

Judicial Review

Judicial review exists at:

- 1) Common law (the State System)
- 2) Statute (the Federal Court under s39B of the *Judiciary Act 1903* Cth)
- 3) Under s75(v) of the Constitution

Is something subject to judicial review?

1. Is the matter state or federal?
2. Is the decision reviewable?
3. Are there grounds for review?
4. Does the applicant have standing?
5. Have they applied for the right remedy?
6. Will the court exercise its discretion to grant the remedy?

At Common Law (State) Level

-Constitution s75(v) confers an original jurisdiction on the high court to grant mandamus¹, prohibition and injunction against 'an officer of the Commonwealth'.
 -*Supreme Court Act 1935* (SA) s17(2)(a) 'There shall be vested in the court the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following..'

At Commonwealth Level

-*Federal Court Act 1976* (Cth) ss19-23.
 -*AD(JR) Act 1977* (Cth) ss1-13, 18.

Evans v State of NSW (2008)

-The Court was being asked to rule on a completely hypothetical case.
 -Australian Courts do not give advisory opinions.
 -There being no facts in issue, there was nothing on the case *as it had been pleaded* to attract either Constitutional power, Federal common law or accrued jurisdiction.
 -Court had misapplied test.

Federal Statutory Process

Decisions

AD(JR) s3(1) '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...'

Australian Broadcasting Tribunal v Bond

-Mason CJ: ADJR Act is a remedial statute providing for a review of administrative action rather than some form of appeal from final decisions disposing of issues between parties...

-A reviewable decision is a decision which a statute requires or authorises rather than merely a step taken in the course of reasoning on the way to making the ultimate decision.

Conduct

AD(JR) s6(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;
- 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

¹ A judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.

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;
 i) that the making of the proposed decision would be otherwise contrary to law.

AD(JR) s6(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;
- j) any other exercise of a power in a way that constitutes abuse of the power.

AD(JR) s6(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.

ADJR s7: applications in respect of failures to make decisions

Yasmin v Attorney-General

-Judicial review regarding failure to determine whether to refer a petition to the Court of *Criminal Appeal (WA)* under s140 of *Sentencing Act 1995 (WA)*.

-Held that appeal should be allowed on basis that trial judge's construction of s140 was incorrect and it means there is a duty to consider, and then determine, whether to exercise the referral power or not, which they failed to do.

Limits on Review

Privative/finality clauses

Privative clauses in legislation is one which attempts to prevent courts from pronouncing on the lawfulness of administrative actions.

Plaintiff S157/2002 v Commonwealth of Australia

- The plaintiff challenged a decision of the Refugee Review Tribunal confirming the refusal of a visa, on the grounds of breach of natural justice. The High Court considered the operation of an amendment to the Migration Act which purported to limit judicial review of the Tribunal's decisions.

- There is a strong presumption that a privative clause will not be effective to exclude judicial review generally, particularly of a jurisdictional error including a breach of natural justice.

-Held: The High Court essentially rendered the privative clause useless. Although the clause was 'valid', the court held that parliament couldn't have possibly intended to apply it to jurisdictional error. Jurisdictional error is not affected by privative clauses because those