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## LINKS BETWEEN TOPICS

### Grounds of review that 'go together'

- Simple Ultra Vires
- Breach of an essential procedural condition
- Relevant considerations
- No evidence
  
- Improper purpose and bad faith
- Irrelevant considerations
- Bias rule
  
- Inflexible application of policy
- Acting under dictation

<p style="text-align: center;"><b>JUDICIAL REVIEW</b> <b>I ADJR ACT</b></p> <p><u>Element 1: Jurisdiction</u></p> <p><u>Element 2: Standing</u></p> <p><u>Element 3: Reasons</u></p> <p><u>Element 4: Grounds of Review</u></p> <p><b>e.g. Simple ultra vires</b> <b>Essential procedural condition</b> <b>Improper delegation</b></p> <p><u>Element 5: Remedies</u></p>
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OPTION 1: DIVIDE INTO ADJR/CL

<p style="text-align: center;"><b>JUDICIAL REVIEW</b> <b>II COMMON LAW</b></p> <p><u>Element 1: Jurisdiction</u></p> <p><u>Element 2: Standing</u></p> <p><u>Element 3: Reasons</u></p> <p><u>Element 4: Grounds of Review</u></p> <p><b>NOTE: Jurisdictional Error</b> <b>e.g. No evidence – common law</b> <b>Jurisdictional Fact</b></p> <p>* <u>Element 5: Remedies</u></p>
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OPTION 1: DIVIDE INTO ADJR/CL

<p style="text-align: center;"><b>JUDICIAL REVIEW</b></p> <p style="text-align: center;">I ADJR ACT</p> <p><u>Ground 1: Simple Ultra Vires</u></p> <p><u>Ground 2: Procedural Condition</u></p> <p><u>Ground 3: Improper Delegation</u></p> <p style="text-align: center;">II COMMON LAW</p> <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>I adopt my analysis as above (see: ADJR Act) with regard to the likely success of the grounds of review.</p> </div> <p><u>Ground 1: No evidence *</u></p> <p><u>Ground 2: Jurisdictional fact *</u></p>	<p><b>JURISDICTIONAL ERROR</b></p> <p>However, the success of the aforementioned grounds would be dependent on the Courts concluding that the breach of <i>any particular ground</i> was sufficiently serious for it to be characterised as <i>jurisdictional (Kirk)</i> – which used to be a separate category of grounds, but is currently used as a measure of seriousness of the breach of the ground of review. Furthermore, this is because the remedies of certiorari and mandamus are available only with regard to jurisdictional errors of law.</p>
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OPTION 1: DIVIDE INTO ADJR/CL

## SUMMARY LIST OF TOPICS/GROUNDS OF REVIEW

### Narrow ultra vires – absence of power

- Administrative action beyond scope – simple ultra vires
  - o **Only exists in ADJR** – common law would be jurisdictional fact
- Breach of an essential procedural condition
  - o Common law and ADJR the same
- Improper delegation
  - o Common law and ADJR the same

### Broad ultra vires – abuse of power

- Relevant considerations
  - o Common law and ADJR the same
- Irrelevant considerations
  - o Common law and ADJR the same
- Improper purpose
  - o Common law and ADJR the same
- Bad faith
  - o Common law and ADJR the same
- Unreasonableness
  - o Common law and ADJR the same

### Broad ultra vires 2 – fact-finding errors

- No evidence
  - o Common law and ADJR **DIFFERENT**
- Jurisdictional Fact
  - o Purely Common Law concept – **no ADJR** – go to simple ultra vires

### Broad ultra vires 3 – discretion

- Inflexible application of policy
  - o Common law and ADJR the same
- Acting under dictation
  - o Common law and ADJR the same

### Procedural fairness

- The hearing rule
  - o Common law and ADJR the same
- The bias rule
  - o Common law and ADJR the same

### Jurisdictional error

- Purely Common Law concept – **no ADJR**

### Remedies

- Common law and ADJR **DIFFERENT**

### Privative clauses

## **JURISDICTION**

### ADJR JURISDICTION

*In order for a court to have jurisdiction, an application for review must be brought with regard to a decision (s 5)/conduct in relation to a decision (s 6)/failure to make a decision (s 7), which is a decision of an administrative kind made under an enactment (s 3)*

### 'Decision' under s 5

#### Examples of 'decisions' – s 3(2)

2. In this Act, a reference to the making of a decision includes a reference to:
- 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;
- and a reference to a failure to make a decision shall be construed accordingly.

### Decision as per Bond

- a reviewable decision must be 'final or operative' of the issues of fact falling under consideration (**Mason J in Bond**)

### **Final decision**

- this will usually be satisfied if provision is made in the relevant legislation for the making of the decision
- this is provided in ...s x... which provides for ... decision power ...

### **Intermediate decision**

- which leads to a final decision
- is REQUIRED by statute
- can also include legislative pre-requisites such as reports or recommendations that are made before a decision (**s 3(3)**)

### **'Conduct related to a decision' under s 6**

- an activity of a *procedural nature*, taken in relation to a reviewable decision (**Bond**)
- once a decision under s 5 has been made, s 6 can no longer be used to establish jurisdiction

### **Procedural nature**

- conduct is procedural in nature if it is not substantive (**Bond**)
- includes taking evidence, holding an inquiry or investigation (**s 3(5)**)

### **'Failure to decide' under s 7**

- where DM has a duty to make a decision but
  - a) failed to make that decision with the prescribed time OR
  - b) where there is no prescribed time, has not done it within a reasonable delay

### **Of an administrative kind**

- Decisions which involve applying general statutory provisions to a specific case
- This is satisfied through the application of s ... to the specific case of ...(decision)...
- A decision that is not legislative or judicial (**Tang**)
- Decisions that carry into effect the laws of the Commonwealth

### **Made under an enactment**

- Must satisfy the two limbs of Tang

### **First limb**

- Where it authorised by the enactment (either impliedly or expressly)
- Same as the first type of *Bond* 'decision'
- *This is provided in ...s x... which provides for ...decision power...*

### Second limb

- The decision has to confer, alter or otherwise affect *legal* rights or obligations
- Does it have to affect someone's rights or the applicant's rights
  - o Interpretation 1
    - The plurality in *Tang* meant that the decision has to affect the legal rights of the applicant
  - o Interpretation 2
    - The plurality meant that the decision had to affect *someone's* legal rights
    - This is likely the preferable interpretation
    - Otherwise it would eliminate the possibility of public interest groups being able to seek judicial review and it there is no indication that the judges here intended that.

### Exceptions

<p><b>ABT v Bond</b></p>	<ul style="list-style-type: none"> <li>- Former QLD premier wanted to sue channel 9 for defamation.</li> <li>- Bond owned channel 9</li> <li>- Out of court settlement between the parties</li> <li>- The opposition party argued that the payment was excessive and amounted to a bribe for the government to treat Bond and his companies favourably</li> <li>- Broadcasting tribunal had to investigate to see if channel 9's license should be revoked</li> <li>- In making the decision to revoke they came to a number of ancillary steppingstone decisions along the way</li> <li>- Bond wanted to challenge the stepping-stone decisions</li> <li>- Held that the stepping-stone decisions weren't conduct – conduct is about the way proceedings are conducted</li> </ul>
<p><b>Griffith Uni v Tang</b></p>	<ul style="list-style-type: none"> <li>- Tang enrolled in PhD program at G Uni</li> <li>- G Uni Act established the Uni and prescribes functions as providing education, facilities of research, courses of study and instructors and conferring higher education awards.</li> <li>- The Act determines the council is the unit's governing body</li> <li>- Act provides that the council may delegate most of its powers to committees</li> </ul>

	<ul style="list-style-type: none"><li>- One of the committees found that Tang had fabricated PhD data and was thus excluded from the PhD program</li><li>- Tang sought judicial review</li><li>- Established the two limbs</li><li>- Held that taking her out of the program didn't affect her legal rights or obligations.</li><li>- This was mostly because of her poor arguing – should have argued contract law</li></ul>
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- The First Schedule to the ADJR Act lists decisions that are expressly excluded from jurisdiction
  - o E.g. migration, taxation, national security
- Decisions of the Governor-General are not reviewable

### COMMON LAW JURISDICTION

*The federal court has jurisdiction under s 39B of the Judiciary Act to issue constitutional writs against a decision made by an officer of the Commonwealth. The High Court also has a similar power directly under s 75(v) of the Constitution. It is advisable that the ...applicant... seeks review in*

***the Federal Court as it may be remitted back to the Federal Court if first brought in the High Court (s 44 Judiciary Act)***

<p><b>Re McBain</b></p>	<ul style="list-style-type: none"> <li>- Vic infertility treatment act stated only women who were married or de facto could get IVF (with a man)</li> <li>- McBain was a Dr who wanted to give IVF to a single woman</li> <li>- McBain sought order that the Act was inconsistent with anti-discrimination legislation</li> <li>- The Australian Catholic Bishops conference sought judicial review of the decision</li> <li>- Held – the proceedings did not give rise to a matter</li> <li>- The courts do not have a mandate to seek out interesting and important questions of law</li> <li>- Justiciable controversies concern the rights and duties of parties</li> <li>- Hypothetical questions give rise to no matter</li> </ul>
<p><b>FAI Insurance v Wenneker</b></p>	<ul style="list-style-type: none"> <li>- The government didn't renew the FAI as an approved provider for compensation and gave reasons for not doing so</li> <li>- FAI sought a right of reply</li> <li>- Government argued that the issue was not justiciable because final approvals were made by the Governor in council (prime ministers in cabinet)</li> <li>- Held that the decision was void for denial of procedural fairness</li> <li>- Just because decision made by GIC doesn't itself provide basis to exclude review</li> </ul>
<p><b>Council of Civil Service Unions v Min for Civil Service (UK)</b></p>	<ul style="list-style-type: none"> <li>- Margaret Thatcher decided that the staff in the communications headquarters couldn't be members of a union</li> <li>- There was no consultation with staff or the union</li> <li>- Union sought to challenge the decision</li> <li>- If it was justiciable then it would have been a strong case for breach of natural justice</li> <li>- Court dismissed governments argument that prerogative powers are not subject to review</li> <li>- It is about the nature of the power, not is source – when deciding justiciability</li> <li>- matter was non-justiciable because it dealt with national security</li> </ul>
<p><b>Min for arts, heritage</b></p>	<ul style="list-style-type: none"> <li>- Group of mining companies collectively known as Peko had mining leases all over Kakadu National park</li> </ul>

<p><b>and enviro v Peko- Wallsend</b></p>	<ul style="list-style-type: none"> <li>- Cth cabinet decided to nominate an area in Kakadu for world heritage protection – this would stop them being able to mine</li> <li>- Peko’s existing leases covered areas that would have been restricted under the decision</li> <li>- Peko sought an injunction asking Federal Court to prevent Cth from proceeding with the nomination - arguing procedural fairness</li> <li>- Held that matter was no justiciable</li> <li>- Prerogative powers can be subject to review but this particular decision involved complex policy and political issues</li> </ul>
<p><b>Hicks v Ruddock</b></p>	<ul style="list-style-type: none"> <li>- Hicks was caught by the US in Pakistan training with terrorist organisation</li> <li>- Was detained by the US in Guantanamo</li> <li>- H sought judicial review of a decision by the minister for not seeking a request for his release</li> <li>- The minister applied to have the case struck out because it was non justiciable – involved issues of foreign relations</li> <li>- Held that this case was justiciable</li> <li>- Just because something involves foreign relations didn’t necessarily preclude judicial review</li> </ul>

***The court can hear judicial review applications ‘in all matter in which a writ of Mandamus or prohibition or an injunction is ought against an officer of the Cth’ (s 75(v) of the Constitution)***

**Matter**

- ‘controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled’ (**Re McBain**)

**An actual dispute**

- There must be an actual dispute about a legal issue
- It cannot be hypothetical
- This is shown on the facts because ...applicant... thinks that ...DM’s... decision... was illegal.

**Justiciability**

- Involves courts defining situations in which judicial review is appropriate
- Two-fold test
  - o whether the court can resolve the matter
  - o whether they should resolve it
- Courts are hesitant to become involved in cases that involve competing policy considerations
- ...decision...is not of such a high concern of politics that the court should not review it (**Hicks**)

**Factors**

- Source of the power
  - Constitutional vs statutory
- Status of the DM
  - Prime Minister vs departmental officers
- Nature of the DM power
  - National security vs application for license
- Nature of the issue for determination
  - Real adversarial vs hypothetical

### **Officer of the commonwealth**

- If the DM is employed in the office of a Cth department this will be satisfied
- Officer is broadly interpreted
  - It includes all officers appointed by the Crown, including ministers, public servants, statutory office holders, judges, tribunal members etc.

### **An available remedy**

- Must be seeking one of the remedies that the High Court can grant in such matters – certiorari, prohibition, Mandamus, injunction or declaration (**s 75(v) Constitution**)

### **Certiorari**

- An order that quashes a defective decision
- Requires
  - The decision to have *legal effect*
    - Any impact on legal rights
  - Made pursuant to an exercise of public power
    - Refer to the section of the Act that the decision is made under
    - ‘a body in carrying out a particular function exercises public power if, in the absence of a private party, the government would inevitably carry out that function’ (**Datafin**)

### **Writ of mandamus (prerogative writ)**

- Less desirable than certiorari – returns the decision to the DM to make it again legally
- DM has to make choices in accordance with the law
- Requires

- DM must be a public body or official who is obliged to perform a duty of a public nature recognised by law which has not been performed (**WA Field and Game Association**)

**Injunction (prerogative writ)**

- Order by the court that the respondent refrains from undertaking a particular act or undertake a particular act
- Generally hesitant to grant this

**Writ of prohibition (prerogative writ)**

- Order that prohibits a person from taking a proposed action or making a proposed decision
- Requires
  - Same as certiorari however applied to a proposed decision

**Declaration**

- An order which has no coercive effect but which merely declares the parties' legal rights

<p><b>R v Panel on Takeovers and mergers; Ex parte Datafin (UK)</b></p>	<ul style="list-style-type: none"> <li>- Takeover panel administered stock exchange</li> <li>- There was a de facto power granted to the panel to exclude a company from the exchange – no legislative power</li> <li>- Panel excluded a company</li> <li>- Datafin sought judicial review based on procedural fairness</li> <li>- Question was whether the panel exercised public power</li> <li>- Held that they did exercise public power</li> <li>- ‘a body in carrying out a particular function exercises public power if, in the absence of a private party, the government would inevitably carry out that function’</li> <li>- Here if no panel, the government would have to step in and do it</li> <li>- This case has been widely criticised</li> </ul>
<p><b>Hot Holdings</b></p>	<ul style="list-style-type: none"> <li>- WA Mining act gave WA minister discretion to grant or refuse an application for a mining lease</li> <li>- Before decision made – have to receive report from Mining warden which contained a recommendation</li> <li>- Where there were multiple applicants the warden had to specify which was the first in time to lodge</li> <li>- In this case there were 8 applications made at the same time</li> <li>- Warden held a ballot to decide which would have priority</li> <li>- Before the ballot happened Hot Holdings launched proceedings to challenge the decision to hold a ballot</li> <li>- Did the decision affect legal consequences?</li> </ul>

	<ul style="list-style-type: none"> <li>- Held that if it was a decision to grant a license then it definitely would</li> <li>- The decision here was just to hold a ballot, much earlier in the process</li> <li>- Still held to have legal consequences</li> <li>- Minister could only grant or approve licenses once they have taken into account the warden's recommendation of which priority is an important part</li> <li>- It was a pre-condition and therefore affected legal consequences.</li> </ul>
<p><b>WA Field and Game Assoc</b></p>	<ul style="list-style-type: none"> <li>- WA conservation Act empowered minister to declare an open season in respect of any fauna</li> <li>- The minister didn't make the decision to declare open season</li> <li>- The field and game association sought a writ of mandamus to make the minister decide</li> <li>- The application failed – the text of the legislation didn't put the minister under a duty to consider and decide</li> </ul>