**Problem solving steps**

1. **Justiciability: is it a Commonwealth or State (NSW) matter?**
   
a. **Commonwealth** — what is the relevant court and basis for judicial review?
   
   i. **Federal Court**
      - *AD(JR) Act, s 3(1):*
      - *Judiciary Act, s 39B:*
      - *Migration Act, pt 8:*
      - *Remittal: Judiciary Act, s 44:*

   ii. **High Court**
      - *Constitutional Writs, ss 75(iii), 75(v):*
      - *Appellate Jurisdiction, s 73(ii):*

b. **State (NSW)** — NSW Supreme Court has the following jurisdiction:
   
   i. **Inherent Jurisdiction:** Supreme Court has inherent jurisdiction to conduct judicial review and issue writs and equitable remedies need to show either:
      - Jurisdictional error (always available), or
      - Error of law on face of the record (can be modified by statute) – record in NSW includes transcript of decision – *s 69(4), Supreme Court Act*

   ii. **Supreme Court Act, s 23:** affirms common law power of judicial review, still need to show either jurisdictional error OR error of law on face of the record.

c. **Privative Clause (other limitation clause)?** — is there a privative, ‘no invalidity’, or ‘time limit’ clause that purports to limit the jurisdiction of the court or the grounds of review?

2. **Standing**
   
a. **Basis for Review** — is the matter under the *AD(JR)* or common law?

   b. **ADJR:** aggrieved person test.

   c. **Common Law:** special interest test.

   d. **Alternatives to Standing:** could the applicant intervene or be an amicus curiae?

3. **Grounds of Review: breaches of administrative law norms**
   
a. **Basis for Review** — is the matter under the *AD(JR)* or common law?
   
   i. **AD(JR):** frame the grounds around the statutory provisions *(ss 5-6):*
      - Procedural grounds
      - Reasoning Process grounds
      - Decisional grounds

   ii. **Common law:** need to show jurisdictional error or error of law on the face of the record (latter may be modified by statute) to invalidate decision — frame response around jurisdictional error or error of law and then go into substantive grounds:
      - Procedural grounds — *Re RRT, Ex parte Aala*
      - Reasoning Process grounds
      - Decisional grounds

b. **Consequences of Breach** — if a breach of an administrative law norm is made out, then need to determine whether it invalidates the decision itself — anything that is procedural or a Jurisdictional Error will nearly always invalidate. Otherwise, need to consider *Project Blue Sky, Ex parte Palme etc* and equitable remedies (e.g. an injunction could be issued anyway for breach of procedure)

c. **Procedural Fairness:**
   
   
   ii. **Content of Hearing Rule**

   iii. **Rule Against Bias** – was the decision-maker biased?

   iv. **Further Principles of PF** – obligations to consider arguments, give reasons...not a thing.

   v. **Effect of PF Breach and Discretion** – PF = jurisdictional error, court has discretion

   vi. **Breach of Statutory Procedures** – does it invalidate decision? – *Project Blue Sky* rule

d. **Reasoning Process Grounds:**
   
   i. **Considerations Grounds** – failure to have regard to relevant considerations, having
regard to irrelevant considerations
ii. Improper/Unauthorised Purpose – power exercised for ulterior purpose
iii. Policies – unlawful policies, policies must not be applied inflexibly
iv. Representations and Estoppel
v. Acting under Dictation – decision-maker must not act under direction of another
vi. Unauthorised Delegation – when discretionary power is unlawfully delegated
c. Decisional Grounds:
i. Jurisdictional Error – grave legal error invalidating decision – exceeding authority to decide:
   • Basic Jurisdictional Errors
     a) Incorrect Assertion/Denial of Jurisdiction – literal absence of authority
     b) Misapprehend Extent of Power – do something beyond powers granted
     c) Objective Jurisdictional Facts – prerequisite facts for authority to decide
     d) Subjective State of Mind Powers – state of mind for authority to decide
   • Procedural Fairness – almost always jurisdictional error – Ex parte Aala
   • Reasoning Process Grounds – any error in reasoning process meaning decision- maker exceeds authority to decide – e.g. consideration grounds, improper purpose
   • Wednesbury Unreasonableness – almost always jurisdictional error – MIAC v Li
   • No evidence – demonstrates or indicated an error in jurisdictional facts
   • Breach of Statutory Requirements – when compliance was essential pre-condition to an exercise of power, then jurisdictional error – Project Blue Sky rule.
ii. Errors of Law on the Face of the Record – any error of law allows certiorari
iii. Errors of Law vs Errors of Fact – distinguishing between the two for AD(JR) purpose
iv. Error of Law under AD(JR) – any error of law is a ground of review – s 5(1)(f), AD(JR)
v. No Evidence
vi. Uncertainty of Statute and Delegated Legislation
vii. Wednesbury Unreasonableness

4. Remedies — all remedies are discretionary (Ex parte Aala; s 10, AD(JR))
a) Basis for Review — is the matter under the AD(JR) or common law?
b) AD(JR): select from s 16 shopping list of remedies for appropriate one(s) – s 16
c) Common law
   i. Writs: writs can be issued for jurisdictional error or error of law on face of the record
   ii. Equitable Remedies: injunction or declaration can be used instead of or in addition to writs for jurisdictional error or error of law on face of the record. ALSO: because they are equitable, courts can issue injunction or declaration if decision is valid, but was made unlawfully if it is “just and convenient” (City of Enfield v DAC) to do so (e.g. Project Blue Sky)
   iii. NSW: Statutory Remedies: Supreme Court has power to make following orders:
      • Statutory Mandamus: order government to fulfil duty – s 65(1), Supreme Court Act
      • Make Orders: make any orders to give effect to judgements – s 69(1)
      • Statutory Certiorari: quash decision of tribunal etc – s 69(3)

5. other factors
a) Judicial Review of Rule Making — challenging the validity of delegated legislation.
Scaffolds

1. Does the Court have JURISDICTION?
   i. NSW: NSWSC – inherent jurisdiction to review the legality of State admin decisions (s 23 SC Act) and grant remedies (s 69 SC Act). Held in Kirk that state Supreme Courts have an inherent supervisory jurisdiction, providing for a constitutionally entrenched ‘minimum provision of judicial review’.
   ii. Cth : FCA
      ✓ s 39B Judiciary Act – same original jurisdiction as HCA under s 75(v) (Cth officer)
      ✓ ADJR – ‘decision’ under s 5 = ‘decision of an administrative character made under an enactment’
         ✓ ‘Decision’ – Final or operative and determinative decision of an actual, substantive issue of fact
            • An intermediate finding is reviewable if (i) it is provided for by the act and (ii) would resolve an important substantive issue with a quality of finality (Bond, s 3(3))
         ✓ ‘Of admin character’ – non-judicial and non-legislative decisions made in exercise of statute
            • Consider whether decision involves the application of the general to the particular (or vice versa); Parl control; broad policy considerations; public consultation (Roche)
         ✓ ‘Under an enactment’ – decision must be expressly or impliedly required by the legislation and must itself confer, alter or affect legal rights or obligations (Griffith)
            • Decisions made under K law are not ‘under an enactment’ (General Newspapers)
            • Decisions made by private companies are not UAE even where decision has statutory significance (NEAT)
            • NB: under s 3, ‘decision to which this Act applies’ expressly excludes decisions by the GG or other decisions included under Sch 1.

2. Is the decision JUSTICIABLE? (Public/private bodies)
   i. While the approach to JR of private bodies in Aus is unclear, the institutional approach seems to be preferred NEAT. Tang, nonetheless the functional approach has been adopted by UK courts (Datafin)
      ✓ ADJR: ‘under an enactment’ NEAT, Tang
      ✓ CL Datarin – public element (Takeover Panel - woven into fabric of govt regulation, immense power to affect rights, performance of a public duty i.e. regulatory function) + sole source of power not consensual submission to jurisdiction of DM
         • Forbes – public nature of activity + power to affect public to a significant degree
         • Ptf M61 – actions tied to Cth Officer’s decision under a statute
      ✓ Public contracts Ansett – exec cannot fetter a statutory discretion by entering into a contract

3. REMEDY Sought
   • Who is your client and what do they seek in response to the impugned decision?
     o What grounds of review does the applicant need to establish to receive the remedy?
   • Is the court likely to refuse on discretionary grounds?
     o Court retains discretion at CL Aala and ADJR (s10) to refuse relief for delay, futility, lack of GF or existence of an adequate alternative avenue of review
   i. Certiorari – quashes decision, but decision must affect legal rights or have legal consequences Answorth
      ✓ Available for JE or EoLoFoR Kirk, but not normally for preliminary determinations unless it is a condition precedent to a final decision capable of altering rights, interests or liabilities Hot Holdings
      ✓ Only available for decisions, cannot be used to quash a legislative function (rule-making)
   ii. Prohibition – restrains a DM from taking further action, where that action [would have] a discernible legal effect Answorth
      ✓ When administrator has not yet made legally significant error- decision must not have yet been made – could have got this in Answorth if there was notice before report published
   iii. Mandamus – commands performance of a public duty where there has been an actual failure to perform a duty or a constructive failure to exercise a discretion according to law Answorth
   iv. Equitable remedies – may be granted if the court considers it would be just and convenient to do so in the circumstances Bateman’s Bay
      ✓ Injunction (mandatory/prohibitory/interlocutory)
        • Advantage - flexible remedy which can be moulded to fit the case
        • Not dependent on jurisdictional error
        • Large discretionary element- can consider delay, defendant’s likely resulting economic loss, offer of an undertaking instead, inconvenience, proportionality to defendant’s illegality etc
      ✓ Declaration – conclusive statement of pre-existing rights or parties but without coercive legal effect
- Court may declare that a decision is unlawful even if the unlawfulness does not result in retrospective invalidity [PBS].

v. Consequences of breach – A decision infected by JE is treated retrospectively invalid (void ab initio) [Bhardwaj].

BUT can a legislative purpose to invalidate any act that fails to comply with a statutory condition be discerned from the language of the statute, the nature of requirements it imposes and the consequences for the parties of holding void every act done in breach of it? [PBS].

vi. ADJR – confers general power to provide relief [s16] by quashing or remitting the decision, declaring the rights of the parties or ordering the parties to do or refrain from doing anything.

✓ Need not specify the remedy sought; [s5(1)(i)] makes all errors of law reviewable under the ADJR whether or not they appear on the face of the record (no distinction between JE and non-JE).

✓ FCA has discretion over the date a decision is set aside [s16(1)(a)] and it will be prospectively set aside from the date of the order where a date is not specified (Jadwan).

vii. Severance – delegated legislation is to be read down such that they are within the power conferred by enabling statute.

NSW: s32 Interpretation Act 1987 (NSW)

Cth: s46 Acts Interpretation Act 1901 (Cth) (for non-legislative instruments e.g. conditions on a licence) & s13 Legislation Act 2003 (Cth) (for legislative instruments).

4. STANDING

There is emerging ‘broad agreement’ between the various remedies re standing [Power Engineers]. Although the ADJR provides standing to ‘a person aggrieved’ [s3(4)] interests adversely affected by decision/conduct etc), the case law suggests the test has essentially converged with that at CL:

Test
1. Are the applicant’s private rights affected by the decision? [ACF].
2. Where no private right is affected, does the applicant have a special interest in the subject matter of the action beyond that of the rest of the public? (ACF).

   ▪ An ‘SI’ is more than a ‘mere intellectual or emotional concern’ [ACF].
   ▪ Established cultural/spiritual connection or custodial relationship with matter is sufficient (Onus v Alcoa) – proximity testing.

Although the special interest test is purportedly applied, it is reinterpret ed expansively consistent with the enforcement model – liberalisation of standing law.

Examples:
- A business competitor can seek review of a decision favourable to a rival operating in the ‘same limited market’ where they possess an ‘immediate, significant and peculiar commercial interest’ [Bateman’s Bay].
- An applicant may have standing where they are centrally drawn into a formalised and regulated statutory process (by giving evidence/submissions etc) (US Tobacco ct. ACF – participated in an open public consultation process).
- Although an org cannot rely solely on its objects, commentary or complaints, additional factors may demonstrate the closeness of its relationship with the matter, such as: (North Coast per Sackville J).

   ▪ Expertise of the group or person in that particular matter.
   ▪ Prior involvement in particular matter/locale to which the application relates.
   ▪ Recognition/funding by govt (e.g. grants/representation on advisory committees).
   ▪ Research and other activities related to the subject matter.

- In recent Argos v Corbell case (2014), HCA rejected the contention in Right to Life that an applicant’s interest in the challenged decision must be within the ‘zone of interests’ which the legislation was intended to protect.

Other options:
- Statutory reform (open standing - Environ Planning Act & Enviro Protection & Biodiversity Act).
- Attorney General fiat: always has standing on his own motion or on the relation of another.
• **Interveners** – non-party may be given leave to intervene where their legal interest is likely to be affected and their submissions raise an issue not raised by the original parties *(Hope)*

• **Amicus Curiae** – non-parties may make submissions where the court is satisfied that it will be significantly assisted by those submissions *(in respect of matters not fully argued)*

5. **REVIEW OF DELEGATED LEGISLATION**

i. **Jurisdiction** – cannot be reviewed under ADJR Act per s.3 – G-G decisions excluded – but arguable that they may be reviewable in the course of deciding whether the DM had legal authority to act

ii. **Three-Step Process** – where the exec makes delegated legislation, it must be consistent with the regulation making power in the enabling Act under which it is made *(SA v Tanner)*
   1) Construe the terms of enabling statute (by actual language and SM) *(Swan Hill)*
   2) Ascertain the scope and legal effect of the impugned regulation
   3) Determine whether the regulation is within the ambit of the enabling statute

iii. **Delegated legislation** made under an enabling act conferring ‘necessary and convenient’ powers must complement, not supplement or extend that Act *(Shanahan)*
   ✓ Absence of objective criteria may be sufficient to place regulation outside of ambit *(Evans)*

iv. Power to make regulations “regulating and restraining” does not confer a power to prohibit outright (unless evil or noxious) *(Swan Hill)* can only prescribe place, time, manner, circs + impose conditions
   ✓ A power to prohibit entails the power to prohibit outright or conditionally *(Foley v Padley)*

v. Those regulations that are repugnant to fundamental freedoms and rights are likely to be outside of the rule-making power without express and unambiguous words to the contrary *(Evans)*

vi. **MEANS/END DISTINCTION:** Where enabling Act grants purposive power to regulate/prohibit a certain means for achieving an [express or implied] end, regulations:
   ✓ Must NOT prescribe a different means to achieve that end [not authorised under the Act] *(Paul)*
   ✓ MUST prescribe the means to secure the end to be achieved and not merely the end itself *(Utah* – if leg. says power to make regs re manner of carrying out the work, regs must set out a specific system for achieving the ends)
   ✓ MUST be reasonably proportionate to the purpose prescribed in enabling statute *(SA v Tanner)*
   - To be invalid, a regulation has to be so lacking in reasonable proportionality so as to not to be a real exercise of the power *(Corporation of Adelaide)*

vii. **Severance** – Where delegated/subordinate legislation is partly invalid, the valid parts of the legislation may be saved where it is either read down or severed *(Foley/Evans)*

   e.g. *(Evans)* ‘inconvenience’ could be read down, ‘annoyance’ could not be read down to avoid interference with the freedom of political communication lack of objective criteria
   ✓ s 13 Legislation Act 2003 (Cth) *(for legislative instruments)*
   ✓ s 32 Interpretation Act 1987 (NSW)

   but note – if severed, is it beneficial to the client? E.g. $7 payment, severing ‘$7’
6. PROCEDURAL FAIRNESS

If you can, use ADJR ground 6(1)(e) – breach of the rules of NJ occurred in connection with the making of the decision.

i. IMPLICATION (deal with this only briefly)

- TEST – Where a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectation of a benefit in a ‘direct and immediate way’, the power is conditioned by the requirements of procedural fairness unless excluded by plain words of necessary intendment (Kioa)
  - Right or interest = affecting personal liberty, status, preservation of livelihood, reputation, proprietary rights and interests (Kioa). Reputation is an interest (Annetts; Ainsworth)
  - PF may be implied at the investigative or preliminary stage where rights, interests and LEs may be affected (Ainsworth; Annetts)

- High level policy or political decisions made by Cabinet on areas of public interest do not, as a general rule, attract PF even where the decision affects an individual’s interests (O’Shea)
  - BUT Mason J – an individual should be able to make submissions on such a policy where they impact and are closely related to that individual (O’Shea)
  - Note Plaintiff S10 (re Minister’s discretion to use his dispensing provisions)- dismissed as under the Act, powers are “personal, non-compellable” – reveal “necessary intendment” of the Act to oust PF requirement

- LEs – recognised in Kioa, Annetts, Ainsworth where a pattern of behaviour gives rise to an legitimate expectation of certain treatment, departure from that pattern of behaviour requires the aggrieved person to be heard as to that departure
  - LE re procedure, not substantive result (Quin)

  "Sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord PF to those affected by their decisions."

  o Exclusion
    - Statutory construction – plain words of necessary intendment are required to exclude PF obligations (Annetts; WZARH)
    - Provision for certain aspects of PF will not necessarily exclude others unless it is unequivocal that the list is exhaustive (Math)

- National security [CCSU]
  - Urgency – powers which must sometimes be exercised urgently but are often exercised in situations which would provide an opportunity to be heard, PF is not excluded but the content of the obligation is adjusted [Marine Hull]
  - Subsequent right of appeal – there is no general rule that a right of appeal necessarily ousts or limits PF at first instance (Math)
    - But may do so depending on the nature of original decision. Indicative factors per McHugh J:
      - Decision made in public vs private e.g. reputation will be publicly affected, here private (refugee matter) but not determinative
      - Nature of decision - preliminary or final. Prelim = NJ requirements less likely to attach
      - Formalities required i.e. highly formal supports inference that appeal is not sole source of PF
      - Nature of the appellate body (judicial, domestic or internal) – if a court, easier to infer right of appeal excludes NJ early on, cf. internal = less independence
      - ✗ Urgency – decision here not urgent, 13 mos later cf. ✗ Twist – dangerous building demolition
      - Breadth of appeal - If complete de novo appeal right on merits – easier to infer exclusion/modification than if merely limited appeal. De novo here not determinative
      - Nature of interest and subject matter – serious consequences for individual?

- Multi-stage process - where a d-making process involves different steps or stages before a final decision is made, the requirements of NJ are satisfied if the “d-making process, viewed in its entirety, entails PF” (O’Shea)
  - In a 2 stage process, where later body acts on recommendations of the first, sufficient that PF accorded at the first stage, provided the DM is informed of all
ii. **HEARING RULE** (spend more time on this – what kind of hearing entitled to?)

- ‘Flexible obligation’ determined by asking **what does fairness require** in all the circumstances? Depends on individual case and construction of relevant statute (Khoa)
- **Adequate prior notice** that a decision will be made that may **adversely affect a person’s interests** (Mahon)
  - BUT requirements relaxed in investigative proceedings – must give notice of general issues, but need not particularise allegations (Bond)
- Disclosure of adverse material personal to the individual which is credible, relevant and significant to the decision (Kiao; Miah)
  - Material may be “credible, relevant and significant” even if ultimately given no weight by the DM or decision made on other grounds (VEAL)
  - It is sufficient to disclose the substance of the confidential material without providing a copy or revealing the identity of the author/informer (VEAL)
  - In matters of national security, a balance must be struck between the obligation to afford PF and the protection of public interest, which may reduce the content of PF to “nothingness” (Leghaei)
  - A DM does not need to disclose provisional or evaluative conclusions, but the person liable to be affected must be made aware of the critical issues upon which the decision will turn (Kiao; Miah) or on which the decision MAY turn (SZBEL) ‘running commentary’ not needed/wise but if Member considers issues important and open to doubt must at least ask applicant to expand on aspects and why they should be accepted)

- MAY NOT NEED TO BE ADVERSE per SZS/J (2015) - spreadsheet data breach- far outside realm of ordinary principle that only adverse info need be disclosed- reqs of PF fluctuate
  - **Procedural Requirements at the hearing**
    - No general rule that oral hearing required, particularly in context of high volume d-making (White) unless credibility findings are centrally relevant (WZARB).
    - Look to whether legal issue involved, facing a charge, witnesses, or whether mere ‘simple factual matters which could have been put in writing’ (White)
    - No general rule that a person must be legally represented, but may be required according to the complexity of the issues, character of tribunal and fairness between parties (White)
    - Delay is usually not a breach of PF, but may be if a procedure depends upon individual assessment and the delay creates a real and substantial risk that a DM’s capacity for competent evaluation is diminished and it was the DM who was responsible for the delay (NAIS) – ground of relief will be oppression caused by the delay
    - No general right to cross-examination, but may be depending on fairness in the circumstances and the nature of the hearing/tribuna (O’Rourke v Miller)
    - No general right in investigative proceedings/inquiries to determine the order of witnesses (Bond)
    - No general CL right to reasons except in ‘exceptional’ circumstances (Osmond)

- But Cane and McDonald say increasing judicial willingness to find implied obligations to give reasons in statute esp. where right to appeal or decision is judicial in nature.
  - **Failure to respond to a clearly articulated argument** may amount to failure to provide a fair hearing (Dranichnikov; businessmen in Russia’ but may be better characterised as a failure to account for a relevant consideration
iii. RULE AGAINST BIAS

A reasonable apprehension of bias arises where a fair minded lay observer might reasonably apprehend that the DM might not resolve the matter with a fair and unprejudiced mind.  

- Ebner: appearance of departure from fundamental rule of impartiality prohibited lest integrity of judicial system be undermined.  
  2 inquiries from Ebner:  
  1) Identify the matter that might prevent bringing an impartial mind  
  2) Articulate the logical connection between that matter and possible departure from impartiality  
    - Possibility rather than probability- actual bias not required

Types of biases:  

1. Pecuniary Interest – No rule that pecuniary interest automatically amounts to logical connection, but a DM with a not insubstantial, direct, pecuniary, or proprietary interest in the outcome will normally be disqualified. [Ebner]  
   ♦ Ebner- shares in listed public co (common) vs private. Relevant question: whether realistic possibility that outcome of litigation would affect value of the shares  
   ♦ If a person with a pecuniary interest contributes to the preparation of a decision, no bias if role merely peripheral but RAB may be established where role significant  

2. Policy – Minister’s pursuing policies or holing preconceived views only results in disqualifying prejugedness if it is shown the D’s mind was closed to evidence and argument [Jia Legenz- Minister’s position different to that of a judge, political responsibility]  

3. Previous Findings – Adjudicators should not sit where they have previously expressed views about a q of fact which constitutes a live or significant issue in the case before them [Livingsey]  

4. Previous Associations – Where a DM is appointed on account of their experience and expertise, RAB will only arise where the DM actively enters the controversy between the parties, rather than conciliate it [Koppen]  

5. Prosecutor/accuser participating or being present at hearing – An accuser/prosecutor should not be present at a hearing, even if they do not participate [Knox v Isbester, Stollery]  
   ♦ One member’s bias can cast doubt on the deliberations as a whole [Stollery]  
   ♦ Incompatibility b/w prosecutor and decision-maker roles [Knox v Isbester]  

6. Judge’s pre-conceived views: Disclosure of provisional views during trial will not constitute RAB, unless they ‘cross the line’ and have the effect of conveying an appearance of impermissible bias [Vakauta v Kelly—‘unholy trinity’]  

Exceptions

- Waiver: A person who knows of circumstances giving rise to a RAB must object at the earliest opportunity, or will be taken to have waived the right to subsequently object unless the RAB is revived by further comments in the written judgement [Vakauta]  
- A statutory requirement that a tribunal perform certain functions prevails over PF to the necessary extent of the inconsistency [Laws]  
  1) Cannot be invoked where an alternative tribunal or quorum can be formed or where the bias was caused by the deliberate act of the party who would not otherwise be able to complain [Laws]  
  2) If a statute requires performance of a dual function, PF cannot be invoked to prevent performance of one of those functions (and thereby frustrate the intended operation of the act) [Rauben]  

iv. BREACH OF STATUTORY PROCEDURES

- Common Law – where there is a breach of statutory procedures, the court is not remediably restricted to a binary of validity/invalidity, but can reach for non-JE (prospective unlawfulness) [PBS]  
  • As a matter of construction, was it the intention of the Act that such a breach would invalidate the decision, considering the language of the statute, its subject matter and objects, and the consequences for holding void every act done in breach of the condition? [PBS]  
    - Is it an essential preliminary, a vague requirement or would cause public inconvenience?  
    - We show ‘mandatory’ and ‘directory’ have continuing relevance, although labelled unhelpful in PBS
- A breach may be JE for other purposes, if not for invalidating the decision [Palme].
  - Failure to comply with a statutory duty to give reasons is a non-JE [Palme].

**ADJR – under s 5(1)(b)** an applicant may seek review where procedures required by law to be observed ‘in connection with’ the making of the decision are not observed.
  - “In connection with” extends to any procedure required to be followed and whether that procedure is required, or happens to precede or to follow the actual decision making [Our Town].

**7. REASONING PROCESS GROUNDS**

1. **Has the DM failed to have regard to any (IR)RELEVANT CONSIDERATIONS? s5(2)(a) &(b)**
   - Is it relevant? It must be established there is an express or implied obligation to take a particular consideration (legal or factual issue or policy) into account [Peko-Wallsend].
     - If there is no express list, relevant considerations can be implied from the ‘subject matter, scope and purpose’ of the Act [Peko].
     - Even if express list, this may be interpreted as exhaustive or only inclusive (examine purpose, scope, object of the Act) [Peko].
   - Is it irrelevant?
     - Will be irrelevant where it would frustrate the purpose of the act or is extraneous to the power conferred in the Act (e.g. political embarrassment) [Padfield].
     - Where the SM or purpose of the Act is broad, few considerations will be irrelevant unless ‘entirely personal or whimsical’ and unconnected with proper govt administration (Murphyares – e.g. ‘socialistic philanthropy’ or ‘feminist ambition’ [Roberts v Hopwood].
   - Has it been considered?
     - The court has shied away from requiring a ‘proper, genuine and realistic consideration’, rather consideration involves an ‘active intellectual process’ [Tickner] based on the most recent and accurate information that the DM has at hand [Peko].
     - The weight given to a relevant consideration is a matter for the DM unless the weight given is “manifestly unreasonable” [SZJS: RRT gave no weight to letters, HC weight was up to RRT, pref. for other evidence not JE].
   - Is the consideration to be considered personally? (see unauthorised delegation)
     - A court will not set aside the decision if the factor not taken into account is ‘so insignificant it could not have ‘materially affected’ the decision [Peko].

2. **Has the DM acted for an IMPROPER PURPOSE? s 5(1)(e) and (2)(c)**
   - A DM may not exercise power for a purpose other than those for which the power has been conferred [Toohey].
   - Need not be ‘bad’, but merely extraneous to the enabling legislation [Thompson v Randwick].
     - Where a DM can achieve the same purpose using different powers, he must only use the power for the purpose it has been conferred (Schlieske).
   - Was the actual purpose extraneous/ulterior to the enabling legislation?
     - e.g. Schlieske - disguised extradition, not a purpose of the Immigration Act to give power to extradite/aid foreign powers to bring fugitives to justice.
       - ‘Motivating purpose’ test
         - Where a decision achieves multiple purposes, would the power have been exercised BUT FOR the unauthorised purpose? (Thompson)
           - Qualified in Samrein such that a decision will only be unlawful where the ‘initiating & abiding’ purpose is improper.

3. **Is a POLICY inconsistent with enabling legislation or been inflexibly applied? s 5(2)(f)**
   - A policy must be consistent with its enabling legislation [Green v Daniels].
     - If Act provides for specific criteria, a policy will be invalid where it has the effect of superimposing upon that criteria a requirement which effectively precludes it from being satisfied.
   - Where an act confers a discretion on a DM, an [intra vires] policy must be applied flexibly and the DM must retain the ability to consider the merits of the case so as not to fetter that discretion (Rendell: Riddell) without power under the Act, Minister not entitled.
to circumscribe a broad discretion by a policy e.g. ‘must’, or ‘power may be exercised if and only if, objectively considered, the following criteria are shown to exist’)

- A DM who has a discretion over a myriad of similar cases is entitled to have a precise policy, provided it is willing to make an exception and not ‘shut its ears’ (British Oxygen)
- Courts are least tolerant of the fettering of discretion by ‘inflexible rules’ where personal liberties are at stake (Rendell)

iv. Was the DM acting under DICTATION?
**ADJR – ss 5(2)(e) and 6(2)(e)**: A personal discretionary power must not be exercised at the discretion or behest of another person.

- **Independent DM** – a DM with a statutory discretion must exercise that discretion independently and not submit to the instructions, views or policy of another (Rendell)
  - The extent to which a DM can take into account and act on govt policy is a question of construction, determined by the statutory function, nature of question, character of tribunal and general language of the statutory provisions regarding the relationship between DM and Min (Bread Manufacturers)
- **High govt policy** – where a discretion concerns high level govt policy, a DM may have regard to the policies of the relevant minister, but cannot abdicate his responsibility for making the decision by merely acting on the direction given to him by the minister (Mason J Ansett cf Windeyer J in Ipec – DG under a legal duty to obey the Minister under whom he serves the Crown)

v. DIRECTIONS – If legislation expressly authorises a Minister to give directions as to the exercise of another’s discretion, whether the directions can confine or fetter a discretion is a question of construction (NSW Farmers)

- If the power only extends to guidance, directions which purport to dictate that discretion will be invalid (Riddell)

vi. UNAUTHORISED DELEGATION – Has the DM delegated its power without authorisation?
**ADJR Act 5(1)(c) and 2(e)**

- When Parl delegates power to a particular person, that person cannot then delegate to another unless an expressly authorised or an implied power of agency can be inferred to empower an agent as an alter ego subject to the principal’s direction
- While the Carltona presumption still exists, the multifactorial approach to agency of Mason J in O’Reilly was followed by the FCA in Nelson Bay Claim. Consider
  - Practical necessity (so multifarious they cannot be exercised personally (Carltona)
  - Seriousness of the power (ability to affect rights)
  - Breadth of discretion
  - Accountability of agent to principal (cf Gibbs CJ)
- In cases where a decision is not to be made personally, a DM can take into account relevant considerations by adopting an accurate summary undertaken by staff (Tickner – secret women’s business, but Act required personal consideration)

vii. Can a decision maker be ESTOPPED?

- **No general rule of estoppel** in public law, as it provides substantive outcomes which would fetter stat discretion and difficult to establish reasonable reliance on clear/unambiguous representation, considering changing nature of govt policy (Kurtovic)
- Estoppel could only be granted where satisfaction would be intra vires: the effect of estoppel may be to sanction someone acting outside their powers, or trying to overturn a decision that was made intra vires (e.g. Kurtovic)
- **Quin qualification**: where not to grant estoppel would result in grave injustice to individual so that it is not in the public interest to allow the Minister to escape from that representation
8. DECISIONAL GROUNDS – JE – LAW/FACT

i. Errors of Law/Fact

3 stages of an adjudicative process in which there could be a legal error (Azzopardi):

✓ Fact finding – determining the facts by way of primary findings and inferences
  • Not reviewable even if finding manifestly illogical or perverse (Azzopardi) unless a JF or there was no evidence to support the finding (Melb Stevedoring)

✓ Rule-stating – finding and interpreting the law
  • If word/phrase bears ordinary or non-legal tech meaning q of fact
  • Otherwise questions of law include
    o Where statutory interpretation required to ascertain whether word to be given ordinary meaning or some other technical meaning (Screen Australia: ‘documentary’)
    o Where word bears a tech legal meaning
      - E.g. in Pozzolanic - ‘connected with the rearing of live-stock’ – ‘connection’ has imprecise meaning – q of law as involves selection process
    o Where the effect or construction of a term whose meaning is established is required
    o Where a word is a composite phrase

✓ Rule application – question of whether facts fully found fall within the provision of a statutory enactment properly construed
  • Technical or legal terms applied to facts law (Pozzolanic)
  • Ordinary words applied to facts fact
  o BUT if application of law to facts admits only one conclusion, and another is reached q of law (Hope v Bathurst Council)

✓ If error of law reviewable under ADJR or Cst, if JE established
  • Appeals from the AAT to the FC lie on questions of law – s 44(1) AAT Act
✓ If error of fact not reviewable unless JF established or no evidence relied on to make finding

ii. JURISDICTIONAL ERROR

  o A JE arises where a DM does not have legal authority to make a decision. For administrative DMs (cf inferior courts), JR encompasses all grounds of review except breach of statutory procedures:
    ▪ Mistaken assertion/denial of jurisdiction (Yusuf)
    ▪ Misunderstanding/misapplication of the substantive legal tests to be applied/nature and limits of stat functions/powers (Melb Stevedoring)
    ▪ Making a decision when JFs are not established (Timbarra)
    ▪ Breach of PF (Aala)
    ▪ Breach of reasoning grounds – obiter in Craig affirmed in Yusuf
    ▪ Wednesbury Unreasonableness (La)
    ▪ No evidence (Melb Stevedoring)
    ▪ Breach of statutory procedure (PBS) – whether breach amounts to JE depends on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition
      - Palme – some errors may amount to a JE, but not a JE in respect of the ultimate decision

  o Inferior Courts – narrower conception (Craig) but note reluctance at state level in Kirk
    ▪ Will be in JE where it acts outside jurisdiction, grants an order it lacked power to make, breaches essential conditions (absence of JF), disregards statutory preconditions for jurisdiction, or misconstrues its functions/extent of powers
    ▪ Will not be in JE where it errs in the identification of issues and questions or fails to consider a relevant consideration/reliance on irrelevant matters
iii. **Certiorari for ERROR OF LAW ON THE FACE OF THE RECORD**
   - Review and certiorari available for non-JEs of law that appear on the face of the record
   - Record limited to initial applications, pleadings and formal orders and does NOT include the evidence, transcript or reasons unless the tribunal incorporates them (or DM decides to include them)
   - But in response to *Craig*, in NSW record includes the court’s reasons pursuant to s69(4) SC Act
   - May also be incorporated into the record by reference (*Osmond; Craig*)
   - Confirmed in *Wingfoot* that non-compliance with a statutory duty to provide reasons would be recognized as an EoLoTFotR and provide basis for certiorari
     - BUT note: unlike J.E, not constitutionally entrenched – can be excluded by statute (*Wingfoot v Kocak*)

iv. **Errors of law under ADJR**
   - For an error of law to be established under s.5(1)(l), must show that the error was material to the decision in the sense that the decision may have been different if the error had not occurred (*Bond*)

v. **JURISDICTIONAL FACTS**
   - A JF is a criterion the satisfaction of which enlivens the exercise of statutory power or discretion in question
     - JFs are reviewable notwithstanding the rule in *Azzo* that questions of fact generally are not
   - **Objective JF** – where legislation conditions the exercise of power on the objective existence of a certain fact, a DM will fall into JE when it purports to act in circumstances where the fact does not exist (*Timbarra*)
     - Relevant Factors for identifying JFs
       - Role of factual reference in the scheme is so significant as to be an ‘essential preliminary’ (*Timbarra*) or enlivens a different set of procedures (*Enfield*)
         - Statutory criterion expressed in mandatory and objective terms (not determinative) (*Enfield*)
         - If the factual reference involves a matter of broad judgement, less likely to be JF
       - **Public inconvenience** may lead a court to determine that a factual reference is ‘directory’ and not ‘mandatory’ (*Timbarra*)
       - **Potential grave impact** on HRs or public interests makes it more likely to be a JF (*Enfield*)
       - **Nature and qualification** of the DM (body and expertise of DM cf court)
         - If OJF established, court engage in an inquiry as to whether the fact exists and can substitute its opinion on that matter, for the opinion of the administrative DM
   - **Subjective JFs** – where an exercise of statutory power is expressly or impliedly conditioned upon the formation of a DM’s state of mind, the existence of the state of mind itself will constitute a JF (*PfM70 – French CJ*)
     - E.g. ‘may grant/alter….if satisfied that [X]’ – *Connell* rates anomalous
     - Court will not review the formation of the state of mind for correctness, but will conduct a ‘reasonableness review’ (*Connell*) and only intervene where the opinion is so illogical or irrational that no rational or logical decision maker could have been satisfied on the same evidence before it (*SZMDS*) or where there was no evidence on which to form the opinion
     - Q is whether the opinion has been formed - will not have been formed (will be a nullity - Latham CJ) if it was reached by taking into account irrelevant considerations or by misconstruing terms of the legislation (*Connell*)
vi. **NO EVIDENCE**

- CL – Review is available where there is no evidence to provide a basis for a conclusion of fact that is a ‘critical step in the ultimate conclusion’ and for a JE to be established, where the factual finding relates to a JF (SGLB)
  - Inadequacy of material is insufficient but in such a case it will be a ‘short step’ to the conclusion that the DM has misconceived its jurisdiction or powers and thereby committed a JE (Melb Stevedoring)
  - HIGH THRESHOLD: as long as evidence capable of providing an evidentiary foundation for the Tribunal’s finding – no evidence claim will not succeed. But Tribunal must set out adequate **reasons** for their findings, identifying evidence/material on which findings are based (Holder – war PTSD)

- ADJR – s5(1)(h) – ‘no evidence or other material to justify the making of the decision’ not made out unless – s 5(3)
  (a) The DM 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 satisfied** the matter was established; or
  (b) The DM based the decision on the **existence of a particular fact**, and that fact **did not exist**

- A fact will not be critical if the same decision could have been made in any event (Raja)
- Rajamanikkam – better view that s5(3)(a) and (b) are **cumulative – necessary but not sufficient elements** of the no evidence ground, need also to satisfy CL requirements

**9. DECISIONAL GROUNDS - UNCERTAINTY**

i. **Ground available where power exercised in such a way** that the result or operation of the exercise is **uncertain** (s5(2)(h))
   - Not interpretative difference but where the decision (instrument, order or condition) does not clearly delineate the parameters or establish ‘ascertainable limits’ (King Gee)
   - **Linguistic ambiguity is not sufficient** but estimates, complex formulas or matters of judgement may lead to uncertainty in operation or result

ii. Where a **benefit is subject to conditions**, and a breach can take away the benefit, the conditions must be expressly certain (TV Corp)

**10. DECISIONAL GROUNDS – WEDNESBURY UNREASONABLENESS**

i. Administrative determinations may be ultra vires where an exercise of power is so unreasonable that no reasonable person could have so exercised the power (Wednesbury Corp; s5(2)(g))
   - Legal standard of reasonableness indicated by the nature of power conferred and statutory context
   - HCA suggested in Li that W.U not limited to what is irrational but only requires decisions to be justifiable (ie those that have an **evident and intelligible justification**)

ii. **Species of unreasonableness**
   - Flagrant breach of community standards/HRs norms (Edelsten)
   - Inconsistent/unequal treatment of similar cases (Pestell)
   - Irrational or devoid of plausible explanation (Austral Fisheries - formula with statistical fallacy)
   - Extreme disproportionality/arbitrary or draconian use of powers (Edelsten; Li)
   - Failure to make further inquiries – no duty to go beyond material provided for by the parties, however unreasonable for a DM to fail to make an **obvious inquiry about a critical fact**, the existence of which is **easily ascertained** i.e. material readily available (Prasad: Fiji spousal visa; We - easy to contact Macq Uni)
   - Must be shown that investigation would have yielded a useful result (SZIAI)

**11. PRIVATIVE CLAUSES**

i. **Cth & State Privative Clauses**
   - Construed strictly and read down, subject to the Cst, so as not to protect decisions that
     - Transgress Cst limits
       - Cannot confer judicial power on non-judicial bodies (Ptf S157)
       - Cannot oust review of ‘purported’ decisions (Kirk)