

TOPIC 3: STANDING

3.1 INTRODUCTORY PRINCIPLES

A person, entity or group who has standing in relation to a complaint has the right to invoke the jurisdiction of the Court, be heard by the Court in relation to the complaint and have the complaint determined by the Court

Standing may be established using the Attorney-General's fiat (rarely used), or by satisfying the legal standing requirements

3.1.1 GATE-KEEPING FUNCTION OF STANDING

The requirement of standing effectively operates as a 'gate-keeping' function of the Courts

There are competing policy considerations regarding broad/narrow interpretations of standing

<u>FOR: Restrictive Standing</u>	<u>AGAINST: Restrictive Standing</u>
<ul style="list-style-type: none">- The role of the court should be to adjudicate disputes between parties that concern their individual interests (not to resolve disputes on issues of general public policy)- Parties whose private interests are at stake have more of an incentive to ensure their legal issues are properly framed and argued- If every 'busy body' was allowed to challenge administrative decisions, the government administration would be impeded, and courts would be inundated with public interest groups	<ul style="list-style-type: none">- If government action is unlawful, why should a technical standing requirement prevent the courts from restraining that unlawfulness- Public interest litigation plays a valuable role in enforcing legal compliance and government accountability- Inappropriate litigation can be better managed through other powers available to the court (i.e. costs orders, summary dismissals etc.)

3.1.2 STANDING AND PUBLIC INTEREST GROUPS/UNIONS/BUSINESSES

Standing is rarely an issue where the complaint relates to a private interest, but can be much more controversial where the interest is not obviously private in nature but seems to be more public

This arises most often with public interest groups, unions/associations, businesses or ordinary members of the public who may be concerned citizens

The Attorney-General's Fiat

The Attorney-General has ex-officio status to challenge certain actions which affect the public interest – An individual or organisation may, with the Attorney-General's consent, obtain his fiat and sue in his name (*Re McBain*)

Public Interest Group Considerations

- Are they the peak organisation or the only organisation? (*North Coast*)
- What is the object of the organisation? (*North Coast; Animals Angels cf Right to Life*)
- Has the group received any financial support from the Government or been recognised by the Government? (*North Coast*)
- Has the group participated in any government projects or conferences? (*North Coast*)

- Has the group participated in any lobbying campaigns? (*North Coast*)
- Where are the members of the public interest group? Does it have presence in Australia? (*Animals Angels*)
- Is there only an intellectual, philosophical or emotional concern relating to a matter of policy? (*Right to Life*)
- A purely competitive or economic interest of a business will be insufficient (*Alphapharm v Smithkline*)
- How has the group devoted their financial resources? (*Animals Angels*)

3.2 COMMON LAW STANDING

An applicant will establish standing if they can show that:

1. The interference with the public right was such that some private right of the person was at the same time interfered with

OR

2. No private right was interfered with, but the person, in respect of his public right, suffered special damage peculiar to himself from the interference with the public right (*Boyce v Paddington*)

3.2.1 'SPECIAL DAMAGE PECULIAR TO HIMSELF'

The common law test of 'special damage peculiar to himself' has been developed in Australia to mean 'having a *special interest in the subject matter* of the action' (*Gibbs J in ACF v Commonwealth*)

Special Interest Considerations

1. Is the applicant likely to gain some advantage if the action succeeds? (*Gibbs J in ACF v Commonwealth*)
2. Is the applicant likely to suffer some disadvantage if the action fails? (*Gibbs J in ACF v Commonwealth*)
3. Is there only a mere intellectual or emotional concern? (*Gibbs J in ACF v Commonwealth*)
4. Does the applicant have a special relationship with the controversy? (*Onus v Alcoa*)
5. Will the applicant be affected to a substantially greater degree or in a manner significantly different to an ordinary member of the public? (*Brennan J in Onus v Alcoa; Shop Distributive v Minister*)

3.3 STATUTORY STANDING (ADJR ACT)

WRITE: To pursue the decisions made by the [DM], [X] must have standing. Under the ADJR Act, [X] must be a 'person who is aggrieved' (s 5/s 6 ADJR Act). This test is the same as the common law and can be applied in this situation (*Tooheys v Minister for Business and Consumer Affairs*). In relation to the [decisions/conduct] made by the [DM], [X] must evidence a 'special interest' that 'rises above that of an ordinary member of the public' (*Australian Institute of Marine and Power Engineers, Gummow J; ACF, Gibbs J*). It is for [X] to demonstrate 'the importance of its concern with the subject matter of the decision and the closeness of its relationship to that subject matter' (*North Coast, Sackville J*). Considering

the scope and purpose of the Biosecurity Act, the subject matter of the decisions concern [subject matter of decision/conduct]. However, the High Court has recently asserted that the test for standing need not consider the purpose and scope of the statute in question (Argos). Therefore, the subject matter of the decisions shifts to [true subject matter]. The [DM] would argue that despite [X] having ‘certain beliefs’ concerning [subject matter] and their ‘wishes to translate them into action’, that this does not translate into standing (ACF, Right to Life, Lockhart J. [Analogue with cases].

Cases to analogise:

Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124

- No single one of the above matters might be adequate. Cumulatively, there is a sufficient interest to amount to there being a “person aggrieved” (Gummow J)

North Coast Environmental Council Inc v Minister for Resources (1994) 55 FCR 492

- Must show a special interest in the subject matter of the litigation (Sackville J)
- Demonstrate the importance of its concern with the subject matter of the decision and the closeness of its relationship to that subject matter.
- Need not be the preeminent body in the interest area, only that they have sufficient interest (*North Coast, Sackville J; Animals’ Angels, Kenny, Robertson and Pagone JJ*)
- *There is some disagreement regarding the relevant of Government recognition (North Coast, Sackville J), the aforementioned factors combined with personal expenditure in pursuit of [subject matter] suggest sufficient standing beyond a ‘mere intermeddler’ recognition (North Coast, Sackville J; Animals’ Angels, Kenny, Robertson and Pagone JJ)*

Right to Life Association (NSW) v Sec, Commonwealth Department of Human Services and Health (1995) 56 FCR 50

- If one of [X]’s functions is to make the community and politicians aware of [subject matter]. This does not transmute into a right to standing (Lockhart J)

Argos Pty Ltd v Corbell, Minister for Environment and Sustainable Development (2014) 254 CLR 394

- The nature of the interest required in a particular case will be influenced by the subject matter and content of the decision under review (Davies J)
- If a decision concerns the affairs of one person alone, other persons may not institute proceedings merely because it would be to their commercial advantage that the person should not receive a benefit or should suffer a disadvantage (Davies J)
- The purely competitive or economic interest is not an interest that is recognised (Davies J)

Animals' Angels e.V. v Secretary, Department of Agriculture (2014) 228 FCR 35

- The fact that the organisation had no Australian members was not fatal to it establishing a 'special interest' in the subject matter (Kenny, Robertson and Pagone JJ).
- Devotion of financial resources
- Broader and global nature of objects or purposes does not derogate from engagement in Australia
- Recognition by relevant department of the Commonwealth Government (North Coast, Sackville J)
- Do the activities of [X] intersect with their objects and purposes? (Kenny, Robertson and Pagone JJ)

CONCLUDE: *It is [likely/unlikely] to prove they do have standing in the matter (North Coast Environmental Council, Sackville J).*

To establish standing under the ADJR Act, the applicant must demonstrate they are a 'person aggrieved' meaning that they are a person whose interests are adversely affected (*section 5(1) or section 6(1) and section 3(4) ADJR Act*)

- The ADJR Act's "person aggrieved" test is regarded as the same as the common law's test for standing (*Tooheys v Minister for Business and Consumer Affairs*).
- Cases decided in either jurisdiction can therefore be used to address issues of standing arising in both

NOTE:

- Decisions before Argos concern the statutory phrases may be deemed too restrictive – there seems to have been a broadening of standing since the decision (*Argos v Corbell*)

3.3.1 'PERSON AGGRIEVED'

The test to establishing whether the applicant is a 'person aggrieved' is regarded as the same as the common law's test for standing and is not encased in any technical rules (*Toohey v Minister for Business; Australian Institute of Marine and Power Engineers*)

Person Aggrieved Considerations

Analogue with cases – look at particular factors from specific cases

- Affirmed the approach in *ACF v Commonwealth* and *Onus v Alcoa* to the ADJR Act (*North Coast*)
 - o Will the applicant be affected to a substantially greater degree or in a manner significantly different to an ordinary member of the public?
 - o Emotional or intellectual concern does not preclude an applicant from establishing standing (*Onus v Alcoa*)
- The interest does not need to be peculiar to the applicant, and does not need to be legal, proprietary or financial (*North Coast*)
- Is the applicant a mere intermeddler or busy body? (*North Coast*)

- The test for standing under the ADJR Act 1989 (ACT) does not need to be applied with reference to the scope and purpose of the statute under which the decision under review was made (*Argos*)
- Do the factors cumulative amount to standing? Cumulative factor approach (*Right to Life*)
 - o Looking at the singular factors will not be sufficient to have standing (*Australian Institute of Marine and Power Engineers (Gummow J)*)
- The function to make the community and politicians aware of concern – it will not always transmute into a right to standing (*Right to Life*)
- The intention to right a perceived wrong is only an ‘intellectual, philosophical and emotional concern’ (*Right to Life, Beaumont J*)

TOPIC 5: GROUNDS FOR JUDICIAL REVIEW (ULTRA VIRES)

5.1 INTRODUCTORY PRINCIPLES

The common law has developed three major grounds of review – ultra vires, breach of natural justice jurisdictional error

Translated literally, ultra vires means ‘beyond power/outside power’ and informs the legal principle that administrative decision-makers should only act or make decisions that they are lawfully authorised to make – If an administrative decision-maker acts ultra vires, they have acted in a manner that goes beyond the administrative power conferred to them by the law

Narrow ultra vires: Cases where the decision-maker had no power at all to make the decision
Broad ultra vires: Cases where the decision-maker had power, but erred in the process of making the decision

Note:

- These common law grounds of review were codified within the ADJR Act
- Under the Act, there is no practical point in distinguishing between ultra vires and jurisdictional error – This distinction is still relevant at common law

5.2 DECISION NOT AUTHORISED/ACTION NOT PERMITTED BY STATUTE (NARROW ULTRA VIRES)

The power of decision-maker is derived from the authorising statute and thus limited to the power conferred by the statute

5.2.1 COMMON LAW

Governments and their officers cannot do anything which is not authorised by the law (*Entick v Carrington*)

1. Identify the decision-maker the decision made

- *Is it a decision to make regulations? (Shanahan v Scott; Foley v Padley; Paull v Munday)*
- *Is it a decision to issue a search warrant? (Entick v Carrington)*
- *Is it a decision to cancel a visa (Haneef)?*

2. Identify the possible statutory source of the decision-maker’s power to make that decision

- What is the relevant provision?

3. Interpret what the statutory provision permits the decision-maker to do

- Does the power conferred by the Act to make the decision extend beyond the scope of the Act?
- Does the power conferred by the Act to make the regulation extend beyond the scope or operation of the Act?

(*Shanahan v Scott*)

Ask: Based on the interpretation of the statutory provision and statute conferring the power, does the decisionmaker’s decision fall outside the scope of that power?

Note on Regulations:

- The power to make regulations can cover what is ‘incidental to’ the execution of the Act
- Regulations cannot attempt to widen the purposes of the Act
- Regulations can ‘compliment’ but not ‘supplement’

5.2.2 ADJR ACT

Under this ground of review, the common law principles are relevant to the application of the ADJR Act provisions

Section 5(1)(d) ADJR Act allows an applicant to challenge an administrative decision on the basis that it was not authorised by the statute

Section 6(1)(d) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Note: Regulations cannot be challenged under the Act

5.3 DISREGARD OF PROCEDURAL REQUIREMENTS (NARROW ULTRA VIRES)

A procedural requirement refers to steps or requirements outlined in the legislation that must be observed or fulfilled by an administrative decision-maker before making the final decision

Historically, a distinction was drawn between ‘mandatory’ requirements necessitating strict compliance, and ‘directory’ requirements which required substantive compliance, but non-compliance would not invalidate the decision

5.3.1 COMMON LAW

Breach of a procedural requirement alone is generally insufficient to invalidate administrative decisions – The invalidity of acts done in breach of procedural requirements is a matter of statutory construction, requiring a purposive approach (*Project Blue Sky*)

Thus, it is important to ascertain Parliament’s intention when construing the impact of non-compliance, that is, whether non-compliance invalidates the decision or not (*Project Blue Sky*)

1. Identify the decision-maker, the decision made, and the statutory source of the decision-maker’s power
2. Identify the procedures that were required to be observed in connection with the making of that decision
3. Assess whether the procedures were observed

Ask: Was is the purpose of the statute that a decision made in breach of the procedural requirement should invalidate the decision? (*Project Blue Sky*)

- Look at the plain language of the provision
- Look at the nature of the procedural requirement and the subject of the decision made
- Look at the language of the Act as a whole

- Look to the purpose/objective of the Act
- Consider the consequences flowing from invalidity (i.e. public inconvenience; substantial breaches)

5.3.2 ADJR ACT

Under this ground of review, the common law principles are relevant to the application of the ADJR Act provisions

Section 5(1)(b) ADJR Act allows an applicant to challenge an administrative decision on the basis that procedures that were required by law to be observed in connection with the making of the decision were not observed

Section 6(1)(b) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

5.4 IMPROPER DELEGATION (NARROW ULTRA VIRES)

Legislation will often nominate a principal repository in whom an administrative decision-making power is to be reposed – However the nature of government administration gives rise to circumstances where it is impractical for the principal repository to make every administrative decision

The law strictly states that a repository of power should not improperly delegate their decision-making power

In such cases the principal repository may seek help from others:

- The Assistant: Assists the principal repository to become better informed to make the decision
- The Delegate: Is expressly conferred the decision-making power, pursuant to the principal repository's express statutory authority to delegate their power
- The Agent: Makes the decision on behalf of the principal repository where there is a practical administrative necessity to do so, but unlike a delegate, is not expressly authorised by the statute to do so (i.e. implied delegation)

5.4.1 COMMON LAW

There is a common law presumption against a repository being able to delegate administrative power – This presumption is rebuttable and can be varied expressly by statute

1. Identify the Principal Repository of the decision-making power
 - Is the principal repository a Minister, giving rise to the Carltona principle which recognises the 'multifarious' functions of Ministerial power, imputing a need for agency? (*Carltona*; *Affirmed in O'Reilly v State Bank*)
2. Identify who made the decision
 - Did the principal repository make the decision without assistance?
 - Did the principal repository have assistance and relinquish control of their decision-making responsibility?
 - Did a duly authorised delegate make the decision?
 - Did a duly authorised delegate appoint an agent to make the decision? (Requires practical administrative necessity *per O'Reilly v State Bank*)
 - Did an agent make the decision?

- Did an agent appoint an agent? (Not permissible *per O'Reilly v State Bank*)
3. Consider the nature of the decision-making power
 - Could Parliament have reasonably expected the principal-repository to carry out each exercise of decision-making power? (*Carltona; O'Reilly v State Bank*)
 - Can a practical administrative necessity be identified giving rise to agency principles? (*O'Reilly v State Bank*)
 4. Is there any evidence of a dual application of agency and delegation principles?
 - A delegate cannot also act as an agent (*Re Reference*)
 - There is no administrative necessity to confer powers of agency to delegates (*Re Reference*)
 - A delegate has decision-making power in their own right and name (*Re Reference*)
 - An agent does not have decision-making power in their own right and name, and must act as the principal repository (*Re Reference*)

Ask: If the decision was not made by the principal repository, and the delegate was not duly authorised, is there a possibility that agency principles can be imputed to save the validity of the decision? (*O'Reilly v State Bank*)

Note:

- The Court in *O'Reilly* did not limit the *Carltona* principle to Ministers only (*O'Reilly v State Bank*)

5.4.2 ADJR ACT

Under this ground of review, the common law principles are relevant to the application of the ADJR Act provisions

The ADJR Act does not expressly provide for a ground of review on the basis of improper delegation

Decision-Maker Does Not Have Jurisdiction

Section 5(1)(c) ADJR Act allows an applicant to challenge an administrative decision on the basis that the decisionmaker did not have jurisdiction to make the decision (primary provision)

Section 6(1)(c) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Decision Was Not Authorised By Statute

Section 5(1)(d) ADJR Act allows an applicant to challenge an administrative decision on the basis that the decision was not authorised by the statute

Section 6(1)(d) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Decision Was Contrary to the Law

Section 5(1)(j) ADJR Act allows an applicant to challenge an administrative decision on the basis that it was otherwise contrary to the law

Section 6(1)(j) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Statutory Interpretation Principles – *Acts Interpretation Act (Cth)*

Section 34AA The power of delegation in an Act will be construed as including a power to delegate a function, duty or power to any person (rather than only to a specified person)

Section 34AB

- 1) Where an Act confers power to delegate:
 - a) The delegation may be made generally or as provided by the instrument of delegation
 - b) The powers that may be delegated do not include that power to delegate
 - c) **A function, duty or power when performed by the delegate, for the purposes of the Act, shall be deemed to have been performed or exercised by the authority**
 - d) A delegation by the authority does not prevent the performance of a function, duty or power by the authority
 - e) If the authority is not a person, section 34A applies as if it were
- 2) If the powers of the principal repository are expanded, and all their powers are delegated, the powers of the delegate will also be expanded
 - a) If the powers of the principal repository are altered, and their powers are delegated, the powers of the delegate will also be altered

Section 34A If the decision-making power is dependant upon the principal repository's opinion, belief or stat of mind, and their power has been delegated – The delegate may exercise the power basing their decision on their own opinion, belief or state of mind

5.5 RELEVANT/IRRELEVANT CONSIDERATIONS (BROAD ULTRA VIRES)

Administrative decision-makers should consider all relevant matters which Parliament directed the decision-maker to take into account in the enacting legislation, when exercising their discretionary power

Administrative decision-makers should not consider any irrelevant matters when exercising their discretionary power

5.5.1 COMMON LAW

The common law requirement to only consider relevant considerations and discard irrelevant considerations reflects the rule of law principle and the principle of parliamentary sovereignty – That is, the law must be determined by Parliament and cannot be exercised according to the whims of decision-maker's in their personal capacity

1. Does the statute expressly or impliedly require the decision-maker to consider particular matters?

- If the statute does not contain an express list of relevant considerations or highlight irrelevant considerations, the subject matter, scope and purpose of the statute must be considered to determine whether the repository is bound to have regard to any and what matters (*Brennan J and Mason J, Peko-Wallsend*)

2. Did the decision-maker fail to consider any of those particular matters?

- The failure to take into account a relevant consideration is an abuse of discretion (*Peko-Wallsend*)
- Only established if the decision-maker is bound to take a certain matter into account? (*Peko-Wallsend*)
- Determining this ground is a matter of statutory interpretation (*Peko-Wallsend*)
- Not every failure to take a relevant consideration into account will be fatal (*Peko-Wallsend*)
- Decision-makers are obliged to give matters proper, genuine and realistic consideration to all relevant material (*Sheppard J, Hindi v Minister*)

3. Was anything else taken into account by the decision-maker?

- Is the decision-maker considering matters that are not within the boundaries of their discretionary power under the Act? (*Roberts v Hopwood*)
 - o Eg. Not ordinary economic considerations (*Roberts v Hopwood*)

Note: In every statute there is 'an implication that the decision is to be made on the basis of the most current material available to the decision-maker' (*Peko-Wallsend*)

5.5.2 ADJR ACT

Under this ground of review, the common law principles are relevant to the application of the ADJR Act provisions

Relevant Considerations

Section 5(1)(e) ADJR Act when read with section 5(2)(b) ADJR Act allows an applicant to challenge an administrative decision on the basis that a decision-maker failed to take into account a relevant consideration when exercising their administrative power

Section 6(1)(e) ADJR Act when read with section 6(2)(b) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Irrelevant Considerations

Section 5(1)(e) ADJR Act when read with section 5(2)(a) ADJR Act allows an applicant to challenge an administrative decision on the basis that a decision-maker took into account an irrelevant consideration when exercising their administrative power

Section 6(1)(e) ADJR Act when read with section 6(2)(a) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

5.6 BAD FAITH, FRAUD AND IMPROPER PURPOSE (BROAD ULTRA VIRES)

Administrative decision-makers must exercise their powers for the purposes for which they were conferred and in good faith

They cannot exercise their powers for unauthorised or improper purposes, in bad faith or fraudulently

NOTE:

- You need to prove the subjective state of mind
- This ground of review is very rare and hard to win

5.6.1 COMMON LAW

1. Identify the purpose(s) for which the administrative power can lawfully be exercised

- Is this expressly outlined in the objects/purposes of the Act?
- If the purpose is not expressly stated, inferences can be drawn looking to the available evidence (*R v Toohey*)
- Consider the construction of the Act when read as a whole (*R v Toohey*)
- If the discretionary power is very broad such as a public interest power, it will be difficult to show that the purpose is improper (*Plaintiff M79/2012 v Minister*)

2. Identify the purpose(s) for which the administrative decision-maker actually exercised the power

- If there are multiple purposes, consider which purpose would be deemed the substantial purpose (*Samrein*)
 - o It will be an abuse if one of those purposes is an ulterior and substantial purpose.
- It may be difficult to ascertain the subjective purpose of the decision-maker (*R v Toohey*)
- If the decision-maker would otherwise have made no attempt to exercise its administrative power, that would suggest their purpose was improper (*Samrein*)

Ask: Is the decision-maker's actual purpose(s) in accordance with the lawful purpose intended by Parliament?

5.6.2 ADJR ACT

Under this ground of review, the common law principles are relevant to the application of the ADJR Act provisions

Improper Purposes

Section 5(1)(e) ADJR Act when read with *section 5(2)(c) ADJR Act* allows an applicant to challenge an administrative decision on the basis that administrative power was exercised for a purpose other than a purpose for which the power was conferred

Section 6(1)(e) ADJR Act when read with *section 6(2)(c) ADJR Act* allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Bad Faith (Note: Easier to establish bias)

Section 5(1)(e) ADJR Act when read with *section 5(2)(d) ADJR Act* allows an applicant to challenge an administrative decision on the basis that the administrative power was exercised in bad faith

Section 6(1)(e) ADJR Act when read with *section 6(2)(d) ADJR Act* allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Fraud – See also *SZFDE v Minister for Immigration*

Section 5(1)(g) ADJR Act allows an applicant to challenge an administrative decision on the basis that the decision was induced or affected by fraud

Section 6(1)(g) ADJR Act allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision (i.e. that fraud has taken place, is taking place, or is likely to take place in the course of the conduct)

5.7 UNREASONABLENESS (BROAD ULTRA VIRES)

There is an underlying expectation that a decision-maker will act reasonably and rationally in exercising their decision-making powers, this is because ‘lawfulness, fairness and rationality ... lie at the heart of administrative justice’ (*French CJ in Minister v Li*)

The ground of review of unreasonableness is somewhat controversial because it essentially considers the merits of the decision, rather than the legality of the decision

The ground of unreasonableness has historically been difficult to establish independently

Note: A successful challenge on another ground of judicial review may often lead to the ground of unreasonableness being made out by necessary implication

5.7.1 COMMON LAW

The common law standard of unreasonableness was first outlined by Lord Greene stating that the grounds of unreasonableness will be established ‘if a decision on a competent matter is so unreasonably that no reasonably authority could ever have come to it’ (*Wednesbury*)

In *Minister v Li*, the Court seemingly expanded the ground of unreasonableness to encompass interpretation of the statute, rejecting the limited interpretation of the *Wednesbury* principle which required an amount of irrationality or bizarreness (*Minister v Li*)

Factors to Consider:

- Consider the limitations of the statutory discretionary by looking at the subject matter, scope and purpose of the legislation (*Minister v Li*)
- Unreasonableness reflects a limitation imputed by Parliament on the decision-maker (*Minister v Li*)
- May not automatically support an argument that a decision-maker failed to consider a factor, or over-considered a factor, but disproportionate weight may assist an argument for unreasonableness (*Minister v Li*)
- ‘Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification (*Minister v Li*)’

5.7.2 ADJR ACT

Under this ground of review, the common law principles are relevant to the application of the ADJR Act provisions

The ground of unreasonableness under the ADJR Act slightly differs from the common law, albeit predominantly adopting the language of the Wednesbury unreasonableness – The common law has developed in *Minister v Li*; it is unclear whether these developments impact the application of the ADJR provisions

Section 5(1)(e) ADJR Act when read with *section 5(2)(g) ADJR Act* allows an applicant to challenge an administrative decision on the basis that the decision was so unreasonable that no reasonable decision-maker could have made it

Section 6(1)(e) ADJR Act when read with *section 6(2)(g) ADJR Act* allows an applicant to mount a challenge regarding the conduct of a decision-maker leading up to the making of a decision

Note: *Wednesbury* unreasonableness refers to the reasonable ‘authority’ versus the ADJR Act which refers to the reasonable ‘person’ – This may make unreasonableness under the ADJR Act more difficult to establish