

I JURISDICTION

A ADJR Act

[If uncontentious]

Federal Court/Federal Circuit Court clearly has jurisdiction under the *ADJR Act* as [decision by DM to do x] is the [insert relevant decision here] which is a decision of an administrative character made under an enactment, ie under s _ of the [Relevant Act] (s 3(1) *ADJR Act*; *Tang*).

Relevant decisions (s 3(2)(_) *ADJR Act*)

- (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

[If contentious]

Possible source of jurisdiction for the Federal Court/Federal Circuit court is the *ADJR Act*. To prove jurisdiction, [applicant] must show that there was a decision of an administrative character made under an enactment (s 3(1) *ADJR Act*; *Tang*). Here, [applicant] may seek to characterise [DM's decision to do x] as ____

- a decision to which the *ADJR Act* applies (s 5 *ADJR Act*)
- conduct engaged in for the purposes of making a decision to which the *ADJR Act* applies (s 6 *ADJR Act*)
- failure to make a decision to which the *ADJR Act* applies (s 7 *ADJR Act*)

1 Final Decision?

Rule: The decision must be (a) '**final, operative or determinative**'; and (b) **be a 'substantive determination'** (*Bond* (Mason CJ)). The decision cannot be a preliminary/intermediate decision unless **expressly provided for by the statute** (*Bond*) and must be distinguished from 'conduct' as 'action taken ... for the purpose of making a reviewable decision' (*Bond*).

Analogue:

- **Final, operative and determinative:** Factual findings will often lack the element of finality and hence are unreviewable (*Bond*)

- Analogous to *Bond* where factual finding that Bond was not a fit and proper person was merely an intermediate conclusion *en route* to a final substantive decision (ie, whether the licence should be revoked/varied), here [apply]

2 Administrative Character?

Rule: A decision will be of administrative character if it is **neither legislative nor judicial** in nature (*Tang*). Although legislative decisions normally involve the formulation of general rules, the focus is on how these legislative decisions change the content of the law (*Blewett*).

Consider:

- Relevant indicators of legislative nature (*Central Land Council Aboriginal Corp*):
 - Decision raises broad policy questions
 - Decision is subject to parliamentary oversight (if merits review, then admin decision)
 - Requirements to consult and give public notification

Analogise:

- Analogous to *Blewett* where the decision to substitute a new table of fees for an existing table was considered legislative in nature (as it replaced the existing law), here [apply]

3 Made under an enactment?

Rule: The decision must be (a) '**expressly or impliedly authorised by the enactment**'; and (b) '**must itself confer, alter, or otherwise affect legal rights or obligations**' (*Tang*).

a. Enactment?

[Act] is an 'enactment' as it is ____.

- **Cth Act** (s 3(1) *ADJR Act*).
- **Instrument** made under a Cth Act (includes rules, regulations, by-laws) (s 3(1) *ADJR Act*).
 - **Rule:** The instrument must allow the decision-maker to unilaterally affect rights or obligations (*Lewins*).
 - **Yes:** In *Chittick*, a document setting out the terms and conditions of employment in a public agency was an 'instrument' as it was made under an enactment, allowed for the making of administrative decisions, and had the capacity to affect legal rights and obligations. [Analogise – similarly, xyz]

- **No:** In *Lewins*, the university promotions policy did not allow the university to unilaterally alter staff employment contracts and hence was not an 'instrument'.
- NOT delegated legislation (as not an Act) or non-statutory executive powers (eg, prerogative)
- **Excludes contracts:** Decisions taken pursuant to a contract are not 'made under an enactment' as they only affect rights and obligations through the operation of the contract and contract law (*Tang*)

b. *Expressly or impliedly authorised by the enactment?*

- **[Source of power]**
 - Courts will look at the source of the decision-maker's power in determining if it was made 'under an enactment' (*NEAT*). In *NEAT*, the Court held that AWBI's power to issue written approvals was not derived from the Act, but rather from its status as a company and hence it was not a decision 'made under an enactment'. Here, [apply, DM did/did not need statutory authority to do x]
- **[Role in statute]**
 - Further, must distinguish between a decision that is a precondition to the making of a further decision; and that further decision itself. In *NEAT*, AWBI's approval was merely a condition precedent for the authority's final decision of consenting to wheat exports; it was not the final operative decision authorised by the Act. Similarly, [apply]
- **[Private interests]**
 - May also argue that [DM's] 'private' character and interests as a [company etc of pursuing profits for shareholders etc] are not amenable to public law obligations (*NEAT*). Analogous to *NEAT* where AWBI's self-interested purpose of profit maximisation for wheat growers who sold to the pool was viewed as incompatible with the imposition of public law obligations, a Court may likewise decline to find that [DM's decision] was made 'under an enactment'.

c. *Affects legal rights or obligations?*

- In *Tang*, the relationship between Tang and the university was non-contractual and one of 'mutual consensus'; she enjoyed **no present or future** legal rights/ obligations under statute or private law which could be affected by the decision.
 - Tang had no entitlement under the Act to study her degree and there were no statutory obligations to follow certain procedures – the relationship was one of 'voluntary association'
 - 'The respondent would still have had to satisfy the requirements for award of the degree' (*Tang*).

B Constitution

[If claim at first instance = Federal Court]

1 s 75(v) Constitution

As this is a claim at first instance, [applicant] may bring it to the Federal Court which possesses the same original jurisdiction of the High Court (s 39B(1) JA). Here, [applicant] is likely to seek the constitutional writ(s) of [mandamus/prohibition/injunction] against [DM] who is an officer of the Cth (s 75(v) Constitution).

- **Requirements:** Must be officer of Cth; must prove JE
- **Remedies:** Mandamus; prohibition; injunction; certiorari

2 s 75(iii) Constitution

-OR- Here, Cth/ [DM] appearing on the Cth's behalf is party to the proceedings (s 75(iii) Constitution).

- **Requirements:** Cth must be party
- **Remedies:** Can grant certiorari even if no JE (PBS); constitutional writs

Officer of Cth: Person (not corporation) appointed by Cth to an identifiable office, is paid by the Cth and responsible to and removable by the Cth (*Broadbent*)

Cth: Includes bodies corporate, statutory corporations and government-owned corporations

- Mandamus [Order to perform public duty not yet performed]
- Prohibition [Order to refrain from exceeding DM's jurisdiction]
- Injunction [Order to refrain from doing something] (available for non-JEs)
- Certiorari as ancillary remedy [Deprives decision of legal effect]
 - Only if necessary for effective exercise for mandamus/prohibition

[If appeal/matter raising serious constitutional issues = HCA]

[Applicant] may invoke the High Court's original/appellate jurisdiction under s 75() Constitution as ____

s 75() Constitution

- (iii) the Cth is a party to the proceedings ([DM as x] is officer of Cth).
- (v) he/she is likely to seek the constitutional writ(s) of [mandamus/prohibition/injunction] against [DM] who is an officer of Cth.
 - 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'

C State courts' supervisory jurisdiction

State Supreme Courts have common law and constitutionally entrenched jurisdiction to engage in judicial review (s 73(ii); *Kirk*).

- No need for decision to be by 'officers of a State'

1 'Public' Decision?

- Decisions made by non-government bodies pursuing private interests may not be subject to judicial review as the Court may find that those private interests are incompatible with public law obligations (*NEAT*).
- Also look at the source of the decision-maker's power (*NEAT*) to determine if it is a 'public' decision
- Condition precedent to exercise of statutory power or final operative decision? (*NEAT*)

2 Justiciable?

Decision is likely to be non-justiciable if it involves:

- Controversial policy issues regarding foreign affairs (*Hicks*) or national security (*CCSU*); the court is likely to decline judicial review as it is ill-equipped to consider such political matters
 - Note: Although decision in *Aye* (cancellation of visa without hearing) concerned matters regarding foreign affairs and politics, the Court found that it was reviewable as it directly affected *Aye* but did not affect the private/public rights of other Australian citizens and was not dependent upon a factual determination of any personal circumstances
- Polycentric policy issues
 - In *Peko-Wallsend*, the subject matter involved intertwined policy questions on the environment, Aboriginal rights, the economic costs/benefits of mining policy, and matters affecting private interests. The Court found that the issue was non-justiciable and that it was better resolved in 'the political arena'.
- Use of historically prerogative powers (*Hicks*)