SUBSTANTIVE GROUNDS

Considerations Grounds

Failure to have regard to relevant considerations

Consideration is an active intellectual process (*Tickner*). The decision-maker must be bound to consider the matter (mandatory) or can consider the matter (middle-ground) (*Peko-Wallsend*). Whether they are bound to consider the matter is determined by reference to the subject-matter, scope and purpose of the Act (Mason J).

Peko Wallsend 1986 CLR	Land Trust grants to traditional owners – applicants are vetted by the commissioner who recommends to the Minister who then decides Commission must decide whether there is detriment to those people in not granting a land trust. Minister did not consider Minister should consider detriment. 5 key principles: 1) Failure to have regard to relevant consideration only made out if d/m bound to make decision 2) 'bound' determined by subject-matter, scope and purpose of the Act, expressly or impliedly 3) Setting aside a decision only occurs if the consideration would have materially affected the decision 4) It is generally for the d/m to determine the appropriate weight to give to matters – likely that if they don't this is *Wednesbury* unreasonableness 5) Ministerial d/m is given allowances for policy considerations that might temper their discretion Although not expressly bound by act to consider detriment, commissioner is required to consider 4 things. Therefore, minister is too. • This obligation is not confined to matters contained in commissioner's report. If information updates or elucidates the commissioner's comments, then it too is necessarily imnplied b/c 1.5 yr delay between report and decision requires the decision be made on up to date info

Giving no weight to a consideration as compared to contradictory evidence still constitutes having regard to that consideration (*SZJSS*). A minister has failed to consider relevant considerations if they must **personally** consider a matter and they delegate it (*Tickner*).

SZJSS 2010 CLR	Nepalese immigrant – claiming refugee status on basis of persecution – adduces 2 letters that relate to persecution – tribunal gives 'no weight' to the letters. Giving 'no weight' is fine. Fourth principle in *peko-wallsend* – d/m gets to choose how much weight they give to evidence: • They considered that the letter was irrelevant b/c other evidence had been adduced to the contrary including by applicant – e.g. social and political changes that had occurred since the letters were written • They had therefore 'considered' it by giving it no weight at all
Tickner v Chapman 1995 FCR	Land protection for Aboriginals who could claim that it was important and required protection – applicant had to adduce representations from people – wanted to stop proposed bridge Minister acted on oral advice of what the representations were made of instead of reading them himself. Representations ought to have been taken into account personally Minister bound to consider representation personally • This fn specifically excluded from power of delegation • Consideration is an 'active intellectual process' and should not be read down by urgency. • That the representations were by traditional law not allowed to be read by men was not a bar to this personal consideration requirement b/c everyone knows the Minister **has** to consider everything – that's the point of the Act – applicant must make their own informed decision about whether Minister should hear or traditional privacy upheld.

Having regard to irrelevant considerations

Having regard to eccentric philosophical principles that are not within the scope of the Act is an error (*Hopwood*). This includes considerations like political embarrassment (*Padfield*), which would be deemed irrelevant on the basis that it is a 'corrupt or entirely personal and whimsical consideration' (*Murphyores*), which renders the decision not 'bona fide)

- Viz., consider the scope of the act to determine what considerations exist and are not excluded → then explore irrelevance
- Very high bar on the basis of *Murphyores*.

Hopwood 1925 AC	Labour minimum wage laws – wages as the Council 'may think fit' – Would be decided differently today b/c equal pay views are very archaic.

	<u>Irrelevant considerations are those which are not at the core of the act</u> Council fails in their duty if they allow themselves to be guided by eccentric principles of socialistic philanthropy or by feminist ambition to secure equality of pay.
Padfield v Minister for Agriculture 1968 AC	Milk producers to sell milk to the Milk Board – south eastern region wanted their prices to be higher but this would result in lower price elsewhere – demanded a committee of investigation to test viability – Minister refused <u>Minister should have allowed – considered irrelevant considerations</u> Just b/c an issue is 'wide' does not mean it cannot be considered. **Political embarrassment** is an irrelevant reason b/c they must decide the merits of the case before engaging on a cost-effectiveness consideration of merits cf. political embarrassment/public interest → need to consider merits
Murphyores 1976 CLR	Plaintiffs extract minerals – Cth Act allows prohibition on certain exports – require approvals that will be refused if they have adverse effects on the ecology of Fraser Island <u>Environment is a relevant consideration</u> It will seldom be that the extent of the power cannot be seen to exclude form consideration all corrupt or personal and whimsical considerations • B/c unconnected with 'proper governmental administration' → therefore decision will not be bona fide • Unrestricted export of goods may produce an array of effects both positive and negative – therefore the scope of considerations is virtually infinite for the d/m • Where such a breadth of considerations exist, only a **lack of bona fides** could justify curial intervention in the decisions made in the exercise of the power to relax export prohibitions.

Improper or Unauthorized Purpose

Regulations or decisions made for a purpose that are not the purpose of the empowering Act are invalid (*Toohey*).

Toohey 1981 CLR	Planning Act regulations for NT Governor: • Planning Act NT 'town means land specified to be a town' • Regulations – tried to decree 4500 sq/km as a town – contiguous areas around Darwin to be a town

	Land Rights Act: aboriginal land claims could not be made over unalienated Crown land – e.g. a town <u>Improper purpose – not for town planning</u> Improper purpose ground invoked → not substituting d/m's view with that of Courts – court merely ensuring that d/m exercise its power in accordance with purpose it was given it. • Proper purpose was town planning – e.g. town amenities • Here: actions designed to defeat the traditional land claims of Aboriginals.

Court must examine the **substantial** or **dominant** purpose (*Samrein*) – it is this characterisation which suffices to bring a decision within power. Purposes may overlap to an extent – but the right purpose must be used (*Schlieske*).

Samrein v Metropolitan Water, Sewereage & Draingage Board 1982 ALR	Drainage board – trying to resume Samrein's land in order to build 42 story building • Only needed 21 floors • Going into joint venture with GIO S argues that acquisition is not for office space but for joint venture purposes. <u>Was not an improper purpose</u> Question is of **substantial** purpose • The **initiating and abiding purpose** (*Auto Port*) was the provision of office space • Proposed acquisition was for the purpose of acquiring a city block on which it could erect a building which would provide for space – joint venture was a means for achieving that end. Cf. *Randwick*, where resumption was purely for purpose of resale (i.e. profit).
Schlieske v Minister for Immigration & Ethnic Affairs 1988 ALR - FCFCA	West German government trying to extradite S – court error and law changes problematize this: • In the end, Minister invokes power under Migration Act and issues a deportation order Was this improper purpose – for 'disguised extradition' <u>Improper purpose found</u> Have to operate within framework of the Act: • **Purpose**: deportation is for purpose of sovereign right to this country to determine who should be allowed entry and not → viable here b/c deportee is a national of that country and has documents only for that country

	• H/e Migration Act **not for:** the purposes of aiding foreign powers to bring fugitives to justice Can deport knowing someone is wanted – if it is necessary for enforcing Migration Act, but not if doing for purpose of an unlawful extradition

Policies

Policies must be consistent with empowering statute (*Green*; *5(1)(d); 5(1)(e)[5(2)(a)]*), and cannot fetter the discretion of the d/m by ensuring that the policy is applied flexibly (*British Oxygen; Rendell; 5(2)(f)*)

Policies must be consistent with enabling legislation
Although not specifically in *ADJR,* can be brought under *5(1)(d)* (**not** authorised by enactment) or *5(1)(e)* citing improper purpose being irrelevant consideration under *5(2)(a)* (**irrelevant consideration**).

- Policies set out criteria or factors that **guide exercise** of discretion – so long as consistent with relevant statute (*Green*)
- Cannot **remove that discretion** – e.g. by imposing extra criteria (*Green*).

Green v Daniels 1977 HCA	Green leaves school – applies for unemployment benefit: • **Legislation**: person gets benefits if d/m is satisfied they are unemployed, capable of work, taken reasonable steps to get work • **Policy (manual)**: General rule that school leavers will not be in a position until the end of school vacation. Policy is inconsistent with statute (Stephens J) • No general discretion on d/m – specific set of criteria in legislation • The new criteria in the policy are not interpretive but restrictive → **superimposing** additional criteria→ Parliament could have done this but didn't • The general rule didn't clarify what are 'reasonable steps' b/c it doesn't analyze the steps taken – merely is an **exclusively temporal concept** o 'arbitrary criterion – b/c it does not depend at all upon matters relevant to the application – e.g. range of available opportunities Court can't make a declaration in green's favour b/c that would be usurping the power of the d/m Merely can say what the d/m could have had regard to

Policies must not be inflexibly applied

An exercise of discretionary power in accordance with a rule or policy **without regard to the merits** of the particular case is actionable under *5(2)(f)*.

Non-fettering principle means policy cannot control the exercise of the discretion – d/m must retain ability to consider the merits of a case

- Policy dealing with high volume of application is ok if d/m does not 'shut his ears' to an application (*British Oxygen*)
- D/m must apply its own discretion – i.e. have an ability to depart from a policy based on the merits of a particular case – must fulfill the functions vested in it by the legislation (*Rendell*)

British Oxygen v Minister of Technology 1971 HOL	BO – gas processing applied for grants for gas cylinders • Spends £20 per cylinder (4m spent) **Legislation**: Minister may make grants **Policy:** Minister will not pay a grant if < £25 per cylinder This particular policy was okay Draws a distinction between a 'rule' (not to hear any application whatsoever) and a 'policy' (a broad standard, that will not be applied in exceptional cases) • Having dealt with a multitude of similar applications – **a policy so precise may well evolve** → a policy adopted for reasons that a tribunal might 'legitimately entertain' • The key is that d/m '**must not shut his ears'** to an application [doesn't necessarily have to be oral] ○ Viz., so long as willing to listen to what has to be said, then a policy is okay. They did this hear – just rejected application after hearing merits. • Not a fetter on discretion b/c **legislation says 'may'** → nothing else in Act guides the board as to the circumstances in which they should or should not pay a grant • **Enabling legislation has no criteria** – leaves a broad-spectrum discretion which is **guided** by this policy c.f. (*Green*)
Rendell v Release on Licence Board 1987 NSWLR	Rendell trying to get release by Parole (7 years into life sentence) 1) Board makes recommendation to Minister 2) Minister makes recommendation to Executive 3) Decision made by Governor **Minister/government policy**: no recommendations to be made for a prisoner who served less than ten years. → Board applied policy Inflexible application by board Extent to which and independent body can reflect established government policy depends on its functions/the policy