act, a person who is aggrieved by a decision to which this Act applies may rely on the following grounds to apply a FC or Federal Circuit Court review the conduct:
      - (a) that a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct;
      - (b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;
      - (c) that the person who has engaged, is engaging, or proposes to engage, in the conduct does not have jurisdiction to make the proposed decision;
      - (d) that the enactment in pursuance of which the decision is proposed to be made does not authorise the making of the proposed decision;
      - (e) that the making of the proposed decision would be **an improper exercise of the power** conferred by the enactment in pursuance of which the decision is proposed to be made;
        - ★ Explanation of improper exercise of the power: **[s 6(2)]** → shall be construed as including a reference to:

## Judicial Review: Jurisdiction of the Courts

- (a) taking an irrelevant consideration into account in the exercise of a power;
  - (b) failing to take a relevant consideration into account in the exercise of a power;
  - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
  - (d) an exercise of a discretionary power in bad faith;
  - (e) an exercise of a personal discretionary power at the direction or behest of another person;
  - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
  - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
  - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
  - (i) any other exercise of a power in a way that constitutes abuse of the power.
- (f) that an error of law had been, is being, or is likely to be, committed in the course of the conduct or is likely to be committed in the making of the proposed decision;
- (g) that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;
- (h) that there is no evidence or other material to justify the making of the proposed decision;

★ Only under the following scenarios, the applicants can rely on s 6(1)(h) to apply for the JR: [s 6(3)]

- (a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he or she is entitled to take notice) from which he or she can reasonably be satisfied that the matter is established; or
  - (b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.
- (i) that the making of the proposed decision would be otherwise contrary to law.
- Application in respect of failures to make decisions
    - ✓ s 7 provides that a person who is aggrieved by the failure of the person to make a decision can apply to the Federal Court or Federal Circuit Court for an order of review
      - s 7(1): for an unreasonable delay (i.e., no law prescribes the deadline for the decision)
      - s 7(2): for expiration of a time period (i.e., a law prescribes a period within which the person is required to make that decision)
    - ✓ Elements:
      - The plaintiff is aggrieved by the failure to make decisions.
      - The defendant has a duty to make a decision to which this Act applies;
      - The defendant's failure to make the decision.
  - ♦ **Limitation of ADJR Act**
    - A reviewable decision is one that is "final or operative and determinative", as held by Mason CJ in [Australian Broadcasting Tribunal v Bond \(1990\)](#)
    - Legislative and judicial decisions are not decisions of an "administrative character", as held by Branson J in [Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee \(2007\)](#)
    - The following decisions are not made "under an enactment":
      - ✓ Decisions made under contracts, as held by Davies and Einfeld JJ in [General Newspapers Pty Ltd v Telstra \(1993\)](#)
      - ✓ Decisions made under consensual arrangements, as held by Gleeson CJ in [Griffith University v Tang \(2005\)](#)
      - ✓ Decisions made under legislation by companies, as held by McHugh, Hayne and Callinan JJ in [NEAT Domestic Trading Pty Limited v AWB Limited \(2003\)](#)

### Officers of the Commonwealth

#### Plaintiff M61/2010E v Commonwealth of Australia (2010) 243 CLR 319

- The two impugned administrative processes were:
  - i) A Refugee Status Assessment- undertaken by a departmental officer, to lift the 'bar' so that the plaintiffs could make a valid visa application, as provided by s 46A(2) of the Migration Act 1958 (Cth) (found that no plaintiff was a person to whom Australia had protection obligations)
  - ii) An Independent Merits Review of the Refugee Status Assessment (as it was unfavourable to the plaintiffs)- undertaken by an outsourced company, Wizard People (confirmed the Refugee Status Assessments) – Department had contracted with the company 'Wizard People'

1. Each plaintiff arrived at Christmas Island by boat, and was detained under the Migration Act. Under the Migration Act, each became an "unlawful non-citizen" and by the operation of section 46A(1) could not make a valid application for a protection visa.
2. The Minister had power to waive the operation of section 46A(1), or grant a visa, if it was in the public interest to do so.
3. During the plaintiffs' detention, officers of the Department of Immigration and Citizenship made assessments of each plaintiff's refugee status and concluded that neither was a person to whom Australia owed protection obligations.
4. An Independent Merits Review of each of those decisions conducted by contractors of the Department reached the same conclusion.
5. Each plaintiff argued before the High Court that he was not afforded procedural fairness during the assessment or review process, and that the persons conducting the assessment and review erred in law by not treating themselves as bound by relevant provisions of the Migration Act and relevant decisions of Australian courts.

#### Held

1. Because the Minister has decided to consider exercising powers under the Migration Act in every case where an offshore entry person claims to be owed protection obligations, the assessment and review inquiries adopted in respect of such offshore entry persons are therefore steps taken under and for the purposes of the Migration Act.
2. Because these inquiries prolonged the detention of the plaintiffs, there was a direct impact on the rights and interests of the plaintiffs to freedom from detention at the behest of the Executive.
3. Those making the inquiries were therefore bound to act according to law and to afford procedural fairness to the plaintiffs.
4. The Court rejected the challenge to the validity of section 46A.

## Judicial Review: Jurisdiction of the Courts

- The problem in terms of the jurisdiction of the High Court was that neither Wizard People, nor its employees, would qualify as an “officer of the Commonwealth” according to its orthodox definition from the Federal Court in *Broadbent v Medical Board of Queensland* (2011)
- ★ But the High Court did not need to resolve the issue whether a private company or an independent contractor exercising the public functions of the government which had been ‘contracted’ out may be deemed an “officer of the Commonwealth”: it left the resolution of this issue “for another day”
  - ➔ This is because the jurisdiction of the High Court was available on other grounds:
    - ✓ The High Court made a declaration that the administrative processes were procedurally unfair (which is not a ‘constitutional writ’ in s 75(v) of the Constitution)
    - ✓ The Minister and the departmental officer were both “officers of the Commonwealth” under s 75(v) of the Constitution
    - ✓ The Commonwealth was a party, so jurisdiction was available under s 75(iii) of the Constitution
    - ✓ These involved matters arising under a treaty (the Refugees Convention and the Refugees Protocol), so jurisdiction was available under s 75(j) of the Constitution

### Elements of a ‘decision’ -- Per ADJR

#### Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

##### What is a decision?

- The High Court’s definition of a ‘decision’ for the purposes of s 5(1) of the ADJR Act resulted in a significant restriction of the scope of its judicial review. In this case, s 88(2) of the Broadcasting Act 1942 (Cth) provided that “the Tribunal may suspend or revoke a commercial licence if... (b) the Tribunal is satisfied that the licensee... is no longer a fit and proper person to hold the licence”.
- The Australian Broadcasting Tribunal found that Mr Alan Bond was not a fit and proper person to hold a broadcasting licence (due to a settlement of defamation litigation with Sir Joh Bjeke-Petersen for \$400 000 and using his television station, Queensland Television Limited, to gather information and threaten business competitors at the AMP Society) and that the licensee companies were not fit and proper persons to hold a broadcasting licence
- ❖ Mason CJ outlined **two key elements of a ‘decision’**:
  - i) Reviewable decisions will be “**final or operative and determinative**”, not a mere ‘step along the way’ as an element in the chain of reasoning (unless the statute specifically provides for such a making of a decision which is a ‘step along the way’)
  - ii) Reviewable decisions must be “**substantive**”, rather than mere fact-finding
- Applied to the present case, Mason CJ held that the finding that the licensee companies were not fit and proper persons to hold broadcasting licences was a “**final or operative and determinative**” decision as it was “**a matter of substance for which the statute provided as an essential preliminary to the making of the ultimate decision**”, but the finding that Mr Bond was not a fit and proper person to hold a broadcasting licence was “no more than a step in the Tribunal’s process of reasoning”.
- Furthermore, Mason CJ held that **the judicial review of ‘conduct’**, as provided by s 6 of the ADJR Act, defined as “action taken... for the purpose of making a reviewable decision” (like taking evidence or holding an inquiry) **does not allow for the judicial review of fact-finding**, “unless what is alleged is some breach of procedural requirements in the course of the conduct involved in reaching the relevant conclusion”
- Mason CJ held that there can only be judicial review of fact-finding if it is “an essential preliminary to the taking of ultimate action or the making of an ultimate order”
- There were two policy reasons for restricting the definition of a ‘decision’, according to Mason CJ:
  - i) To preserve the limited nature of judicial review and halt it from transforming into a merits review
  - ii) To prevent any damage to efficient administration by fragmenting and delaying administrative processes

##### Justice Mason – Policy considerations.

- What was the context / background to the ADJR Act applications for review of the ABT acts?
- ADJR Act applicants challenged 11 acts – they characterised them each as ‘decisions’ and / or ‘conduct’. What were these 11 acts?

1. s 88(2) of the Broadcasting Act 1942 (Cth) provided that “the Tribunal may suspend or revoke a commercial licence ... if (b) the Tribunal is satisfied that the licensee ... is no longer a fit and proper person to hold the licence”.

2. The Australian Broadcasting Tribunal found that Mr Alan Bond was not a fit and proper person to hold a broadcasting licence (due to a settlement of defamation litigation with Sir Joh Bjeke-Petersen for \$400000 and using his television station, Queensland Television Limited, to gather information and threaten business competitors at the AMP society) and that the licensee companies were not fit and proper person to hold a broadcasting licence.

##### Issue: Restrictive interpretation.

The High Court held that the actions were not reviewable as decisions or conduct. The terms ‘decision’ and ‘conduct’ should be read restrictively. ‘Decision’ refers to administrative activity that is substantive and final or operative and ‘conduct’ refers to administrative activity preceding a decision that reveals a flawed procedural processes, as opposed to substantive issues.