Topics:

- Judicial Review - Jurisdiction of the Courts
- Judicial Review Remedies
- Judicial Review of Rule-making
- Procedural Grounds of Judicial Review
- Reasoning Process Grounds of Judicial Review
- Decisional Grounds of Judicial Review
- Access to Judicial Review - Standing
- Restricting Judicial Review - Privative Clauses
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- Ministers
- Departments
- Agencies
- Tribunals
- Etc

High Court
- Constitutional writs
- Remittal (Judiciary Act, s 44)
- Appeal

Federal Courts
- ADJR Act
- Appeal (qu of law)
- Inherent jurisdiction
- Statutory jurisdiction
- Appeal (qu of law)

State Administration

State Supreme Courts
(2) Judicial Review: Jurisdiction of the Courts

Judicial Review Overview

1) Avenue of review
   (a) Constitution s 75
   (b) Judiciary Act 1903 (Cth) s 39B
   (c) Administration Decisions (Judicial Review) Act 1975 (Cth)
   (d) Supreme Court Act 1970 (NSW)

2) Preliminary requirements
   What are the essential requirements for bringing action under this avenue?
   (a) Constitution s 75(v): 'officer of the Commonwealth'
   (b) ADJR Act: decision under an enactment of an administrative character

3) Jurisdiction
   What courts can exercise jurisdiction under this avenue?

4) Standing
   Who can apply for review under this avenue?

5) Grounds
   What must such a person establish in order to succeed?
   (a) Procedural fairness
      ‣ Hearing rule
      ‣ Bias rule
   (b) Decisional grounds
      ‣ Error of law
      ‣ No evidence
      ‣ Jurisdictional facts
      ‣ Wednesbury unreasonableness
      ‣ Uncertainty
   (c) Reasoning process grounds (Broad ultra vires?)
      ‣ Account of irrelevant consideration
      ‣ Omission of relevant consideration
      ‣ Improper purpose
      ‣ Inflexible policy
      ‣ Behest of others
      ‣ Unreasonableness

6) Remedies
   What can a court order if the applicant is successful?
   (a) Prerogative remedies
      ‣ Certiorari
      ‣ Prohibition, mandamus
      ‣ Habeas corpus
   (b) Equitable remedies
      ‣ Injunction and declaration
   (c) Statutory Remedies
      ‣ ADJR Act
      ‣ Statutory reforms in Supreme Court Act 1970 (NSW)
   (d) Constitution s 75
All state Supreme Courts must maintain a supervisory jurisdiction to review for jurisdictional error. A defining characteristic of a state Supreme Court is the power to review decisions made by state decisions-makers on the basis of jurisdictional error.

**Supreme Court Act 1970 (NSW)**

**Section 23 - Jurisdiction generally**

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

**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.

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:
   - 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
   - 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:
     - the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
     - shall not issue any such writ, and
     - shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
     - proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

**HIGH COURT: ‘CONSTITUTIONAL WRITS’**

**Constitution of Australia Act**

**Section 75 - Original jurisdiction of High Court**

In all matters:

1. arising under any treaty;
2. ... (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
   - [NB potential problem: no entrenched remedies]
3. (iv) ...
4. (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
   - [Can the error that has been made be characterised as a jurisdictional error]
   - [Must be against an ‘officer of the Commonwealth’]

the High Court shall have original jurisdiction.


Wizard People a private company, not held to be officers of the Commonwealth. However this question was not necessary to decide. They were involved in a process which was very much bound together with decisions that the Ministry is making under the act. Therefore:

- The jurisdiction of the court may be invoked under s 75(v) due to the fact the assessments by the private contractors were so intertwined with the minister’s decision.
- The jurisdiction may also be invoked under s 75(iii) a “person suing or being sued on behalf of the Commonwealth” s75(iii).
May also have jurisdiction under s 75(i) matters “arising under a treaty”, in order to give effect to obligations under the Refugee Convention.

**Officer of the Commonwealth**
- Broadbent v Medical Board of Queensland [2011] FCA 980
  - Orthodox approach to the definition of ‘officer of the Commonwealth’: “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”.

**Is there a matter?**
- In re Judiciary and Navigation Act (1921) 29 CLR 257
  - The word “matter” does not mean a legal proceeding, but rather the subject matter for determination in a legal proceeding. There can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court and no declaration of the law divorced from any attempt to administer that law.
  - A ‘matter’ can’t be an advisory opinion
  - Two Critical concepts - there will be no ‘matter’ if the matter involves:
    1. The notion of an abstract question of law not involving right or duty of any body or person.
    2. The making of a declaration of law divorced or dissociated from any attempt to administer it.

- Commonwealth v Queensland (Queen of Queensland Case) (1975) 134 CLR 298
  - The judicial power delineated in Ch III is exhaustive of the manner in and the extent to which judicial power may be conferred on or exercised by any court in respect of the subject matters set forth in ss 75 and 76, ‘matters’ in those sections meaning ‘subject matters’.
  - This is not so only in respect of federal courts but also in respect of State courts whether or not they are exercising federal jurisdiction conferred on them under s 77(iii). In respect of the subject matters set out in ss 75 and 76 judicial power may only be exercised within the limits of the kind of judicial power envisaged in Ch III and if in respect of those matters an investing with federal jurisdiction of a State court does not enable it to perform the particular judicial function, then in respect of those matters the State court cannot under any law exercise that judicial function.

- Mellifont v Attorney-General (Queensland) (1991) 173 CLR 289
  - The giving of answers, in pursuance of a statutory reference by a Crown Law Officer to a State superior court as to matters arising in particular proceedings, is an exercise of judicial power because the seeking and the giving of the answers constitutes an influential if not decisive step in the judicial determination of the rights and liabilities in issue. As such answers do not involve any abstract question of law or the making of a declaration of the law divorced from any attempt to administer it, they accordingly fall within the description “judgments, decrees, orders” in s 73.
  - A matter must be a determination of a dispute (i.e. A controversy determined according to law), and must have an effect on right or duty of a person/body.

- Croome v Tasmania (1997) 191 CLR 119
  - Referred to Mellifront re what led court in In re Judiciary and Navigation to decide there was no matter; 2 critical concepts:
    - The notion of an abstract question of law not involving right or duty of any body or person.
    - The making of a declaration of law divorced or dissociated from any attempt to administer it.
  - A ‘matter’ must be distinguished from the action or judicial proceeding which is commenced in order to obtain a determination of a controversy between the parties. The ‘matter’ is not the
proceeding but the subject of the controversy which is amenable to judicial determination in the proceeding.

Is the matter justiciable?
• Is it a suitable dispute to be dealt with by judicial means.
• If a court concludes that a decision is non-justiciable, it will decline to exercise its jurisdiction to review it on the basis that judicial involvement is not ‘appropriate’ or ‘proper’ - even assuming that judges should attempt to steer clear of the merits of the decision (as in theory they always should).

Minister for Arts v Peko-Wallsend (1987) 15 FCR 274
• Executive action is not immune from judicial review when carried out in pursuance of prerogative, rather than statutory, power.
• ‘Polycentric decisions’ are not justiciable, that is, disputes characterised by numerous, complex, interrelated issues and which potentially affect a large number of interests

Re Ditfort; Ex parte Deputy Commissioner of Taxation (1988) 83 ALR 265
• A question as to the character and extent of the powers of the executive government in relation to the conduct of relations with other countries may give rise to a matter which arises under or involves the interpretation of s 61 of the Constitution and will so affect the interests of a plaintiff as to give the necessary standing. These circumstances will provide a subject matter for the exercise of federal jurisdiction pursuant to Ch III of the Constitution. In such a case no question of “non-justiciability” ordinarily will arise.

FEDERAL COURT
(1) ADJR Act 1977 (Cth) s8: Federal Court & Federal Circuit Court has jurisdiction to hear and determine applications for review under the ADJR Act.
(2) Judiciary Act 1903 (Cth) s39B(1): original jurisdiction when a writ of mandamus, prohibition or injunction is sought against an officer of the Cth.
(3) Judiciary Act 1903 (Cth) s449(1): HC may remit matters that fall within its original jurisdiction to the Federal Court.

ADJR Act Avenue of Revue

Decisions subject to review: Is it a decision to which the ADJR Act applies?
• A decision will be reviewable if it is:
  ○ A ‘decision’, which is
  ○ Of an ‘administrative character’
    ‧ C.f. policy or making regulations (legislative character);
  ○ Made (whether in exercise of a discretion or not) under an enactment;
    ‧ C.f. exercise of prerogative or common law powers;
• Other than a decision by the G-G or a decision included in any of the classes of a decision set out in Schedule 1

Administrative Decisions (Judicial Review) Act 1977

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.

• See Schedule 1 section 3 [in extended notes]: Classes of decisions that are ‘not decisions to which this Act applies”
A decision...of an administrative character...made under an enactment

(i) What is a decision?

Section 3 - Interpretation

(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 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; 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) ...

(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.

“Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
   o Qualities of a ‘decision’ (Mason J):
     (i) Final and operative: does not typically include ‘intermediate’ conclusions unless statute provided for a finding or ruling.
     (ii) Does not include findings of fact unless expressly provided for under statute.
     (iii) Substantive: does not include procedural determinations.
   o A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision will not ordinarily be a reviewable decision unless the statute provides for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.
   o [Bond was seeking to challenge findings (at early stages) made by the Department which found he was not a fit and proper person to hold a license. The Act itself only empowered the govt to make a decision about the license holder (in this case was not Bond, but his companies). Issue: were these findings (at an early stage of the decision-making process) reviewable as decisions under s5? - No]

(ii) Of an ‘Administrative Character’

   • A decision of an ‘administrative character’ includes the application of a general policy or rule to a particular case, and the making of an individual decision. i.e. the formulation of new rules of law which have a general application to the public are ‘legislative activities’, whilst the application of general rules to particular cases which affect individuals are ‘administrative activities’.
     o Indicia of administrative decisions: individual application, raises questions of policy, subject to merits review.
     o Indicia of legislative decisions: of general application, ‘rule-like’ quality, binding legal affect, parliamentary oversight, public notification and consultation.

R G Capital Radio Ltd v Australian Broadcasting Authority (2001) 185 ALR 573
   o Indication of ‘legislative’:
     • Decision determining the content of rules of general application.
     • Parliamentary control of the decision - parliamentary disallowance.
     • Public consultation.
   o Indication of ‘administrative’
     • Applying rules to particular cases.
     • Provision for merits review.

Griffith University v Tang (2005) 221 CLR 89
The ‘evident purpose’ of this element of the Act’s jurisdictional phrase “is the exclusion of a ‘legislative’ or ‘judicial’ character”.

- Burns v Australian National University (1982) 40 ALR 707
  - By a process of elimination, decisions which are neither ‘legislative’ nor ‘judicial’ will be classified as administrative.

- Ministry for Industry and Commerce v Tooheys Ltd (1982) 60 FLR 325
  - Whether the determination is legislative or administrative, it is necessary to look to the content (general or particular) of the power. The distinction [between a decision of a legislative character and a decision of an administrative character] is essentially between the creation or formulation of new rules of law having general application (legislative) and the application of those general rules to particular cases (administrative).

- Queensland Medical Laboratories v Blewett (1988) 84 ALR 615
  - Whereas Tooheys looks to the content (general or particular) of the power to determine whether it is legislative or administrative, Blewett suggests that what is relevant is not so much the content of the determination as its effect... A decision will be legislative if it has the effect of changing the content of the law (Gummow J).

- Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee (2007) 163 FCR 451
  - Factors relevant to the characterisation of a decision as legislative: These factors are whether the challenged matter:
    - Creates new rules of general application, rather than applying existing rules to particular cases.
    - Was publicly notified in the Gazette or similar publication.
    - Cannot be made until there has been wide public consultation
    - Incorporates or has regard to wide policy considerations;
    - Can be varied or amended unilaterally by its maker;
    - Cannot be varied or amended by the Executive;
    - Is not subject to merits review in a tribunal such as the AAT;
    - Can be reviewed in Parliament (for example, it is a disallowable instrument);
    - Triggers the operation of other legislative provisions; and
    - Has binding effect.

- [The applicant was the sponsor/manufacturer of Xenical, the brand name for orlistat, which is a treatment for excessive body weight. The respondent National Drug and Poisons Schedule Committee decided to include orlistat in Appendix H of the Standard for the Uniform Scheduling of Drugs and Poisons (the Poisons Standard). The inclusion of a medicine in Appendix H has the consequence that the medicine can be advertised directly to consumers. After receiving complaints concerning the advertising of Xenical, the committee decided to remove orlistat from Appendix H. The complaints arose from concerns that advertising of Xenical during the television program Australian Idol could lead to the inappropriate use of the substance. Issue: Was the decision of an administrative character? - No, it was of a legislative character]