

Table of Contents

**JUDICIAL REVIEW – OVERVIEW..... 2**

**WHICH COURT HAS JURISDICTION?..... 2**

    State..... 2

    HCA: ..... 2

    Commonwealth ..... 3

**Privative Clauses – ousting jurisdiction ..... 6**

    Examples of privative clauses..... 7

**STANDING..... 8**

**DELEGATED LEGISLATION – is it lawful? ..... 9**

    Jurisdictional errors of lawmakers: Judicial review of rulemaking ..... 10

**FOUNDATIONS OF REVIEW ..... 13**

**1.PROCEDURAL FAIRNESS ..... 13**

        A. Implication Principle ..... 13

        B.THE CONTENT OF THE HEARING RULE ..... 15

        C.RULE AGAINST BIAS..... 17

**2.CONSIDERATION GROUNDS - reasoning process grounds..... 20**

        Relevant/ Irrelevant considerations ..... 20

        Improper/Unauthorised Purpose ..... 22

        Policies ..... 23

        Representations and Estoppel..... 24

        Acting under dictation..... 25

        Unauthorised delegation..... 27

**3.UNREASONABLENESS/UNCERTAINTY (last resort...) ..... 29**

        Wednesbury Unreasonableness – really high threshold but will overlap with irrelevant consideration etc ..... 29

        Uncertainty ..... 30

**DECISIONAL GROUNDS ..... 31**

    Who has the “authority to decide”? ..... 31

    Jurisdictional Errors ..... 31

    Exceptions:..... 33

    Objective/subjective Jur fact; error of law on the face of the record..... 33

**REMEDIES ..... 37**

## GROUNDS OF REVIEW

### 1. PROCEDURAL FAIRNESS

ADJR Act s 5(1)(a) ‘...a breach of the rules of natural justice occur[ing] in connection with the making of the decision’ is a ground for review for decisions under the ADJR Act.

#### A. Implication Principle

– ALWAYS applies - presumption that procedural fairness applies: *Kioa* (Mason J), provided:

- i. The exercise of power **directly affects an individual’s rights, interests, status or legitimate expectations** (Mason J) and
  - ii. The acts or decisions **directly affect the person individually and not simply as a member or a class of public** (Brennan J).
- b. Legislation can exclude PF but must do so in a clear way: *Annetts; Miah*

*Miah* –

New information on Miah –

Issue: Were the rules of PF excluded by plain words of necessary intendment?

(Court applying *Annetts v McCann*)

Code of procedure was not an exhaustive statement – as such, it must be read in light of common law rules of procedural fairness, which allowed Miah to have a right to reply to the new information.

- a. Probably includes **policy decisions** made in the public interest, although unclear: *O’Shea* – Mason CJ – Minister like cabinet concerned with political judgement, yet in appropriate cases he will be subject to a duty to act fairly at 14
  1. cf Brennan J – **policy decisions don’t need to afford PF**
  2. PF Does not apply to delegated legislation

*Plaintiff S10* –

The dispensing provisions did not require the application of PF rules. They were ‘personal, non-compellable, public interest powers’. As such, there was the requisite “necessary intendment” that the provisions did not attract PF requirements.

**Factors:**

“a senior official standing at the peak of the administration of the statute is not required to give an opportunity for a hearing in every case affecting an individual who has had an opportunity of a merits review in the course of the administrative process”.

Importantly:

Decisions were for the Minister to make personally;

The Minister is accountable to Parliament;

The exercise is not preconditioned by a request;

The Minister is not obliged to exercise the power;

Personal circumstances were not considered a mandatory relevant consideration

- b. Includes preliminary investigative procedures where **rights of reputation of individual** are at stake and advisory reports are made (Where its not the actual decision) : *Ainsworth; Annetts*
  - a. Duty is not excluded where statute expressly provided for certain limited Procedural rights.

*Annetts* –

Facts: Multi stage decision making process included a report which named a deceased person and how and when they died.

**Held:** no intention to exclude PF from legislation, PF required and **applied to advisory report**...even though its only a finding, not actual decision.

Remedies: Mandamus ( reconsider applicant’s concerns), Prohibition (restrain Coronel from making any more findings until after that consideration was granted).

Applied in *Ainsworth v Criminal Justice Commission* –

‘rights and interests’ test from *Kioa* applied.

Procedure was a two stage process: 1. Prelim investigation 2. Reporting  
PF applied to both stages.

## B. THE CONTENT OF THE HEARING RULE

The rules of natural justice are 'chameleon like' *Miah*

- 3 minimum requirements:

1. **Prior notice** that a decision is being made
2. **Notice and Disclosure of** relevant material

### a. **Adverse Material**

- i. Not all material, but adverse material personal to the individual which is '**credible, relevant and potentially significant**': *Kioa; SZSSJ*
- ii. Confidential information must be disclosed before the DM process even if decision maker states they didn't rely on it:  
*VEAL*

*VEAL* –

Did PF require the Tribunal to inform the applicant of the existence of a letter it received, or its contents, before affirming the refusal of the applicant's protection visa?

**Held:** 'credible, relevant and significant' means information that cannot be dismissed from further consideration before making the decision. Making the decision on other grounds, or giving no weight to the material does not obviate the duty.

The **substance of the material is sufficient** – the identity of the author is not necessary, nor a copy of the document.

### b. **Issues critical to the decision must be disclosed**

- i. Although no need for tribunal to give running commentary of what they're thinking: *SZBEL*

*SZBEL* –

RRT found an Iranian man's application implausible regarding

- (i) his conversion to Christianity and
- (ii) (ii) his return to the vessel on which he arrived, from which he claimed to be fleeing persecution.

Did the RRT need to disclose to the applicant that these were issues?

**Held:** both issues = critical and need to be disclosed

**Sufficient that issues may be important** to the decision – legitimate for applicant to assume that the reasons given by the DM are the issues that arose on review

- ii. Can be reduced to 'nothingness' in case of National security:  
*Leghaei*

*Leghaei* –

Islamic cleric had visa cancelled, ASIO did not provide reasons why he was a risk to national security

Was ASIO required to do so?

The specific grounds on which the decision turned had to be put to *Leghaei*.

But reasons of national security may make it impossible to disclose the grounds.

In such circumstances, judges are to apply a balancing test, even if this is reduced essentially to "nothingness".

National security questions: dealt with at the content stage of PF analysis, not implication.

### 3. **Notice of adverse conclusions**

- i. Disclosure of adverse conclusions with some specification of the issues so that person is not 'left in the dark': *Bond (the Mahon principle)*

*Bond* –

Notice must be given of proposed adverse conclusions, and an opportunity to be heard in response must be granted.

Since this was an inquisitorial proceeding, no particulars were required.

Particulars only needed in **adversarial** proceedings.