

1 TABLE OF CONTENTS

2	Introduction to Administrative Law	8
2.1	Accountability.....	8
2.1.1	Introduction	8
2.2	Forms of Accountability.....	10
2.2.1	Political accountability	10
2.2.2	Financial Accountability	10
2.2.3	Administrative Law Accountability	10
2.2.4	Accountability through ethics and integrity.....	11
2.3	Separation of Powers	11
3	Controlling the Executive.....	13
3.1	Soft Law	13
3.1.1	Creyke- Soft Law v Hard Law	13
3.1.2	Weeks Soft Law	13
3.2	Sources of legal authority for government decision-making	14
3.2.1	unauthorised decision-making: general principles	14
3.2.2	the principle of legality – foundation cases	15
3.2.3	executive power as a source of legal authority for govt. action	16
3.3	Government power: its classification and the nature of disputes	17
3.3.1	legislative, executive and judicial power.....	17
3.3.2	polycentricity	17
3.4	Rules, discretion and policy.....	17
3.4.1	discretion	17
3.4.2	THE ROLE OF POLICY IN GOVT. ADMINISTRATION.....	18
3.4.3	DISCRETION VERSUS POLICY: A CLASH OF VALUES?	18
3.4.4	the legal status of executive powers.....	18
3.5	What is ‘delegated’ or ‘subordinate’ legislation?.....	18
3.6	Constitutional issues.....	19
3.7	Accountability and control of delegated legislation.....	19
3.8	Unauthorised Decision-Making: Subordinate Legislation	20

		2
3.8.1	Standard principles – special issues	20
3.9	General Test for Invalidity	20
3.9.1	Complement/Supplement Description	21
3.10	Means/Ends Distinction	21
3.11	Unreasonableness as a test of invalidity	21
3.12	Reasonable proportionality and the purpose/subject matter distinction	21
3.13	Unauthorised Decision-Making: The Decision-Maker	22
3.13.1	Categories of authorised decision-maker	22
4	Statutory Interpretation (Guide).....	24
4.1	Legislation - Acts Interpretation Act 1901 (Cth)	24
4.2	CASES.....	25
4.3	LAW/FACT DISTINCTION AS A GENERAL LEGAL CONCEPT	26
4.3.1	LAW/FACT – General Principles	26
4.3.2	Applying legislation to the facts	27
4.3.3	Judicial Substitution of a New Decision	28
4.4	The jurisdictional (or objective) fact concept.....	29
5	Information	29
5.1	Reasons	29
5.1.1	Administrative Decisions (Judicial Review) Act 1977 (Cth)	31
5.2	Freedom Of Information Act	33
5.2.1	Legal Right To Access	33
5.2.2	Duty to publish.....	33
6	Merits Review	34
6.1	Internal review	34
6.2	THE TRIBUNAL FRAMEWORK IN EACH AUSTRALIAN JURISDICTION	34
6.2.1	Commonwealth Jurisdiction	34
6.2.2	NSW JURISDICTION	35
6.2.3	Appeals.....	35
6.2.4	THE ADMINISTRATIVE APPEALS TRIBUNAL ACT.....	35
6.2.5	INDEPENDENCE OF TRIBUNALS.....	36
6.3	THE CONCEPT AND SCOPE of Merits Review	37

6.3.1	(a) Difference between merits review and judicial review:	37
6.3.2	(b) Legislation for merits review and implications:.....	37
6.3.3	(c) “Correct or preferable” decision and the scope of merit review.....	38
6.3.4	(d) Purpose of tribunals compared to courts.....	40
6.4	Contemporaneous (de novo) Review	40
6.4.1	(a) Change in administration outlook:	40
6.4.2	(b) Change in facts:	40
6.4.3	(c) Change in law:	40
6.5	PROCEDURE AND EVIDENCE – THEIR ROLE IN MERIT REVIEW BY ADMINISTRATIVE TRIBUNALS.....	41
6.5.1	(a) Common structural models for tribunal procedure	41
6.5.2	(b) Statutory guidance:	42
6.6	ADMINISTRATIVE TRIBUNALS AND GOVERNMENT POLICY	42
6.6.1	(a) Arguments for and against implementing executive policy in tribunal reviews.....	42
6.6.2	(b) Different kinds of policies and their treatment	44
6.6.3	(c) “High” vs “low” policy	45
6.7	Conduct of tribunal proceedings, and the respective roles of tribunal member and parties.....	45
6.7.1	Sullivan v Department of Transport (1978) 20 ALR 323 (FCA)	45
6.8	Evidence, fact-finding and onus of proof	46
6.8.1	Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 2 ALD 33 (AAT)	46
6.8.2	Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41 (FCA).....	46
6.8.3	McDonald v Director-General of Social Security (1984) 1 FCR 354 (FCA)	47
6.8.4	Epeabaka v Minister for Immigration and Multicultural Affairs (1997) 150 ALR 397 (FCA).....	47
7	Jurisdictional Error	49
7.1	“jurisdictional error” and “ultra vires” and the language of judicial review	49
7.1.1	Jurisdictional error and invalidity.....	49
7.1.2	<i>Craig v South Australia</i> (1995) 184 CLR 163 (HCA).....	51
7.1.3	<i>Kirk v Industrial Court of New South Wales</i> (2010) 239 CLR 531 (HCA).....	51
7.2	Formulating the grounds for judicial review	53
7.2.1	<i>Council of Civil Service Unions v Minister for the Civil Service</i> [1985] AC 374 (HL)	53
7.2.2	<i>Minister for Immigration and Multicultural Affairs v Yusuf</i> (2001) 206 CLR 323 (HCA)	53
7.3	'categories' of jurisdictional error	54

7.3.1	Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611	55
7.4	Review for jurisdictional fact.....	56
7.4.1	Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55 (NSWCA)	56
7.4.2	Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship (2011) 280 ALR 18 (HCA)	57
8	Judicial Review – The concept and Scope	58
8.1	The legality/Merits Distinction – Foundation Cases.....	58
8.1.1	Associatied Provincial Picture Houses Ltd v Wednesbury Corporation (UK)	58
8.1.2	Chief Constable of the North Wales Police v Evans (UK)	58
8.1.3	Green v Daniels (1977).....	58
8.1.4	Attroney-General (NSW) v Quin.....	59
9	The judicial Review Framework in Each Australian Jurisdiction	59
9.1	The legal basis for Judicial Review.....	59
9.1.1	Judicial review under Statutory Schemes	59
9.2	Commonwealth – Federal Court	59
9.2.1	Administrative Decisions (Judicial Review) Act 1977	59
9.2.2	Judiciary Act 1903	59
9.2.3	Associated & Accrued Jurisdiction & the Federal Court of Australia Act	60
9.2.4	Migration Act 1958	60
9.2.5	Other limitations on the Federal Court’s Jurisdiction	60
9.3	State and territory jurisdiction in federal matters	61
9.4	The High Court’s Original Jurisdiction	61
9.5	State and territory judicial review schemes	61
9.5.1	NSW.....	61
9.6	Integration of Australian Judicial Review Schemes	61
9.7	Jurisdiction under the Constitution s 75(v) & the Judiciary Act s 39B.....	62
10	Commencing Judicial Review Proceedings	62
10.1	The Principle of standing in Australia	62
10.2	Standing at Common Law.....	63
10.3	Australian Conservation Foundation(ACF) v Commonwealth.....	63
10.4	Standing in the Administrative Appeals Tribunal (AAT)	64

		5
10.5	Standing for Not Statutory Remedies:.....	66
10.6	Standing under the Administrative Decisions (Judicial Review) Act	66
10.7	Constitutional Concept of a Matter.....	68
11	Jurisdictional limitations on judicial review	68
11.1	JURISDICTION UNDER THE ADMINISTRATIVE DECISIONS (JR) ACT 1977 (cTH)	68
11.2	'decision' and 'conduct'	69
11.3	'[d]ecision...of an administrative character'	70
11.4	'[d]ecision...made...under an enactment'	72
11.4.1	What is an enactment?.....	72
11.4.2	When is a decision made 'under that enactment'?.....	72
12	Judicial Review Remedies	74
12.1	Introduction:.....	74
12.2	Certiorari	74
12.2.1	Craig v South Australia.....	75
12.2.2	Hot Holdings:	75
12.2.3	Kirk.....	75
12.3	Prohibition.....	76
12.4	Mandamus.....	76
12.5	Injunction	77
12.6	Declaration	77
12.7	Statutory Judicial Review Remedies.....	78
12.8	Judicial Discretion to Refuse Relief.....	78
12.8.1	Edward v Santos:	79
12.9	Protection of an invalidity by Parliament: Privative/ouster/preclusion clauses	79
12.10	Privative clauses and the Constitution s 75(v).....	80
12.11	Privative clauses and the states	80
12.12	Kirk v Industrial Relations Commission (2010) 239 CLR 531	81
13	Grounds of Judicial Review	82
13.1	Introduction.....	82
13.1.1	JUDICIAL REVIEW OF FACT-FINDING ERRORS.....	82
13.1.2	JUDICIAL DEFERENCE AND RESTRAINT	82

13.2	Natural Justice- Procedural Fairness (Hearing Rule)	83
13.2.1	THE THRESHOLD TESTS FOR THE HEARING RULE OF PROCEDURAL FAIRNESS.....	84
13.2.2	HEARING RULE – SPECIAL FACTORS.....	86
13.2.3	Hearing Rule – Content:.....	86
13.2.4	Who Should Conduct the Hearing?	86
13.2.5	Requirement to Give Prior Notice and Disclosure:	87
13.2.6	Opportunity - Oral Hearing or Written Submissions:	88
13.2.7	Oral Hearings: Legal Representation:	88
13.2.8	Cross-Examination:	89
13.2.9	Duty of inquiry	89
13.3	Natural Justice- Bias	89
13.3.1	Introduction + categories of Bias.....	89
13.3.2	EXCEPTIONS TO THE BIAS RULE, AND CASE LAW	91
13.3.3	COMPLIANCE WITH STATUTORY REQUIREMENTS	94
13.4	“No evidence” ground.....	96
13.4.1	At common law.....	96
13.4.2	Under the ADJR ACT	97
13.4.3	Application of policy	100
13.4.4	Ministerial directions.....	102
13.5	Irrelevant Consideration of Matters.....	104
13.5.1	The Criteria of Relevance.....	104
13.5.2	TWO STEP TEST	104
13.5.3	Effect of an unauthorised purpose or an irrelevant consideration	106
13.5.4	Policy as an irrelevant consideration.....	106
13.6	Failing to Consider Relevant Matters	106
13.6.1	Difference between failing to consider relevant matters and considering irrelevant matters:.....	106
13.6.2	Breach can be committed in two ways:.....	106
13.6.3	TWO STEP TEST	107
13.6.4	Degree of Consideration:.....	108
13.6.5	Failure to Conduct an Inquiry:	108
13.7	Acting for an Unauthorised Purpose	109

13.7.1	The Authorised Statutory Purpose	109
13.7.2	The actual purpose for the decision	109
13.7.3	Multiple Purposes.....	109
13.8	<i>Wednesbury</i> Unreasonableness (The development of)	111
13.8.1	Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003)	111
13.8.2	Minister for Immigration and Citizenship v SZMDS (2010).....	111
13.8.3	Minister for Immigration and Citizenship v Xiujuan Li (2013)	112
14	Judicial Review of Private BODies	113
14.1	Accountability across the public/private divide	113
14.2	The ‘clubs cases’	113
14.3	<i>Datafin</i> and its reception in Australia.....	114
15	The interaction of public law with private law	115
15.1	Officer of the commonwealth	115
15.1.1	Textbook	115
15.1.2	Matthew Groves, ‘Outsourcing and s 75(v) of the Constitution’	116
15.1.3	Bouhey and Weeks- Officers of the Commonwealth	116
15.2	Government Liability in Tort - Greg Weeks Notes.....	116
15.2.1	Can public authorities ever be liable in tort?.....	116
15.2.2	Can public authorities ever be liable in tort where individuals would not be?	116
15.2.3	Can public authorities be liable for both acts and omissions in breach of common law duty?	117
15.3	Public Law Estoppel.....	118
15.3.1	Textbook	118
15.3.2	Weeks, ‘Estoppel and Public Authorities: Examining the case for Equitable Remedy’	118
15.4	Substantive Legitimate Expectations	118
15.4.1	Textbook	118

2 INTRODUCTION TO ADMINISTRATIVE LAW

2.1 ACCOUNTABILITY

2.1.1 INTRODUCTION

- Aus community tends to rely on government to provide public services. As a result, we deal with the govt from birth to death. - 'power wielded by officials is considerable and has grown over time.'
- Increase in government control has led to demand for heightened scrutiny of govt, consistent with democratic ideal that those who elect the government are entitled to call it to account
- As we fund govt through taxes we have right to monitor govt expenditure.
- Rule of law also provides foundation for members of public to assert a right to complain against government and to challenge the legality and propriety of government decisions
- With power, comes accountability and responsibility
- 4 forms of accountability:
 - **Political accountability**= parliamentary system → parliamentary committees, question time, letters to ministers, and ministerial control of and answerability for executive government action
 - **Financial accountability**= constitutional and statutory controls on finance → monitoring by Auditor-General and committees of parliament
 - **Administrative Law (mechanisms)**= courts, tribunals, oversight bodies (Ombudsman etc) and legislation like FOI + reasons
 - **Ethical responsibility and integrity** of govt employees= codes of conduct, ethics advisory services, policies on conflicts on interests

Report of the Royal Commission into Commercial Activities of Govt and Other Matters, 1992

- In a democratic society, effective accountability to the public is the indispensable check to be imposed on those entrusted with public power
- It is not the purpose of accountability measures to prevent a govt from governing
- The purpose of such measures is to hold govts, public officials and agencies to account for the manner of their stewardship
- Govt is constitutionally obliged to act in the public interest. To the extent that it is given power to do so, it must be allowed to do so. Such is its trust. Accountability provides the test and measure of its trusteeship.
- Accountability to the public is the obligation of all who hold office or employment, in whatever capacity, in our govt system
- Having entrusted govts, public officials and agencies with public power, the public reasonably is entitled to entertain a variety of expectations of those institutions and officials in their management and use of that power
- In their aggregate, these expectations inform the criteria of accountability
- In general terms, public accountability provides the means for gauging the extent to which the govt's institutions and officials comply with the expectations the public is entitled to have of them
- 3 principal avenues through which public accountability can be rendered:
 1. To the members of the public directly, both in their individual capacities and as a community
 2. Accountability to accountability agencies which act for and on behalf of the public (i.e Auditor General, Ombudsman + Parliament)
 3. Accountability of officers to their superiors and peers who are themselves accountable, directly or indirectly, to accountability agencies= Westminster style
- All 3 above are essential, the first two should be the major ones
- No single measure alone can secure effective public accountability. A variety of measures is necessary.

Report of the Senate Select Committee on a Certain Maritime Incident, 2002

- There is a continuum of accountability relationships, both vertical and horizontal, between the public service, the government, the parliament and Aus' citizens.

- There are fundamental tenets and practices of accountability that are well established in public administration, even though these received notions of accountability are increasingly being stretched
- Legislative prescription for public service is contained in several pieces of legislation; *Public Service Act 1999* etc
- Other material also available- Prime Minister's *Guide on Key Elements of Ministerial Responsibility*
- Govt ministers have, under the constitutional doctrine of responsible gov't, both collective and individual responsibilities.
- Ministers, as the focus for the accountability of subordinates, and as the agents of accountability to parliament must in their turn promote transparency and ensure the integrity of information that is communicated to the public and the parliament

'Delivering Performance and Accountability' Aus Public Service Commission, *Contemporary Gov't Challenges* series, 2008

- Concept of accountability does not have a 'fixed or precise meaning'
- Includes the responsibility that individuals might have to their professional ethics and/or values as well as their personal morality- extends the concept of accountability beyond traditional idea of external scrutiny; referring to an inward obligation
- *Public Service Act 1999*(the act) seeks to fuse these very different notions of accountability by setting out the values which public servants need to uphold...and a code of conduct for public service employees...as well as external process through which public servants can be held to account
- Traditional model of accountability describes a vertical chain that provides a continuum of accountability relationships between the electorate, the Parliament, the Gov't and public service
- Developments in admin law...have extended and strengthened the horizontal accountability of public servants and Ministers
- FOI legislation + ADJR Act + Admin appeals have created new channels for bringing info on the actions of public servants into public domain
- Public servants are now legally accountable for their actions to institutions other than Parliament, and can be obliged to explain their actions and justify their decisions to the courts + quasi-judicial bodies
- Public servants are now seen as accountable 'outwards' to the public as well as being accountable 'upwards'
- However, horizontal accountability still weak and needs to develop
- *Accountability in the Cth Public Sector*, Report No 11, AGPS, 1993, 199:
 - Accountability is where there is a direct authority relationship within which one party accounts to a person or body for the perf of tasks or functions conferred, or able to be conferred, by that person or body
 - Accountability does not imply simply providing info of answering qs, but includes setting goals, providing and reporting on results and the visible consequences of
- R Mulgan:
 - One sense of accountability= being called to account to some authority
 - That is external and is given to some other person or body; it involves social interaction and exchange= one side seeks answers and rectification while the other, being held accountable, responds and accepts sanctions; it implies rights of authority
 - In the context of a democratic state, the key accountability relationships in this core sense are those between the citizens and holders of public office and, within the ranks of office holders, between elected politicians and bureaucrats
- *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, Gaudron J:
 - Accountability can be taken to refer to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers
- D Oliver:
 - Accountability is about... requiring a person to explain and justify- against criteria of some kind- their decisions or acts, and then to make amends for any fault or error, whether by reversing the decision, or paying compensation or in some other way- even resigning from office

2.2 FORMS OF ACCOUNTABILITY

- Important to view admin law...as only one method of achieving govt accountability
- There is no sharp divide between the diff forms of accountability- e.g. parliament plays a role in financial as well as political accountability
- The accountability framework for controlling govt action...is both complex and interconnected

2.2.1 POLITICAL ACCOUNTABILITY

- Parliament and shit
- Responsible government
- Transmission belt process of accountability
- Reduced control of ministers of exec bodies= weaker form of accountability

2.2.2 FINANCIAL ACCOUNTABILITY

- Is the verification of money drawn from public account
- All money raised by govt to be paid to Consolidated Revenue Fund s 81
- Can only draw upon funds by appropriation made by law: s 83
- Parliament holds Executive to account
- Auditor General is independent officer of Parliament who audits expenditure of govt:
 - Audit of financial statements
 - Performance Audit → looks at efficiency, effectiveness and regularity of govt programs

2.2.3 ADMINISTRATIVE LAW ACCOUNTABILITY

- Has grown in recent times because of the failure of traditional methods of accountability
- Purpose is to safeguard the rights and interests of people and corporations in their dealings with govt agencies.
- Achieves purpose in 3 ways:
 - 1. Review of decision-making:**
 - a. Admin law confers a right to challenge a govt decision
 - b. Numerous mechanisms include judicial review, administrative tribunal (merits review), complaining to Ombudsman or other such agency, or by seeking internal review within agency
 - 2. Protection of information rights:**
 - a. FOI legislation = public access to govt docs
 - b. Privacy legislation= handling of personal info by govt
 - c. Administrative review legislation= confers a right for written reasons of decision
 - d. Whistle blower protection legislation= provides protection for disclosing info about unlawful or unethical activity, in circumstances that might otherwise attract disciplinary, criminal or civil law sanctions
 - 3. Public accountability of govt processes:**
 - a. Anti-corruption agencies, human rights commissions and specialist govt inquiries
 - b. Statutes that regulate how subordinate legislation is to be made, publicly notified and tabled in the parliament
- Another perspective on admin law is to identify values or principles it is designed to uphold. These are provided by the Administrative Review Council (ARC)= the govt body that oversees the system of admin review and makes recommendations for reform
- According to ARC, two types of values:
 - Public Law Values:
 - Rule of law, individual rights, accountability, consistency and certainty in admin of legislation
 - Administrative Law Values:
 - Fairness, lawfulness, rationality, openness (or transparency) and efficiency
- Textbook 3 principles of admin law system:
 - **Administrative justice:**

- Philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded
 - **Executive Accountability:**
 - Aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and to justify the way in which they have gone about that task
 - **Good administration:**
 - Principle that admin decision-making should conform to universally accepted standards, such as rationality, fairness, consistency and transparency
- Important to recognize limitations of admin law too. For example:
 - Courts cannot ordinarily substitute new decision
 - Tribunals review selected decisions only
 - Ombudsman is limited to making recommendations for change

Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) Federal Law Review 122

- Admin law growing because of growth in exec govt
- Parliamentary supremacy etc was not planned for modern developments + growth of executive: i.e. licences, charters, franchises etc → more administrative discretions= need more admin accountability mechanisms
- "The scale and complexity of administrative decision-making is such that Parliament simply cannot maintain a comprehensive overview of particular administrative decisions"
- Individual ministerial responsibility is in decline
- "The attraction of judicial review and of Tribunal review on the merits is that they offer justice to the individual by means of the independent adjudication"
- "Independent determination of the citizen's rights against the Executive is the hallmark of a modern democracy and a feature of Chapter III of the *Constitution*"
- "The new system has contributed to a greater measure of administrative justice in its insistence on compliance with the rules of natural justice, its careful scrutiny of the reasons for decision, its emphasis on the justice of the case and its success in making the principles and procedures of review more uniform"

2.2.4 ACCOUNTABILITY THROUGH ETHICS AND INTEGRITY

- Some stated in legislation and others in codes of conduct
- Recurrent theme= loyalty and confidentiality owed by public officials to govt of the day
- Recently, 2 changes:
 - Move to spell out more specifically in legislation and other docs the values that underpin public service
 - Redefinition of values, to include more emphasis on responsibility of public officials to serve the public and to observe core public law values
- See *Public Service Act 1999* (Cth) s 10 (APS Values) and s 13 (APS Code of Conduct)

N Preston, 'Introduction'

- Tl:dr values + ethics are important

J McMillan, 'Re-thinking the Separation of Powers'

- Look at mid-sem, just talks about integrity branch

2.3 SEPARATION OF POWERS

- Objective of SOP is to place checks and balances on the exercise of govt power, while at the same time ensuring that the diff functions of govt are discharged by the arm of govt that is best suited to tasks
- SOP is not pure in Aus, as responsible govt= executive comes from Parliament
- Delegation from legislature to executive of power to make subordinate legislation is another breach of SOP

- Nevertheless, SOP is constitutionally entrenched doctrine. For admin law, it means courts= judicial review and AAT= merits review
- SOP important for considering scope of ADJR act
- SOP also important for admin law; e.g. treaty- making = executive, incorporating treaty into domestic law = legislative
- SOP also important in highlighting diff between judicial and executive method in decision-making. Judicial= focused on individual rights, executive= broader social issues + policies
- French CJ in *M70/2011 v Minister for Immigration* (2011): courts decide according to law, and that's it. Nothing more, nothing less.
- Separation of judicial power different to separation of legislative power

R v Kirby; Ex parte Boilermakers' Society of Australia 94 CLR 254

- Held that federal judicial power can be conferred only upon a court mentioned in the *Constitution* s 71 (a Ch III court); and that those courts can only exercise judicial power
- Cth Court of Conciliation and Arbitration could not impose a fine on a union that was in breach of an order of the court. To impose a fine was a judicial function and could not be mixed with a non-judicial function
- 'The powers of the federal judicature must there be at once paramount and limited'
- 'It is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s 71 and constituted in accordance with s 72 or a court brought into existence by a State...'
- "Chapter III does not allow powers which are foreign to the judicial power to be attached to the courts created by or under that chapter for the exercise of the judicial power of the Cth."
- TI:dr SOP is real concept in Aus

2.3.1.1 DEFINING A CH III COURT

- 4 Ch III courts:
 - High Court
 - Federal Court
 - Family Court
 - Federal Circuit Court (Formerly Federal Magistrates Court)
- Distinguishing features are that:
 - Each is called a court
 - Members are appointed in accordance with s 72 of Constitution (by GG)
 - Primary function is judicial function
- *Kable* (1996):
 - held that NSW statute was incompatible with Ch III of Constitution because authorised NSW Supreme Court to order continued imprisonment of Kable beyond the term of his imprisonment.
 - Gleeson in *Fardon* on principle in *Kable*:
 - Since the Constitution established an integrated Aus court system, and contemplates the exercise of fed jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.

Kirk v Industrial Relations Commission (2010) 113 ALD 1

- Held that state legislature cannot deprive a state Supreme Court of its capacity to review the decisions of inferior courts and tribunals on the ground of jurisdictional error
- It is beyond the legislative power of State so to alter the constitution or character of its Supreme Court that it ceases to meet constitutional description
- Defining characteristic of State Supreme Courts is power to confine inferior courts and tribunals within limits of their authority to decide by granting relief in the nature of prohibition and mandamus, and ... also certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error