

N.S.W

Jurisdiction to hear the matter:

Under s23 of the Supreme Court Act 1970 NSW the court has jurisdiction to hear this matter

+ Constitutionally entrenched minimum standard of review based on the fact that it is us, it is beyond the legislative power of a State (**by way of a privative clause**) to alter the character of its Supreme Court such that it ceases to meet the constitutional description. – *Kirk*

Dealing with the privative clause:

1. If it says: **No decision shall be subject to review:**

This will be read down to not include decisions infected by jurisdictional error (*Plaintiff s157*)

- a. So as to adopt an interpretation consistent with the constitution [*Hickman Principle*]
- b. This is because such a decision is regarded for the purpose of a privative clause as “no decision at all” – **Plaintiff S157**
- c. Adopting absolute theory of invalidity; *Bhardwaj*

2. If it says **NO “purported” decision: PSA v SA**

- a. This will be invalid, it operates to exclude jurisdictional error; *PSA case*
 - i. A failure to exercise jurisdiction (whether by an incorrect finding that the body lacked it - *PSA*) or (by a failure to even

consider exercising a discretionary power – *Plaintiff M61*) is a jurisdictional error

1. Any Privative clause which seeks to oust the jurisdiction of the court to determine whether a body has failed to exercise its jurisdiction conflicts with the constitutionally entrenched minimum standard of review: **and is thus invalid: PSA**

3. If there is a time limit: *Bodruddaza v Minister of Immigration*

A time limit on commencing proceedings is only constitutionally valid if it **does not so curtail or limit the right or ability of an applicant to seek relief under s75(v) of the constitution:**

- ii. Fixing the time on notification of the decision is inconsistent with the purpose of s75(v). This is because there may be supervening events preventing an applicant from being made aware of circumstances to ground an application for review
- iii. **Principle:** Must allow the court to take account of the various circumstances that may effect the fairness of the date P become notified

4. If there is a broad no invalidity clause: *Futuris Corporation*

- a. Where there is other avenues of appeal – court will give effect to statutory language *Futuris*
- b. Minimum level of review that is constitutionally entrenched sets limit; *Kirk*
 - i. *Will read down so as to not exclude JE*

5. *Narrow Invalidity Clause: Palme*

- **The effect of the narrow invalidity clause will be discussed under “remedies” however, it is apt to note from the outset that** while the Court will give effect to the clause in some circumstances (Discussed below) It will not interpret it so as to oust the courts jurisdiction to review for JE such as failure to afford procedural fairness: *Palme Obiter*
 - o **Consequently**, the court has ample jurisdiction to hear this matter.

Standing:

1. s123 **Environment Planning and Assessment Act 1979 (NSW): Open standing**

1. Can apply for A-G's fiat and appear under their name: *Engineers v Secretary of Department*
2. Less stringent for certiorari / prohibition compared to equitable remedies but these are now all converging on special interest test: *Engineers*

TEST: More than a mere intellectual or emotional connection...other than the satisfaction of righting a wrong, upholding a principle or winning a contest; **AFC v Cth**

3. Is Matter of great cultural and spiritual significance to the applicants ; **Ogle v Stickland**; *Onus v Alcoa (Cultural relics used for teaching children)*
4. Are they an important class in the community: represent the interest of a particular strand of society; *Ogle*
5. Have they suffered a damage which is different in kind to that suffered by the community at large; *Ogle*

6. Were they permitted to participate in a conference, which gave rise to further right... Conference informed recommendation by commission to minister to which the Minister **must** have regard: **United States Tobacco; *Sinclair v Mining warden***

 7. Participation in official decision making process: demonstrates that state has recognised as a representative of environmental interests – ***Sackville J (North Coast Council)***

 8. Nexus to subject matter
 - a. Special interest must be more than the satisfaction of righting a wrong, winning a contest or upholding a principle; *Right to Life*

 - b. *Zone of Interest:***
 - i. Matter of statutory construction: The relevant act was not directed toward the wide social issue of the right to life. It concerns the “the quality, safety efficacy and timely availability of therapeutic goods.” Nothing in applicants case to stop the trials went to the issue of what the act is concerned i.e. the quality, safety of the drug.
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Roadshow Films Pty Ltd

Intervention:

1. Are they a non-party whose interests would be directly affected by a decision
 - a. I.e. would they be bound by a decision

2. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome
 - a. Generally cannot be indirect or contingent

3. Where (1) sufficient legal interest and can show **that the parties to the litigation may not present fully the submissions on a particular legal issues...which the court should have to assist it in order to reach a correct decision**

Amicus Curiae:

1. Court must be satisfied in order to grant leave that the submissions of the amicus will significantly assist the court and;
 - a. The delay
 - b. Costs
 - i. Is not disproportionate to the expected assistance
 2. Generally need to show that some legal interests will be at least indirectly affected
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Was it a Decision?

ABT v Bond:

- Where the intermediary steps (such as findings of facts) in a decision making process are not provided for by statute there is a presumption against their amenability to judicial review
 - This presumption can be rebutted where the intermediary decision is of a **substantive character** and its **operative effect** is essential to the ultimate decision
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Is it Amenable to Judicial Review?

Club exercising public function under rules: *Forbes*

Private body acting under statute: *Plaintiff M61*

Non-statutory authority exercising a public function (*Datafin*) arguably extends to Australia: *CECA Institute Pty Ltd v Australian Council for Private Education and Training*
