SCAFFOLDS

1. DOES THE COURT HAVE JURISDICTION

Hierarchy

Appeal provision on question of law
ADJR
s 39B or s 75(v)
Inherent jurisdiction

Also consider: public/private distinction

If appeal on question of law: consider question of fact/law distinction **(TOPIC 2: JUSTICIABILITY)**

2. DOES THE APPLICANT HAVE STANDING

A. Private rights affected (**ACF**)

B. Special interest
(Sackville factors in **North Coast Environment Council**)

If standing is established and details of a regulation are given, try to knock it out as invalid **(TOPIC 4: INVALID REGULATION)**

3. WHAT REMEDY ARE YOU SEEKING?

If not under ADJR, consider if you need certiorari or if a declaration will suffice (or mandamus or prohibition).

Certiorari, mandamus or prohibition need jurisdictional errors. Certiorari can have error of law on the face of the record. Declaration just needs an error of law.

4. JURISDICTIONAL ERRORS

Making a decision or taking an action when jurisdictional facts are not established (**Enfield, Timbarra**)

Breach of procedural fairness (**Aala**)

Breach of considerations grounds (**Craig, Yusuf**)

Wednesbury unreasonableness (**Li**)

No evidence (**Holden; Melbourne Stevedoring**)'

Breach of a statutory requirement or procedure can be a jurisdictional error, depending on whether there is a **legislative purpose to invalidate** any act that fails to comply with the condition (**Project Blue Sky**)

GROUNDS OF REVIEW TO CONSIDER

PROCEDURAL FAIRNESS

1. Implication: rights/interests affected

2. Fair Hearing:

- all information been disclosed (including adverse info, adverse conclusions, information about the process so they can participate);
- critical issues must be disclosed (shifting the goal posts)
- must respond to all arguments;
- delay in making decision can create unfair hearing

3. Bias Rule:

- consider fair minded lay observer
- pre-judgment;
- extraneous information;
- enters the field;
- accuser part of the decision;
- conflict of interest;
- alternative decision maker available?
- peripheral or central role bias?
- one biased all biased on a multi-person decision making panel
- is it a minister? needs adjustment

SUBSTANTIVE GROUNDS OF REVIEW

- Relevant and irrelevant considerations
  - Proper, genuine, realistic level of consideration
  - Decision made with no evidence (refer to topic 2)
- Improper or unauthorised purpose?
- Is a decision made under a policy valid?
  - Supplement or compliment legislation?
  - Inflexibly applied?
- Administrative estoppel – not in Australia
- Was the administrator being dictated to by another person?
- Decision validly made under agency or delegation?
- Was the decision unreasonable?
  - Inconsistency of treatment?
  - Oppressive treatment?
  - Decision-maker failed to make inquiries?
- Uncertain conditions or regulations? (look for complicated)
- Jurisdictional fact?
  - Enlivens decision-maker's power – satisfication/ opinion
- Breach statutory requirement or procedure (reasons)?

FINAL CONSIDERATIONS

1. Are there any restrictive clauses: privative clause; 'no invalidity' clause; time limit clause

2. Remedies:

- Which remedies are available?
- Is the court likely to exercise discretion not to grant a remedy? (one sentence only)
- If a condition, regulation or provision is invalid, can it be severed? (one sentence only)

SUMMARY: THRESHOLD FOR PROCEDURAL FAIRNESS

Are rights or interests affected?

MEETS THRESHOLD: Usually financial interests or property rights. Looking for decisions that **single just one or a couple of people out** (Brennan J, **Kioa**). Example: Parents' interest in children's' reputations (**Annetts**) Damage to business reputation affected interests (**Ainsworth**) Interest in personal security is given important status in refugee cases (esp **Miah**; **Kioa**; **VEAL**; **NAIS**)	**RULE: Private rights or interests must be affected to reach the threshold for implied procedural fairness. This does not apply to decisions affecting the public generally. (Kioa)**	**DOESN'T MEET THRESHOLD:** When only **legitimate expectations** are affected (**WZARH**). However, Court was willing to consider 'interests' more broadly, given the two areas already overlapped significantly. Decisions that **affect the public generally**, e.g. govt decisions (like council rates) (**Kioa**). However, the court split on this distinction in **O'Shea**. Thought parole **could be a decision that affects personal rights, but also one for public safety generally** (decision was made by cabinet). This issue is unsettled.

EXCEPTION: Is procedural fairness excluded by legislation?

NOT EXCLUDED: A '**code of procedure**' intended to be an exhaustive statement of the law will be 'too weak a reason' to exclude procedural fairness. Must be crystal clear legislative intention (**Miah**)	**RULE: The rules of procedural fairness regulate the exercise of power unless they are excluded by plain words of necessary intendment (Annetts)**	**EXCLUDED:** Where the empowering statute includes a **clear intention** to exclude 'natural justice' (procedural fairness) (**Miah**) Procedural fairness is likely to be excluded with regard to '**dispensing provisions'** (see Section A2 for factors that add up to procedural fairness not being required) (**Plaintiff S10**)

EXCEPTION: Is procedural fairness required at that stage of the process?

REQUIRED: Procedural fairness can be required at the '**findings'** stage of an administrative process, even if a decision is not made. (**Annetts**; **Ainsworth**)	**RULE: Procedural fairness can be required at any stage of the process (Annetts; Ainsworth), but not necessarily if it has already been provided (O'Shea)**	**NOT REQUIRED:** If procedural fairness has been provided **earlier in the process** it will not be required again, unless new information has been introduced (**O'Shea**)

EXCEPTION: Does the legislation include a right to appeal?

UNLIKELY TO BE EXCLUDED: If the appellate body is **independent** from the organisation (i.e. not an internal review). If the review is '**de novo'** – i.e. not limited to specifics kinds of review. Availability of merits review is the most compelling. If the subject matter has **grave consequences** (e.g. personal security in refugee cases)	**RULE: General principle is that a right to appeal will 'cure any breach of procedural fairness', but the principle is very flexible and McHugh J gave list of factors to consider (Miah)** **←McHugh J factors (Miah)→**	**LIKELY TO BE EXCLUDED:** If the appellate body is **internal** If the review is **limited**, especially if it does not include merits review If the subject matter does **not have serious consequences** (e.g. not about personal security)

EXCEPTION: Are there circumstances of urgency?

NOT EXCLUDED: Powers that **may** have to be exercised in circumstances of emergency, however the opportunity to be heard may be limited. There is **flexibility** with regard to urgency and content of procedural fairness may shrink to something very minimal (**Marine Hull**).	**RULE: Urgency will only exclude the requirement for procedural fairness when powers must ALWAYS be exercised urgently (not might be sometimes urgently exercised) (Marine Hull)**	**EXCLUDED:** Only powers that **always** need to be exercised urgently can completely exclude the requirement for procedural fairness (e.g. dangerous animals, infectious diseases, fires, etc) (**Marine Hull**)

A. ARE THE APPLICANT'S RIGHTS AFFECTED BY THE DECISION?

An applicant will have standing if their **private rights are affected by the decision** (**ACF**).

- Most commonly affected rights to look for are: financial; property; or even reputation. This has been extended to include the commercial financial interests of companies affected by decisions that allow competition (**Bateman's Bay**; **Argos**)
- Look to whether the applicant has been singled out. Gummow J in **Power Engineers** said the plaintiff needs to have 'some peculiar grievance of their own'.

This is largely non-controversial. Most disputes are over 'special interest'.

B. DOES THE APPLICANT HAVE A SPECIAL INTEREST?

If no private rights are affected, does the applicant have a **special interest** in the subject matter of the action? (**ACF**; affirmed in **Onus v Alcoa**).

- **ACF** was a very strict application, held public interest group did not have standing just because it had made a submission to the public consultation process.
    - Courts have kept the language of ACF, but applied it more liberally.
- **Onus v Alcoa** qualified ACF and said court should assess 'closeness' of plaintiffs to subject matter of the litigation.
    - But, Stephens J affirmed there's no clear rule. Courts have inconsistently applied the principles.

ONUS v ALCOA Applicants had standing due to spiritual significance of the subject matter to them. If relics were damaged, it would cause them emotional harm. Also emphasised role as custodians of relics.

BATEMAN'S BAY **The special interests test should be construed as an "enabling, not restrictive, procedural stipulation"**

The Court here thought that standing could be replaced completely by other requirements – eg justiciability, discretion to refuse remedies. Also costs liability is a disincentive to bringing inappropriate proceedings

Additionally, this case allowed a commercial competitors to have standing, saying their financial interests were affected and they're harmed differently to other people. so they clearly had standing. Traditionally the courts did not allow standing for this reason.

ADJR Act Cases: Standing under the ADJR Act has developed in line with the 'special interests' test.

- Standing under ADJR: Person who is aggrieved by a decision, or conduct, or failure
- "Person aggrieved" is defined in s 3(4) as relating to a persons **"whose interests are adversely affected" by the decision/ conduct/failure"**

***Note:** Attorney-General has standing for decisions that affect public generally (rather than personal interests) and can bring relator proceedings on behalf of a person who otherwise does not have standing. Court noted in **Bateman's Bay** that people are right to be sceptical about the A-G's willingness to bring proceedings, especially given some will be against decisions of A-G's cabinet colleagues. Accordingly, A-G relator proceedings have shrunk as 'special interests' standing has liberalised.*

CASES: SPECIAL INTEREST

ACF (1980): Resort in Queensland that required financial approval of Reserve Bank. Environment Minister determined that an environmental impact statement (EIS) was required. Approval decision was made before the EIS was completed. ACF sought to argue that approval process was legally flawed, but the court held ACF did not have standing.

Onus v Alcoa (1981): Alcoa wanted to build an aluminium smelter. Local Aboriginal group claimed to be custodians of relics on Alcoa's land and said that aluminium smelter would interfere with relics in breach of the heritage legislation. Applicants had standing.

Bateman's Bay (1998): Two companies operated funeral benefit funds for members of the NSW Aboriginal community. Two aboriginal land councils wanted to establish a funeral contribution fund for aboriginal people. Approval was granted to land councils by Minister for Fair Trading. Land councils could offer lower subscription rates. Companies sought to challenge the land councils' operations as contravening legislation. Companies had standing.

ADJR Cases

US Tobacco (1988): Trade Practices Act granted Minister power to declare goods unsafe and he proposed to declare unsafe smokeless tobacco products. US Tobacco Co requested conference and Trade Practices Commission decided that a consumer organisation could attend. US Tobacco Co brought judicial review proceedings, consumer organisation had standing to intervene in those proceedings.

North Coast Environment Council (1994): Minister granted an export licence for woodchips. North Coast Environment Council sought a statement of reasons under the ADJR Act. Court held it had standing.

Right to Life (1995): Anti-abortion group wanted to stop clinical trials of an abortion inducing drug. Wrote to respondent seeking to stop clinical trials, because the respondent had power to stop trials "in the public interest". Respondent refused and applicant sought to challenge, but Court held no standing.

Argos (2014): Supermarket challenged approval decision for another supermarket and specialty shops under planning legislation (laws designed to protect environment and amenity). Provided evidence that increased competition would result in loss of profit. Applicants did not have standing.

STANDING WAS ESTABLISHED

US TOBACCO: Public interest group was given standing to intervene in judicial review proceedings, because it was **participating in the administrative process** (conference, c.f. public consultation process). This was enough to establish a special interest in US Tobacco's judicial review proceeding.

> *The conference here was going to be small hearing (closed to the Minister, US Tobacco and consumer organisation) with a relatively informal process.*
>
> *This was relevant to distinguish the open-ended public consultation process in **ACF** where anyone could participate. The Minister here actually requested the consumer organisation to participate in the conference for their expertise (and to challenge US Tobacco), rather than ACF involving themselves in the public consultation process.*

NORTH COAST ENVIRONMENTAL COUNCIL:

This case was a bit of a step forward in the liberalisation of standing. Known as the '**Sackville Factors'**, these have been applied to subsequent cases, which have compared public interest groups to North Coast Environmental Council to determine standing.

Identified **insufficient factors** for 'special interest' *(drawn from Gibbs J in ACF):*

- × Objects or purpose of the consumer/public interest group being aligned with subject matter
- × Submissions to public consultation process
- × Complaint about possible non-compliance with procedures – belief that the law should be complied with.

Identified **additional factors** to consider when determining proximity to the subject matter, which can establish standing *(drawn from Stephens J in Onus v Alcoa)*

- ✓ The organisation's status as a peak body for the local area and subject matter
- ✓ Whether the organisation is recognised by NSW and Commonwealth governments as a good public interest group, received grant money and participates in government committees
- ✓ Whether it conducts or co-ordinates projects and conferences on the subject matter
- ✓ Whether it had a history of making submissions with regard to previous decisions relating to the subject matter.

Sackville J had another second layer of reasoning: said that the purpose of the NCEC and the purpose of the legislation were both to protect the environment. Said this **compatibility of purpose** is a compelling factor for standing.

ARGOS: If private interests are directly affected by the decision, then a party will have standing. Compatibility of purpose is not really relevant.

> *Majority here (French, Keane and Gageler JJ) said that compatibility of purposes is only really relevant for public interest groups whose private interests are not directly affected by the decision.*
>
> *Gageler J thought you could look to for compatibility of purposes, but it would not be enough to deny standing of a party whose interests had been directly affected.*

STANDING NOT ESTABLISHED

RIGHT TO LIFE: Incompatibility between purpose of a public interest group and purpose of legislation that empowers the decision-maker can be a reason to deny 'special interests' standing.

> *Lockhart J didn't think that recognition by governments from the Sackville Factors was a good principle for determining standing: want challenger to be completely independent and they won't be if they're getting money from the one of the parties. He thought **compatibility of purpose** was more compelling.*
>
> *Primary reasoning: Right to Life group was not singled out by this decision. Kind of issues they wanted to raise were views that any member of the public could have. Applicant was not singled out, didn't have any greater interest in the subject matter than any other person. All they had was an intellectual, philosophical or emotional concern.*
>
> *Secondary reasoning: Considered purpose of the group and purpose of legislation. Therapeutic Goods Act dealt with regulation for safety of drugs. Right to Life group had bigger social concerns, which were not compatible with objective and purposes of the regulatory system established by the TGA.*

LOGICAL CONNECTION CASES

Ebner (2000): Two cases – both involving judges. Judges in both cases had shares in ANZ bank

Ebner: Judge's family trust held shares in the bank and bank helped fund the proceedings

Clenae: Judge inherited shares in ANZ bank during the case. Bank was a party to the proceedings.

Court held that there was not reasonable apprehension of bias in either case.

Hot Holdings (2002): Minister's decision to grant an exploration licence to Hot Holdings. Alleged bias of two department officers who were involved in decision-making process. Department officers had financial interests in Hot Holdings' exploration licence. Officer 1 was involved in preparing a recommendation to the Minister. Officer 2 was present in recommendation discussions. Court held there was no reasonable apprehension of bias in the Minister's decision.

1. Is there a logical connection to the feared deviation?

EBNER: **2-Step Test for Reasonable Apprehension of Bias**

1. Identification of what might lead a judge (or juror) to decide a case other than on its legal and factual merits; AND
2. Must be an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on its merits (needs effect the outcome).

Up until Ebner, the law was thought to be that financial interests were handled differently to other interests. Financial interests meant they were automatically disqualified, both judges would have to recuse themselves. Alternative test proposed here was whether the shares in the ANZ bank in either case would actually affected by the decisions? In both cases, the decisions would not have any effect on their share price – they had small shareholdings and the total amount of shares in ANZ is huge. If share price could not change because of their decisions, then there can be no deviation from the course.

*High Court said the **automatic disqualification for financial interests was out** and 2-step test was in.*

HOT HOLDINGS: If someone in the decision-making process (other than the decision-maker) could be affected by bias, the Court will consider **whether they play a central or peripheral role in the process**. Peripheral involvement does not provide a no logical connection to the feared deviation.

Gleeson J gave example of someone being a typist as a peripheral role that would not be sufficient to create a logical connection to the feared deviation. He held that in this case, the two departmental officers were only playing a peripheral role, not a central role.

Kirby J dissented, said it was close, but the Court should be prioritising financial integrity which is essential for sound public administration. Courts shouldn't let the financial issues slide. It might be inconvenient for the process, but really the Courts should be insisting on integrity. But other judges agreed with Gleeson.

Note there are two Hot Holdings cases – this one from 2002 is about bias, the other one is from 1996. Put a year number if you refer to it in a problem question response.

2. Is there any pre-judgment?

JIA: The **standard of the bias rule needs to be accommodated to the role of a Minister**, which is to talk publicly about policies and answer questions. The Court made this accommodation by asking 'did the Minister give genuine consideration to Mr Jia's situation?' **This is a great example of the pragmatic flexibility of procedural fairness.**

On its surface, it looks a lot like a classic case of pre-judgment. Made the statement then made the decision he said he would. However, the High Court said there was no reasonable apprehension of bias. The Court did not say whether or not there was pre-judgment, but the Court did say that you cannot apply the same standard to Ministers as you would to judges. If a judge said how they would decide a case beforehand, there would definitely be a reasonable apprehension of bias. But they said it can't apply this kind of standard to a Minister.

The role of minister is to go out in public and talk about policy. In this interview, the Minister was asked directly on this point. His role was to explain government attitudes to these kinds of things. Judges said it could easily have happened in Parliament, which is the main institution for Ministers providing answers to questions. Courts need to accommodate the standard of the bias rule to the minister's role. They did this by asking 'did the minister give genuine consideration' to Mr Jia's situation? There was no evidence he didn't, therefore there was no bias.

PRE-JUDGMENT CASES

Jia (2001): Numerous visa applications and refusals. Jia convicted of four offences including rape. AAT appeal was successful –Mr Jia was of good character despite the offences. Minister interviewed on the radio – interviewer expressed concern about about the AAT's decision. Minister responded:

"I don't believe you are of good character if you've committed significant criminal offences. [I] could grant the visa and then cancel it on character grounds"

Visa was granted to Mr Jia and then cancelled.

VAKAUTA: Pre-judgment will be established where a judge makes seemingly biased comments **during a hearing that are reflected in the final judgment.** Court looks for evidence that pre-judgment flowed through into the final decision.

*High Court judges **said there probably would not have been bias if the judge had simply made those statements in the hearing**. In fact, the Court said it would be good for judges to make those comments during the hearing to allow barristers to adjust strategy or negotiate a settlement. **Difficulty was that the negative comments in the hearing were revived in the reasons,** which proved that the pre-judgment flowed through into judge's final conclusion. Also said the 'fair-minded lay observer' would look at the reasons in the context of the hearing comments and think the judge had pre-judged the case.*

LIVESEY: Pre-judgment will be established where judges have **previously expressed clear views about questions of fact** (in this case, across two different cases that dealt with the same set of facts). There was also pre-judgment because they had made clear statements about the credibility of a key witness. Decision makers should depart from standard practice where there is a reasonable apprehension of bias.

Mr Livesey represented a criminal client, Steven Sellars, who had been convicted of breaking into jail to let all the prisoners out. Had been given bail on a surety, but the barrister went and got his client's money to pay the surety. Sellers absconded. Essentially he bought his way out of jail. Court said it was misconduct, because the money is supposed to come from another person to hold the criminal accountable.

*Mr Livesey wanted to call legal assistant Wendy Bacon as a witness, but the judges had already expressed clear views about questions of fact in Mr Livesey's case and made statements about the credibility of Ms Bacon in the earlier case. High Court said there's a reasonable apprehension of pre-judgment because of these judges' findings about Wendy Bacon. Mr Livesey had a dilemma - there were only two bad options. If he called her as a witness, they could pre-judge and think she's not credible. But if he doesn't call her, they could think it's because he knows she is not credible. **Either way there is pre-judgment.***

*Court argued there was a standard practice for misconduct cases of having most senior judges in the state. Court didn't say this directly, but **the judgment implies that the judges should have just departed from the standard practice, because there would be a reasonable apprehension of bias.** Bar Association made an argument that they're senior judges, very experienced, they will be able to bring a fresh mind to this case. Lawyers may think that, but it's not about that. **It's about what a fair-minded lay observer would think and they would think there was a reasonable apprehension of bias.***

PRE-JUDGMENT CASES

Vakauta (1989): Personal injuries (car accident) case. Trial judge's made comments during a trial about medical expert witnesses. Said they "think you can do a full week's work without any arms or legs". Their opinions are "almost inevitably slanted in favour of the Government Insurance Office by whom they have been retained, consciously or unconsciously"

Trial judge's comments in his reasons for decision: The doctor's evidence was "as negative as it always seems to be —and based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints of pain". Court held trial judge prejudged the decision.

Livesey (1983): Decision by NSW Supreme Court that Mr Livesey be struck off the roll of barristers due to misconduct (participation in actions relating to a criminal client). Two of the judges had determined a previous case refusing an application by Ms Bacon for admission as a barrister. Same facts related to both proceedings. Judges had made adverse findings about Ms Bacon in her case. Ms Bacon was to be called as a witness in Mr Livesey's case. Court held there was pre-judgment.

EXTRANEOUS INFO CASE

Koppen (1986): Six Aboriginal people lodged complaints of unlawful discrimination against a nightclub in North Qld, after they were excluded entry. Had to go through a compulsory conciliation conference as a preliminary step before litigation. Chairperson of conciliation conference was Aboriginal and a member of the local community. Chairperson stated in the conference that her daughters had been refused entry to the nightclub. Court held there was a reasonable apprehension of bias and nullified the conciliation certificate, so they had to go back and do it again before they could proceed to litigation.

3. Is there any extraneous information?

KOPPEN: There could be a reasonable apprehension of bias when a decision-maker has access to information that hasn't been provided by parties, it's come from another source (e.g. through the decision-maker's own experiences).

*Court said it's not bad thing that someone from the local community with local knowledge is the Chairperson here, but having that local experience cannot extend to prejudgment or partiality. By making the statement that her daughters had been refused entry to the nightclub, **the chairperson had entered the field and become a player.** She wasn't conciliating the dispute, she'd become a player for the dispute. Certificate from the conciliation conference was a nullity, they needed to get a new conciliation conference.*

*This type of situation is a common bias case. Tribunals and conferences like this often hire people with particular experience and expertise, which is sometimes good for helping them make considered decisions, but it can put them at risk of a bias case – **exactly that expertise and experience that makes them a good decision-maker can be used against them in a claim of prejudgment**.*