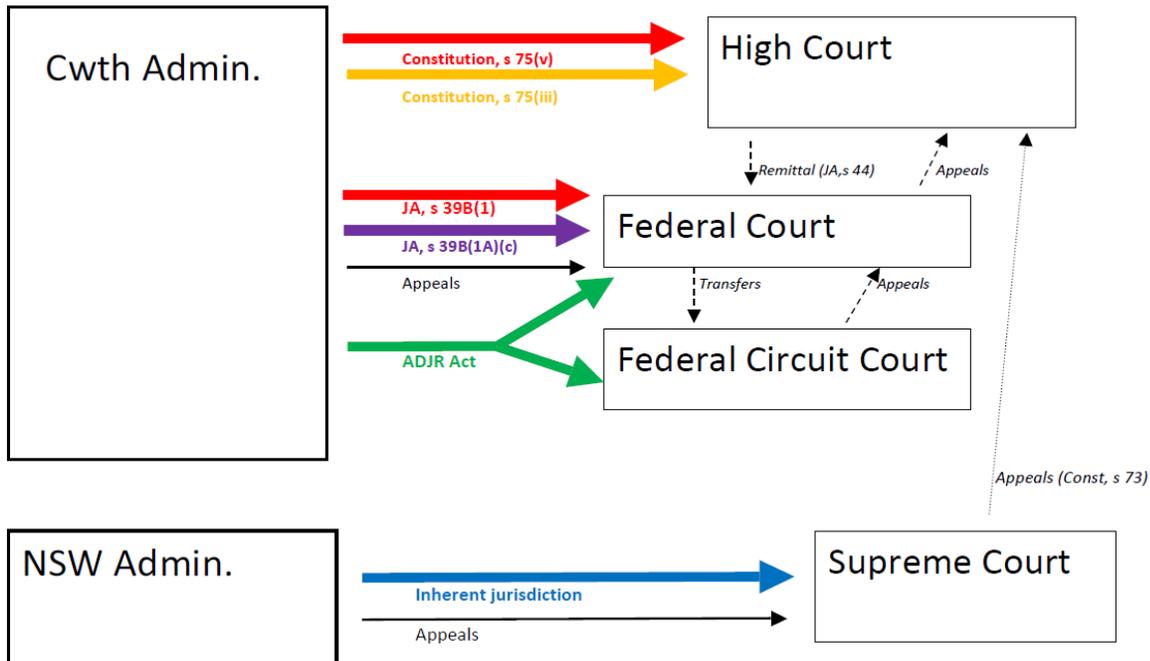


Topic 2: Jurisdiction of the Courts

Relevance of Topic 2

JR Practitioner Check-List:	Coverage?
1. Is a JR jurisdiction engaged?*	Topics 2 and 9.
2. Is the decision justiciable?	Not covered.
3. Does the applicant have standing?	Topic 8.
4. Is breach of 1 or more grounds of review established?	Topics 4, 5-7.
5. Is a remedy available?*	Topic 3.
*scan and evaluate all possibilities – none, one or more than one may be available.	

JR Jurisdictions dealt with in LAWS5010



NB: Not dealt with in LAWS5010 - statutory grants of JR jurisdiction to other NSW Courts (eg NSWLEC) and NSW Tribunals (eg ADT).

Diagram of Judicial Review

Check List for what court and what act applies

1. What judicial review jurisdiction is engaged?

a. Commonwealth

i. Federal Court

1. **Administrative Decisions Judicial Act 1977** (Cth) (ADJR) (if possible → check requirements in s 3(1): 'decision of an administrative character made under an enactment', other than a decision by the GG or decisions in Schedule 1') OR
2. **Judiciary Act 1903** (Cth) s 39B

- ii. **High Court: Needs to be** serious issues such as migration (issues in Schedule 1) (**Constitution: s 75(v)**)

b. NSW

- i. NSW Supreme Court (**Supreme Court Act 1970** (NSW): ss 23)
 1. Mandamus (s 65(1))
 2. Certiorari, prohibition, mandamus (s 69(1)(a))

IF COMMONWEALTH

HC has original jurisdiction under s75(v) under Constitution but reserves it for the most important issues. So it can remit it down to Federal Court under s 75(3)

Reason why you want to bring it under ADJR:

- **Section 13 'written statement of reasons' + standing provision + remedy set out very clearly (s16).**

1. Establish FC and whether ADJR 1977 applies, **look to s 3(1)**

a. "Decision" (*ABT v Bond* 1990)

- i. 'ultimate and operative'
- ii. If the finding of fact can amount to 'essential preliminary (the finding needs to be required under statute) to the taking of ultimate decision'
 1. "Investigations, finding of fact, reports" will be a **step along the way** to ultimate decision.

b. "Administrative character" (*Roche v National Drugs and Poisons Schedule Committee* 2007)

- i. Generally, legislation are **not admin character** since they apply to everyone.
- ii. Legislative test (*Roche* – "Listing" is not an admin decision)

c. (s 3(1)(a)) - "Made under an enactment" (*NEAT Domestic v AWB Limited* 2003)

- i. Articles of association, company legislation then not decision made under an enactment even if decision has statutory significance.
- ii. 'expressly or impliedly require or authorised by the enactment' **AND**
- iii. Decision must itself confer, alter or otherwise **affect legal rights** or obligations → both criteria must be met for a decision to be derived from an enactment (*Griffith v Tang* 2005)

d. Other than decision by the GG or decisions in Schedule 1 (Migration, National Security)

e. **ALSO: From NEAT, neither ADJR Act nor the common law can review a decision by a private corporation. (Needs to be public)**

- i. **Note:** If private company (Wizards People) was delegated to make decision **we don't know whether the private company's decision can be reviewed** (M61)

2. If no, then **Judiciary Act s 39B**

a. Apply Common Law rules

State Courts

New South Wales

Supreme Court Act 1970 (NSW)

Section 23: Jurisdiction

The Court shall have all jurisdiction which may be necessary for the administration of justice in NSW.

Section 65: Order to fulfil duty

(1) The Court may order any person to fulfil any duty in the fulfilment of which **the person seeking the order is personally interested**. (Remedy of Mandamus)

(2) The Court may, on terms, make an interlocutory order under subsection (1) in any case where it appears to the Court just or convenient so to do.

(3) The powers of the Court under this section are in addition to any other powers of the Court.

Section 69: Proceedings in lieu of writs

(1) Where formerly:

(a) The Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of **prohibition, mandamus, certiorari** or of any other description, or

(b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

Then, after the commencement of this Act:

(c) The Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but

(d) Shall not issue any such writ, and

(e) Shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and

(f) Proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to:

(a) The writ of habeas corpus ad subjiciendum,

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

High Courts

Commonwealth of Australia Constitutional Act 1900

Section 75: Original jurisdiction of High Court

In all matters:

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;

The High Court shall have original jurisdiction.

Section 73: Appellate jurisdiction

The High Court shall have jurisdiction ... to hear and determine appeals from all judgments, decrees, orders, and sentences:

- ii. of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

Federal Court

Judiciary Act 1903 (Cth)

Section 39B: Original jurisdiction of Federal Court of Australia

Scope of original jurisdiction

(1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a **writ of mandamus or prohibition or an injunction** is sought against an officer or officers of the Commonwealth.

(1A) the original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(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, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

Section 44: Remittal of matters by High Court to other courts

(1) Any [matter](#) other than a [matter](#) to which subsection (2) applies that is at any time pending in the High [Court](#), whether originally commenced in the High [Court](#) or not, or any part of such a [matter](#), may, upon the application of a [party](#) or of the High [Court](#)'s own motion, be remitted by the High [Court](#) to any federal [court](#), [court](#) of a [State](#) or [court](#) of a [Territory](#) that has jurisdiction with respect to the subject-matter and the parties, and, subject to any directions of the High [Court](#), further [proceedings](#) in the [matter](#) or in that part of the [matter](#), as the case may be, shall be as directed by the [court](#) to which it is remitted.

(2) Where a [matter](#) referred to in paragraph 38(a), (b), (c) or (d) is at any time pending in the High [Court](#), the High [Court](#) may, upon the application of a [party](#) or of the High [Court](#)'s own motion, remit the [matter](#), or any part of the [matter](#), to the Federal [Court](#) of [Australia](#) or any [court](#) of a [State](#) or [Territory](#).

(2A) Where a [matter](#) in which the [Commonwealth](#), or a person suing or being sued on behalf of the [Commonwealth](#), is a [party](#) is at any time pending in the High [Court](#), the High [Court](#) may, upon the application of a [party](#) or of the High [Court](#)'s own motion, remit the [matter](#), or any part of the [matter](#), to the Federal [Court](#) of [Australia](#).

(3) Where the High [Court](#) remits a [matter](#), or any part of a [matter](#), under subsection (2) or (2A) to a [court](#):

(a) That [court](#) has jurisdiction in the [matter](#), or in that part of the [matter](#), as the case may be; and

(b) subject to any directions of the High [Court](#), further [proceedings](#) in the [matter](#), or in that part of the [matter](#), as the case may be, shall be as directed by that [court](#).

(4) The High [Court](#) may remit a [matter](#), or any part of a [matter](#), under this section without an oral hearing.

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Section 3: Interpretation

1) In this Act, unless the contrary intention appears

"**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)

a. **under an enactment** referred to in paragraph (a), (b), (c) or (d) of the definition of *enactment* ; or

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:

- c. a decision by the Governor-General; or
- d. a decision included in any of the classes of decisions set out in Schedule 1.

"*enactment*" means:

- 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
 - ca) an Act of a State, the Australian Capital Territory or the Northern Territory, or a part of such an Act, described in Schedule 3; or
 - cb) an instrument (including rules, regulations or by-laws) made under an Act or part of an Act covered by paragraph (ca); or
 - d) any other law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act;
- 2) In this Act, 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 license, 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; or
 - (g) doing or refusing to do any other act or thing;

and a reference to a failure to make a decision shall be construed accordingly.

- 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.
- 4) In this Act:
 - a) a reference to a person aggrieved by a decision includes a reference:
 - i. to a person whose interests are adversely affected by the decision; or
 - ii. in the case of a decision by way of the making of a report or recommendation--to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and
 - b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.
- 5) A reference in this Act to 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, including the taking of evidence or the holding of an inquiry or investigation.

Section 5: Applications for review of decisions

- (1) A person who is aggrieved by a **decision¹ to which this Act applies** that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:
- (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 authorized 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;
 - (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;
 - (j) that the decision was otherwise contrary to law.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power 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
 - (j) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
- (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.

Section 6: Applications for review of conduct related to making of decisions

- (1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the conduct on any one or more of the following grounds:
- (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;

¹ ABT v Bond (1990)

- (d) that the enactment in pursuance of which the decision is proposed to be made does not authorize 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;
 - (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;
 - (j) that the making of the proposed decision would be otherwise contrary to law.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power 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
 - (j) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
- (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.

Section 7: Applications in respect of failures to make decisions

(1) Where:

- (a) a person has a duty to make a decision to which this Act applies;
- (b) there is no law that prescribes a period within which the person is required to make that decision; and
- (c) the person has failed to make that decision;

a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

(2) Where:

- (a) a person has a duty to make a decision to which this Act applies;
- (b) a law prescribes a period within which the person is required to make that decision; and
- (c) the person failed to make that decision before the expiration of that period;

a person who is aggrieved by the failure of the first-mentioned person to make the decision within that period may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision within that period on the ground that the first-mentioned person has a duty to make the decision notwithstanding the expiration of that period.

Section 10: Rights conferred by this Act to be additional to other rights

(2) Notwithstanding subsection (1):

- (b) [the Federal Court](#) or the [Federal Circuit Court](#) may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a [failure](#) to make a decision, for the reason:
 - i. That the applicant has sought a review by the court, or by another court, of that decision, conduct or [failure](#) otherwise than under this Act; or
 - ii. that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the court, by another court, or by another tribunal, authority or person, of that decision, conduct or [failure](#).

Section 16: Powers of the Federal Court and the Federal Circuit Court in respect of applications for order of review

- (1) On an application for an order of review in respect of a decision, the Federal Court or the Federal Circuit Court may, in its discretion, make all or any of the following orders:
 - (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
 - (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;
 - (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
 - (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.
- (2) On an application for an order of review in respect of conduct that has been, is being, or is proposed to be, engaged in for the purpose of the making of a decision, the Federal Court or the Federal Circuit Court may, in its discretion, make either or both of the following orders:
 - (a) an order declaring the rights of the parties in respect of any matter to which the conduct relates;
 - (b) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.
- (3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Federal Court or the Federal Circuit Court may, in its discretion, make all or any of the following orders:
 - (a) an order directing the making of the decision;
 - (b) an order declaring the rights of the parties in relation to the making of the decision;
 - (c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.
- (4) The Federal Court or the Federal Circuit Court may at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section.

Schedule 1: Classes of decisions that are not decisions to which this Act applies

Section 3

- (a) decisions under the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, the *Road Safety Remuneration Act 2012*, the *Workplace Relations Act 1996*, the *Building and Construction Industry Improvement Act 2005*

