

Admin Study Guide:

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1. Freedom of Information

Elements of Freedom of Information

1. What is the **Act you are requesting access under** (**FOI Act 1982 (Cth)** or **Government Information (Public Access) Act 2009 (NSW)** (GIPA))
2. **State the object of the Act**
 - a. **Cth: Section 3(1)** states object of Act is to give Australian community access to information held by Commonwealth government, by:
 - i. Requiring agencies to publish the information; and
 - ii. Providing for a right of access to documents
 - b. **GIPA:**
3. **Establish that a person has a right of access**
 - a. **Cth: Section 11(1)** states that every person has a legally enforceable right of access to, other than an exempt document:
 - i. A document of an agency; or
 - ii. An official document of a Minister
 - b. **GIPA:**
4. **Establish that the party in question is an agency**
 - a. **Cth: Schedule 2** defines agency as a Department, a prescribed authority, or a Norfolk Island authority
 - i. A prescribed authority is defined as:
 - ii. A body corporate, or an unincorporated body, established for a public purpose by, with the provisions of, an enactment; or
 - iii. A person holding an office or appointment under an enactment
 - iv. A prescribed authority does not include:
 - v. An incorporated company or association, Territory legislatures, Royal Commissions
 - b. **GIPA:**
5. **Show the documents being sought fall within the statutory definition**
 - a. **Section 11(2)** states that this right of access is not affected by the person's reasons for seeking access
 - b. Document defined in s 4
 - c. Is the document exempt under s 31B?
 - d. Conditionally exempt document? Section 11B(1) & (2)
6. **Request access to the document**
 - a. **Section 15(1)** states that a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document
 - b. **Section 15(2)** requires that the request be:
 - i. In writing; and
 - ii. Provide such information concerning document as reasonably necessary to enable a responsible officer to identify it; and
 - iii. Give details of how notices may be sent to the applicant
7. **If access is denied, review can be sought of this decision**

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6.2 Procedural Fairness – Natural Justice

Basic Information:

- Identical at both ADJR and CL level
- **Hearing Rule:** IF a person's interest will be adversely affected by a DM, the DM is required to give them **an opportunity to be heard**
- **Bias Rule:** A DM is required to be **disinterested or unbiased in the matter** to be decided
- A breach of PF is 'sufficient to entitle the prosecutor to relief under s 75(v): **Miah**
- When answering in an exam – **reference the ADJR – Review of decision (s 5(1)(a) or review of conduct (s 6(1)(a))**

Section 5 Applications for review of decisions

(1) A person who is aggrieved by a **decision** to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) That a breach of the rules of natural justice occurred in connection with the making of the decision;

Section 6 Applications for review of conduct related to making of decisions

(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the **conduct** may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the conduct on any one or more of the following grounds:

(a) That a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct;

Elements – Making Out the Ground of Review:

1. Does Procedural Fairness Apply?
2. Has Procedural Fairness Been Excluded?
3. Content of Procedural Fairness (PF) (Hearing Rule)

Bias Rule

1. Actual bias
2. Apprehended Bias
3. Exceptions to the Bias Rule
4. Consequences

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Procedural Fairness – Making Out the Ground of Review

Element 1: Does Procedural Fairness Apply?

- **Threshold question of both hearing and bias rule**
- If, as a requirement of the hearing, an applicant's 'rights, interests or legitimate expectations' were affected adversely, then PF has been breached (and is therefore a ground of review)
- Legitimate expectation (LE) – it is highly contextual
 - Exists where a person seeks renewal of some benefit (e.g. a license) in circumstances where no right to success exists, but they have 'more than a hope of success' (**FAI Insurance (1981)**)
 - A LE can be an expectation that it is reasonable that a right or liberty will be interfered with in the reaching of a decision made by an ADM
 - In legitimate expectations, PF applies, giving person a right to be heard

FAI Insurance (1981)

- **Facts:** FAI had a business license they renewed regularly
- **HC Held:** Created concept of legitimate expectation, PF applied in the case, as FAI would have a right to be heard regarding right to renew their licence.
- FAI had their licence renewed consistently without problem
- No substantive right to get license, just a procedural right

KIOA v West (1985)

- Mason J created a baseline duty to protect PF that exists at all times
- DM's always required to act fairly in context of giving fair hearing w/o bias
- **Exception:** A clear manifestation of a contrary statutory intention (privative clause) – clearly
- **ALWAYS argue PF – It is a CL duty that applies all the time**
- This is the Tongan immigration case; there is a duty to act fairly but the critical question in most case is what does the duty to act fairly require in the circumstances of the particular case
- The law has now developed to a point where it may be accepted that there is a **common law duty** to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect **rights, interests and legitimate expectations**, subject only to the clear manifestation of a contrary statutory intention' – MASON J

Minister for Immigration v Teoh (1995)

- **Facts:** deportation order made on criminal conviction for heroin possession
- HCA held breach of PF – tribunal failed to invite D to make a submission
- It was not a right not to be deported but a procedural right that he would be heard in the first place

Ex Parte Lam

- HC read down Teoh to factual circumstances – only applies to cases regarding the ICRC. In this case, Lam was being considered for deportation. In this case, LE was substantially criticised. Gleeson CL said no breach of PF, fairness is not abstract concept, it is **essentially practical**

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Element 2: Has Procedural Fairness Been Excluded

- Question is has PF been excluded
- Legislation can explicitly exclude the rights of PF through a privative clause, however the HCA has not let one stand to date
- The courts require express words, evincing a 'clear manifestation' of the intention to exclude PF in the statute: *Kioa v West*
- This was tested in *Ex Parte Miah*, which was followed by *Saeed*
 - *Miah* – HCA said you need plain words of necessary intention in statute
 - *Saeed* → HCA extended it further; said PF principle are found in the common law and in the statutory powers of the ADJR – *Parliament is presumed not to overthrow the CL duty unless it is irresistibly clear*
- Waiver of Hearing Rule (Not likely to come up)
 - Absence of insistence on procedural rights will not in itself constitute waiver, and courts are slow to construe the conduct or remarks of a party, or even the party's legal representative, as a positive waiver of a fundamental part of procedural fairness: *Escobar v Spindaleri*
 - In case of a represented litigant, "waiver may depend upon the court's satisfaction that the legal representative made a conscious decision not to rely upon a legal entitlement: *MH6 v Mental Health Review Board*

Element 3: Content of Procedural Fairness (Hearing Rule)

- *Kioa* tells us that it is always about context and statutory interpretation
- Fair procedures are appropriate and adapted to a particular case: Mason J
- **In each situation consider:**
 - Statutory framework (exclude PF? *Miah, Saeed*)
 - Circumstances concerning individual decision to be made (*how serious is it?*)
 - Subject matter of the decision (*is someone's life and liberty at stake?*)
 - Nature of the inquiry
 - Rules of the tribunal
- Three Minimum Requirements of the Hearing Rule (*Comm v Alpha*)
 - 1. **Prior Notice:**
 - Simply needs to be prior and adequate
 - 2. **Disclosure:**
 - There is enough specificity of the complaint in sufficient particularity to enable the person affected to know the case they have to meet
 - 3. **Opportunity to be heard** (*):
 - May involve an oral hearing but sometimes written submissions can be sufficient, depends on circumstances and severity of decision
 - Must be meaningful
 - An applicant's illness may prevent their participation or attendance, and if so, they don't have a meaningful opportunity to be heard (*SZQRU v Min For immigration and Citizenship*)
- Have a right to know allegations that are 'credible, relevant and significant: *Kioa v West (Brennan J); Applicant Veal*, matters that are credible, relevant or significant can never be dismissed from the DM's mind (*Applicant Veal*)

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The Rule Against Bias

- **Starting point – does PF apply (do not forget) – Element 1****
- An ADM is required to be disinterested or unbiased in the matter to be decided

1. Actual Bias

- Actual bias is a “pre-existing state of mind which disables the decision-maker from undertaking, or renders him unwilling to undertake... any proper evaluation of the materials before them which are relevant to the decision (*Jia*)
- Actual bias is established only where the DM can be shown to have a closed mind and was not open to persuasion - Seldom encountered, rarely argued
- Go for apprehended bias instead

2. Apprehended Bias

- Idea justice should not only be done but should be seen to be done
- Apprehension of bias arises where a ‘fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’ (*Ebner*)
- **Objective Test (Fair-minded observer) - does MORE than reasonable person**
 - They have an ability to character-shift dependent on the circumstances – they may have randomly expert knowledge
- What will differ in each case is how the Court construes the obligations of the particular decision maker (according to their institutional and political functions) and what that infers for apprehension of bias by a FMO

BATS Ltd v Laurie

- Held there was an apprehended bias, held that apprehended bias was concerned with the appearance of bias (not the actuality of bias)
- **Dissent** – Gummow and French JJ – judges’ job not to be biased
- **Definition of FMO**: FMO is not simply a reasonable person, the FMO understands the intricacies of how judge’s operate – therefore, the FMO understands that judges have to be unbiased, that they know how to do their job without bias

Circumstances where Bias Found:

- **Direct or indirect interest**: Pecuniary interest relevant insofar it indicates bias (*Ebner*); a not insubstantial direct interest likely to result in disqualification
- **Conduct and statements**: derogatory or insulting statements: *Vakuata v Kelly*
- **Association, relationship**: personal connections/contact with interested persons: *Hot Holdings*; Prior involvement with matter (*Angliss*)
- **Extraneous Information**:

Exceptions to the Bias Rule

- **Exclusion**: E.g. statutory modification
- **Waiver**: Expressly or implication (*Vakuata*) – i.e. failure to object
- **Necessity**: (No other DM make decision, other DM’s similarly biased (*Laws*))

Consequences: What are the consequences of breaching the rule against bias?

- If breach is **prior to decision**, person cannot participate in the decision
- After decision? Decision invalid - Why? Breach of PF = JE (Again, coming soon)

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6.3 Consideration/Relevance:

Basic Information:

- Reasoning Grounds
- Same test for relevancy grounds at CL and ADJR
- A decision may be invalid because the DM
 - Failed to take account of a relevant consideration (mandatory consideration required by Act, ADM had to take into account but didn't)
 - Took account of an irrelevant consideration (absolutely cannot be considered, prohibited from consideration – (appears alongside apprehended bias sometimes))

Section 5(1)(e) and Section 5(2) of the ADJR Act

5 Application for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

(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) The reference in paragraph 1(e) to an improper exercise of a power shall be construed as including a reference to:

(a) Taking an irrelevant consideration into account in the exercise of a power

(b) Failing to take a relevant consideration into account in the exercise of power

You need to prove the following elements for both considerations (FOR BOTH)

1. **What did the DM consider?** (FACTUAL QUESTION)
2. **What was the status of the consideration? Was it required (etc.)?** (LEGAL QUESTION)
3. **Was the consideration significant?** (FACTUAL QUESTION – did this irrelevant consideration actually change the outcome on the facts? E.g. An insignificant consideration that might have been irrelevant might have been noting the weather --- not significant and doesn't affect the outcome)

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Relevant Considerations (s 5(1)(e) and s 5(2)(b))

Step 1. Where DM has failed to take account of a RELEVANT Consideration: S 5(1)(e) and s 5(2)(b)

- This will be present on the facts
- Arises in two situations
 - The DM **didn't take into account** the relevant situation **at all**; **OR**
 - The DM gave some consideration but **insufficient weight** – they didn't consider it enough –(note: interfering with how DM made the decision)

Tinker v Chapman (1995)

- DM's decision was **invalid because he failed to consider a relevant consideration** – Act required DM to consider a report and submissions (he had not done this)
- Therefore, did not engage in the 'active intellectual process'

Khan v Minister for Immigration and Ethnic Affairs

- **A decision may be set aside if a DM fails to give adequate weight to a relevant factor, if this is required by statute**
- DM was required to give 'proper, genuine and realistic consideration' to the merits of the case

Minister for Immigration v SZJSS (2010) HCA

- In this case – no failure by giving some evidence 'no weight'
- The application considered a letter which supported a circumstance in Nepal that had changed, and was therefore no longer relevant
- **Is entirely a matter for the DM**

Note: There is no duty on DM to make an inquiry to ascertain relevant matters

Minister for IMIA; Ex Parte S 134/2002 (2003)

- HC held there is **no duty** for a DM to inquire, HC set a very low threshold and for this reason, the **decision was morally problematic**

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Step 2. Required to Consider by Act

- Statutory construction: did the Act expressly or impliedly require this consideration to be taken into account?
- **Express provision:** DM must/bound to consider it under the Act
- **Implied provision:** Courts draw inferences from the language of the statute, the nature of the function being exercised, sometimes HR implications
 - Where Act grants discretion to make a decision in broad terms, the matters which may be considered are fairly unconfirmed

Sean Investments (1981): A DM need not consider everything an applicant suggests is relevant, and could not be criticised for failing to consider every little matter which the affected party has raised.

Minister for Aboriginal Affairs v Peko-Wallsend:

- HC imbued the Minister with constructive knowledge of PW's additional submissions
- Was the Minister bound to consider the latest representation by PW to the Commissioner as part of their duty to consider relevant information?
 - The Act granted the DM a discretion
 - The Act required the Minister to take account of detriment to other parties
- **HCA decided to imbue the minister with constructive knowledge of PW's additional submissions and deemed that the Minister had failed to take account of a relevant consideration, rendering the decision flawed and allowing it to be re-made**

Step 3. The Matters was Significant for the Decision

- Was it significant enough to amount to invalidity?
- It's walking a fine line between JR and MR but largely it is **factual** – up to you to argue
- Question: did this consideration (which the DM was required to consider but did not take into account) materially affect the decision?
 - Was it significant enough to amount to invalidity?