

- Identify Decision and DM**
- Background (Reasons & FOI)**
- Choose Avenue of Review**
- Threshold Issues**
- Standing**
- Grounds (JR) / Procedures & Evidence (AAT)**
- Remedies & Potential Restrictions on Remedies (JE or Privative Clause)**

Factors consider when selecting review avenue:

- Cost
- Time lapse since decision (28 days AAT, 60 days JR, 12 months Ombudsman)
- Need to exhaust lower level review first? E.g. approach original DM (give more info and ask for review), internal review by higher officials, local MP, media)
- Legislative referral to AAT for merits review?
- Nature of error: legal or factual?
- Discretion involved in making of decision? (AAT can remake)
- Remedy sought?

Start with ADJR Judicial Review , if not applicable then go CL Judicial Review.

Remember JR limited in that affirm or set aside decision, if set aside then remitted to original DM to remake according to law.

STATUTORY (ADJR) JUDICIAL REVIEW:

Threshold 1: DECISION TO WHICH THIS ACT APPLIES

- s 5 ADJR:** allows review of 'decision' to which this Act applies'
- s 3 ADJR:** 'decision to which this Act applies' is a decision of an administrative character made or required to be made under an enactment by a Cth authority or officer
- s 3(2) ADJR:** reference to a decision includes...
 - making, suspending, revoking or refusing to make order, award or determination;
 - giving, suspending, revoking or refusing to give certificate, direction, approval, consent or permission;
 - issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - imposing a condition or restriction;
 - making a declaration, demand or requirement;
 - retaining or refusing to deliver up an article; or
 - doing or refusing to do any other act or thing;
- ABT v Bond:** seminal case on what constitute a decision, must have element of finality and must impact substantive rights, Bond found not to be fit and proper and accordingly company found not to be fit and proper, license removed

according to second finding, second finding reviewable because final and impacted rights (i.e. ability to show TV) but first finding not. Not to say decision cannot be reviewed at two different stages, see *Saleno*

- Saleno's Case:** house raids preliminary to inquiry but decision to enter premises had immediate impact on rights, and findings of raid determined whether inquiry would go forward. Element of finality and impact on rights meant decision to raid house was reviewable
- Edelston's Case:** recommendations may be reviewable, whether recommendation qualifies as decision depends on what was required by statute, any element of finality or impact on final rights. Here, investigation of doctors led to board recommendation to de-register doctor, recommendation was reviewable because had element of finality and was *close enough to final decision to have an impact*
- Crunch point at which rights definitely impacted is point at which decision is reviewable

Threshold 2: OF ADMINISTRATIVE CHARACTER

- Process of deduction, exclude things of legislative or judicial character to determine what is of administrative character
- Admin character usually requires application of general rules to specific situation
- Don't be fooled by term 'regulation' used to make it appear legislative and non-reviewable, substance over form (see *Fed Airport Corp* below)
- Roche:** withdrew drug from legislative schedule, even though was quasi-legislative only impacted Roche so decision was of admin character and Roche could seek review
- Toohes:** Customs Act refused to exempt piece of equipment only T used, T granted judicial review because despite Customs Act apparent legislative nature, was in fact admin character because applying general law to T specifically
- Blewitts:** Medicare schedule changed and applicant hadn't submitted some claims, held bad luck, can't review because change was legislative and didn't impact him specifically
- Fed Airports Corp:** Passed regulation saying all airlines using would have to pay fee, held to be admin character despite use of term 'regulation' since airport is public body and can't pass legislation, also decision applying to small, specific group and not world at large

Threshold 3: DECISION MADE UNDER AN ENACTMENT

- Consider: what is an enactment? when is decision made under an enactment?

- s 3(1) ADJR:** 'enactment' means Cth Act and instrument (including rules, regulations, by-laws) made under such an Act
 - Note: This is why prerogative decisions usually not judicially reviewable, because not made under enactment / statute
- For decision to be made under enactment there must be link between decision and power conferred by an enactment to that decision
- In *Tang*, Ct said decision will be made under enactment for purposes of ADJR if it 'derived from the enactment the capacity to impact legal rights and obligations', or 'took its legal force or effect from statute'
- Griffith v Tang:** GU authorised Council to do all necessary for Uni to function, Council formed committed which formed policies on academic misconduct, Tang guilty of misconduct and excluded from uni on basis of policies, HCA held decision to exclude Tang not made under an enactment so not reviewable. Two part test, Tang fell down on second limb because decision to exclude made under policy not under statute (decision to exclude too far removed from statute)
 - Decision has to be expressly or impliedly authorised by enactment
 - Decision itself had to confer, alter or otherwise affect rights or obligations

COMMON LAW JUDICIAL REVIEW:

- Power for CL JR from Constitution s 75 (inherent jurisdiction of HCA to hear matters involving officer of Cth)
- Fed Ct jurisdiction granted in s 19 Fed Ct Aus Act 1976, extended by s 38B Judiciary Act 1903, and s 44(2A) Jud Act allows HCA to delegate matters to Fed Ct
- So, can bring JR via HCA or Fed Ct but usually begin in Fed

Threshold 1: MATTER

- Must have actual dispute and be a party, no hypotheticals
- Re Navigation Act:** Ct will not give advisory opinions, advisory opinion is not a matter for purposes of CL JR because no actual dispute in question
- Mc Bain's Case:** Ct will not entertain matter that has already been resolved and if it's not one of the parties to the action bringing the matter. Bishops not allowed to get IVF decision reviewed since already resolved and no dispute between them and Vic gov on which Ct could adjudicate

Threshold 2: OFFICER OF COMMONWEALTH

- No definitive HCA ruling on who is 'officer of Cth' - general consensus that covers public servants, ministers, tribunals, boards, commissions
- Debate as to whether statutory corp is 'officer of Cth'

- Court less likely to be strict here since other checks and balances
- Make sure CTH and not STATE officer
- Difficult where gov bodies outsource to avoid liability, may have to broaden definition of 'officer of Cth' for CL judicial review to look at function being performed rather than what body is calling themselves
 - **Neats Case:** gov outsourcing to get around sanctions placed in time of conflict

Threshold 3: JUSTICIABILITY

- Whether Cts will hear matter or not, considers subject matter of dispute
- Cts don't tend to have justiciability in relation to:
 - Exercises of prerogative power (but not blanket ban per *Hicks v Ruddock*) or high level political issues (*Peko Wallsend*)
 - Cases involving foreign relations (*Hicks v Ruddock*)
 - Advisory opinions (*Re Navigation Act*)
- **Peko Wallsend:** exercised prerogative power in nominating part of Kakadu Park to Heritage List, PW sought review since hadn't had chance to present case, Ct held no review because was Cabinet decision involving complex policy matters.
 - Note: later site extended and PW successfully appealed because was merely admin decision to extend existing declaration so not as political as previous decision
- **Hicks v Ruddock:** exercise of prerogative power and involved foreign relations, court said NO just because exercise of prerogative power not automatically non-justiciable, look at each case individually

GROUNDS OF REVIEW:

1. Identify grounds of review
2. Refer to relevant section no. if using statutory JR
3. Explain tests and requirements of the ground
4. Discuss relevant case law
5. Apply law to facts
6. Conclude on likely success of the ground

PROCEDURAL FAIRNESS (PF): s 5(1)(a)

- Also called 'natural justice', not yet automatic right
- Must ask: (1) when is PF required? (2) What does PF entail?

1. When is PF required?

Statutory Provisions

- Required if statute says so: look at statute to see if includes or excludes PF, some aspects of it, or if silent on it
- If statute restricts PF then Cts tend to interpret restriction narrowly (**Re MIMA; Ex parte Miah:** if Parliament wants to exclude must do so clearly and explicitly)

- If statute is silent on PF then look at rights and interests effected to determine if PF should be afforded

Interests & Legal Rights Affected

- If legal rights effected then there is right to PF
- **Cooper's Case:** there is a right to PF where property rights effected, built house without Council approval, Council knocked down without telling or giving chance to rebut
- **Ridge Baldwin:** right to PF where decision impacts property rights, right to belong to professional body (here, police force), membership of public office positions. Police officer dismissed for 'corruption' but not given reasons or chance to defend self
- May also be entitled to PF something less than legal rights effected (per Denning in *Schmidt*) i.e. LEGIT EXPECTATION
- PF afforded where legit expectation that legal right will not be interfered with, however not unless ignorance of the legit expectation would cause unfairness or detriment of some
- **FAI Insurance:** Minister refused to renew license without giving reasons, denied opportunity to ask questions/explain selves, held where business interest involved then there is also a right to be heard, had legit expectation that licence would be renewed unless adequate reasons to contrary
- **Kloa v West:** Overstayed VISA but moved house so didn't receive notice of deportation, had legit expectation that would be notified prior to being deported, should have been afforded PF
- **Teoh's Case:** Deportation for drug offences set aside because was entitled to expect children's interests would be considered in accordance with the relevant convention (note: convention at time was not actually entrenched in domestic law so not binding and could have deemed his expectation was not legit on that basis)

- **Re MIMA; Ex parte Lam:** Where there is a legit expectation of something happening, person will only be entitled to PF if detriment or unfairness results from legit expectation being ignored. Deportation order not overturned on basis of 'legit expectation that mother of children would be contacted', legit expectation is not rule of law and no resulting unfairness to L, he already had a full hearing

- **Haoucher's Case:** Where minister departed from AAT recommendation whether to deport or not, usually had to give reasons and justify, overturned deportation order since no reasons/justification given where H had legit expectations he would receive them
- Distinguish between mere hope (weak), legit expectation (stronger), and legal right (strongest entitlement to PF) - **FAI: Haoucher's Case**

Preliminary Decisions & Investigations

- General rule that decision making process to be viewed in entirety, no PF at prelim stages, but not always the case
- **Laws v ABT:** L not told of inquiry into his controversial radio comments, Ct held PF should be afforded at prelim stage (i.e. before inquiry started) because publicity would impact L's reputation
- **Edelston's Case:** PF not required every step of the way i.e. may not be required at prelim stages
- **Wirth v Mackay Hospital:** Act required PF for 'discipline employees', Ct held PF was required for whole process including disciplinary steps, Dr W should have been given prelim report that made adverse findings against him from which disciplinary proceedings arose
- **Ainsworth's Case:** potential gambling machine supplier found incompetent by report, HCA held where person's reputation might be adversely impacted by prem investigation then person should be afforded PF

Statutory Appeals

- Generally, Ct reluctant to conclude that statutory right of appeal displaces duty to afford PF – but not a blanket rule
- **Re MIMA; Ex parte Miah:** decisions of minister usually upheld by tribunals hence importance of offering PF at every stage regardless of later right to statutory appeal

Secrecy, Urgency & National Security

- Considerations of secrecy, urgency, national security may outweigh considerations of PF
- **Kloa v West:** Brennan J noted that can't use national security as blanket defence to not providing PF
- Eg's cases of urgency: destroying dangerous animals, quarantining persons with infectious diseases, forcibly entering premise at time of fire/natural disaster

Necessity

- **Laws v ABT:** HCA held even though tribunal biased (denial of PF), were only ones who could hear matter. Rules of PF cannot be invoked to frustrate intended operation of statute that sets up tribunal and requires it to perform functions entrusted to it

2. What is required by PF? Content of PF

- Right to fair hearing + right to unbiased decision maker
- Where contents of PF denied, applicant may ask for adjournment (e.g. in order to get legal rep, prepare submissions)
- To ensure PF, applicant may ask Board to give witness statements under oath
- What is required by PF depends on circumstances of each individual case (*Kloa v West*)

- No absolute right to oral hearing, depends on seriousness of case and whether person given adequate opportunity to hear and present their case
- For what is required by PF, consider nature of inquiry, subject matter and rules under which DM acting (*Deane J in Haoscher's Case*)
- PF requires at least that person must have prior notice that adverse finding had been made against them, should know info being relied on and have time to prepare, right to make submissions to defend self (*Re Macquarie Uni v Ong*)
- What constitutes adequate notice of findings depends on seriousness of matter
 - Re Macquarie Uni v Ong:** removal from office, given notice but didn't contain all necessary info, Ong denied PF
 - Dainford v ICAC:** unaware ICAC inquired into his land dealings, ICAC then made allegations, Ct held only necessary to give notification of general scope and nature of inquiry
 - Re MIMA; Ex parte Miah:** applicant of protection VISA unaware of Minister's intent to rely on change of gov in home country to argue no well founded fear of persecution
 - Consider whether this is the applicant's first hearing or a re-hearing – if re-hearing shorter period of time may be sufficient since already knows info being relied on/adverse comments being made
- Fair hearing may also require Legal Rep or Interpreter, or right to cross examine

Legal Rep/Interpreter

- No CL right to legal rep (*Kaine v Jenkins*)
- Must ask: is applicant apt to represent self?
- WABZ v MIMA:** applicant prejudiced because didn't speak English, Fed Ct noted four factors to consider in determining whether applicant apt to represent self:
 - Capacity to understand nature of proceedings and issues;
 - Ability to communicate effectively in language used;
 - Legal and factual complexity of case; and
 - Importance of decision to applicant's liberty and welfare
- Krstac v Aus Tel Com:** denial of legal rep was not unfair because apt to represent herself and allowed adjournments to consult with union reps
- Limited cases on right to interpreter as part of PF, but note *Singh*: where decision set aside for lack of interpreter

Right to X-Examine

- No general right to X-examine (*O'Rouke v Miller*)
- Can X-examine where reliability of witness is an issue (*Aus Post Com v Hayes*)
- Can usually X-examine where credibility is an issue (*Harrison v Pattison*)

Consequences for Breach of PF

- Breach of PF (e.g. unfair hearing since no prior notice) = **VOID AB INITIO**, as if no decision in first place and have to start again (*Ridge v Baldwin*)
- Where relief provided by void decision is futile, then Ct may use its discretion to refuse to grant (*Glynn v Keel Uni*)

PROCEDURES: s 5(1)(b)

- What procedures required by statute?
 - Did DM follow them?
 - If not, what are the consequences?
- Project Blue Sky:** must look at purposive approach to statutory interpretation when looking at the requirement to follow procedures in the Act, what was Parliament's intention? Two conflicting provisions, Ct reconciled by reference to purpose of the Act (s 15AA Acts Interp), regulations invalid prospectively for too much inconsistency, Parliament would not have intended to inconvenience the public
 - MIC v SZIZO:** Notice sent to Dad rather than English speaking daughter, no injustice done by failing to follow procedure since notice sent to house where whole family resided and whole family attended hearing. Decision will not be void for failure to follow procedure where no substantive injustice was done by failure to follow procedure.

DELEGATION: s 5(1)(c)

- Who is allocated the power by statute?
 - Who actually made the decision?
 - Was that person authorised by proper delegation or appointment as agent of the principal?
- Argument that person who made decision was not authorised to do so
 - Delegation must be effected properly, usually by writing
“Delegate cannot delegate”
 - Agent vs. Delegate: agent's capacity to act ceases when principal leaves office, delegate's power continues indefinitely until revoked

O'Reilly's Case (1983)

No authority for deputy to delegate to investigative officer (IO) BUT accepted that IO was acting as agent for deputy.
Agency accepted as 'practical'

Pattenden's Case (2008)

'Rubber-stamping' DCT's signature on DPO, held DPO was unauthorised because did not reflect decision made by authorised tax officer on behalf of DCT. No mal intent

administrative necessity'. Agency only inferred in limited circumstances, usually where no discretion (just tick a box) and little impact resulting from agency

but still unauthorised. Ct probably hesitant to imply agency because of huge implication of DPO (restricts freedom of movement)

DECISION NOT AUTHORISED: s 5(1)(d)

- Consider scope of DM's powers;
 - Consider nature of decision actually made; and
 - Compare them to determine whether decision was within that scope
- “Decision” not authorised under enactment it was purported to be made under
 - London County Council Case:** regulating trams and tried to regulate buses, out of scope of authority
 - Shannahan v Scott:** Vic Egg board no eggs in cold storage, S not bound by Vic regulation because eggs from NSW, not within scope of Vic Egg Board's powers
 - Activity that's ancillary in nature can be incidental to the power, but cannot add to the power (*Shannahan v Scott*)
 - Note:** can't challenge actual legislation/regulation because that's legislative, can only challenge application to the case
 - Regulating activity requires activity to carry on, there can be no prohibition (*Foley's Case*)
 - Foley's Case:** Council could regulate activity around mall, F chanting and advocating, F argued by-law prohibiting such behaviour invalid because was prohibiting what it could only regulate, Ct creatively said what was being regulated was use and enjoyment of mall, by-law prohibiting such behaviour was incidental to regulating use and enjoyment of mall, Thus by-law not invalid and F's fine stood
 - ‘Means to end distinction’: may not be support for rules that do no more than specify the end to be achieved (jumping to conclusion without going through each step)
 - Paull Case:** power to make laws for emissions from equipment, P burned rubbish, successfully argued that Act merely prohibited end result without discussing means to end (e.g. burning rubbish specifically). Prohibition invalid
 - Where DM imposes conditions alongside decision, conditions must align with Act's objectives in order to be within DM's scope of power – so look at Act's objects/purpose clause to establish whether that is the case
 - Still, conditions shouldn't be too restrictive (e.g. restriction on freedom of movement or liberty) since Parliament probably didn't intend to restrict. On contrary, could argue that restrictive conditions necessary to facilitate other conditions or to uphold Act's objective

ERROR OF LAW: s 5(1)(f)

- Error of law is error made in applying statutory principle
- E.g. where provision conferring strict liability, and DM took fault into account = error of law
- Distinguish between error of law and error of fact – error law is judicially reviewable, error fact only reviewable by Merits Review

FRAUD: s 5(1)(g)

- Identify decision made
- Identify fraud involved
- Prove fraud actually happened

- Fraud is only ground of review at ADJR level, Not ground of review at CL
- Similar to bad faith – linked to dishonesty, seriously bad behaviour, bribery or corruption
- Difficult to establish because must prove actual fraud
- SZFDE:** Fraud on part of TP tainted the decision enough to have it invalidated, migration agent (TP) fraudulently failed to make application
 - Note:** Ct careful to limit ruling to facts on this case, avoid heaps of people claiming fraud of TP tainted decision so should be invalidated
- Illogical fact findings or procedural blunders along the way not usually sufficient for finding of bad faith. Such defects could be explicable by overwork, forgetfulness or other human failings not inconsistent with honest attempt to discharge DM's duties (Heerey and Kiefel J in *MIMA v SBAN*)
- 'mere error or irrationality does not amount to bad faith' (*Thompson v Dept Environment and Conservation*)

NO EVIDENCE: s 5(1)(h)

- Where no evidence to justify the decision, even some evidence may be sufficient (so long as logically probative/based in fact)
- Overlaps with, but is narrower than the equivalent CL ground of review
- s 5(3) expands s 5(1)(h) – together essentially say that decision is invalid if there is a lack of evidence to support an essential statutory element of the decision

s 5(3) ADJR: Review ground in s 5(1)(h) will only be established if:

- DM was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which DM was entitled to take notice) from which DM could reasonably be satisfied that the matter was established;

OR

- (b) DM based the decision on the existence of a particular fact, and that fact did not exist.
- Either prove that there is absolutely no evidence or no logically probative evidence supporting the decision, or that decision based on a **WRONG** fact that was critical to the decision
- Rahamanikam:** RRT rejected R's claims based on 8 facts, 2 of which didn't actually exist, HCA held still enough evidence to render RRT's decision valid. Those 2 reasons were not 'critical' to the finding since there was other evidence that could be relied upon
- Poaches:** in deciding to deport relied on gossip (e.g. about applicant's marriage), must have logically probative evidence i.e. even just a little bit of evidence will be sufficient but must be based in fact

OTHERWISE CONTRARY TO LAW: s 5(1)(j)

- Catch all provision
- Proves way in which ADJR has expanded scope for JR, not limited to CL grounds
- Closely related to unreasonableness, and s 5(2)(j) abuse of power
- E.g. Negligence on part of DM (or TP closely linked to DM and final outcome of decision) might be sufficient to make out this ground

IMPROPER EXERCISE OF POWER: s 5(1)(e) read with s 5(2)

s 5(1)(e) notes improper exercise of power as a ground of review must be read with s 5(2) ADJR, which says improper exercise of power includes:

- s 5(2)(a) Irrelevant Considerations
- s 5(2)(b) Relevant Considerations
- s 5(2)(c) Improper Purpose
- s 5(2)(d) Bad Faith
- s 5(2)(e) Discretion/Behest of Another
- s 5(2)(f) Policy Without Regard to Merits
- s 5(2)(g) Unreasonableness
- s 5(2)(h) Uncertainty
- s 5(2)(j) Abuse of Power

IRRELEVANT CONSIDERATIONS: s 5(2)(a)

RELEVANT CONSIDERATIONS: s 5(2)(b)

- Identify scope of power
- Identify irrelevant/relevant matter
- Confirm that DM considered irrelevant matter or didn't consider relevant matter
- Check if significant enough to invalidate decision

- To identify scope, look to statute conferring power – does clearly say what is relevant or irrelevant? What are the objects of the Act and do the considerations taken into account align with those objects? (s 15AA Acts Interp Act)
- Paramatta City Council:** relevant considerations were obvious because statute clearly said Council had to take into account traffic flow, pedestrian access etc.
- Peko Wallsend:** Mason J said to est. irrelevant/relevant considerations (may vs must) look at objects or purpose of Act, subject matter, rights affected, office of DM (e.g. in this case was high-level Cabinet decision so had to take more considerations into account)
- Hindmarsh Island Case:** rights effected were serious since restricted land use for 25 years, restrictive so had to take more things into account
- Teoh's Case:** International treaty may be a relevant consideration
- 'National interest' usually relevant consideration but Cts hesitant to go further and explain what that entails
- Be careful in deciding irrelevant/relevant consideration where discretion involved in making decision because cannot reprimand weighting DM gives to each consideration – so long as disregarded irrelevant ones and turned mind to relevant ones
- Proving what DM did take into account can be difficult since no general right to reasons
- What does it mean to consider or take into account?
 - Subjective test, get into mind of DM
 - Hindmarsh Island Case:** active intellectual process, must turn mind to matter/consideration, secret women's business, Minister made decision in 48hrs, not enough to consider all relevant info, Minister also not allowed to delegate consideration to someone else
 - Hindi Case:** proper, genuine and realistic consideration of a matter. Must apply mind and think about considerations as they pertain to the issue. Leb man applied for VISA, hadn't been back to Leb in 25yrs but couldn't show displaced for fear of persecution, DM read and 'noted' the considerations but Ct held that was insufficient. Merely reading may be enough to establish if irrelevant but not enough to establish if relevant
- Peko Wallsend:** mining interest was held to be a relevant consideration (but didn't get over the line because was a Cabinet decision)
- Murphyore's Case:** Minister delay in making decision re export permit so could get environmental impact statement, applicant sought review on basis that enviro impact statement was irrelevant consideration. Ct said NO not irrelevant consideration, so no review on that ground
- Lu's Case:** In cancelling VISA, Minister failed to take relevant considerations into account (e.g. seriousness of