

Administrative Law

Problem Question Summary

What are the main elements of a judicial review application?

- Forum – in which court (or tribunal), and at what level, should the application be brought?
- Jurisdiction – court must have jurisdiction to review the act or decision
- Standing – the applicant must be an appropriate person to bring the application
- Justiciability – court must accept that the application raises ‘justiciable issues’
- Grounds of review – there must have been a breach of an administrative law norm
- Exclusion
- Remedies – the court must have the power to grant an appropriate remedy
- Privative Clauses – the legislature must not have validly excluded the court’s review jurisdiction
- Allied rights – this can be raised at any stage (eg right to reasons under ADJR or AAT Act, utilising FOI)

Scope of Judicial Review:

Green v Daniels

Green v Daniels [1977] 13 ALR 1

- **Facts:** Karen Green was a school-leaver who registered for employment at the Cth Employment services (CES) on 20 December 1976 after completing her final year of schooling. She was told there were no jobs and she could not yet receive employment benefits (until 2 months later on 22 February 1977) because she was a school leaver (this time coincided with the end of summer vacation). The service, which derived its powers from the *Social Services Act 1947*, had a **departmental policy** (not in the legislation) that school leavers registering within 28 days of the end of the school year should not receive benefits until after holiday time, and this **had formed the basis of their decision** to wait until granting Green benefits. Green also made reasonable efforts to find work, finally received benefits on 22 February 1977. She initiated proceedings in the HCA seeking a **declaration** of entitlements to employment benefits and an order for payment in arrears.
- **Issue:** The principal issue was whether the CES decision to withhold employment benefits from December to February was lawful, and if not, what remedy should be granted.
- **Held:** The court held that the department's (CES) decision was **unlawful** because it was based (and hinged) on the rigid application of a departmental policy which was not supported by statute.
 - **Remedy:** The remedy was to remit the decision back to the Director-General of the CES— the court did not state what the decision should have been (ultimately, however, the same decision was re-made): *'...the plaintiff, I think, is entitled to some relief. But that relief does not extend so far as the plaintiff seeks to press it.'*
 - **The departmental policy should not have been determinative (ultra vires)** - the Director-General should have considered all circumstances of the plaintiff's claim in accordance with the requirements of s107(c) of the *Social Services Act 1947* – the fact that the claim was lodged before the school holidays were finished may influence the decision but should not be treated as decisive. The CES was not a body granted discretion, it was to apply s107(c), and ought not have applied the policy as a blanket ban.
 - Departmental policies **must be:**
 - **Consistent with legislation** (as was not the case here); and
 - **Cannot be substituted for those criteria outlined in the legislation** which Parliament has determined are appropriate.
 - **Merits/Legalities distinction:** While the plaintiff requested the Court form its own conclusions as to compliance with the Act (and thus would declare her eligibility to receive payments), Stephens J held this would equate to stepping into the shoes of the original decision maker, which is to usurp the function of the executive: *'it is to the Director-General or his delegates that the legislation assigns the task of attaining satisfaction and the court should not seek to usurp that function.'*
 - **Note – Constitutional basis** – at time ADJR act not available, so cn remedies based on availability of HCA original jurisdiction on matters about writ of mandamus, prohibition or injunction (Constitutional remedies) against officers of the Cth (s75(5) Cn). s39B of Judiciary Act now allows these to also be heard by federal court. Under
 - **Comparison to Datafin:** It should be noted that were *Datafin* applied to *Green*, there would have been no grounds of review (since only grounds are illegality, irrationality and procedural impropriety), and thus there was no ground for 'unfairness'.

ADJR Act Jurisdiction - Statutory Sources of Judicial Review:

Applications to under the ADJR may be made to either the Federal Court or the Federal Magistrates Court.

General Rule: Applications for judicial review can be brought under the ADJR by aggrieved persons in relation to:
[pick relevant option]

- 'a decision to which this Act applies' — s5
- proposed and actual conduct engaged in for the purpose of making a 'decision to which this Act applies' — s6
- a failure to make a 'decision to which this act applies.' — s7

Thus, the pertinent issue is what is defined as →

'A Decision to which [the ADJR] Act Applies':

Rule: The ADJR Act applies to **decisions** of an **administrative character**, which were **made under an enactment** — s3(1)

- Exceptions (decisions which the ADJT act does not apply to): — s3(1)
 - Decisions made by the Governor General; and
 - Decisions listed in Schedule 1 of the Act
- Note: the HCA has cautioned against treating these as distinct criteria — *Griffith University v Tang*

Element 1: 'Decision'

While s3(2) of the ADJR defines decisions extremely broadly (s3(2)(g) specifies that decision includes 'doing or refusing to do any other act or thing [not listed in the section]', this definition has been interpreted restrictively by the HCA in *Australian Broadcasting Tribunal v Bond* →

Rule: Reviewable decisions must be sufficiently 'final or operative and determinative' (as provided for in legislation), and must be 'substantive' in nature — *Bond*

A. Final and Operative or Determinative:

Rule: A decision is reviewable where it is sufficiently 'final or operative and determinative' (not preliminary) — as provided for in legislation. — *Bond*

- Caveat — where statute specifically provides for the making of preliminary decisions as a mere step in the course of a making a final decision, this 'intermediate decision' can constitute a 'decision made under enactment' and is thus sufficiently final and reviewable.

B. Substantive

Rule: A decision is reviewable where it is 'substantive' in nature. — *Bond*

- Not intermediate conclusions reached en route to a final decision, or steps in a deliberative process, or mere findings of fact.
- **'Conduct' s6 route allows for review of procedural decisions:** if the decision was not 'final' (per A above), it can still be reviewable under s6 *ADJR Act* where the 'conduct' is procedural — that is, focused on the 'actual conduct of proceedings and not on intermediate conclusions reached en route to a final conclusion' — *Bond*; *ADJR s6*
 - Decisions of a procedural nature are 'taking of evidence', holding of inquiry or investigation — *Mason J in Bond*
 - To clarify, you can only review procedural decisions where an ultimate final decision has not yet been made (eg decision not to allow certain evidence to be admitted), since this falls within the meaning of conduct related to a decision in s6. However, where an ultimate and final determinative decision has been made, you cant then challenge the procedures or the facts of the case — you need to challenge the

actual decision itself.

Element 2: 'Administrative Character'

Rule: Reviewable decisions must be of an administrative (not judicial or legislative) character. –s3(1)

- Judicial character – must not be determinative of rights and obligations of parties
- Legislative character – must not be rule-like; binding, of general application; changes content of the law (*Blewett*)
 - Factors distinguishing legislative and administrative character:
 - Formulates general principles (legislative) rather than applying those principles individually (administrative);
 - Where the decision changes the content of the law (legislative) – *Gummow J* in *Queensland Medical Lab*
 - Binding effect on legal entities (Legislative)
 - Applies to a large group in society (legislative), rather than an individual/small group (administrative)
 - Parliamentary oversight involved, tabled in parliament or published in gazette (legislative)
 - Decision is subject to merits review (administrative)
 - Instability of 'legislative character'
 - *Queensland Medical Laboratory v Blewett* – ministerial decision for new table of fees set out in schedule of enactment; said not all rules need to formulate rigid rule of application, emphasis is on how legislative decision change the content of the law.'
 - VS -
 - *Federal Airports Corp* – decision by corporation under enactment to change landing charges at airports; applied generally and clearly changed law, but nonetheless held to be administrative not legislative decision.
 - Delegated or subordinate legislation? Not reviewable under ADJR - This is where a statute confers power on the executive to make further legislation (or rules) - which (so as to avoid breaching separation of powers principle) must adhere strictly to the scope provided for in the primary legislation.
 - Exception – decisions made under delegated/subordinate legislation can be challenged under ADJR on the basis that the delegated legislation itself was beyond the scope of the original legislation allowing for it, and thus, the decision had no legal basis. However s39B(1) can be used for common law/constitutional judicial review (provided the decision was by an 'officer of the Commonwealth')
 - Note the key difference – legislative regulation (ie how legislation works) is not reviewable, but regulation (executive decisions applicable to an individual) made under legislation are reviewable

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

- **Facts:** *Bond* was concerned with whether the company owned by Alan Bond could be granted a television license based on a character assessment of Bond himself. The decision concerned was an assessment of whether he was a fit and proper person, a factual assessment when the decision to grant or revoke the company's license had not yet been made. This was justified by the Tribunal on the basis that since Bond owned and thus, in practice controlled the companies to which the licenses were (possibly) going to be granted, an assessment of his character was relevant to their final decision. Nevertheless, when proceedings were brought, the Tribunal had not conclusively made a decision on the actual granting of a license to the company controlled by Bond.
- **Issue:** Was the conclusion reached about Bond's character a 'decision' within the meaning of s3(1) ADJR Act?
- **Held:** Mason J held that a decision that Mr Bond was not a fit and proper person was not judicially reviewable under the ADJR. This is because:
 - **Reviewable decisions must be 'final or operative and determinative'**
 - That is, they cannot be preliminary decisions in the process of making a final decision; **except** where a statute specifically provides for the making of a preliminary decision as a mere step in the course of making a final decision. In that case, the decision is considered 'under and enactment' and is thus reviewable.
 - **Reviewable decisions must be 'substantive' in nature**
 - Reviewable decisions must not be mere findings of fact or 'steps in the deliberative process'
 - The 'conduct' (per s6 ADJR Act) whilst including 'actual conduct of proceedings' (ie procedural issues such as taking of evidence or holding of inquiry/investigation) does include intermediate conclusions reached en route to final substantive decisions.
- **Policy Reasons for Court's Conclusion:**
 - Mason J: the decision to allow review of only substantive, rather than procedural decisions (where the decision is final) was influenced by the inclusion of 'conduct' in section 6 of the ADJR Act. Mason J held that conduct in the statutory scheme was 'essentially procedural' focusing on the actual conduct of the proceedings not on the intermediate conclusions to final (substantive) decisions: *'it would seem strange if conduct [as referred to in s6] were to extend generally to unreviewable decisions which are in themselves no more than steps in the deliberative or reasoning process.'*
 - **Merits vs Judicial Review:** Mason J also noted that review of factual determinations could transform the ADJR judicial review into merits review, and he suggested that if this was intended in the purpose of the Act, then Parliament would not have created an entirely separate scheme of merits review in the form of the AAT
 - The ADJR Act was understood against the background of existing common law administrative law principles, and those common law principles did not ordinarily allow findings of fact to be reviewable. This was based on an underlying feat that review of fact would fundamentally frustrate and undermine the functional divide between merits review and judicial review.
 - If every factual error an administrator made also constituted a legal error, it would be difficult to cling to the notion that judicial review is only limited to ensuring decisions are made legally (intra vires) and not simply 'correctly'.
 - **Fragmenting and Delaying Proceedings:** Finally, Mason J maintained that procedural decisions would 'fragment and delay' the process of administrative decision making (however this has been criticised, since Mason's finality test has a caveat for legislatively entrenched intermediate decisions; and applicants can plead using other jurisdictions and 'escape hatches' eg s75(v)/s39B(1) – *Tang*)
 - Others have criticised this decision on the basis that it has created a wave of technical jurisprudence which delays administrative decision making in the first place.
 - Moreover, intermediate decisions can eventually be considered to the extent that they play a part in a final and substantive later decision.

Element 3: 'Made Under an Enactment'

Rule: The decision must have been made under an instrument made under a Commonwealth act, which has the capacity to alter or affect rights and obligations – s3(1) ADJR Act; *Tang*

A. Instrument made under a Commonwealth Act

- The decision must expressly or impliedly be required or authorised by the enactment – *Tang*
 - Must simply show nexus or chain between rules or instruments (legislative in character) under which decision was made and a Commonwealth Act – sometimes chain is 1 link (eg literally made under the Act), sometimes it takes a few steps to demonstrate.
- Includes: rules, regulations or by-laws & subordinate or delegated legislation
- Excludes non-statutory government powers (eg prerogative powers); decisions made under private contract – *Tang*

B. Capacity to Affect Rights and Obligations

- The decision must confer, alter or otherwise affect legal rights and obligations – *Tang*
 - Rights and obligations must be legal (eg could derive from statute - but not necessarily); excludes procedural fairness rights etc.
- The decision-maker must also have power to unilaterally (non consensually) make alterations to the 'instrument' – *Chittick v Ackland*; *ANU v Lewins*
 [ANU v Lewins: a contract dealing with promotions policy was deemed not an instrument, since, since it could not be altered unilaterally by the decision-maker.]

B1. Limiting the scope of 'under an enactment' to public decision-makers

- The question is whether it is *necessary and appropriate* to conclude that the statute authorises non-government body to exercise government power (*Neat*)
 - Must take into account policy considerations regarding protection of private status of government corporations and restricting public review of private bodies, since they have duties (eg to shareholders) which are 'incompatible' with public duties as required by administrative law.
 - ***Tang*** – emphasised that decision must itself *confer or alter affecting legal rights or obligations*, and thus emphasis on legal rights excludes common law or inherent rights (such as mutual agreement).

- **Facts:** This case arose under the *Judicial Review Act 1993* (QLD) ('Qld Act'), which is very similar to the ADJR Act (and thus principles ascertained apply in both jurisdictions). Tang was a PhD student accused of academic misconduct (for entering uncontroversial results prior to completion of tests to save time). She was investigated by a university committee at Griffith which decided not to allow her to be eligible for her PhD. Tang appealed to the committee, but they upheld their original decision. Tang thus sought judicial review on the grounds of procedural fairness. Griffith University was set up under the *Griffith University Act*
- **Issue:** Was the decision 'made under an enactment' for the purposes of the Qld Act (and thus ADJR Act also)?
- **Held:** The court held that there was no scope for judicial review under the Qld Act/ADJR Act since Tang failed to fulfil the 2nd element of the 'under an enactment' test – the decision did not affect her rights or obligations.
 - **Contract:** Both parties agreed they were not bound by contract. Nevertheless, the court stated that **decisions made pursuant to contract/under contract are not made under an enactment and therefore are not subject to judicial review.** Nevertheless →
 - **First element** – The court held that Tang **did satisfy** the first element, since the decision was '*expressly or impliedly authorised by the enactment*'. The Court held that the decision must have been authorised broadly by the *Griffith University Act*, which was the relevant enactment.
 - **Second element** – The court held that the decision did **not** '*confer, alter or otherwise affect legal rights or obligations.*' This element was not satisfied because Tang had no existing legal rights and the university had no obligations – instead, the relationship was under 'general law' (as opposed to enactment) and was thus merely voluntary and of '**mutual consensus**'. This was highlighted by the fact that the laws used by the committee to expel Tang were merely policy documents (soft law) which did not have the formal backing of legislation. Moreover, were either party to withdraw, no rights or obligations would be affected.
- **Dissent: Kirby J** – Kirby argued that the majority's approach was 'unduly narrow'.
 - **Mistaken Purpose:** Kirby J argued that the test established by the majority 'put a gloss' on the ADJR Act which 'defeats the attainment of important reformatory purposes of the Act'.
 - This 'purpose' was an allusion to the Kerr Report's attempt to make access to judicial review less formulaic, pedantic and ultimately restrictive, and instead to focus on the need to provide a remedy where breach of a ground of review can be shown. The addition of a 'rights and obligations affected' test essentially undermined this purpose of the ADJR Act.
 - Kirby J also engaged in statutory interpretation to determine the overarching purpose of s3(1) and the ADJR Act as a whole, which he found was to ensure a 'broad connotation of 'decision'; a large ambit of 'enactment'...and the very large scope afforded to persons to establish standing.'
 - Thus, Kirby argued a **better test for the second element** than 'affecting rights and obligations' was '**affecting interests**' – it was broader and better achieved the purpose of the ADJR Act.
 - **First element: 'Under Enactment'** – Kirby argued that the majority's view that Griffith's decision lacked any legislative source of power (and was merely a result of 'mutual consensus') was wrong. Both parties agreed they were not contractually bound, and thus only source of power to refuse PhD was *Griffith University Act* ('no competing statutory or other source of a relevant power existed.'). Kirby says it fell within the act's provisions allowing Griffith to 'provide education at university standard' & 'confer higher awards'. Termination of that relationship fell within the act, since making a decision includes 'not making a decision' (ss5(a) & 3(2) *ADJR Act*).
 - **Policy grounds:** this argument is also grounded in the fear that without an enactment, Tang was left without recourse to any form of justice.

Facts:

- **AWB** was a private corporation dominated by shareholders who were primarily wheat growers. The purpose of AWB was, among other things, to establish a single desk arrangement where its wholly owned subsidiary (AWBI) would take amounts received from sales of a pool of wheat exported overseas and divide it proportionally amongst those who supplied the grain to the pool. It was thus designed to ensure there was a single seller of Australian Wheat overseas and thus no internal competition (thereby maximising profits and allowing for leverage based on quantity).
- Before giving consent to the export of wheat, s57(3A) of the *Wheat Marketing Act 1989* (Cth) provided that the Wheat Export Authority (WEA) had to get written consent from AWBI.
- NEAT, the appellant, made six applications to the WEA to seek its consent to export wheat, but in each case WEA refused because AWBI had not given written approval (since NEAT did not contribute wheat to the common pool, and thus AWBI sought to maintain its monopoly over wheat exports). Thus NEAT sought a declaration that the WEA's authority – and thus AWBI decision – to refuse consent was **unlawful** and void. It argued this on the basis

Issue:

Could the decision of AWBI to refuse consent be subject to judicial review, and were public law remedies therefore available?

Arguments:

NEAT argued that AWBI's refusal to consult with the WEA and its refusal to give written consent was a decision (or conduct engaged in for purpose of making a decision per ADJR s6) of administrative character made under enactment (per ADJR s5). It argued the relevant grounds of review were failure to take into account relevant considerations, taking into account irrelevant considerations, and applied policy inflexibly.

Held:

The court held that the decision was not subject to judicial review under the ADJR Act or the common law (since remedies were not available) [though these arguments are considered indistinguishably in the case]. HCA held that **even where a private body exercises a public function, public law remedies are not available** →

Propositions:

Whilst this scenario was strikingly similar to *Datafin*, the HCA decided against a functional approach for 3 predominant reasons: [the first pertains to ADJR review, 2-3 relate to common law review]

- **1. Act did not confer authority on AWBI to make a decision:** The HCA **limited its decision** to 'the particular structure of the legislation', finding that it was **not** 'necessary and appropriate' to hold that the statute (*Wheat Marketing Act*) did not confer power on AWBI to make a decision – hence, it was **not a decision under an enactment**. This was reasoned as follows:
 - s57(3B) *Wheat Marketing Act* gave 'statutory significance' to the decision of the AWBI to consent but ultimately the power to make the decision rested with the WEA, not AWBI. Therefore, a decision to apply policy inflexibly, and to evaluate the relevant considerations (the grounds of review which NEAT argued were breached) lay with WEA and not with AWBI.
 - Rather, AWBI's power to issue consent came from its status as an 'incorporated' legal person, which like any other private actor, has the right to 'consent' and to issue written documents (which in this case express consent) on the export of wheat. [Thus first element of *Tang* not satisfied, but second element – rights and obligations affected – certainly is]
- **2. AWBI was of a private nature:** Court did not accept Neat's argument that AWBI was a private body with public nature. Since AWBI did not rely on statute or executive power, it was simply a private body.
- **3. Cannot reconcile AWBI's private nature with 'public considerations' which are reviewable:** AWBI's legal obligation as a corporation was to maximise return for its shareholders (as set out in its corporate constitution), which is fundamentally incompatible with the public law obligation to engage in 'other regarding' practices, except to the extent that its private interests overlapped with those of the public (ensuring strong grain trades).
 - NEAT argued that the historical decision in 1997/1998 to change the Act to restructure AWB from statutory authority to grower owned company, and thus transition it from public company to private body was an example of private body exercising a public function.
 - However, the court rejected the compatibility of this private nature and a reviewable public function - it stated that 'no sensible accommodation can be achieved' of private and public interests.

- **Gleeson J (same conclusion, different reasoning):**
 - Gleeson J found that the decision **was** made under an enactment, and was therefore reviewable under the ADJR – *‘to describe it [AWBI] as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established...it has power to withhold approval which is a condition precedent to a statutory decision.’*
 - Nevertheless, while Gleeson found that ADJR review was possible, he found that there was no breach of a ground of review. The statutory scheme setting up a ‘single desk arrangement’ in AWBI in effect gave a statutory monopoly to AWBI to export wheat. Thus, even if this monopoly system seemed unfair: *‘judicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function conferred upon the AWBI. The appellant might genuinely believe the system itself is unfair...Nothing follows from that...there is nothing inherently wrong in an administrative decision maker pursuing a policy, provided the policy is consistent with the statute.’*
 - Thus, AWBI’s refusal to issue consent was subject to judicial review, but did not breach a ground of review, since it was based directly on the stator scheme.
- **Kirby J (dissenting):** Kirby attacked the majority’s opinion that AWBI’s decision was not under an enactment and therefore susceptible to judicial review (point 1 above).
 - Kirby J highlighted the artificiality of this conclusion by arguing that any private actor can issue approvals and these are virtually meaningless. Rather, it is the conferral upon AWBI by the statute of the special significance for its approvals which is important – it was ‘provided for, required and given legal force’ by the statute and therefore ought to be considered ‘under an enactment’ and thus amenable to judicial review. The Act gave what otherwise was a meaningless act meaning.
 - Kirby also argued by extension that no normal person would be complied with if they issued their consent to the WEA – clearly there was something which meant that AWBI approvals were binding, and this ‘something’ flowed from the statutory scheme.
- **Criticisms of NEAT:**
 - *NEAT* was the first opportunity for the High Court to consider the ‘functional turn’ in administrative law as put forward by *Datafin*. However, instead of considering the issue, they dodged it by framing their judgement in terms of the specifics of the relevant legislation (and by suggesting that public functions are incompatible with private interests). This latter point has been subject of much academic criticism in particular.
- **Conclusion:**
 - Although theoretically the ADJR does not preclude a more functional approach (assuming the private decision-maker is acting under the authority of an enactment) *Neat* appears to hold that the court will question whether or not it is appropriate, given the private nature of the decision-maker, to be considered as making a decision under the relevant enactment.
 - Thus, the court’s approach appears to suggest strong underlying policy implications in favour of maintaining the institutional approach to administrative law.

Can the Federal Court review a report or recommendation under the *ADJR Act*?

- S 3(3) – see page 27 – 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.
- Federal court has read this quite narrowly (Eddleston) – despite preliminary nature, report needs to be a statutory precondition for the making of a final, operative decision.

Constitutional Sources of Judicial Review:

Federal Court: [use this jurisdiction before High Court, unless statute in question specifically excludes it]

General Rule: In any **matter**, the Federal Court of Australia has original jurisdiction in which a **remedy** – of mandamus, prohibition or injunction – is **available** and **sought** against an **officer(s) of the Commonwealth**. – s39B(1) Judiciary Act

- Note, the Federal Court and Federal Magistrates Court also have jurisdiction under the ADJR Act.

High Court:

General Rule: In any **matter**, the High Court of Australia (HCA) has constitutionally entrenched ‘original’ judicial review jurisdiction where a **remedy** – of mandamus, prohibition or injunction – is **available** against ‘an **officer of the Commonwealth**’ – s75(v) Cn

- The High Court’s original judicial review jurisdiction in s75(v) is entrenched (s128 requires a referendum to change it). The legislature cannot repeal this jurisdiction, whereas both the ADJR and the Judiciary Act can be taken away. Thus, this jurisdiction is powerful and fundamental.
- Since the ADJR Act, some decisions which cannot be reviewed under the Act still fall within s75(v) jurisdiction and this has given rise to greater numbers of cases coming before the HCA. As a direct result, the s39B(1) was inserted into the Judiciary Act was in 1983 to confer identical jurisdiction on the Federal Court. →

(pages 45-46)

Application - Requirements & Limitations on Exercise of Constitutional Jurisdiction:

A. Officer of the Commonwealth:

Rule: Applications for constitutional remedies are limited to matters, in which claims seeking relief against ‘an officer of the Commonwealth’ – s75(v); *R v Murray & Cormie*

- Orthodox approach:** ‘a person appointed by the Commonwealth to an identifiable office who is paid by the Commonwealth for performance of their functions under the office and who is responsible to and removable by the Commonwealth concerning the office’ – *Broadbent v Medical for of Qld*
 - Office of Cth includes: public servants, Cth Director of Public Prosecutions and Police, Ministers, members of AAT, Federal Judges (excluding HCA justices)
- Implications:**
 - ‘**Formal appointment**’ to an office is necessary, only **natural persons** can occupy an office and the ‘**office**’ **must be distinct from the person who occupies it** – *Vietnam Veterans Affairs v Cohen*
 - This allows the government to **evade judicial scrutiny** under s75(v) (and s39B(1)) by adopting the corporate form. Thus, it doesn’t include:
 - Legislative grant of capacity to statutory corporation – *Australia Post*
 - Government owned bodies – *Australia Post*
 - Outsourcing of Departmental Officers – *Plaintiff M61*

[compare this approach to that in *Datafin*]
- However, the **HCA** has **not ruled definitively** on the issue, and ‘counsels judicial vigilance against possible evasion’ of judicial scrutiny under s75(v) – *Bank of NSW v Cth*

Plaintiff M61 / 2010E v Commonwealth (2010) 243 CLR 319

[page 48 textbook *not* C&M]

- **Facts:** Plaintiffs detained on Christmas Island ('excised offshore place') and were unable to therefore make an application the Migration Act for protection visas on the basis of claimed refugee status - only 'onshore' applications were allowed, unless minister gave permission for application to be made. Once permission was given, the minister also had power to grant a visa, though both powers were stated in highly discretionary terms, and the Act stated no duty was placed on minister to exercise powers. Nonetheless, on the evidence, the HCA determined the minister had decided to exercise his power in every case a person detained offshore asserted they were owed protection as a refugee, and thus involved 2 steps: an RSA (Refugee Status Assessment) by departmental officer, then if the first was challenged by the applicant, an IMR (Independent Merits Review) by persons employed by a private company engaged by the Cth department in contract (ie outsourcing).
- **Held:** The Court did not have to give a clear answer (since it could rely on other sources of jurisdiction to grant declaration remedy), **however the clear assumption was that neither the contractor (private corporation) nor its employees would qualify as officers of the Cth on the orthodox approach.**

B. 'Matter':

Rule: Jurisdiction is only conferred (by the Cn or laws of parliament) in relation to 'matters'; namely there must be some **immediate right, duty or liability** to be established by the determination of the court' *Re Judiciary and Navigation Acts*

- Similar test to *Tang* for ADJR
- A matter means there can be no '**declaration of the law** divorced from any attempt to administer the law'.
– *Re Judiciary and Navigation Acts*
- **Justiciability:** A matter is only present where there is a justiciable controversy (ie cannot be an abstract, hypothetical question or advisory opinion (*Millifont v AG*), or multidimensional issue of foreign affairs/policy with – see p. 29 summary]
- **Standing:** This issue of 'matter' subsumes (incorporates and intersects with) issues of standing. Thus where applicant lacks sufficient standing there is also not matter to be decided (since no rights and obligations at issue) (*Croome v Tasmania*)
- **Criticism:** judicial review rarely focuses on determination of underlying rights of the parties – it is concerned with whether a decision was lawfully or validly made (not the person's legal entitlement to a particular decision) and thus it is doubtful whether the boundaries of judicial review are usefully determined by reference to abstract and indeterminate notions of rights, obligations or liabilities alone.

C. Remedy Available

Rule: To obtain judicial review under s75(v) either mandamus, prohibition or injunction must be **available** to the applicant to remedy a **jurisdictional error**.

Application: In the present case, [*insert remedy from below*] is most appropriate. Nevertheless, it will only be available where there has been a jurisdictional error → [go on to grounds of review]

- **Jurisdictional Error** – mandamus, prohibition, injunction – and even certiorari – all rely on being able to prove there has been a jurisdictional error (the decision was ultra vires). Thus, there must have been either an excess or a denial of jurisdiction.
 - Jurisdictional error is the 'conceptual lodestar' of judicial review under s75(v) Cn and 39B(1) JA
- **Certiorari** – while not mentioned in s75(v), certiorari may be granted as an **ancillary** remedy where it is 'necessary for the effective exercise of the remedies named in s75(v) - *Aala*
 - Provided, of course, it is for a jurisdictional error →
 - Ancillary means that you must show that another remedy could be available if you want certiorari

Constitutional Remedies:

I. Jurisdictional Error Only - Prohibition and Mandamus:

A. Prohibition:

Rule: Prohibition is an order to a decision-maker to refrain from exceeding its jurisdiction (ie to not make a decision which would be unlawful). It is only available to remedy jurisdictional errors (*Aala*).

- It is not available where the legal effect of a decision has been finalised (final and operative; as in ADJR per *Bond*).
- Unlike certiorari, it may not be required (with the same force) that the decision have a discernible legal effect.
- **Not available to remedy non-justiciable errors.**

[page 99 textbook]

B. Mandamus:

Rule: Mandamus is an order compelling a decision-maker to remake a decision that they are compelled to make – that is, it **enforces the performance of a public duty according to law**. It is only available to remedy jurisdictional errors (*Aala*).

- Available in cases where there has been '**actual**' or '**constructive**' failure to make the decision
 - Constructive failure is when the decision was based on a jurisdictional error and is therefore invalid, such that there was no decision at all – *Bhardwaj*
- Availability is tied to the performance of a duty owed to the public
 - Whether it was intended by Parliament that a duty should exist requires *Project Blue Sky* statutory interpretation
- Accordingly, mandamus will not enforce a private obligation, even against a public respondent (though the reverse is possible) – *John Fairfax v Australian Telecommunications Commission*
 - Theoretically, since it is tied to the performance of duties owed to the public, it could compel private bodies exercising public functions (cf *Neat*) however this is unlikely to be upheld by an Australian court.
- Usually accompanied by certiorari to quash the decision before the decision maker is then compelled to remake their decision (where the error is non-jurisdictional/unlawful). If the error is jurisdictional and the decision invalid, certiorari is likely unnecessary.
- **Discretionary powers:** Whilst mandamus can only issue to compel performance of public 'duties', and not discretionary powers, mandamus **can** be used to order the decision-maker to exercise one of those discretionary power (though cannot specify which).
 - *Public Service Association of SA; R v Cth Court of Conciliation and Arbitration*
 - It will also often be the case that decision-makers have an obligation at least to consider where or not to exercise their powers, even if they are not required to exercise them- *Herrington Re Election Offices* (*Abbassi; Hicks*)
 - Aspirational goals/duties: 'decisions made in performance vague or aspirational duties may (in theory at least) be reviewed in the same way as discretionary powers...however courts are unlikely to compel such decisions...[reflecting their] general reluctance to usurp functions conferred on administrators...[and] about the appropriateness of judicial involvement in [polycentric] decision-making.' (*R v Inner London*)' [textbook p100]
- **Prerogative powers** are in theory immune from mandamus, however this is unlikely to apply in modern Australian – *CCSU* [page 99-101 textbook]

II. Jurisdictional & non-Jurisdictional Error – Certiorari, Declaration & Injunction:

C. Certiorari

[page 96 textbook]

Rule: Under s75(v), certiorari is only available for jurisdictional errors as an ancillary remedy (where necessary for effective exercise of a named remedy in s75(v) - mandamus, prohibition or injunction). It is a quashing order; it deprives a decision of legal effect retrospectively.

- **Limitations:**

1. **Decision must have a ‘discernible legal effect on rights’ – *Hot Holdings v Creasy***

- This is because it is not logically possible to deprive a decision of legal effect (quashing) if it had none to begin with.
- ‘Rights’ are given a broad meaning – requires only that interests affected in **legally significant** way (*Ainsworth*); though **nexus** between the decision and affected rights **may be minimal** (*Hot Holdings*)
 - In *Ainsworth* a government report which was clearly detrimental to applicant’s business and reputation could not be quashed because it had no significant legal effect;
 - In *Hot Holdings* the decision (to hold a ballot) was deemed to have a discernible effect on legal rights because the report it was included it was a necessary step to the minister making a decision on mining rights.
- Certiorari is **not available for preliminary decisions** in the decision-making process such as a recommendation, since it lacks legal effect (unless prelim decision provided for in legislation – *Hot Holdings*; analogous to Mason J in *Bond* per ADJR).

[*Hot Holdings*: non-binding recommendation on whether mining license should be granted was subject to certiorari because final determination could not be made until recommendation was considered]

2. **Only applies to bodies with legal authority – *R v Electricity Commissioners***

- Certiorari **applies** to **government** and **statutory bodies** (eg statutory corporations) and non-government bodies **exercising statutory, prerogative and non-statutory** powers (provided issue deemed justiciable)
- Uncertain whether certiorari applies to **private non-government** authorities exercising public power/function **not in statute** – *R v Criminal Injuries Comp Broad*; s75(v) requires ‘officer of Cth’

3. **Crown’s official representative (State Governor or GG) are immune from certiorari**

- However, Ministers are not immune

D. Injunction [Equitable & Cn Remedy]

[page 101 textbook]

Rule: Injunction is only available where no other remedy is available. It is an equitable remedy in the form of a court order requiring a party to do, or refrain from doing, certain acts. It is available under s75(v) for jurisdictional errors, and possibly for non-jurisdictional errors but this remains controversial (*Project Blue Sky; Plaintiff S157*)

- **Only available where no other remedy is available.**
- Applies to private bodies exercising public functions: Injunctions are applicable to private bodies which exercise similar powers or functions to public officials – in those instances where prerogative writs are not available. Commonly justified on the basis of implied contractual terms (*Aronson & Dyer*).
- Applicable for non-jurisdictional error: Performs functions **similar or equivalent to prohibition or mandamus** - but has broader applicability given equitable nature since **applicable for non-jurisdictional error** for prospective unlawful decisions - *Project Blue Sky*
 - Prohibitory Injunction – prohibiting a certain act (equity version of prohibition)

- Mandatory Injunction – requiring performance of act (equity version of mandamus)
- Interlocutory Injunction – to preserve status quo
- Unlike mandamus and prohibition, injunction **can possibly issue for non-jurisdictional errors** - In *Plaintiff S157* the court speculated that injunction under s75(v) is wider than other s75(v) remedies '[injunctive relief] may be available on grounds that are wider than those that result in relief by way of prohibition or mandamus.' (per *Project Blue Sky*) (page 105 textbook)
 - One interpretation is that this meant injunction may be granted for prospective quashing (unlawfulness) but this is not certain or definitive.
- Origin of Public Law Equitable Remedies: Equitable remedies developed under private law of contract and tort, and were applied to public law as a way to evade the formulaic requirements of the prerogative writs (*Bateman's Bay*). The popularity of these remedies is reflected in the broad approach taken to remedies under the ADJR.

E. Declaration [Equitable Remedy]

Declaration is a remedy which shadows other judicial review remedies. It is available without a jurisdictional error (*Project Blue Sky*)

- The Court may declare: [even where the shadow remedy is not available - *Ainsworth*]
 1. A decision invalid (ie certiorari);
 2. That an as-yet unmade decision would exceed jurisdiction (ie prohibition and injunction);
 3. That a public duty should be performed (ie mandamus and injunction)
- Technically speaking, a declaration changes nothing since it cannot create legally enforceable rights. It is it coercive, nor is non-compliance contempt of court.
 - However, in practice government decision-makers in Australia can be relied upon to respect an authoritative statement by a court about what the law requires.
- Declarations must be **directed to determination of legal controversies, not 'abstract or hypothetical questions'** in which the applicant has a '**sufficient interest**'.
 - However, in practice it may be difficult to distinguish between the an abstract hypothetical question and an advisory opinion; for example:
 - *Dyson v AG* – court did not require taxpayer to wait until prosecution to bring case before court (regarding refusal to provide information to tax department)
 - *Plaintiff M61* – court granted a declaration even where there was no obligation on the decision-maker to consider whether or not to exercise the power in question
- Declarations can be understood as providing guidance on how discretionary powers should be exercised – for example, by stating what should and should not be considered for a power to be lawfully exercised (*Green v Daniels*).
- Can declarations be issued for non-jurisdictional errors on the face of the record?
 - This issue arises because in order to be prospectively void, the court must issue such an order to deprive it of its legal effect.
 - However, this appears to be challenged by the Court's decision in *Project Blue Sky* which granted a declaration even where the content standard was deemed unlawful (not invalid).