THE NATURE OF ADMINISTRATIVE LAW

Nature of Admin Law
- Branch of public law (rather than private law)
- Body of law that regulates the exercise of power and making of decisions by:
  - Executive arm of government (to implement what the legislature has legislated)
  - Administrative arm of government (provides some means to review exec decisions)
  - Non-government bodies (provides the process of accountability for decisions made by the exec gvt)
- Branch of public law dealing with:
  - Actual operations of government and administrative processes and impact on citizens
  - Making of decisions that affect rights, interests and legitimate expectations of citizens
  - Carrying out of public works and management and provision of public services, and;
  - Regulating the above process

Development of Administrative Law
- ‘Old administrative law’
  - Common law
  - Entirely concerned with judicial review
  - Had to be reviewed by the judiciary under the Common Law system. But if judicial arm will sit on decision of executive power, then there is no separation of power
(Most admin law developed in late 20th Century in Australia. Dicey’s theory: public officials)
- ‘New administrative law’
  - Primary concern with administrative review
  - Provision for statutory form of judicial review
  - Also concerned with:
    - Human rights
    - Complaint handling
    - Privacy and information
    - Integrity
  - Largely based on legislation. Rather than going to judiciary to seek administrative decision there should be some quick way to resolve such problems, i.e. the Admin of Tribunal Act

- It encompasses both judicial and extra-judicial review (merit review, ombudsman etc)
- The purpose of admin law is to ensure openness and accountability of governments, and quality and consistency in their decision making

Role of Admin Law
- Constitutional law concerned with validity of laws; focuses on legality
- Concerned with validity of decisions and actions of executive government under valid laws
- Separation of powers – allows judiciary to review:
  - Validity of laws (constitutional law)
  - Decisions and actions of executive (admin law)

• Judicial review by the judiciary = to see whether they are acting legally
  1. Standing: does the person who wants to seek the review of this have standing to do so?
  2. Grounds: if they have standing, what are their grounds to seek legal review?

Purpose of Admin Law:
Balance between:
- Accessible and effective justice for aggrieved individuals
- Openness and accountability of government
- Quality and consistency of government decisions AND
- Administrative and fiscal efficiency
- Cost and complexity in dispute resolution
- ‘Collective’ public interest and individual interest

Scope of Judicial Review
- Performed by superior courts
- Concerned with legality of decisions
- Limited to reviewing executive power
- Breached limits of power
  o Acted unlawfully
  o Acted ‘irrationally’
  o Procedurally flawed
- Decision treated as illegality
- Does not extend down to Magistrate Court (as it is part of the Judicial system), thus rather it is an administrative court. Therefore, they are subject under admin law rather than judicial reviews
- Here the Magistrate Court is concerned with legality of decision
- It is important to note the body does not remake the decision (it is judicial, thus they can only send back the decision to decision-maker for reviews)

Remedies

Common Law:
- Certiorari – quash invalid decision
- Prohibition to prohibit further unlawful action
- Mandamus to compel lawful exercise of power, and
- Habeas corpus to require release of person from lawful detention;

Equitable remedies:
- No review of merits
  o Separation of powers
  o Courts avoid politics
- Mason J – “It is not the function of a court to substitute its own decision for that of an administrator…its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned” (MAA v Peko-Wallsend)

Judicial Review

Requirements:
- Court must have jurisdiction (have power to seek the review, e.g. inherent power (through colony), power to court by statute)
- Court must accept that a justiciable issue (is the decision court prepared to review? E.g. national security or war (big policy decision) is not subject to judicial reviews)
- Legislature has not validly excluded court’s review
- Court must have power to grant remedy
- Applicant must have standing
- I.e. ground of review available (what have they done to make it illegal? E.g. fail to take account of relevant consideration)
- NOTE: stand and ground are separate issues

JUDICIAL REVIEW

- Distinction between Judicial and Extra-Judicial reviews
- When Court looks at judicial review: look at legality
- Have they acted within their power to make such decision?
- The Court cannot look to see if it is the best decision, that is the role of extra-judicial reviews such as Ombudsman and Tribunals (part of administrative executive arms, thus can make or remake that decision)
- Judicial review can be undertaken either under Common Law or can be statutory power

- Scope of judicial review
  o Limitations on scope
- Jurisdiction
  o Limitations
- Justiciability
  o Limitations
- Remedies from judicial review
- Standing for judicial review
- Grounds for judicial review

Judicial Review

Requirements:
particular case; of which it was purported to be made; observed; the following grounds: may apply to judicial review under this Act.

Note: other than: paragraph discretion or not and whether before or after the commencement of this definition): "decision to which this Act applies" means: - S3 ADJR (Dictionary) (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; and, for the purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment. Note: Regulations for the purposes of section 19B can amend Schedule 3 (see section 19B).

"decision to which this Act applies" – S3 ADJR (Dictionary) 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. Note: Regulations for the purposes of section 19 can declare that decisions that are covered by this definition are not subject to judicial review under this Act.

Applications for review of decisions – s5 ADJR (1) A person who is aggrieved by a decision 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 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.

**Jurisdiction of Federal Court and Federal Circuit Court – s8 ADJR**

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.

Note: See also subsections 3(10), (11) and (12).

**Original jurisdiction of Federal Court of Australia – Section 39B Judiciary Act 1903 (Cth)**

Scope of original jurisdiction

- 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.

1. 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.

(1B) If a decision to prosecute a person for an offence against a law of the Commonwealth, a State or a Territory has been made by an officer or officers of the Commonwealth and the prosecution is proposed to be commenced in a court of a State or Territory:

(a) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against the officer or officers in relation to that decision; and

(b) the Supreme Court of the State or Territory in which the prosecution is proposed to be commenced is invested with, or has conferred on it, jurisdiction with respect to any such matter.

(1C) Subject to subsection (1D), at any time when:

(a) a prosecution for an offence against a law of the Commonwealth, a State or a Territory is before a court of a State or Territory; or

(b) an appeal arising out of such a prosecution is before a court of a State or Territory;

the following apply:

(c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related criminal justice process decision;

(d) the Supreme Court of the State or Territory in which the prosecution or appeal is before a court is invested with, or has conferred on it, jurisdiction with respect to any such matter.

(1D) Subsection (1C) does not apply where a person has applied for a writ of mandamus or prohibition, or an injunction, against an officer or officers of the Commonwealth in relation to a related criminal justice process decision before the commencement of a prosecution for an offence against a law of the Commonwealth, or of a State or a Territory.

(1E) Where subsection (1D) applies, the prosecutor may apply to the court for a permanent stay of the proceedings referred to in that subsection, and the court may grant such a stay if the court determines that:

(a) the matters the subject of the proceedings are more appropriately dealt with in the criminal justice process; and

(b) a stay of proceedings will not substantially prejudice the person.

Jurisdiction for certain writs that relate to civil proceedings

(1EA) If:

(a) a civil proceeding is before the Family Court of Australia, the Federal Circuit Court of Australia or a court of a State or Territory; or
(b) an appeal arising out of such a proceeding is before the Family Court of Australia or a court of a State or Territory;

the following apply:

(c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person who is or was a party to the proceeding seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related civil proceeding decision;

(d) the following court is invested with, or has conferred on it, jurisdiction with respect to any such matter:

(i) if the civil proceeding or appeal is before the Family Court of Australia— that court;

(ii) if the civil proceeding is before the Federal Circuit Court of Australia—that court; or

(iii) if the civil proceeding or appeal is before a court of a State or Territory—the Supreme Court of the State or Territory.

Jurisdictional rules to apply despite any other law

(1F) Subsections (1B), (1C), (1D), (1E) and (1EA) have effect despite anything in any other law. In particular:

(a) neither the Jurisdiction of Courts (Cross-vesting) Act 1987, nor any other law, has the effect of giving the Federal Court of Australia jurisdiction contrary to subsection (1B), (1C) or (1EA); and

(b) neither section 9 of the Administrative Decisions (Judicial Review) Act 1977, nor any other law, has the effect of removing from the Supreme Court of a State or Territory the jurisdiction given to that Court by subsection (1B), (1C) or (1EA).

References to officer or officers of the Commonwealth

(2) The reference in subsection (1), (1B), (1C) or (1D) to an officer or officers of the Commonwealth does not include a reference to a Judge or Judges of the Family Court of Australia.

Definitions

(3) In this section:

"civil proceeding" has the same meaning as in the National Security Information (Criminal and Civil Proceedings) Act 2004.

"related civil proceeding decision", in relation to a civil proceeding, means:

(a) a decision of the Attorney-General to give:

(i) notice under section 6A of the National Security Information (Criminal and Civil Proceedings) Act 2004 in relation to the proceeding; or

(ii) a certificate under section 38F or 38H of that Act in relation to the proceeding; or

(b) a decision of the Minister appointed by the Attorney-General under section 6A of that Act to give:

(i) notice under section 6A of that Act in relation to the proceeding; or

(ii) a certificate under section 38F or 38H of that Act in relation to the proceeding.

"related criminal justice process decision", in relation to an offence, means:

(a) a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:

(i) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and

(ii) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and

(iii) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and

(iv) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and

(v) a decision in connection with an appeal arising out of the prosecution; or

(b) a decision of the Attorney-General to give a certificate under section 26 or 28 of the National Security Information (Criminal and Civil Proceedings) Act 2004 before or during a federal criminal proceeding (within the meaning of that Act) in relation to the offence.
Creature of statute by the *Australian Act* 1966 as result of new admin law

- It's jurisdiction is limited by what statute gives it power (thus, originally not a wide jurisdiction, but got widened)
  - *ADJR Act*; the federal magistrate power to engage in non-judicial reviews (gives extensive admin jurisdiction on administrative matters)
  - *Judiciary Act* 1903
  - Original jurisdiction corresponds to HC
  - Limitations

- Federal Magistrates Court
  - *Federal Magistrates Act* 1999

- State Supreme Courts
  - Superior courts of record
  - Statute
    - They inherited power when they were created after the creation of States post colonisation of Australia
    - Some states still rely on this inherent power to engage admin matters
    - *NSW s23 Supreme Court Act*: gives it power to engage in admin reviews

- Is this a decision of administration under the authority of state legislation or was it made under the power given under Cth?
- If its decision was made under power grant by state legislation, there is no power in HC. State court gives you power.
- If act under Cth legislation, it is the *ADJR Act* that gives you power

**Justiciability**

- Nature of power
  - Prerogative power (non-statutory executive power – Common Law power from the Monarchy during the 13th Century. Such as King possesses such power rather than those from statute)
  - Policy, national security, defence
    - *Council of Civil Service Unions v Minister for the Civil Service (CCSU)*
    - Public service sought to change the conditions of public servants without consultation through prerogative matters. There is right to challenge such power but such right is not qualified. Such as there is some power such as national security or decision to go to war is high level, decisions are not justiciable by prerogative power. Look at the nature of the power
  - *Minister for Arts, Heritage and Environment v Peka Wallsend*

- Determine legal rights
  - *Re McBain; Ex parte Australian Catholic Bishops Conference*
    - HC: proceeding did not give rise to a matter
    - Gleeson CJ: court has no right to look at the interesting issues, rather they are there to solve matters

- Status of decision maker
  - Governor General once outside judicial review
  - Changed – *R v Toohey; Ex parte Northern Land Council*

**Limitation on Justiciability**

- Non-justiciable powers
  - Not advisory opinion
    - *Re McBain; Ex parte Australian Catholic Bishops Conference*
  - No manageable legal standards
  - Unfettered power
  - Capacity to function

**Limitations on judicial review**

In recent times, government has been privatising companies which means now the decisions are made by private/corporate bodies. Are decisions of these bodies still subject to judicial review?

- Use of private sector model by government
  - UK – amenable to judicial review – *Datafin* (non-government industry body: court held even the decision as not in government executive body, you do not look at the identity or source of power or nature, critical factor is what is the nature of decision thus is it subject to judicial reviews)
o AUST – no judicial review – *NEAT v AWB* (whether there could be judicial review made by this corporate body? HC: recognized but sidestepped the issue. Power of *veto* derived from incorporate company thus action is not subject to judicial review. In Australia, we looked at the nature of the body rather than nature of the decision such as UK has done, e.g. government could incorporate the company and what once was government body is no longer subject to judicial reviews as they are now corporations)

- Clubs etc
  o *Forbes v NSW Trotting Club* (the club was required to view the rule of natural justice, if it breaches such rule there could be judicial review and render such decision illegal)
  o *P51/2002*: court tried to prevent decisions made by Migration Tribunal Reviews. Sought to preclude those decisions, HC said there is no decision here as the decision was made illegally

- Statutory restrictions – privative clauses
  o Statutory power in areas such as industrial act
  o Judicial reviews can occur for disciplinary matters for clubs

### Remedies

**Powers of the Federal Court and the Federal Circuit Court in respect of applications for order of review – s16 ADJR**

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.

### Applications for review of decisions – s5 ADJR

1. A person who is aggrieved by a *decision 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 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;
   i. 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.

Applications for review of conduct related to making of decisions – s6 ADJR

(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 conferred by the enactment in pursuance of which the decision is proposed to be made; and
(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.

Applications in respect of failures to make decisions – s7 ADJR

(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.

- Common law and statutory – judicial review is only allowed in Court to review whether the decision is made legal. Such as did they act under a particular power or not (the Court cannot remake the decision because it would be a breach of the power of the executive administrative power and breach the separation of powers)

- Common law prerogative writs
  o Certiorari – setting decision aside
  o Prohibition – prohibiting order
  o Mandamus – mandatory order to act
  o Habeas Corpus – release if unlawful detention

- Equitable remedies
  o Injunction – restraining administrator
  o Declaration – declaratory relief

Certiorari
- Quashing impugned decision: if Court decides the matter is made illegally, they may quash the decision rather than tell the decision-maker to remake the decision
- Requirements
  o Error must be error of law
  o Error must appear on the face of the record
- Does not compel decision maker to start again – mandamus required
- Operated retrospectively
- Must be a decision
  o Ainsworth v CJC: Court: there was no decision rather a report by investigation body. Thus, at this state there was no decision to quash. Although there was illegality but again there was no decision thus CJC did not lie
  o Not Holdings v Creasy

Prohibition
- Restrain body from acting in excess of jurisdiction
- Prohibits impugned decision-maker from doing something illegal
- Prohibition can be used prior to decision
- Not available once decision-making process complete
  o Difference between prohibition and certiorari is timing (has to be a decision), but for prohibition, there need not be a decision. You can stop the decision before prohibition, to stop anybody else acting on the decision

Mandamus
- Compels performance of public duty; done in conjunction with certiorari. Can be used where person has not performed the public duty, thus used to make them perform their duty
- Establish respondent has failed to perform public duty
- Whether a public duty of discretion exists
  o WA Field & Game Assoc v Minister for Conservation: Court: the duty for the Minister is to exercise a discretion as whether to open season or not. Thus the public duty is to decide the matter and make a decision. He has done his duty thus no role for mandamus
- Only ordered to do what under a duty to do

Habeas Corpus
- Right to be free from wrongful restraint
- Test legality of detention
  o MIMA v Vadarlis – ‘Tampa’ rescues; not a restraint amenable to habeas corpus
  o Hicks v Ruddock – deprivation of liberty prima facie unlawful: Cth application to proceed but was struck out. Case never went to trial

Injunction
- Restrain breach of statutory duty
- Available whether prohibition available or not
Available if no duty to afford procedural fairness

- An equitable remedy, thus may be available more widely than prohibition

**Declaration**

- Resolve dispute over law applicable to situation in which applicant has sufficient interest
- Implied power – courts to do all that is necessary to resolve legal dispute

**Standing**

**Applications for review of decisions – s5 ADJR**

1. A person who is aggrieved by a decision 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

- **Locus standi** – sufficient connection to institute proceedings (ensures the applicant only litigates their own business, court will not look at matter that does not concern you)
- Generally substantial economic interest
- Formal filter to courts
  - Hussein v Sec DIMIA – Graham J – “standing demands a connection between the applicant’s interest and the relief sought. As a general rule the Court will not recognize busybodies who interfere in things that do not concern them”

- Separate from the merits
- Statutory rules – AAT Act, ADJR Act
- Test varies with remedy sought
  - Prerogative writs
  - Prohibition and certiorari – partly aggrieved; court discretion
    - Re McBain – McHugh J – stranger may apply for certiorari or prohibition…lack of standing will frequently result in court refusing either writ on discretionary grounds
  - Mandamus – more restrictive (mandamus is higher threshold: enforcing someone to do something. Such standing to get this must be high as it is compelling someone to do something)
  - Habeas corpus – lower threshold but still need to satisfy the court; court has discretion – Vadarlis

- Equitable remedies
  - Originally preserve of Attorney General (AG was there to look after the public interest, thus they had standing. Individuals sought to join AG in a related action, then by this way standing is available. But this does not work well in Australia, as it is unlikely AG will seek judicial review)
  - Boyce v Paddington Borough Council – 2 exceptions that applicant could base on to gain standing:
    - Interferes with plaintiff’s private right, or
    - Plaintiff suffered special damage ‘peculiar to himself’

**Application of Standing**

- **Australian Conservation Foundation v Cth**
  - Gibbs J
    - Special damage not limited to pecuniary monetary loss
    - The plaintiff need to suffer in a greater way than rest of the community
    - Interest not a mere intellectual or emotional concern
    - Not interest unless some advantage or disadvantage
  - Mason J
    - Property or proprietary rights, business or economic interests, perhaps social and political issues
    - Mere belief or concern is not enough to constitute special interest
  - Murphy J
    - Wider than property
    - Political and environmental interests

- **ACF v Minister for Resources (1989)**
  - Davies J – political perception has changed
    - Roles played by ACF increased and its role gave it enough interest to gain standing. Political perceptions have changed – such as environmental concerns grew, such representative bodies were seen to act more in the interest of us and were given more focus
- **Onus v Alcoa of Australia**
  o Stephen J – assess importance of concern and closeness of relationship
  o Brennan J – deny effective procedure for curial enforcement

- **North Coast Environmental Council Inc v Minister for Resources**
  o Sackville J – factors:
    - Peak environment body
    - Recognized by Cth – grants
    - On NSW advisory bodies
    - Projects and conferences

  Has standing as it was funded to run conferences and funding, it had special interest. Thus, enough to give a standing, it determines on nature and scope of legislation to determine this

- **Right to Life Assn (NSW) v Secretary, Dept of Human Resources and Health**
  o Lockhart J – right to speak not transmuted into right of standing
    - Intellectual, philosophical and emotional concern
  o Beaumont J – consider community perceptions and values

  Decision made to allow drug for child, which was contrary to abortion law. But this was not enough to have a standing as did not demonstrate enough special interest

- **Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)**
  o Special interest rule is flexible
  o Dictated by nature and subject matter of legislation

  Decision made to start Sunday trading. Court: did have standing – the special interest represents the special interest of those workers that will work on the weekends. But the rule is flexible; the nature and subject matter determines what amounts to special interest

- **Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefits Fund**
  o Gaudron, Gummow, Toohey JJ – nature and subject matter of litigation dictate what amounts to special interest

  Body sought injunction to prevent arrival in the community, granted standing as the rule is flexible and court said there were immediate and significant peculiar effect to them. Thus the body would suffer damage to private rights

Remedies are all based on judicial review. ONLY LOOK AT LEGALITY, rather than right or wrong. Standing and ground are two distinct and separate concepts. Need to get standing before moving onto ground (seek judicial review)

**STATUTORY INTERPRETATION**

Most admin actions will be based on a power that is based on statute, get from prerogative power (from Kings or Queens) or statutory power for decision makers to make decisions.

- Legislation
  o General rules applied to particular situation
  o Interpretation
    - Common law rules (developed by court over a long time) – not changed at will – *Corporate Affairs Comm of NSW v Yull* (authority for court to change its CL rules of statutory interpretation is very limited, as court came up with these rules and should not readily depart from them)
    - Statutory rules (these apply at both Cth and state level)
      - *Acts Interpretation Act 1901* (Cth)
      - *Interpretation Act 1987* (NSW)

**Parts of Legislation**
- Preamble – reason for legislation
- Titles
  o Long title (act of Parliament action)
  o Short title
- Parts and divisions
  - Sections
    - Traditional division of legislation
    - Section headings – not part of Act

**Common Law Interpretation**

- **Literal approach**
  - Language of statute – work out the intent of the legislation by looking at the clear word of the legislation; ‘black letter rule’ (what they said is what the legislation intended)
  - *Amalgamated Society of Engineers v Adelaide Steamship Co* – Higgins J – examination of the language used in its ordinary and natural sense (follow the clear words of the legislation)
  - *Cooper Brookes (Wollongong) v FCT* – Gibbs CJ – ordinary and grammatical meaning (words must mean what they mean, it does not mean the court should look at the real intent, but must try not to depart from the real meaning of the words)
  - Limitation – golden rule

- **Purposive approach**
  - Origin in ‘mischief rule’
  - Purpose from statute as a whole (seen as preferable approach to literal approach, as it looks at the statute as a whole, such as looking at the purpose of the act in order to define the act)
  - Not always clear – *Avel Pty Ltd v AG for NSW* – Kirby P – statute a jumble of ill-matched and poorly integrated enactments (the only safe approach is if drafting is done properly, then both approaches will get the same result, but when legislations have been drafted and amended so many times, its purpose may change so it is better to apply the literal approach)

**Statutory aids to interpretation**

- **Acts Interpretation Act 1901 (Cth)**
  - Section 5 Commencement of Acts
    - …shall come into operation on the twenty-eighth day after the day on which that Act receives the Royal Assent, unless the contrary intention appears in the Act
  - Section 18A – parts of speech and grammatical forms have corresponding meanings
  - Section 22 – meaning of certain word
    - (1) In any Act, unless the contrary intention appears:
      - expressions used to denote persons generally (such as “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” and “whoever”), include a body politic or corporate as well as an individual;
      - (aa) individual means a natural person

**Statutory aids**

- Section 15AA – construction that promotes purpose is preferred
  - *Mills v Meeking* – displaced common law approaches (Dawson J: purposive approach for Cth legislation is the preferred approach, displaced the CL approaches)
- Section 15AB – reference to extrinsic material (allows access to extrinsic materials, such as Royal Memorandums or speech. If the ordinary gives an ambiguous result, then you can go to extrinsic material for consultation)
  - To confirm meaning
  - To determine meaning if
    - Ambiguous or obscure
    - Ordinary meaning manifestly absurd
  - *Re Australian Federation of Construction Contractors; Ex parte Billing* – extrinsic material only if condition met
  - *Re Bolton; Ex parte Beane* – words of Minister don’t replace text of law

**Grammatical Aids**

- Acts to be read as a whole
  - Section limited by other sections (scope may be limited by the context of other part of the legislation)
  - *Metropolitan Gas Co v Federated Gas Employees Industrial Union* – read as whole instrument
  - *K & S Lake City Freighters v Gordon & Gotch* – words read in context
- Words assumed to be used consistently
  - *Craig Williamson v Barrowcliffe* – same meaning to same words
Rebuttable – Comm of Taxes (Vic) v Lennon
- Words have ordinary and current meaning
  o Act may intend to depart from meaning (where an act indicates an act to depart from the intended meaning, then the court shall depart from this meaning. If there is no accepted meaning, then court shall apply the context and come up with appropriate meaning)
  o Current meaning – ‘an Act…is always speaking’
- Legal technical words
  o Legal meaning – AG (NSW) v Brewery Employees Union NSW (unless legislation defines the word to mean something else, then you can assume to legislature to know that [take the well known meaning])
  o Technical words – whether common usage (non-technical words, the court generally can take the common usage of the word where it is well known, the less commercial use of such word the less likely the court would use its meaning and vice versa)

Syntactical Presumptions
- Noscitur a sociis – meaning derived from context
  o Avondale Motors v FCT – meaning depends on context
  o Prior v Sherwood – meaning limited by context; ‘house, office, room or place’ did not include public lane
- Ejusdem generis – general matters constrained by particular matters
  o Re Latham (dec’d) – ‘trustee, guardian, committee or other person…’ excluded person beneficially entitled; limited to persons in fiduciary capacity
  o Canwan Coals v FCT – ‘railway, road, pipeline or other facility’ – excluded storage facility
- Expressio unius est exclusio alterius – express reference to one matter excludes other matters
  o Heatley v Tasmanian Racing and Gaming Comm – hearing for revocation of licence, but not for warning off
  o Houssein v Under Secretary, Dept of Indus Relations & Technology – applied with care, valuable servant but dangerous master
- Generalia specialibus non derogant – specific prevails over the general if a conflict occurs
  o Within an Act rather than between Acts
  o Purcell v Electricity Comm of NSW – should only be used if there is an inconsistency that cannot be reconciled
  o Last resort – later sections prevail over earlier (with presumption that drafter intends to have later one prevail over earlier one)
- Reddendo singula singulis – two or more subjects qualified by two or more matters, qualifications attach to subject in order that they appear
  o Bishop v Deakin – person disqualified from being elected or being a member if within 5 years before election or since election, convicted; ‘within 5 years’ attached to ‘being elected’; ‘since elected’ attached to ‘being a member’

Common Law Presumptions
- Implied incidental power (where a person is given a power to do something, there is an implied incidental power that does with the power to act)
  o Power from incidental and consequential functions – Herscu v The Queen (concerned a Minister who received bribes to change the road entrance to a shopping centre. Argument: activities for which the money has been paid was not the explicit duty of the Minister, rejected by the HC: he had the power but he had the power of the administration of the government (incidental power went with his ministerial power)
  o Limitations:
    ▪ Clear language to interfere with fundamental rights
    ▪ Not for authorized purposes
    ▪ Activity must complement not supplement – Kent v Johnson
- Established freedoms and immunities
  o If court wants to interfere with those basic CL rights, can only do so by clear and unambiguous language
  o Not to abrogate fundamental common law rights
    ▪ Coco v R (drug dealer convicted on telephone conversation. Police had a warrant to use listening device but did not extend to unauthorized entry to install the device)