**Jurisdiction to Conduct Judicial Review**

1. **Definition:** A Court must have power to interfere with a matter by recognizing it has jurisdiction to conduct judicial review.
2. ***When can an applicant argue for judicial review ?***
   1. A Court must be satisfied it has **jurisdiction**
   2. The litigant must have **standing**
3. ***Has the applicant satisfied the Court it has jurisdiction?***
   1. **Jurisdiction at \*\*\*Common Law\*\*\***
      1. *Inherent Common Law Jurisdiction* – The inherent common law jurisdiction of superior Courts to grant prerogative writs such as
         1. *Certiorari* – Quash an invalid decision
         2. *Prohibition* – Prohibit a decision-maker from further unlawful activity
         3. *Mandamus* – Compel a lawful exercise of power
         4. *Habeas Corpus* – Require the release of a person unlawfully in custody
         5. *Injunctions* – Prohibitory and mandatory
         6. *Declaration* – Declaring legal obligations
      2. In Most States and Territories Superior Courts – still hold inherent jurisdiction to conduct judicial review *subject to Statutory Modification*
      3. **For Commonwealth Public Officials – no court has inherent common law jurisdiction** to conduct judicial review.
         1. *The High Court* – Formed from the *Constitution* and therefore its has *constitutional power* **and not inherent**.
         2. *Federal Court* – Formed by Statute and its jurisdiction is limited by Parliament (*Federal Court of Australia Act 1976 (Cth)*
4. ***Can the Applicant take the Matter to the High or Federal Court ?***
   1. *Essential Requirements for Enacting Original Jurisdiction?*
      1. ***Applicant Must:***
         1. ***Have a Matter –*** involving some disputes about rights, duties or liabilities,
         2. ***Entitlement to a Remedy*** – One of the remedies listed at *(b)(a)(i)* above
         3. ***Against a Commonwealth Officer*** – the Dispute must be against a Commonwealth Officer.
   2. **\*\*\*Original Jurisdiction for Officers of the Commonwealth\*\*\* (next page)**
      1. Must establish original jurisdiction of the High or Federal Court
      2. ALSO REFER TO PRIVATIVE CLAUSES (where relevant)
   3. **\*\*\*Original Jurisdiction for Officers of the Commonwealth\*\*\***
      1. **High Court –** The High Court has **original jurisdiction under s75(v) of the *Constitution* in all matters in which involve a**
         * 1. *Writ of Mandamus; or*
           2. *Prohibition; or*
           3. *Injunction*
5. This is taken to mean Jurisdiction to Conduct Judicial Review at common law.
   * 1. **Federal Court** – The Federal Court has only **statutory jurisdiction** and does not have inherent jurisdiction.
        1. ***S39B of the Judiciary Act 1903 (Cth)*** – The Federal Court has **original jurisdiction** for Commonwealth Officers with respect to
           1. *Writ of Mandamus; or*
           2. *Prohibition; or*
           3. *Injunction*
6. S44(2A) of the *Judiciary Act 1903 (Cth)* – Allows the High Court to remit any proceedings initiated under **original jurisdiction** to the Federal Court for determination.
7. ***Is the matter justiciable at Common Law?***
   1. **Must be ‘justiciable’** – Even if the High or Federal Courts have original jurisdiction to conduct a judicial review, they can **refuse to hear a matter on the basis of non-justiciability.**
      1. *Non-justiciable* – *“We are declaring Martial Law in Melbourne”* – it is an executive decision and not justiciable.
   2. **Court will Consider:**
      1. *The Source of the Power* 
         1. i.e. Constitutional or prerogative vs. statute
      2. *The Status of the Decision-Maker* 
         1. i.e. Authority of decision-maker
      3. *Nature of the Decision-Making Power*
         1. i.e. National Security per *Civil Services Union v Civil Service*
      4. *Is the issue ‘real’ or ‘hypotheical’*
         1. *Re McBain; Ex Parte Australia Catholic Bishops Conference*
            1. ***Gleeson CJ***

*‘Courts do not have a mandate to seek out interesting and important questions of law, and decide them, irrespective of the parties desire to litigate’.*

* + - * 1. ***Hayne J*** *-*

*‘Hypotheical questions give rise to no ‘matter’’*

*Justiciable controversies must concern* ***the rights and duties of parties; and the powers of those who hold office.***

1. ***Is the matter justiciable under the ADJR Act?***
   1. **The applicant must establish that there is a**
      1. *Decision* or *conduct for the purpose of making a decision* 
         1. *S5(1) or s6*
            1. *Decision and Conduct per – s3(2) & s3(5)*
      2. *Administrative Character*
         1. *S3(1)*
      3. *Made under an enactment*
         1. *S3(1)*
      4. *About a person aggrieved*
         1. S3(4) – A persons whose ‘interests are affected’
   2. ***Relevant ADJR Act Sections***
      1. ***S5 ADJR Act*** *–* 
         1. Allows a person to apply for an order of judicial review to the **Federal Court** or **Federal Magistrates Court**
            1. *Decision -* In Respect of **‘a decision to which this Act applies’**

*S3(1) –*

***A decision of ‘administrative character’***

*Inferring any admin decision*

*Made under ‘enactment’ – s(3)*

*Not a decision by the Governor-General*

*Not a decision specified by Schedule 1 of the ADJR Act*

* + - * 1. *Person Aggrieved -* If the person is **‘aggrieved’** by that decision
    1. ***S6 ADJR Act*** –
       1. Allows the same Courts to hear an application made by a person aggrieved by **conduct for the purpose of making a decision to which this Act applies**.
    2. ***S7 ADJR Act*** –
       1. Allows the same Courts to hear an application made by a person aggreieved by a **decision-makers failure to make a decision**
  1. ***Common Law Considerations***
     1. *ABC v Bond*
        1. **Held:**
           1. *Reviewable Decision –* A reviewable decision is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative – at least in a practical sense of the issue of fact falling for consideration.
           2. *Decision is substantive* – A decision is substantive in nature.
           3. *Conduct is* ***not*** *substantive –* It is procedural rather than reviewing the making of the final decision.
     2. *Griffith University v Tang*
        1. **Held:**
           1. *Made Under Enactment –* **Two criteria**

Decision must expressly or impliedly require or authorized by the enactment

The decision itself must confer, alter or affect legal rights or obligations

* + - * 1. **A decision will only be made under ‘enactment’ if both these criteria are met.**

If Authorized by Statute – then decision is made under enactment otherwise it is not.

**Standing**

1. ***Standing* –** An applicant must have an interest affected by a dispute which gives them jurisdiction to take that interest to Court.
   1. ***Private Interests*** – Rarely ever an issue as the interest affected is the persons own and there they have standing
   2. ***Public Interests*** – More difficult as who has standing when an issues affects “all the public”?
2. ***Invoking Locus Standi (Standing)* –** A person entity or group who has “standing” in relation to a complaint has the right to:
   * 1. *Invoke the jurisdiction of the Court*
     2. *To be heard by the Court in relation to that complaint*
     3. *To have the complaint determined by the Court in favor of, or against, the person who has standing*.
   1. **Standing at \*\*\* Common Law\*\*\***
      1. A party can obtain relief where public rights or interests are involved such that:
         1. *Interference with the public right* – is such that some private right of the person was at the time interested with
         2. *No Private Right* – was interfered with but a person in their capacity with a public right has suffered special damage from the interference with the public right
            1. *Per Boyce v Paddington Borough Council*
      2. ***What is the test for ‘special damage peculiar to himself’?***
         1. *Australian Conversation Foundation v Commonwealth*
            1. **Held:** *‘Special damage peculiar to himself’* is equivalent to having a ‘special interest in the subject matter of the decision’
            2. *Special Interest* – A person has a ‘special interest’ if:

They are like to gain some advantage if the action succeeds (*other than some mere satisfaction like ‘winning a contest’)*

Likely to suffer some disadvantage if the action fails (*other than a costs award)*

**It is not a mere intellectual or emotional concern.**

* + - 1. *Continued Next Page*
      2. *Onus v Alcoa of Australia Ltd*
         1. **Held:** HCA stated that a plaintiff has no standing to bring an action to prevent the violation of a public right if he has

*‘no interest in the subject matter beyond that of any other member of the public … the litigant must have a “special interest in the subject matter of the action”’*

* + - * 1. That is **the interest must be greater in comparison to any other member the public.**
        2. Upheld in *Shop Distributive & Allied Employees Association v Minister for Industiral Affairs (SA)*
  1. **Standing under s75(V) of the Constitution or s39B Judiciary Act**
     1. *Must have Jurisdiction under s75(v) etc (REFER ABOVE)*
     2. There **must be a matter**

1. *Is the issue ‘real’ or ‘hypotheical’*
   * + - 1. *Re McBain; Ex Parte Australia Catholic Bishops Conference*

***Hayne J*** *-*

*‘A person who has no more than a theoretical interest in the subject matter to agitate a question about the rights, duties or liabilities of others will not give rise to a matter’****.***

* 1. **Standing under the \*\*\*ADJR Act\*\*\***
     1. *Must have Jurisdiction under ADJR Act (REFER ABOVE)*
     2. **The applicant must establish that there is a**
        1. *Decision* or *conduct for the purpose of making a decision* 
           1. *S5(1) or s6*

*Decision and Conduct per – s3(2) & s3(5)*

* + - 1. *Administrative Character*
         1. *S3(1)*
      2. *Made under an enactment*
         1. *S3(1)*
      3. *About a person aggrieved*
         1. S3(4) – A persons whose ‘interests are affected’
    1. **The *ADJR Act* ‘person aggrieved’ is the same the common laws test for standing** *– Tooheys v Minister for Business and Consumer Affairs*
    2. ***Common Law Considerations (next page)***
    3. ***Common Law Considerations*** 
       1. *Australian Institute of Marine & Power Engineers v Secretary, Department of Transport*
          1. **Held:** HCA held *‘meaning of a person aggrieved’ is not encased in any technical rules’*. Rather it depends on:

**The nature of the particular decision and the extent to which the interest of the applicant rises above that of an ordinary member of public.**

* + - 1. *Northwest Coast Environment Council v Minister for Resources*
         1. **Held:** The applicant must **demonstrate the importance of their special interest in the subject matter**. **This can be demonstrated by:**

**Illustrating the importance of its concern with the subject matter of the decision**

**The Closeness of its relationship to that of the subject matter.**

* + - 1. ***\*\*\*Special Interests do not equate to Commercial Advantage\*\*\****
         1. *Alphapharm v Smithkline Beecham & Minister for Family Services*

**Held:** If a decision concerns the affairs **of one person alone**, other persons may not institute proceedings merely because it would be to their commercial advtange that the person should not receive a benefit or should suffer a disadvantage.

**The pure competitive or economic interest** of Smithkline in **protecting its market share was not an interest which the Act recognizes.**

**Privative Clauses**

1. **Definition:** A privative clause is the Parliament, through the legislature, enacting a ‘privative’ or ‘deprivation clause’ such that it
   1. **Removes the jurisdiction of the Courts to judicially review such decisions;** and
   2. **Prevents the Courts from ruling on whether they are lawful.**
2. ***Rationale of Such Clauses***
   1. The creation of privative clauses create fundamental paradigms in relation to ownership of power
      1. **Parliamentary Supremacy** – Parliament can create any legislation which simply removes the judicial arm of government through such clauses.
      2. **Separation of Powers** – The judicial branch must determine the law as its function and not the repository of Parliamentary. Evidently, this is why Courts dislike – *greatly* – privative clauses.
      3. **Rule of Law** – Administrative decision makers must not be able to made decisions which exceed their power.
      4. **Constitutionalism** – The **only** exception seems to be s75(v) of the *Constitution* whicheven Parliament cannot alter.
3. ***Common Law Considerations***
   1. *R v Hickman; Ex Parte Fox and Clinton*
      1. HCA held in Hickmen that Privative clauses that purport to exclude even Certiorari can validly restrict the scope of Judicial intervention provided follow Hickman Doctrine:
         1. *The Protected decision must constitute a bonafide attempt to exercise the power conferred on the decision maker*
         2. *It must relate to the subject matter of the legislation; and*
         3. *It must be reasonably be capable of reference to the power given to the body.*
      2. **DEPSITE THIS:** Original Jurisdiction of the HCA vested in s75(v) for officers of the Commonwealth to whom the respective prerogative writs lie.
      3. **Any privative clauses in the original jurisdiction of the HCA cannot affect the jurisdiction of the HCA within the confinements of s75(v).**
   2. *Re Refugee Review Tribunal; Ex Pane Aala*
      1. **Held:** The HCA **expanded** **its power under s75(v)**
         1. *Prohibition and mandamus are not “prerogative writs”* - under the original jurisdiction of the Court under s 75(v).
            1. They are “constitutional writs” (as is the writ of injunction).
         2. *Certiorari and declaration are “ancillary” writs*
            1. The constitutional and ancillary writs may be issued for “jurisdictional error”.
         3. “Jurisdictional error” includes a breach of procedural fairness.
         4. **‘A remedy under s 75(v) does not lie as of right; it is discretionary’ increasing its application broadly.**
   3. **\*\*\**Plaintiff s157/2002 v Commonwealth of Australia\*\*\**** 
      1. **HCA held that** 
         1. Parliament may
            1. enact a law which offers of the Commonwealth must obey.
            2. create a power and determine the content of the law to be obeyed.
         2. **Parliament cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.**
         3. **It is *ultra vires* of the Parliament to confer upon an Administrative Tribunal the power to make a conclusive decision as to the limits of its own jurisdiction**
   4. *Bordruddaza v Minister for Immigration & Multicultural Affairs*
      1. HCA Held:
         1. A law with respect to Proceedings commenced under s75(v) will be valid if:
            1. **It does not curtail or limit the right or ability of applicants to seek relief under s75.**

**Ultra Vires**

**Definition -** *Ultra vires* literally means “outside power”.

**Purpose** - If an administrative decision-maker acts *ultra vires*, this effectively means she has acted in a way that goes beyond the administrative power that the law has conferred on her

**Two basic categories of ultra vires:**

1. **Narrow ultra vires:** Decision-maker had no power at all to make the decision
2. **Broad ultra vires:** Decision-maker had power, but erred in the process of making the decision

**NARROW ULTRA VIRES**

**Definition** – Decision-maker had **no power at all to make the decision.**

**Grounds for Review:**

1. ***Action not permitted by Statute* (**simple/substantive ultra vires)
   1. ***Determining whether this ground is established***
      1. *Identify the decision-maker and the decision made*
         1. Decision of Secretary to issue a search warrant *(Entick*)*;*
         2. Decision of Minister to cancel visa on ground of bad character *(Haneef*)*;*
         3. Decision of Governor to make regulations *(Shanahan*, *Foley*, *Paull*)*;*
      2. *Identify the possible statutory source of the decision-maker’s power to make that decision. E.g.:*
         1. None?;
         2. Statutory provision to cancel visa in certain circumstances;
         3. Statutory provision to make regulations necessary and expedient for carrying out statute’s objects.
      3. *Interpret what that statutory provision permits the decision-maker to do* (i.e., assess the limits of the decision-maker’s claimed statutory power).
      4. *Based on that interpretation, assess whether the decision-maker’s decision falls outside the scope of that power* (i.e. ultra vires).
   2. ***Decision not authorised by Statute (next page)***
   3. ***Decision not authorised by Statute***
      1. ***ADJR Act* –** s5(1)(d) **–** A decision can be challenged on the basis that it was not authorized by Statute.
         1. S5(1)(d) – *the decision was not authorized by the enactment in pursuance of which it was purported to made*.
      2. ***ADJR Act* –** s6(1)(d) **–** A decision can be challenged on the basis that the conduct of the decision maker was not authorized by Statute.
         1. S6(1)(d) – *that the enactment in pursuance of which the decision is proposed to be made does not authorize the making of the proposed decision.*
   4. ***Decision Not Authorised by Common Law***
      1. *Cannot do anything not authorized by the law -* Governments and their officers cannot do anything that is not authorized by the law – *Entick v Carrigton*
      2. *Executive branches given power by Statute cannot make regulations that go beyond the power of Parliament* –
         1. *Foley v Padley* –
            1. **Held:** Statutory power conferred on a repository to make a by-law that prohibits certain activities will enable the repository to prohibit such activity absolutely or conditionally.
            2. While the by-law was drafted widely – it was valid.
         2. *Paul v Munday* –
            1. **Held:** In determing whether a regulation is valid, the Courts are not concerned with wisdom or expediency.

*‘When a statute allows certain means to be adopted to achieve a desired end, it does not permit adopting a different means to achieve the same end.’*

* + - * 1. Accordingly, the regulation was beyond power.

1. ***Procedural ultra vires***
   1. ***Determining whether this ground is established***
      1. *Identify the decision-maker, the decision made, and the statutory source of the decision-maker’s power to make that decision.*
      2. *Identify procedures that were required to be observed in connection with the making of that decision.*
      3. *Assess whether any of those procedures were not observed.*
      4. *Assess whether it was the purpose of the particular statute that a decision made in breach of the procedural requirement should be declared invalid* (i.e. apply ***Project Blue Sky***).
   2. ***Procedure not authorised by Statute***
      1. ***ADJR Act* –** s5(1)(b) **–** Allows a decision to be challenged on the basis that procedures that were required by law to be observed in connection with the making of the decision were **not** observed.
         1. *S5(1)(b) – that procedures that were required by law to be observed in connection with the making of the decision were not observed.*
      2. ***ADJR Act* –** s6(1)(b) – Allows a decision to be challenged on the basis of the **conduct of the decision-maker** leading up to the making of the decision.
         1. S6(1)(b) – that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed.
   3. ***Procedure not authorised by Common Law***
      1. *Validity of the decision* – historically depended on whether the procedural step was ‘mandatory’ or ‘directory’
      2. *Project Blue Sky v Australian Broadcasting Association (ABA)* ***–*** 
         1. **Held:** The better test in determining the issue of validity is to ask whether it was the purpose of the legislation that a decision made in breach of the requirement should be invalid. The purpose of the legislation can be determined by considering:
            1. *The language of the relevant statutory provision*
            2. *The nature of the procedural requirement*
            3. *The subject matter of the decision*
            4. *The object of the statute*
            5. *The consequences for the parties if the decision is invalid*
            6. *Any public inconvenience result from a decision being invalid*
         2. There was a failure by the ABA to comply with the Statute by treating New Zealand program/film makers less favourably than their Australia counterparts.
2. ***Improper delegation*** (the person who made the decision was not authorized by law to make the decision)
   1. ***Determining whether this ground is made out***
      1. *Identify the Principal repository of the decision-making power in terms of the particular legislation*. E.g.:
         1. “An application … must be determined by **the Commissioner**”;
         2. “… the **Minister may** cancel the visa”.
      2. *Identify who made the decision in this particular case*:
         1. If the Principal (with no assistance), no issue of improper delegation.
         2. If the Principal had assistance, did Principal make the decision or relinquish control of the decision-making responsibility? No ground of improper delegation if Principal retains control.
         3. If not the Principal, was the person a duly authorised delegate?

If so, no ground of improper delegation.

* + - 1. If not a duly authorised delegate, perhaps an agent? If so, no ground of improper delegation.
    1. *Conclude ground made out if decision-maker* ***is not*** *Principal, duly authorised Delegate or legally recognised Agent*.
  1. ***Improper delegation not authorized by Statute***
     1. *No express provision for improper delegation contained with the ADJR Act but can be incorporated in* 
        1. *Section 5(1)(c)* - allows a decision to be challenged on the basis that the decision-maker did not have jurisdiction to make the decision;
        2. *Section 5(1)(d)* - allows a decision to be challenged on the basis that it was not authorized by statute.
        3. *Section 5(1)(j)* - allows a decision to be challenged on the basis that it “was otherwise contrary to law”.
           1. *S5(1)(j) –*

that the person who purported to make the decision did not have jurisdiction to make the decision;

that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

that the decision was otherwise contrary to law

* + - 1. *Sections 6(1)(c), (1)(d) and (1)(j)* - allow the same challenges in relation to conduct of a decision-maker.

that the person who has engaged, is engaging, or proposes to engage, in the conduct does not have jurisdiction to make the proposed decision;

that the enactment in pursuance of which the decision is proposed to be made does not authorize the making of the proposed decision;

that the making of the proposed decision would be otherwise contrary to law.

* + 1. *Acts Interpretation Act 1901* –
       1. S34AA – *Where an Act confers power to delegate a function or power, then, unless contrary intention appears, the power of delegation shall not be construed as being limited …’*
       2. S34AB –
          1. *S34AB(a)* - *The delegation can be made generally or as provided by the statute*
          2. *S34AB(b)* – *The powers that may be delegated do not include that power to delegate*
          3. *S34AB(d)* – *A delegation by the authority does not prevent the performance or exercise of a function or power by the authority.*
  1. ***Improper delegation not authorized by Common Law***
     1. There is a common law presumption against a repository being able to delegate administrative power **only rebuttable** expressly by statute.
        1. *Difference between ‘agent’ and ‘delegate’*
           1. ***Re Reference Under s11 of Ombudsman Act***

Prima facie an act will not fall within the statute unless it is done by the person in whom the statute reposes the power. If the Act permits delegation, then Agents are not required.

***If the power is delegable and has been delegated***- the Delegate acts in effective exercise of the power. The delegate is not an agent of the Principal Repository. The Delegate exercises the vested power in his or her own right and name.

***If the power is not delegable and has been delegated* –** (the statute does not expressly permit delegation) the Principal Repository could not have been expected by Parliament to exercise the power on every occasion, some classes of acts done by others for and on behalf of the Principal can be treated as though they were the acts of the Principal [i.e., they act as Agent].

***Agent and Delegate are valid sources of power* -** The act of an Agent and the act of a Delegate may therefore both be valid exercises of administrative power. But the sources of validity are different. A person cannot act as both.

* + - 1. *Practical Necessity*
         1. ***O’Reilly v State Bank of Victoria***

Government Ministers, in whom statutes expressly repose administrative power, may in general act through a duly authorised officer of his department (i.e., Agents) because of the practical necessity of doing so in the context of the multifarious functions of a Minister and the sheer quantity of transactions in government administration. The principle can be extended to Commissioners and their Delegates.

**Irrelevant Considerations**

1. Administrative decision-makers must not taken into account irrelevant considerations when exercising their discretionary powers.
   1. ***Determining whether this ground is established***
      1. ascertain what was in fact taken into account by the decision-maker;
      2. assess whether anything taken into account was irrelevant.
   2. ***Statutory ADJR Act:***
      1. Section 5(1)(e), when read with s 5(2)(a), allows a **decision to be challenged** on the basis that a decision-maker took into account an irrelevant consideration when exercising administrative power.
         1. *S5(1)(e)* – that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made
         2. *S5(2)(a)* – taking an irrelevant consideration into account in the exercise of power
      2. S6(1)(e) when read with 6(2)(a) – allows the same challenge in relation to the **conduct of the decision-maker**
         1. S6(1)(e) – that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;
         2. S6(2)(a) – taking an irrelevant consideration into account in the exercise of power.
   3. ***Common Law Considerations:***
      1. ***\*\*\*‘Relevant’ effect of irrelevant consideration\*\*\****
         1. *Klein v Domus Pty Ltd*
            1. **Held: ‘**the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion’

*Upheld in Lu v Minister for Immigration and Multicultural and Idigenous Affairs*

* + 1. ***Using ‘common sense’***
       1. *Roberts v Hopwood*
          1. **Held:** ‘[s]hould only take into account those things that justice and common sense demand it taking into account when determining a decision’
    2. ***Decision-maker cannot be influenced by extraneous considerations –***
       1. *Padfield v Minister of Agriculture, Fisheries and Food*
          1. **Held:** A repository of administrative decision-making power must not allow itself to be influenced by something extraneous and extra-judicial which ought not to have affected its decision.

**Relevant Considerations**

1. Administrative decision-makers must take into account all relevant considerations when exercising their discretionary powers.
   1. ***Determining whether this ground is established***
      1. ascertain whether there was an express or implied statutory obligation for the decision-maker to consider a particular matter; and
      2. assess whether the decision-maker failed to consider that matter.
   2. ***Statutory ADJR Act:***
      1. Section 5(1)(e), when read with s 5(2)(b) allows a **decision to be challenged** on the basis that a decision-maker failed to take a relevant consideration into account when exercising their administrative power.
         1. *S5(1)(e)* – that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made
         2. *S5(2)(b)* – failing to take a relevant consideration into account in the exercise of a power.
      2. S6(1)(e) when read with 6(2)(b) – allows the same challenge in relation to the **conduct of the decision-maker**
         1. S6(1)(e) – that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;
         2. S6(2)(b) – failing to take a relevant consideration into account in the exercise of a power.
   3. ***Common Law Considerations:***
      1. ***\*\*\*Breach if material is ‘readily available’\*\*\*\****
         1. *Prasad v Minister for Immigration and Ethnic Affairs*
            1. **Held:** Wilcox J stated that a decision will breach this section if *‘if it was obvious that material is readily available which is centrally relevant to the decision to be made’* such that proceeding to a decision without attempting to obtain such information is considered unreasonable.
      2. ***Effect of failure to take a relevant consideration (next page)***
      3. ***Effect of failure to take a relevant consideration***
         1. *Minister for Aboriginal Affairs v Peko-Wallsend*
            1. The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is an abuse of discretion. Furthermore:

*Must be bound to take it into consideration -* The ground can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account. *(i.e. what does the statute require?)*

What factors is the decision bound by?

*The consideration musn’t be insignificant -* Not every failure to take into account a relevant consideration is fatal. A relevant factor may be so insignificant that it could not materially have affected the decision.

*Weight of the consideration only for the decision-maker -* The court’s role in judicial review is limited (legality/merits distinction). Issues of “weight” are for the decision-maker.

* + 1. ***‘Proper, genuine and realistic consideration’***
       1. *Hindi v Minister for Immigration and Ethnic Affairs*
          1. **Held:** The minister and his officers are obliged to give matters proper consideration.

*‘Minister and the Ministers delegates are require to give proper consideration to the merits of cases before them such that they give proper, genuine and realistic consideration to all the relevant material’.*

**Improper Purpose and Bad Faith**

1. Administrative decision-makers can only exercise their powers for the purposes for which they were conferred in good faith.
   1. **Cannot exercise powers for:**
      1. Unauthorised or improper purposes
      2. In bad faith; or
      3. Fraudulently
   2. ***Determining whether this ground is established***
      1. *Ascertain for what purpose the administrative power can lawfully be exercised* – the question of law determined by construing the statute;
      2. *Ascertain for what purpose (or purposes) the administrative decision-maker actually did exercise the power* - the question of fact determined by the available evidence and inferences made from that evidence
      3. *Assess whether the administrative decision-maker’s actual purpose or purposes are in accordance with the lawful purpose* - the question to be determined by applying the facts to the law).
      4. *If the administrative decision-maker had multiple purposes (some improper but others lawful)* – requires a consideration of whether the improper purposes were substantial purposes
   3. ***Statutory ADJR Act:***
      1. *Improper Purpose* - Section 5(1)(e) with s 5(2)(c) (for decisions) and s 6(1)(e) with s 6(2)(c) (for conduct) allows a challenge on the ground that the administrator’s power was exercised for a purpose other than a purpose for which the power was conferred.
         1. *S5(1)(e)* – that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made
         2. *S5(2)(c)* – an exercise of a power for a purpose other than a purpose for which the power is conferred
         3. *S6(1)(e)* – the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made.
         4. *S6(2)(c)* – an exercise of a power for a purpose other than a purpose for which the power is conferred.
      2. ***Bad faith -*** Section **5(1**)(e) with s **5(2)(d) (for decisions**) and **s 6(1)(e) with s 6(2)(d) (for conduct)** allows a challenge on the ground that the administrator’s power was exercised in **bad faith**.
         1. *S5(1)(e)* – that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made.
         2. S5(2)(d) – an exercise of a discretionary power in **bad faith**
      3. ***Fraud -*** Sections 5(1)(g) and 6(1)(g) allow **decisions and conduct** to be challenged on the basis they are affected by **fraud**.
         1. S5(1)(g) – that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;
         2. S5(1)(g) – that fraud has taken place, is taking place, or is likely to take place in the course of the conduct.
   4. ***Common Law Considerations***
      1. ***Improper Purpose***
         1. *R v Toohey; Ex parte Northern Land Council*
            1. **Held:** A statutory power may be exercised only for the purposes for which it is conferred.
            2. *If it can be seen that from the words of the regulations themselves that the regulations go beyond the purposes of the statute, they will be invalid.*

What evidence is available to prove improper purpose?

* + - 1. *Samrein Pty Ltd v Metropolitan Sewerage*
         1. **Held: *Adopts more than one purpose -*** Where a decision-maker adopts more than one purpose for exercising an administrative power, it will be an abuse of that power **if one of those purposes** is an ulterior and substantial purpose.
         2. ***Adopts no purpose -*** If the decision maker made no attempt to exercise its administrative power then that would suggest an improper purpose ground would be made out.

**Unreasonableness**

1. **Definition -** Courts must assess the merits of an administrative decision (at least to a certain extent). In this regard, administrative decisions must not be “unreasonableness’ origination from *Wednesbury.*

*‘It must be so unreasonable that no reasonable decision maker would have made it’* per *Wednesbury* case.

* 1. ***Determining whether this ground is established***
     1. *Usually this ground is already made out as a facet of other ground (i.e. improper purpose, procedural ultra vires, or failure to take into account a relevant consideration)*
     2. *Is the decision based on a correct application of the statute and has it taken into consideration the ‘merits’ of the case?*
     3. The ground is commonly referred to as “Wednesbury” unreasonableness.

*It must be “so unreasonable that no reasonable decision maker would have made it”*

* 1. ***Statutory ADJR Act:***
     1. ***No reasonable decision maker would have made it -*** Section 5(1)(e), when read with s 5(2)(g), allows a decision to be challenged on the basis that the decision was so unreasonable that no reasonable decision-maker could have made it.
        1. *S5(1)(e)* – the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made.
        2. *S5(2)(e)* – an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.
     2. ***Conduct of decision maker -*** Section 6(1)(e), when read with s 6(2)(g), allows a decision to be challenged on the basis of the conduct of the decision-maker.
        1. *S6(1)(e)* – the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made.
        2. *S6(2)(e)* – an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.
  2. ***Common Law Considerations***
     1. ***Associated Provincial Pictures House Ltd v Wednesbury Corporation***
        1. **Held:** A discretion must be exercised reasonably. This principle would capture all decision making principles such that the administrative decision cannot be

*‘so absurd that no sensible or reasonable person could ever dream it lay within the decision makers power*.’

* + - 1. *Courts can interfere -* An administrative decision-maker may come to a conclusion so unreasonable that no reasonable authority could have ever have come it to and this allows the Courts to intervene.

*‘such a case would require something overwhelming’*

* + 1. ***Prasad v Minister for Immigration and Ethnic Affairs***
       1. **Held:** s5(1)(e) and 5(2)(g) is intended to apply the principle of unreasonableness developed at common law, and so it is appropriate to have regard to judicial authority in relation to the common law rule (*apply Wednesbury)*
       2. *Statutory grounds interpreted as* – *‘decision, that looked at objectively, are so devoid of any plausible justification that no reasonable body of persons would have reached them’* per Lord Grene in Wednesbury.

**No Evidence \*\*\* ADJR & Common Law Differ \*\*\***

1. **All administrative decisions must be supported by evidence**.
   1. “Evidence” means any material which can be used to substantiate the decision (i.e., not just “evidence” in terms of the Law of Evidence).
   2. ***Determining Statutory No Evidence***
      1. Identify the particular administrative decision-making power that has been exercised.
      2. **Then, in terms of a s 5(3)(a) challenge::**
         1. Identify any particular matters which much be established at law before the decision could be reached *(same as “essential elements” under common law)*
         2. Assess whether there was no evidence or other material from which he could reasonably be satisfied that the matter was established
      3. **Alternatively, in terms of a s 5(3)(b) challenge:** 
         1. Identify any particular facts upon which the decision was actually based;
         2. Assess whether a particular fact upon which the decision was based did not exist, that fact was “critical” (Gaudron & McHugh JJ), **and** there was no other evidence or material to support the decision (Gleeson CJ).
   3. ***Statutory No Evidence***
      1. ***ADJR Act for DECISIONS -*** 
         1. *ADJR Act s5(1)(h)* – First limb of the *no evidence* rule
            1. *S5(1)(h)* – A person may apply for judicial on the grounds that there was no evidence or other material to justify the making of the decision.
         2. *ADJR Act s5(3)* – Second limb of the *no evidence rule*
            1. *S5(3)(a)* – The person who made the decision was required by law to reach that decision only if a particular matter was established and there was no evidence or other material from which he could be **reasonably be satisfied** that the matter was established;
            2. *S5(3)(b)* – The person who made the decision based the **decision on the existence of a particular fact, and that fact did not exist**.

*Note: can also be that the fact is wrong.*

* + 1. ***ADJR Act for CONDUCT -*** 
       1. *ADJR Act s6(1)(h)* – First limb of the *no evidence* rule
          1. *S6(1)(h)* – A person may apply for judicial on the grounds that there was no evidence or other material to justify the making of the decision.
       2. *ADJR Act s6(3)* – Second limb of the *no evidence rule*
          1. *S6(3)(a)* – The person who proposes to make the decision is required by law to reach that decision only if a particular matter is established and there is no evidence or other material from which he or she can reasonably be satisfied that the matter is established.
          2. *S6(3)(b)* – The person propose s to make the decision on the basis of the existence of a particular fact, and that fact does not.
    2. ***Common law statutory considerations***
       1. ***ABC v Bond***
          1. **Held:** Under s5(3)(b) that ‘no evidence’ ground is established if the decision was based on the existence of a particular fact and that fact did not exist

***Proof of the non-existence of a fact critical to the making of the decision***

* + - * 1. *s 5(1)(h)* – When combined with s5(3), expands the common law ground of “no evidence” .

Within the area of operation of s 5(3)(a) it is *enough to show an absence of evidence or material from which the decision-maker could reasonably be satisfied that the particular matter was established*.

That is a lesser burden than [the common law requirement] of showing an absence of evidence to support the decision.

* + - 1. ***Minister for Immigration v Rajamanikkam***
         1. **Held:** The effect of s 5(3) is to limit severely the area of operation of the ground of review in s 5(1)(h) [quoting Mason CJ in *Bond*].
         2. *It is not enough to satisfy the requirements of s 5(3)(b) alone -* to do so would ignore the language of the ground in s 5(1)(h) [citing *Curragh,* and referring to fact that s 5(1)(h) states the ground is only made out when there was no evidence or other material to justify the making of the decision].
         3. *The word “particular” in s 5(3)(b) is of significance -* When regard is had to the requirement that the decision be “based … on … a particular fact”, s 5(3)(b) is to be understood as referring to a finding of fact without which the decision in question either could not or would not have been reached.

In this sense, it is appropriate to speak of a “fact critical to the making of the decision”

* 1. **Common Law ‘No Evidence’**
     1. **Definition** - At **common law**, want of logic is not synonymous with error of law. So long as there is **some** basis for an inference – in other words, the particular inference is reasonably open –

*‘even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.’*

* + 1. ***Common Law Test for No Evidence***
       1. *In determining whether this ground is made out at* ***common law****:*
          1. Identify the particular administrative decision-making power that has been exercised.
       2. *Identify any facts or “essential elements” upon which a lawful exercise of that power must be based.* 
          1. Power to “do what?”
       3. *Assess whether there is an absence of any foundation in fact to support the decision.* 
          1. This requires assessing whether the evidence before the administrative decision-maker could be seen as satisfying those “essential elements”.
          2. If there is ***some***evidential basis for an inference leading to the foundation of the decision (even if illogical or inadequate), the ground is not made out.
    2. ***Common Law Considerations (next page)***
    3. ***Common Law Considerations***
       1. ***R v Australian Stevedoring Industry Board***
       2. **Held:** If on the facts no basis could exist for exercising an administrative power it would be a proper exercise of the Court’s jurisdiction to award a writ of prohibition.
       3. A distinction is to be made between:
          1. *A mere insufficiency of evidence or other material to support a conclusion of fact* - there is some evidence before the administrative decision-maker but it appears inadequate to support properly a particular finding
          2. *The absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends* - there is simply nothing before the decision-maker which could be said to support an essential statutory element of the decision
       4. **Mere insufficiency or inadequacy of evidence will not establish a “no evidence” ground of review. There needs to be an absence of any foundation in fact. Difficult to establish.**

**Inflexible Application of Policy**

1. **A policy or guideline must be consistent with the legislation which ensures that**
   * 1. Consistency between cases involving similar circumstances
     2. Predictability in decision making
     3. Fairness to individual citizens
     4. The integrity of administrative decision-making in a liberal democracy
   1. ***Determining Inflexible Application of Policy***
      1. *Identify the particular administrative decision-maker and the statutory/regulatory power that has been exercised*
      2. *Identify any policy/guideline which the decision-maker applied in the exercise of his or her power*
      3. *Assess whether that policy is a lawful/consistent policy in terms of the statutory/regulatory power in the context of the statutory scheme. (if not, the policy is an irrelevant consideration)*
      4. *If the policy is lawful, assess whether the decision-maker applied it having regard to the particular circumstances of the case at hand (if not, the ground is made out)*
   2. ***ADJR Act provisions:***
      1. *Section 5(1)(e), when read with s 5(2)(f) -* allows a decision to be challenged on the basis that the decision-maker exercised of a discretionary power in **accordance with a rule or policy without regard to the merits** of the particular case.
      2. *Section 6(1)(e), when read with s 6(2)(f)* - allows the same challenge in relation to conduct of a decision-maker.
   3. ***Common Law Considerations (next page)***
   4. ***Common Law Considerations (next page)***
      1. ***\*Re Drake & minister for Immigration & Ethnic Affairs (No 2)\*\*\****
         1. Application of a policy doesnot mean an unquestioning adoption of its standard, but rather an assumption that, in the absence of any reason to the contrary, its standards and values are appropriate to \*\*guide the decision\*\*
         2. **If a Minister adopts a guiding policy:**
            1. It assists the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or another;
            2. The integrity of decision-making in particular cases is better assured if decisions can be tested against such policy;
            3. Although the importance of individual predilection is diminished, the policy can diminish inconsistencies between decisions and enhance fairness and continuity of the administrative process
            4. **In** **order for a** **policy to be lawful**, it must:

be consistent with the statute;

allow the decision-maker to take into account relevant circumstances

not require the decision-maker to take into account irrelevant circumstances; and

not serve an improper purpose.

* + 1. *Rendell v Release on License Board*
       1. **Held:** Policies and guidelines must be compatible with legislation.
       2. The discretion must not be exercised be exercised by reference to general and inflexible rules *‘which pay no regard to the particular circumstances of the case*’. This is so whether such rules are laid down by the decision-maker or an external body.

**Acting Under Dictation**

1. **A decision maker reposed of administrative power cannot let others dictate how the power is be exercised.**
   * 1. Parliament intended the decision to be made by the decision-maker it nominated – it did not intend for some other person to make it.
   1. ***Determining Inflexible Application of Policy***
      1. *Identify the particular person/body reposed of the particular administrative decision-making power*.
      2. *Identify any external person/body who communicated a view or tried to influence the decision-maker to decide the case in a particular way*.
      3. *Assess whether the repository of power*:
         1. *merely took into account what was said (i.e. ground not made out); or*
         2. *acted at the direction or behest of that person (i.e., ground made out subject to consideration of 4.*)
      4. *If the decision-maker did act at the behest of that other person (the “dictator”), is the dictator the responsible Minister?* 
         1. *How will that impact on your advice as to whether the Court will find this ground is made out?*
   2. ***Common Law Considerations***
      1. *Telstra Corp Ltd v Kendall*
         1. **Held:** Fine line between suggesting that in the making of a decision
            1. *A decision maker has taken into account what someone else has said*
            2. *A decision maker has acted at the direction or behest of that person.*
         2. A repository of administrative decision-making power acts at the behest of another where he or she gives no real independent attention to the discretion which has been conferred, so that the exercise of that discretion is really the exercise of that discretion by some other person.
      2. ***R v Anderson; Ex parte IPEC Air Pty Ltd***
         1. **Held:** Held of a commonwealth government department is entitled to take account of government policy in exercising discretionary power
         2. A department **head must arrive at his own decision** upon the merits and must not merely express a decision made by the government.
      3. ***Ansett Transport Industries (Operations) Pty Ltd v Commonwealth***
         1. **Held:** The duty of those in a department is to carry out lawful directions and policy of their Minister.
         2. There is nothing improper in the Minister requesting the Secretary to act in a particular manner, nor is there any failure of duty by the Secretary to act in accordance with such a request.

**Jurisdictional Error**

1. **For a jurisdictional error, consideration is given to**
   * 1. The nature of the error that is made by a decision-maker; and
     2. Whether that error negatively impacts on the decision-makers jurisdiction to decide on the matter
     3. Errors which are made by a decision-maker must
        1. **Jurisdictional Errors -** Negatively impact on the decision-makers power/jurisdiction to decide the matter
           1. **Broad Jurisdictional Errors –** this is what Australia uses.

*Minister for Immigration v Yusuf*

* + - * 1. **Narrow Jurisdictional Errors** – Broadly stated in *Craig v SA* and corresponds to ‘narrow ultra vires’
      1. **Non-jurisdictional errors** – Do not negatively impact on his or her power to ultimately decide
    1. ***Jurisdictional Facts (JF)***
       1. *Essential preconditions* – or ‘conditions precedent’ – which must be satisfied before a decision-maker can interpret.
          1. *Timbarra Protection Coalition Inc v Ross Mining NL*

*Is factual reference in a statute a jurisdictional fact ?*

*Objectivity -* Must exist in fact

*Essentiality -* The legislature intends that the **absence or presence of the fact will invalidate the action** under the statute

* + - 1. ***Did Parliament intend for the decision-maker?***
         1. *Existence or non-existence of fact* - If parliament intended that the factual reference in the statute can only be satisfied by the actual existence (or non-existence) of the fact – then the Court may inquire and determine the ‘actual existence’ or non-existence of those facts.
         2. *Authoritative* – The decision-maker could determine the existence or non-existence of a factual reference, then a Court in judicial review can review whether the facts used are ‘reasonable’ (*Wednesbury*) but cannot determine the facts.
         3. *Mental state of decision-maker* – Such words (i.e. ‘belief’ or ‘opinion’) conclude against a jurisdictional fact.
      2. *Summary*
         1. *Factual Reference arises during consideration* – Not JF
         2. *Factual reference is preliminary/ancillary* – Yes, JF
  1. ***Determining Jurisdictional Error***
     1. Is it an error of fact or error of law ?
        1. ***Error of Fact*** – Refers to a decision-makers finding or determination where the error can be seen without reference to any legal or technical standard.
        2. ***Error of Law*** – Refers to a decision-makers finding or determination where the error can only be seen by drawing upon some legal standard or requirement. Can include:
           1. *Irrelevant consideration*
           2. *failure to consider relevant matter*
           3. *no evidence*
           4. *Improper purpose or in bad faith*
           5. *Acting unreasonably in Wednesbury sense*
           6. *procedural unfairness.*
     2. Australia, like the UK in *Anisminic v Foreign Compensation Commission*, have adopted a broad notion of jurisdictional error per *Minister for Immigration v Yusuf*.
  2. ***Common Law Considerations***
     1. ***Minister for Immigration v Yusuf*** –
        1. **Held:** HCA adopted broad jurisdictional error and stated
           1. *to identify a wrong issue,*
           2. *to ask itself a wrong question,*
           3. *to ignore relevant material,*
           4. *to rely on irrelevant material or,*
           5. *at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion,*

*and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.* ***Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it’****.*

* + - 1. These errors of law that affect the exercise of the decision-making power and result in the decision-maker exceeding the authority of power vested in them by the relevant statute.

**Error of Law on the Face of the Record**

1. **Error of law on the face of the record is an exception to the narrow jurisdictional error doctrine.**
   1. ***Determining an Error of Law***
      1. A superior court may grant a writ of certiorari for an error of law on the face of the record where the applicant can show:
         1. there was an error of law; and
         2. this error appears on the face of the record.
            1. *‘Record’* – *R v Northumberland Compensation Appeal Tribunal; ex parte Shaw*

*Record Definition* – All the documents which are kept by an inferior court for a permanent memory of their proceedings.

The record must contain at least

The Document which initiates the proceedings

The pleadings, if any

The adjudication

NOT evidence (unless the tribunal chooses to incorporate them on the record

* + - * 1. *Craig v SA*

Record of an inferior Court for the purposes of certiorari does not *usually* include

The transcript

The exhibits; or

Reasons for the decision

Determination of what should exist on the ‘record’ when hearing an application for certiorari is a matter for the Court.

**Natural Justice / Procedural Unfairness**

1. **Refers to the requirement that decision-makers act fairly when carrying out their decision-making functions**
   * 1. **The Key Two rules at common law**
        1. **The right to be heard *(the ‘hearing rule’)***
        2. **The right to have a decision made free from bias *(the rule against bias)***
   1. ***ADJR Act*** 
      1. *S5(1)(a)* – Allows a person to challenge a decision on the basis that a breach of the rules of natural justice occurred in connection with the making of that decision
      2. *S6(1)(a)* – Allows the same challenge to be made in respect of conduct.
   2. ***Common Law Considerations***
      1. ***Kioa v West***
         1. **Held:** Per Mason J

*‘There is a common law duty to act fairly, in the sense according to procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestations of a contrary statutory intention’*

**The Hearing Rule**

1. **The Hearing Rule**
   1. ***Definition*** –
      1. ***Gives a person an opportunity to be heard before exercising a discretionary power in a way that might adversely impact on that persons interests. Provides procedural but not substantive protection.***
      2. It can be expressly excluded by statute such that natural justice can be excluded and any right to be heard which the common law might have recognized is invalid.
         1. Note: It is a right to be heard about a legitimate expectation but is not a right to have a legitimate expectation.
   2. ***Determining the Hearing Rule***
      1. **Consideration must** be provided to
         1. The nature of the decision
         2. The nature of the decision-maker
         3. The adverse effect the decision will have on the *‘legitimate interest’* of the persons who seek to be heard.
      2. **Procedure must ensure at a minimum**
         1. *Prior notice that a decision is being made*
         2. *Details of the substance of the case against those affected -* Disclosure of the substance of the information on which the decision is proposed to be based
         3. *An opportunity to comment on such information and present and individual response* – against the proposed decision, that is, right of reply.
   3. ***Common Law Considerations***
      1. ***\*\*\*Opportunity to be heard \*\*\**** - *Kioa v West* 
         1. **Held:** Mason J
            1. ***‘****It is a fundamental rule of the common law doctrine of natural justice that, generally speaking, when an order is to be made* ***which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and be given an opportunity of replying to it’***
         2. *‘Expectations’* – extend to expectations which go beyond enforceable legal rights provided they are reasonably based.
      2. *(continued next page)*
      3. ***Right to be Heard before Exercise of Statutory Power ‘Legitimate Interest’***
         1. *Haoucher v Minister for Immigration & Ethnic Affairs*
            1. Concept of ‘legitimate expectation’ has extended the range of protection given by the common law rules of natural justice. Prospective rights as well as existing, right, interests, privileges are now within its domain.
            2. *‘A person has the right to be heard before the exercise of a statutory power which prejudices some right, interest, privilege or benefit which that person can legitimately expect to obtain or enjoy in the future.’*
      4. ***Ratification of a Convention gives rise to a legitimate expectation***
         1. *Minister for Immigration v Teoh*
            1. Ratification is a positive statement by the executive to Australia and the world which is an adequate foundation for a legitimate expectation.
      5. ***Entitled to Put Information and Submissions to the Decision Maker*** *- Commissioner for Australian Capital Territory Revenue v Alphaaone Pty Ltd*
         1. **Held:** ‘where the statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision **is entitled to put information and submissions to the decision-maker** in support of an outcome that supports his or her interests’.
      6. ***Cannot be deprived of right to being heard about property -*** *Cooper v Wandsworth Board of Works*
         1. **Held:** Before the house was demolished, the plaintiff had the right to be heard and ‘***no man is to be deprived of his property without his having an opportunity of being heard’***
      7. ***Must tell what is alleged and hearing a defense -*** *Ridge v Baldwin*
         1. **Held:** *Lord Reid* stated

*‘There is an unbroken line of applicable authority which holds that an officer cannot be dismissed without* ***first telling him what is alleged against him and hearing his defence or explanation’***

* + 1. ***Must preserve reputation (personal and business)*** –
       1. **Held:** *Ainsworth v Criminal Justice Commision*
          1. A duty of procedural fairness arises because the power involved is can *‘destroy or prejudice a persons rights and legitimate expectations’*
          2. The same is true for business or commercial reputation.
    2. *(continued next page)*
    3. ***Public Interest Must be Upheld Always*** –
       1. **Held:** *South Australia v O’Shea*
          1. The public interest in releasing persons who have been declared incapable of controlling their sexual instincts, in the context of the Act, is a *matter of political responsibility*.
          2. When a Ministerial policy giving effect to general public interest – *Ministers and Cabinet* determine general policy or the interests of the general public free of procedural constraints.
    4. ***Provides only procedural protection not substantive –***
       1. **Held:** *Attorney-General (NSW) v Quin*
          1. Where a Court holds that legitimate expectation entitles a person to protection, **that protection takes the form of procedural and not substantive protection** by the decision-maker applying the rules of natural justice.
          2. If substantive protection was offered, it would involve a Court intruding into the merits of an administrative decision and directing the decision-maker to act in a particular way – something which has never been done.
    5. ***Excluding the ‘Hearing Rule’ (Natural Justice)***
       1. **Held:** *Twist v Randwick Municipal Council*
          1. If legislature has expressly excluded the hearing rule – then *no such opportunity will be given* OR *express indication as to what opportunity should be provided.*
    6. ***Must ‘exhaustively excluded’ Natural Justice*** 
       1. **Held:** *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah*
          1. Well settled that every person is entitled to be heard unless expressly excluded by statute.
          2. If a process does set out various formal procedures to ensure exclusion of natural justice **but does not ‘exhaustively declare’ that they are all procedures** – then scope still exists for a right to natural justice as valid grounds of an appeal.

**The Rule Against Bias**

1. **The Rule Against Bias**
   1. ***Definition*** –
      1. The rule against bias requires that the decision-maker
         1. ***Actual Bias*** *-* Be unbiased when exercising their discretionary power
         2. ***Apprehended Bias*** *-* Not act in a way which would lead to a fair-minded observer to entertain a reasonable apprehension of bias
   2. ***Rationale behind no bias***–
      1. *Fairness* - to individual parties involved in a dispute or issue which requires determination
      2. *Impartial and Independent* – process which no preconceived views
      3. *Public Confidence* – in the decision making process
      4. *R v Sussex Justices*; Ex Parte McCarthy –

*‘Justice should not only be done, but should be manifestly and undoubtedly be seen to be done’*

* 1. ***Consequences of Bias***
     1. *Disqualification* - of the decision-maker before a decision has been passed
     2. *Quash the Decision* – The decision is invalid and voided if the decision has already been made and passed.
  2. ***Application of the Rule*** 
     1. *Stricter for Judicial Officers* – the rule is applied strictly to judicial officers who should recognize and excuse themselves from situations of bias
        1. *Vakauta v Kelly –* 
           1. **Held:** Preconceived views about the credit or trustworthiness of a non-expert witness whose evidence is of significance is a live and significant issue in a case.
     2. *‘More relaxed’ for Others* – the rule is less strictly applied to more politically driven decision makers as they are *‘naturally or organically’* influenced by the public and have predisposed opinions
        1. *Minister of Immigration & MultiCultural Affairs v Jia*
           1. **Held:** The question is not whether a decision-makers blind is completely blank – it is whether it is open to persuasion.
           2. A Minister is in a different position to judicial or quasi-judicial officers such that they have a general accountability to the electorate and Parliament.

*‘Every reason to conclude Parliament did not impose to impose the same standards of detachment which apply to judicial officers’*

* 1. **Actual Bias –**
     1. *Note: Practically very hard, if not impossible, to allege without clear and definitive evidence of actual bias*
     2. ***Common Law Considerations***
        1. *Minister for Immigration and Multicultural Affairs v Jia* – Per Gleenson CJ and Gummow J -

*‘bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented’*

* 1. **Apprehended Bias –**
     1. ***Common Law Considerations*** *–*
        1. *Ebner v Official Trustee in Bankruptcy*
           1. ***Apprehended Bias***– A person is disqualified if a fair-minded lay observer might reasonably apprehended that the judge might not bring an impartial mind to the resolution of the question being decided.

*‘Possibility’ such that it is real and not remote involved no probability.*

* + - * 1. ***Determination*** –

*Identification* – Identification of **what matter** might lead to a decision-maker to decide a case other than on its legal and factual merits

*Logical Connection* – between the matter and the **resulting feared deviation** from the course of deciding such a matter on its merits.

* + - * 1. ***What is a matter?***

*Matter* –

**An Interest** (conflict or not)

**Some sort of conduct**

*Economic are critical*

**Some Association**

**Extraneous Information**

* + 1. ***3rd Party Apprehended Bias (next page)***
    2. ***3rd Party Apprehended Bias***
       1. *Definition* – A decision-maker may not be directly biased but those that advise the decision-maker may be influenced by bias.
          1. ***Common Law Considerations*** *–*

*Hot Holdings v Creasy*

**Held:** Decision-makers are always influenced by account information or advice that comes from sources which are not impartial.

A reasonable and fair-minded person would take into account all information and then make an impartial decision regardless of the partiality of those advising them.

**Considered a ‘stretch’ to say that a decision maker is personally impartial but makes a decision with partially. Should consider, if this arises,**

Nature of association

Frequency of contact

Degree of influence and power of partial advisor

Any ‘other’ interests the person has with the partial advisor

* + 1. ***Institutional Bias?***
       1. *ABC v Laws*
          1. **Held:** Laws contended apprehended bias on part of the Tribunal
          2. Three members of the Tribunal had pre-determined the question whether there had been a breach and were disqualified.
          3. *Doctrine of Necessity* – a valid defense to any alleged institutional bias is that *‘it is necessary for a tribunal to conduct reviewing of its decisions’*
          4. Tribunal wasn’t bias as members of tribunal were not predisposed.
  1. **Defenses to a Bias Allegation**
     1. *Failure to Object results in Waiver* – By failing to object to potential bias at the earliest possible opportunity, the party **waives any right** to argue it later
     2. *Argue Affirmative Defenses* – It is possible for one accused of bias to respond to such claim in the affirmative and argue in this regard.
     3. *Modification by Statute* – It is possible that express statute has modified the consideration regarding bias (i.e. excluded etc)
     4. *Necessity* – By reason of necessity, any bias whether actual or apprehended cannot disqualify the decision-maker or invalidate the decision. *i.e.*
        1. There are a limited number of persons who have the power to determine the matter.

**Merits Review**

**Reasons for a Decision**

1. **Definition –** An adversely affected individual intuitively demands to know why the decision was made and should be provided access to the **reasons** for the decisions.
   1. **Right to a reason at Common Law**
      1. There are no general rights to reasons at Common Law.
         1. *Public Service Board v Osmond*
            1. **Held:** Gibbs CJ stated that

***‘There is no general rule of common law, or principle of natural justice, that requires reasons to be given for administrative decision’***

* 1. **Right to Reasons under the *ADJR Act***
     1. *S13(1) of the ADJR Act*
        1. *S13(1)* - Provides that a person aggrieved by a decision to which the Act applies can request from the decision-maker:
           1. *The decision-makers findings* - on material questions of fact
           2. *The evidence or other material* - on which those findings are based
           3. *The reasons* - for the decisions

**S13(7) -** If the reasons provided are too vague – the Court may order that further or more adequate particulars of those reasons been provided by the decision-maker.

* + - 1. *S13(2)* – The decision-maker must provide the written reasons within 28 days of receiving such a request.
      2. ***Decision maker may refuse*** – to give written reasons if:
         1. S13(5) - The aggrieved person makes the request more than 28 days after written notice of the terms of the decision were given
         2. S13(11)(b) – If the written reasons have already been provided
         3. S13(11)(c) – If the decision is of a class specified in Schedule 2 of the Act
         4. S13A – Exclude certain information from a statement of written reasons:

Third party personal or business information

Confidential information

Trade secrets

Third party information only provided due to statutory obligations

Information not permitted to be released by some other statute

**Freedom of Information**

1. **Definition –** A *Freedom of Information Act* 1982 (Cth) request may yield documents which further explain the reasoning of an administrative decision-maker.
   1. ***Freedom of Information Act 1982 (Cth)***
      1. *General Public Right -* S3 & s11 – Provides a **general public right to access information** in the possession of Ministers, government departments and other related public authorities
      2. *Procedure for Information -* S15 – Provides a procedure for individuals to make requests to access such information and for government bodies to deal with such requests
      3. *Exempts documents* – s34, s35, s36 – Certain categories of documents are exempted as it is in the public interest to do so such as *Internal Working Documents* or *Cabinet Documents*

**A Merits Review**

1. **Definition** – **Judicial review**:
   1. ***Involves* -** A Consideration of the legality of the decision and the decision-making process
   2. ***Does Not Involve*** – A consideration of the merits of the particular decision
2. **Definition – Merits Review:**
   1. Consideration of the merits of a particular matter:
      1. *Decision-maker* – A decision-maker providing an adverse decision to an applicant based on their understanding of the law as relevant to the applicants submissions and relevant policy.
      2. *Merits Review Body* – A body or tribunal who can rehear a matter an **remake** a decision based on its understanding of the law as relevant to the applicants submissions and relevant policy.
3. ***What is the purpose of a Merits Review?***
   1. The **affirmative arguments** for a merit review include:
      1. *Erroneous Considerations* – The decision-maker could have based their decision on erroneous information.
      2. *Discretion was inappropriate* – The exercise of discretion was simply inappropriate
      3. *Reconsideration* – The entire matter can be remitted to an independent body to reduce the risk of the decision being incorrect which encourages
         1. *First Decision-Maker* – to carefully ensure that their decisions are accurate, reasonable and sound on the basis of the information before them
         2. *Correct Errors* – Allows a impartial and independent tribunal to approach new cases and correct wrong decisions.
   2. The negative arguments include:
      1. *Inefficiencies*– Infers that Governments extend the time for decisions to be made
      2. *Not ‘truly’ impartial* – Any reviewing body is still part of the Government and therefore part of the Executive Branch.
   3. **Must balance:**
      1. The right to individual justice and have a fair, reasonable and impartial Executive arm
      2. Society demands that the executive branch is efficient.
4. ***How is a Merits Review Conducted?***
   1. Merits review of a primary decision maker is usually conducted by:
      1. *Internal Review* – another member within the same governmental body as the original decision maker will review the decision
      2. *External Review* – an ‘independent and impartial’ administrative tribunal will review the decision (*i.e. AAT)*
   2. ***‘Theoretical’ Common Law Considerations***
      1. *Hot Holdings v Creasy*
         1. **Held:** Argued judicial review but could have argued that – on the basis of all evidence, polices and applicable laws – that the merits of the application were preferred.
      2. *Project Blue Sky v Australian Broadcasting Association*
         1. **Held:** Argued judicial review but could have argued that – Australian Content Standard incorporates both Australia and New Zealand
      3. *Kioa v West*
         1. **Held:** Argued Natural Justice but could have argued that he was genuine and was not doing anything illegal.
      4. *Associated Provincial Picture Houses v Wednesbury Corp.*
         1. **Held:** The license condition was simply unreasonable based on legal and general policy considerations
5. ***What is the Procedure under the AAT ?***
   1. The AAT is not a court of law.
      1. S33 provides broad authority to conduct proceedings as the AAT feels necessary
         1. *Minimum formality and technicality* – s33(1)(b)
         2. *Expedition of proceedings* – s33(1)(b)
         3. *Not bound by rules of evidence* – s33(1)(c)
      2. *Common Law has imposed some requirements:*
         1. *Procedural Fairness* – *Australian Postal Commission v Hayes*
         2. *Logical and relevant evidence –* The decision must be based on logical and relevant evidence per *Re Pochi and Minister for Immigration & Ethnic Affairs*
6. ***What are the Rights to have a Merits Review?***
   1. ***Common Law Considerations***
      1. There is no general law right to have an administrative decision reviewed on a merits basis.
         1. **There must be express statutory power** conferred on a person-tribunal to conduct such a review.
         2. The decision challenged must have been made under an enactment which allows a person-tribunal to conduct a merits review.
   2. ***AAT Act 1975 (Cth)***
      1. ***Does the Act have Jurisdiction?***
         1. *Made in the Exercise of Power - S25(1)(a)* - Allows a Statute to provide a review of decision to the AAT for an exercise of power of such an Statute. (*i.e. decision executed)*
         2. *Applications made to it - S25(4)* – Allows the Tribunal to review **any decision** of any application which is made too it.
         3. **Limiting Review Power:**
            1. *Certain Types of Decisions -* S25(3)(a) and (3)(b) – The statute may confer power on the AAT to review only certain types of decisions made under the Statute.
            2. *Impose Conditions on Review* – s25(3)(c)
      2. ***What is the meaning of “decision” under AAT?***
         1. S3(3) of the *AAT Act 1975 (Cth)*

Unless the contrary intention appears, a reference in this Act to a decision includes a reference to:

* + - * 1. making, suspending, revoking or refusing to make an order or determination;
        2. giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission
        3. issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
        4. imposing a condition or restriction;
        5. making a declaration, demand or requirement;
        6. retaining, or refusing to deliver up, an article; or
        7. doing or refusing to do any other act or thing
      1. *Common Law Considerations*
         1. *Collector of Customs v Brian Lawlor Automotive*

**Held:** ‘Decision’ means, under AAT 3(3), a decision in fact so made

**S25 –** Means purported exercise of powers conferred by the Statute.

1. ***Does an applicant have standing under the AAT Act?***
   1. S27(1) provides that a reviewable decision be challenged by any person whose **interests are affected by the decision**
      1. ***‘Interests are affected***’
         1. *S27(2) AAT Act* – This includes an organization or association whose objects or purposes ‘relate’ to the subject matter of the decision.
         2. *Common Law Considerations*
            1. *Re McHattan & Collector of Customs*

**Held: Brennan J**

S27(1) – Interest of this section speaks of interests ‘to be reviewed’ – not by the review.

*No ‘hard and fast rule’ as to how ‘remote’ an affection of interests can be under s27(1)*

* + 1. ***Right to Reasons under the AAT?***
       1. S28 *AAT Act* 1975 – Allows a person who is entitled to bring an application to the AAT to **request written reasons** of the decision so made.
       2. *S37* – The decision-maker whose decision is under review by the AAT must lodge material and the reasoning behind their decision with the AAT within 28 days of receiving notice of the application for review.

1. ***\*\*\*Review on the Merits under AAT?\*\*\****
   1. *S43(1)* – Provides that the AAT **may exercise all the powers and discretions** which a primary decision has conferred upon them.
      1. *S43(1)* – Tribunal can ‘affirm, vary, set aside or remit’ a decision under review.
         1. ***Trial De Novo*** *­*– s43(1) infers the Tribunal **is not restricted by arguments and material put before the primary decision maker**
         2. *Stand in the ‘Shoes’ of the decision-maker* – the AAT must determine the correct or preferable decision by standing in the shoes of the original decision maker (*Esber v Commonwealth*)
            1. ***Common Law Considerations***

*Re Greenham & Minister for Capital Territory*

**Held:** Scope of review:

AAT is **not limited by the reasons of the primary decision maker**for rejecting the applicants arguments

AAT is **not limited by the reasons advanced by applicant for having the original decision** overturned.

*Drake v Minister for Immigration & Ethnic Affairs*

**Held:** The AAT cannot *‘****abdicate its function of determining whether the decision was the correct or preferable one*** *in favour of a function of merely determining whether the primary decision conformed with the relevant policy’*

*Esber v Commonwealth*

**Held:** AAT is required to **stand in the shoes of the decision-maker** and arrive at its own decision

1. ***Has Policy been Applied to Guide the Decision? (next page)***
2. ***Has Policy been Applied to Guide the Decision? (next page)***
   * 1. ***\*Re Drake & minister for Immigration & Ethnic Affairs (No 2)\*\*\****
        1. Application of a policy doesnot mean an unquestioning adoption of its standard, but rather an assumption that, in the absence of any reason to the contrary, its standards and values are appropriate to \*\*guide the decision\*\*
        2. Reasoning must be shown why the policy is being applied especially if the policy is shown to have been exposed to Parliamentary scrunity
        3. **If a Minister adopts a guiding policy:**
           1. It assists the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or another;
           2. The integrity of decision-making in particular cases is better assured if decisions can be tested against such policy;
           3. Although the importance of individual predilection is diminished, the policy can diminish inconsistencies between decisions and enhance fairness and continuity of the administrative process
           4. **In** **order for a** **policy to be lawful**, it must:

be consistent with the statute;

allow the decision-maker to take into account relevant circumstances

not require the decision-maker to take into account irrelevant circumstances; and

not serve an improper purpose.

1. ***What are the Remedies under the AAT?***
   1. S43 allows the AAT, on the basis that it is satisfied of arriving at the correct decision, it can:
      1. ***affirm*** *the decision* under review;
      2. ***vary*** *the decision* under review; or
      3. ***quash*** the decision under review (and substitute its own decision or remit the matter back to the original decision maker with any directions or recommendations).
2. **Appeals to the Federal Court of Australia from decisions of the Tribunal**

*Appeal on question of law*

*A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.*

1. ***Error of law* – must is both to define and demarcate the supervisory jurisdiction of a court.**
   1. *Relief can be granted* – To correct a deficiency or shortcoming that is classified as an error of law but not if it is instead classified as either an error of fact or as not error at all.
      1. *Tuite v Administrative Appeals Tribunal*

*‘The words ‘question of law’ encompass grounds enunciated in s5 of the ADJR Act such as the failure to take into account a material consideration, the taking into account of an irrelevant consideration, the making of a decision that no reasonable decision-maker would have made, the exercise of a decision-making power for a purpose other than for the purpose for which the power was conferred and the failure to provide natural justice.’*

1. Upheld in *Clements v Independent Indigenous Advisory Committee*
   1. S44 AAT – The right to appeal from the Commonwealth AAT to the Federal Court is restricted to questions of law.
      1. **HOWEVER – an alternative option is to seek *judicial review* in the Federal Court of an AAT decision or proceeding under the *Judiciary Act 39B* as in *Duncan v Fayle*.**

**Remedies (refer Jurisdiction also)**

1. **Definition** – Remedy is the primary focus of **every** client
   1. **Statutory Remedies**
      1. *ADJR Act* – s16 – allows the Federal or Magistrates Court to make **any or all** of the following orders:
         1. ***Quash*** the decision;
         2. ***Remit the matter back*** to the decision-maker for further

consideration, with such directions as the court thinks fit;

* + - 1. **Declare the rights** of the parties to which the decision relates;
      2. **Direct a party to do**, or **refrain from doing**, something.
  1. **Common Law Remedies**
     1. **Jursidction of Remedies –** (Refer Above)
        1. *Federal Court -* S39B of the *Judiciary Act 1903 (all 3)*
        2. *Federal Court -* S21 -23 *Federal Court of Australia Act 1976 (Cth)* (1,3)
        3. *High Court -* S75(v) HCA – *All 3 (original jurisdiction)*
     2. **Types of Remedies**
        1. **Certiorari** – Quash a defective decision. **The decision must:**
           1. Be made by a body having legal authority (i.e. have statutory power)
           2. Have sufficient capacity to impact on the applicants rights or interests

*Common law Considerations*

*Roberts v Hopwood*

**Held:** Sought Certiorari to quash decision

*Re Minister for Immigration & Multicultural Affairs; Ex Parte Jia*

**Held:** Sought Certiorari to quash decision and allow Jia to remain in Australia.

* + - 1. *Prohibition & Declaration (next page)*
      2. **Prohibition –** prohibits a decision-maker from making a defective decision or acting on it after it has been made. **The decision must:**
         1. Be made by a body having legal authority (i.e. have statutory power)
         2. Have sufficient capacity to impact on the applicants rights or interests

*Common Law Considerations*

*R v Australian Stevedoring Industry Board*

**Held:** Prohibition against the Board to prevent it from proceeding with the inquiry

*Annetts v McCann*

**Held:** Sought prohibition against Coroner to prevent him from making any finding or publishing any details until addressing the question.

* + - 1. **Mandamus –** sought to compel the decision-maker to exercise a discretionary power according to law.
         1. A decision-maker must

*Public body or official*

*Obliged to perform a duty of a public nature recognized by law which remains unperformed.*

*Common Law Considerations*

*Padfield v Minister of Agriculture, Fisheries and Food*

**Held:** Sought a writ of mandamus to compel the Minister to do so.

*R v Anderson*

**Held:** Sought a writ of mandamus to compel the Minister to do so.

* 1. **Equitable Remedies**
     1. **Injunction** –
        1. Sought to restrain administrators from acting contrary to a legal obligation – there *must be a serious questioned to tried.*
           1. *Common Law Considerations*

*Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*

**Held:** Sought an injunction to restrain permission

* + 1. **Declaration**
       1. Sought to declare rights and obligations of parties
          1. *Common Law Considerations*

*Samrein Pty Ltd v Metropolitan Sewerage*

**Held:** Sought a declaration that the board is not entitled to acquire the land.

*Ridge v Baldwin*

**Held:** Sought a declaration that the decision to dismiss was void.