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## Stages of Judicial Review

To successfully bring a JR application:

1. Court must have **jurisdiction** to conduct JR
2. Court must accept issues are **justiciable**
3. Applicant must have **standing**
4. Court must have **power to grant a remedy**
5. There must be a **ground of review**
6. Legislature must **not have validly excluded** the court's review jurisdiction (i.e. privative clauses)

## THRESHOLD ISSUES

### **JURISDICTION; 48 & 62**

First question: where are you?

- NSW or CTH?
- Jurisdiction very different...
  - if you're in nsw, cl jurisdiction
  - if you're in the cth, cl & adjr jurisdiction

**ADJR Act jurisdiction applies to...? Federal Court & Federal Circuit Court  
BUT NOT TO: High Court; NSW Supreme Court**

### **Common law**

**1. High Court?** See s75CC, s39B JA, NB: Constitutional  
**Jurisdiction (High Court)** Commonwealth Constitution  
**Constitution: Section 75 - *Original jurisdiction of High Court***

In all matters:

- (i) arising under any treaty;
  - (ii) affecting consuls or other representatives of other countries;
  - (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
  - (iv) between States, or between residents of different States, or between a State and a resident of another State;
  - (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 75(v) CC**

The Constitution specifically vests authority and jurisdiction in the High Court to exercise judicial review via S75 (v):

- **CONFERS** judicial review jurisdiction on HCA as part of its original jurisdiction
- **REMEDIES:** gives power to HCA to issue **injunctions**, and writs **mandamus and prohibition**

- Section 75(iii)CC less significant for judicial review in practice, but remains relevant (and of growing importance)

## 2. Federal Court? See s39B JA

### **S39B Judiciary Act 1903 (Cth)**

#### **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.

*Note: Paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia.*

## **Section 8 Administrative Decisions (Judicial Review) Act 1977 ('ADJR')**

### **8 Jurisdiction of Federal Court and Federal Circuit Court**

- (1) The Federal Court has jurisdiction to hear and determine applications made to the Federal Court under this Act.
- (2) The Federal Circuit Court has jurisdiction to hear and determine applications made to the Federal Circuit Court under this Act.

## 3. NSW Supreme Court? See s23 SCA 1970 (NSW)

### **23 Jurisdiction generally**

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

#### **Jurisdiction – State Courts**

- State Supreme Courts
  - Common law jurisdiction as superior courts of record
    - **s 23 Supreme Court Act 1970 (NSW):** the court 'shall have jurisdiction which may be necessary for the administration of justice'
    - **s 69 Supreme Court Act 1970 (NSW):** Proceedings in lieu of writs.
  - Some states have an equivalent to ADJR Act but NSW doesn't
  - NSW therefore has **common law** judicial review
- Note: High Court also has appellate jurisdiction – can hear appeals from state Supreme Courts (on JR of state government acts/decisions) and Federal Court (on JR of federal government)

**Note: Section 69 SCA 1970 (NSW) - 69 Proceedings in lieu of writs**

### **ADJR Test for Jurisdiction**

#### **S5 ADJR: 'Decisions' - Applications for review of decisions**

## **S6 ADJR: 'Conduct' - Applications for review of conduct related to making of decisions**

### **Section 7 ADJR: 'Failure to make a decision'**

### **Section 3 ADJR 'A decision...'**

#### **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**.

#### **1. What is a 'decision'?**

- *Australian Broadcasting Tribunal v Bond* (2.4.8C)
  - A decision must be the **final or operative decision** which is determinative of the issue for consideration.
  - A decision must be a **substantive determination**.
- See also *Edelsten v Health Insurance Commission*

#### **'Decision' v's 'conduct'?**

- So the HC in *Bond* read the scope of 'decisions' narrowly because of section 6 ...
  - 'Conduct' said to be 'an essentially procedural ' concept which focuses on actual conduct of proceedings and NOT on 'intermediate conclusions reached en route to final substantive decisions.'
  - "It would be strange if conduct were to extend generally to unreviewable decisions which are in themselves no more than steps in the deliberative process and reasoning"

#### **2. 'Administrative character'?**

- Not defined in the ADJR Act.
- Consideration of key cases in *Griffith v Tang*, at 122. Gummow, Callinan and Heydon JJ: 'of administrative character': excludes decision of 'legislative' or 'judicial' character
- Main distinction is between administrative acts and legislative acts
  - Legislative: creation of a general rule of conduct without reference to particular case
  - Administrative: application of general rule to a particular case
- eg - *Federal Airports Corporation v Aerolinas Argentinas* (1997) 76 FCR 582 - authority

#### **3. 'Under an enactment'?**

Section 3(1) defines 'enactment' - **enactment** means:

- 'Enactment' is defined, but what amounts to 'under an enactment'?
- Statute must give the decision-maker power to make the decision (not just create the decision-making body)
- *Griffith University v Tang* (2005) 221 CLR 99 [2.4.42C]
- To be made under an enactment:
  - The decision must be **expressly or implied required or authorised by the enactment**; and
  - The decision itself **must confer, alter or otherwise affect legal rights or obligations**.

## JUSTICIABILITY – 58

- Justiciability is about the appropriateness of a question for judicial resolution: 'the suitability for, or amenability to, judicial review of particular administrative decision or class of decisions' (Chris Finn).
- Classic examples of non-justiciable areas:
  - **prerogative power** (non-statutory executive power)
  - **national security policy, defence**
    - *Council of Civil Service Unions v Minister for the Civil Service* (CCSU) [CB 2.3.8C]
    - *Minister for Arts, Heritage and Environment v Peko Wallsend* [CB 2.3.9C]
    - *Hicks v Ruddock and Others* [2007] FCA 299 [CB 2.3.16C]
- Justiciability is a concept that forecloses the exercise of jurisdiction.
- For more, see pages 394 – 401 textbook

## STANDING – 59

1. We need to consider this question at common law, and under the ADJRA, **although in practice there is little difference today in approach**(*Right to Life*)

- ***Environment East Gippsland Inc v Vic Forests* [2010] VSC 335 [1]-[18]**. This case gives a good summary of the leading cases and principles
- **Foundation Case: *ACF v Cth* (1980)**; Exception = 'special interest'. What is a 'special interest'? A **private or financial interest, Not 'a mere intellectual or emotional concern'**. Example; *Onus v Alcoa* (1981) 149 CLR 27, **Public Interest groups; *Northcoast* (1994) 55 FCR 492**)

### Standing under ADJR: s 3(4)

- Remember section 5-6 ADJR: applications for review of 'decisions' and 'conduct' by **'person who is aggrieved'**
- **Section 3(4): 'person aggrieved' includes 'person whose interests are (or would be) adversely affected by the decision etc'**
- What is the meaning of **'a person aggrieved'**?
- See, eg: *Bateman's Bay*; *Northcoast*; *Right to Life*.

## **Remedies – 68**

At common law, three possible outcomes for errors of law:

- (1) no remedy (valid)
- (2) retrospective invalidation (invalid) - only for jurisdictional errors.
- (3) prospective unlawfulness (voidable) (unlawful) – only for non jurisdictional errors.
- *Project Blue Sky* draws on this idea (and the JE v non-JE distinction) and extends it.

### ***Project Blue Sky: implications?***

- HC - 'An Act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with that condition'

### ***Minister for Immigration v Bhardwaj (2002) 209 CLR 597***

- Following *Project Blue Sky*, *Minister for Immigration v Bhardwaj (2002) 209 CLR 597*, Gaudron and Gummow JJ: general principle: 'A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all':

### **Questions to consider;**

- What is the nature of the remedy?
- What remedies are available, and how do they work? How do the remedy and standing tests relate?
- What is the role of remedies in JR? s 75(v) CC? How do they relate to jurisdictional error?
- How do common law and ADJR remedial models fit together?
- Is there a **discretion** to refuse the remedy?
- Where do remedies sit in the structure of JR? Are they a threshold issue (ie beginning) or the outcome (ie end)?

### **What is a public law remedy?**

- (1) Has there been an **error of law** that triggers the courts jurisdiction? (2) Will the Court go outside its own jurisdiction by granting these remedies?

### **What are the remedies?**

#### **Certiorari**

Quashing order: i.e. it deprives a decision of legal effect, analogous to when a court reverses a decision on appeal - ***R v Electricity Commissioner (1924)***.

- a) If want to use Certiorari to quash a decision to make it *retrospectively invalid*, there must be a jurisdictional error that infects the decision\
- b) If want to use Certiorari to quash a decision to make it *prospectively unlawful*, can still be used as remedy, there need not be a jurisdictional error. But the non jurisdictional error must be on the 'face of the record'

Core issues? 'jurisdictional error', 'on the face of the record'

Remember: no difference under ADJRA

### Prohibition ('P')

- Used to prevent admin acts or decision (prohibition). Restrains a body from exceeding its powers. Makes it invalid.
- **Two major differences** from C:
  1. No prohibition available for a non-JE: i.e. 'ordinary' (merit/fact) error made by ADM. So there is no need to consider 'the face of the record'
  2. No real need to show the decisions was one which 'affects the rights'

### Mandamus ('M')

- Used to compel an ADM to exercise power or jurisdiction or perform a **duty** of a public nature where a failure to do so has occurred.
- TEST? ADM's **duty** must be something:
  - If actually done was justiciable (i.e. open to JR);
  - Must be obviously not done (unperformed); and
  - Must be of a public nature
- Central issue is nature of public duties: which ones can be compelled?  
Problem: some are obligations (duties) others are discretionary...

### The Remedies: Habeus Corpus ('H')

- Right to be free from wrongful restraints upon their liberty. Writ directed to the person responsible for the detention of another requiring they bring that person to court
- For *habeus corpus* to issue, there must be: Unlawful detention, Detention attributable to the detainor, Detainee must have a legal right to be released, Historically important, but for recent examples, see *Vadarlis*; *Hicks v Ruddock*.

### The Remedies: Injunctions ('I')

- **Injunctions and declarations are equitable remedies.** They are generally available to get around the technical limits of the prerogative writs. Consider: *Bateman's Bay*.
- Injunctions can either be used to prohibit or compel (like P and M)
- But unlike P and M may be issued even in cases of **non-JE**.

### The Remedies: Declarations ('D')

- Declarations allow a court to declare that a decision can be quashed or compelled; that as an yet unmade decision would exceed jurisdiction (i.e. injunction with prohibition). A declaration is a remedy that makes the ADM state the rights and obligations of the parties

**But.... Discretion?** - There is always a **discretion** to refuse to grant a remedy...

### Different jurisdictional avenues

Different avenues and different histories for remedies:

1. Common law ('prerogative writs'); **certiorari, prohibition, mandamus.**

2. S75(v) CC ('constitutional writs')
3. ADJR, s 16.

### Issue: Standing & Remedies

- What is the test for standing for each of the general law remedies?
- Are there differences between the standing tests?
- What remedies can a 'stranger' apply for?
- Is the 'special interest' test the same as the 'person aggrieved' test?
- Are we now moving to a single standing test in Australia for all general law remedies?

### Issue: Damages?

- Can you ask for damages?
- CL?
- ADJR?
- Damages are a private law remedy.

### Constitutional Remedies - Constitution, section 75

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

Certiori not expressly mentioned in 75(v) Remember: C is a special case, applies non-JE if on face of the record: *Craig*

### ADJR remedies (ADJR, section 16)

**ADJR remedies (s16)** is where you find a codification of the available remedies.

- S 16 (1) (a): quashing (Note the court can choose the date from which the quashing order will be made)
- S 16 (1) (b): mandatory
- S 16 (1) (c) declarations
- S 16 (1) (d) prohibiting
- Under ADJR first question is not whether a particular remedy is available (which is the first question at common law) but **whether one of the specified grounds of review has been established** (as per s3, then s 5 and 6 of the ADJR); and whether a party has standing & discretion.
- No need to make out any 'ingredients' re JE, non JE, face on record etc (ie s 5 (1) (f))
  - The main issue under ADJRA is whether or not procedures required by law in connection with making a decision have been observed.