

# Procedural Fairness – Answer scaffold

## Introduction

Procedural fairness (or **natural justice**) is a **fundamental principle** of Australian administrative law, requiring government decision-makers to act **fairly, impartially, and based on relevant evidence** when making decisions that affect individuals. It ensures **transparency, accountability, and legal integrity** in administrative actions.

The duty to afford procedural fairness is **implied in statutory decision-making** unless **explicitly excluded by legislation** (**Annetts v McCann (1990)**; **Kioa v West (1985)**). The **Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)** allows for **judicial review** where a breach of procedural fairness occurs (**s.5(1)(a)**).

The three **core principles** of procedural fairness are:

1. **The Hearing Rule** – A person whose rights, interests, or legitimate expectations are affected by a decision must be given a fair hearing (**Kioa v West (1985)**).
2. **The Bias Rule** – Decision-makers must be **free from actual or apprehended bias** (**Ebner v Official Trustee (2000)**).
3. **The Evidence Rule** – Decisions must be based on **logically probative and relevant evidence**, not speculation or irrelevant considerations (**Australian Broadcasting Tribunal v Bond (1990)**).

This answer will assess procedural fairness in administrative decision-making by addressing the following key questions:

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## 1. Issues

- Does procedural fairness apply?
- Did they have a legitimate expectation of a certain process or procedure prior to the decision?
- Was the hearing rule breached?
- Was the bias rule breached?
- Was the evidence rule breached?
- Consequences and available remedies

## 2. Does the Duty to Provide Procedural Fairness Apply?

- **Does the decision affect an individual's rights, interests, or legitimate expectations?**
  - **Kioa v West (1985)** – Procedural fairness applies where a decision has a **direct and immediate impact** on a person.
  - **Annetts v McCann (1990) 170 CLR 596**: Procedural fairness is implied where a decision directly **affects a person's rights or interests**, even if the statute is silent on procedural requirements.
- **Has Parliament explicitly excluded procedural fairness?**
  - **Annetts v McCann (1990)** – Exclusion must be **clear and unambiguous**.

- **Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001)** : The presumption that procedural fairness applies to the exercise of statutory power **can only be displaced by clear and unambiguous statutory language**.

#### Is there a possible limit to the implied right of procedural fairness?

- The implication of procedural fairness is **not absolute** and can be limited when applying it would be incompatible with the subject matter of the decision or broader public policy concerns.
- **National Security** – Procedural fairness may be excluded where it would compromise national security. **Council of Civil Service Unions v Minister for the Civil Service [1985]**:
- **Urgency** – Procedural fairness may be limited or suspended where the urgency of the situation requires immediate action. **South Australia v Slipper [2004]**

✓ **Conclusion:** If the decision affects individual rights/interests and has not been clearly excluded by legislation, procedural fairness applies, unless there is a justifiable reason (urgency/national security).

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### 3. Legitimate expectations?

#### Did the person affected have a legitimate expectation of a certain process or procedure?

A legitimate expectation arises when a public authority, through its actions, promises, or established practices, creates an expectation in a person that a certain procedure will be followed before a decision affecting them is made. (**Council of Civil Service Unions**)(**FAI Insurances**). This expectation does not guarantee a specific outcome but ensures that the person will be treated fairly in the decision-making process (**ex parte Lam**).

#### Cases:

**Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**: A legitimate expectation arises when a **public authority induces a person to expect** that they will be given a hearing or treated in a certain way before a decision affecting them is made. (based on **past practices**)

**FAI Insurances Ltd v Winneke (1982)**: Procedural fairness applies where a legitimate expectation is created by consistent past practice or policy. Expectation cannot be overridden unless party is given opportunity to respond.

**Minister for Immigration and Ethnic Affairs v Teoh (1995)**: A legitimate expectation can arise from international treaty obligations ratified by Australia, even if not incorporated into domestic law.

**Re Minister for Immigration and Multicultural Affairs; Ex parte Lam [2003]**: A legitimate expectation does not create an enforceable right but may give rise to a procedural obligation of fairness.

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### 4. Has the Hearing Rule Been Breached?

- Was the affected party given adequate notice of the decision?
  - **Kioa v West (1985)** – Notice is a **fundamental aspect** of procedural fairness.
  - **SZBEL v Minister for Immigration (2006)** – Decision-makers must **disclose critical issues** to allow meaningful participation.
- Was there an opportunity to respond?

# Judicial review – Answer Scaffold

## Introduction

Judicial review is the process by which courts assess the **lawfulness** of decisions made by government officials, public authorities, or tribunals. Unlike **merits review**, which considers whether a decision is correct or preferable, judicial review is **limited to legal errors** such as jurisdictional error, procedural unfairness, or improper exercise of power (**Plaintiff S157/2002 v Commonwealth (2003)**).

Judicial review in Australia is primarily governed by:

- **The Constitution (s 75(v))**, which gives the High Court power to review decisions made by Commonwealth officers.
- **The Judiciary Act 1903 (Cth) (s 39B)**, which extends similar review powers to the Federal Court.
- **The Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)**, which provides a **simplified process** for challenging administrative decisions based on specified grounds (**ss 5, 6, 7 ADJR Act**).

This answer will assess **whether a decision is reviewable, the grounds for review, and available remedies**.

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## Issue: Can the decision be judicially reviewed?

- Does the court have jurisdiction to review the decision?
- Does the applicant have standing?
- Are the grounds relevant for JR?

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## 1. Does the Court Have Jurisdiction to Review the Decision?

- Which court has jurisdiction?
  - **High Court** – Has **original jurisdiction under s 75(v) of the Constitution** to review decisions made by Commonwealth officers.
  - **Federal Court** – Has **jurisdiction under s 39B of the Judiciary Act 1903** to review federal administrative decisions.
  - **State Supreme Courts** – Review state administrative decisions under **common law or state judicial review legislation** (e.g., **Supreme Court Act 1970 (NSW) ss 23, 69**).
- Are privative clauses an issue?
  - Privative clauses attempt to limit judicial review, but courts interpret them **narrowly** to preserve review for **jurisdictional errors** (**Plaintiff S157/2002**).
  - A privative clause cannot prevent constitutional judicial review under **s 75(v) Bodruddaza v Minister for Immigration and Multicultural Affairs (2007)**
  - Privative clauses need to be very clear and are interpreted narrowly (**Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1995)**)

- Does the Hickman principle apply? [see privative clause doc]

✓ **Conclusion:** If jurisdiction is validly established, the court can proceed with the review.

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## 2. Does the Applicant Have Standing?

- Who has standing to seek review?
  - **Section 5 ADJR Act:** A person “aggrieved” by a decision has standing.
  - **In common law**, the applicant must have a **special interest** beyond that of the general public. **Anderson v Commonwealth (1932), Australian Broadcasting Tribunal v Bond (1990)**
  - **Standing has expanded to also include organisations or groups** that also may have a special interest or be directly affected by the decision. **North Coast Environment Council Inc v Minister for Resources [1994] Ogle v Strickland (1987) Onus v Alcoa of Australia Ltd (1981)**

✓ **Conclusion:** If the applicant is directly affected by the decision, they have **standing**.

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## 3. What Are the Grounds for Judicial Review?

### • Has there been a jurisdictional error?

- **Jurisdictional error** occurs when a decision-maker **exceeds their legal authority**. **(Minister for Immigration and Multicultural Affairs v Eshetu (1999), Craig v South Australia (1995)**
- **Ultra vires** is a fundamental doctrine in **judicial review** and forms the basis for challenging the **lawfulness** of administrative decisions. A decision or action is **ultra vires** if the decision-maker **exceeds the legal power** granted to them by statute or common law.

✓ **Conclusion:** If a decision-maker **exceeds their statutory powers** or **fails to comply with legal procedures**, their decision is **ultra vires** and subject to **judicial review**

### • Was procedural fairness denied?

- **Hearing rule:** Was the affected person given a chance to respond? **(Kioa v West (1985))**
- **Bias rule:** Was the decision-maker impartial? **(Ebner v Official Trustee in Bankruptcy (2000))**
- **Evidence rule:** was the decision based on logical and relevant evidence? - **Australian Broadcasting Tribunal v Bond (1990)**

### • Were irrelevant or mandatory considerations mishandled?

- **Relevant considerations must be taken into account** **(Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986))**.
- **Irrelevant considerations must be ignored** **(Roberts v Hopwood [1925] AC 578))**.

- **Was the decision legally unreasonable?**

- **Wednesbury unreasonableness:** No reasonable decision-maker would reach the same conclusion (**Associated Provincial Picture Houses v Wednesbury Corporation (1948)**).
  - **Modern approach:** Decisions must have an **intelligible justification** (**Minister for Immigration v Li (2013)**).
    - The traditional **Wednesbury unreasonableness** test, established in **(1948)**, set a **high threshold** for courts to intervene in administrative decisions. Under this test, a decision was only **unreasonable** if it was **so irrational that no reasonable decision-maker could have made it**.
    - However, the **modern approach**, developed in **Minister for Immigration and Citizenship v Li (2013)**, softens the strict **Wednesbury test** by incorporating **proportionality and justification**.
  - Key features of the **contemporary approach** include:
    - **Intelligible Justification** – A decision must have a **rational and logical explanation** based on law and evidence. Courts may intervene if a decision lacks **coherent reasoning** (**Li (2013)**).
    - **Proportionality Considerations** – The **severity of the decision** must be balanced against its **purpose**. This aligns with **human rights frameworks** and European administrative law.
    - **Less Deference to Executive Power** – Courts are **more willing** to scrutinize decisions that **seriously affect individuals' rights**.
  - The High Court in **Li (2013)** found that a **migration decision was unreasonable** because it **lacked justification and imposed an arbitrary delay**, even though it did not meet the **strict Wednesbury threshold**.
- ✓ **Conclusion:** The **Li approach** focuses on **whether a decision is legally justified and proportionate**, moving away from the rigid **Wednesbury standard**. Courts are now **more flexible** in assessing whether administrative decisions are **reasonable in substance and effect**.

- **Was the decision made in bad faith?**

- **Bad faith requires dishonesty or an improper motive** (**SBBS v Minister for Immigration (2002)**).

✓ **Conclusion:** If any of these grounds are established, the decision may be **invalid**.

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## 4. What Remedies Are Available?

- **Certiorari** – Quashes an invalid decision (**removes it from the record**).
- **Mandamus** – Orders the decision-maker to **perform their duty correctly**.
- **Prohibition** – Prevents a decision-maker from **acting unlawfully**.

- **Injunction** – Restrains unlawful conduct.
- **Declaration** – Clarifies **legal rights**.
- **Remittal** – Sends the matter **back for reconsideration** under lawful processes.

✅ **Conclusion:** The appropriate remedy depends on the nature of the **legal error** and the desired **outcome**.

# Scaffold to Determine Whether Merits or Judicial Review Should Be Sought

When challenging an administrative decision, it is crucial to determine whether **merits review** or **judicial review** is the appropriate avenue. This scaffold provides a structured approach to identifying the best course of action.

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## Issue: Should Merits or Judicial Review Be Sought?

- Is the applicant seeking a fresh decision, or are they challenging a legal error?
- Does the applicant want the decision reconsidered in full, or do they want a court to assess its legality?
- Is the decision reviewable under the applicable legislation?

✓ **Conclusion:** If the applicant seeks a **better outcome**, merits review is appropriate. If they claim the decision was **unlawful**, judicial review should be pursued.

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## 1. Is the Decision Subject to Merits Review?

- Does the decision fall under the jurisdiction of a review tribunal?
  - **s 12 ART Act 2024 (formerly s 25 AAT Act)** – Allows for **merits review** of certain decisions.
- Is the applicant directly affected?
  - **s 17 ART Act (formerly s 27 AAT Act)** – Standing requirement for affected persons.
- Was the decision made by an administrative agency rather than a court?
  - Merits review is only available for **administrative decisions** and **not judicial or legislative decisions**.

✓ **Conclusion:** If the decision is administrative and covered under the **ART Act**, **merits review** is available.

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## 2. What is the Desired Outcome?

- Does the applicant want the decision changed to a preferable one? → **Merits review**
  - **Merits review allows the decision to be reconsidered in full** and replaced with a **new decision** (**Shi v Migration Agents Registration Authority (2008)**).
- Does the applicant want to challenge a legal error? → **Judicial review**
  - Judicial review focuses on the **lawfulness of the decision** rather than its **correctness** (**Plaintiff S157/2002 v Commonwealth (2003)**).

✓ **Conclusion:** If the applicant seeks a **better outcome**, merits review applies. If they seek to **invalidate an unlawful decision**, judicial review is required.

# Ombudsman – Answer Scaffold

## Introduction

The **Commonwealth Ombudsman**, established under the **Ombudsman Act 1976 (Cth)**, is an independent body responsible for **investigating complaints about maladministration and systemic failures in government decision-making**. The Ombudsman has the power to **access information, question officials, and recommend remedies**, but its findings are **not legally binding**.

The Ombudsman provides an alternative to **judicial and merits review**, often being more accessible and informal. However, it cannot investigate matters **outside its jurisdiction**, such as court decisions or private sector actions.

This answer will assess **whether the Ombudsman can investigate a complaint, the extent of its powers, and available remedies**.

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## Issue:

**Can the Ombudsman Investigate the Complaint?**

- **Is the complaint within the Ombudsman's jurisdiction?**
- **Does it involve government maladministration or improper decision-making?**
- **Are there any legal barriers to an Ombudsman investigation?**
- **What remedies can the Ombudsman provide?**

✓ **Conclusion:** If the complaint falls within jurisdiction and relates to **government misconduct or poor administration**, the Ombudsman can investigate.

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## 1. Is the Complaint Within the Ombudsman's Jurisdiction?

- **Who can be investigated?**
  - **s 5 Ombudsman Act** – Covers **Commonwealth agencies and departments**.
  - **State Ombudsman Acts** – Apply similar provisions at the state level.
- **Who cannot be investigated?**
  - Decisions made by **courts or tribunals**.
  - **Private sector** actions.

✓ **Conclusion:** If the complaint concerns **public sector maladministration**, it falls within the Ombudsman's jurisdiction.

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## 2. Does the Complaint Involve Defective Administration?

- **s 5 Ombudsman Act** – Covers:
  - **Unreasonable delays**.



- **Failure to consider relevant evidence.**
- **Unfair refusals of applications.**
- **Failure to provide reasons for decisions.**
- **Key Cases:**
  - **VT v Commonwealth Ombudsman (2020)** – Established that **procedural fairness** applies in Ombudsman investigations.

✓ **Conclusion:** If the complaint involves **poor administrative conduct**, the Ombudsman can investigate.

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### 3. What Powers Does the Ombudsman Have?

- **s 8 Ombudsman Act** – Can access government records and question officials.
- **s 15 Ombudsman Act** – Can require agencies to respond to reports.
- **However, findings are not legally binding.**

✓ **Conclusion:** The Ombudsman **cannot enforce remedies** but can **pressure agencies to act through recommendations**.

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### 4. What Remedies Can the Ombudsman Provide?

- **Public reports and recommendations to Parliament.**
- **Informal resolution of complaints with government agencies.**
- **Use of "power of embarrassment" to encourage change.**

✓ **Conclusion:** The Ombudsman **cannot overturn decisions** but can influence **systemic reforms**.

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# Privacy – Answer Scaffold

## Introduction

Privacy in Australian administrative law is primarily governed by the **Privacy Act 1988 (Cth)**, which regulates how government agencies and private organizations handle **personal information**. The **Australian Privacy Principles (APPs)** set out obligations regarding the **collection, use, disclosure, and storage** of personal data. However, Australia **lacks a general tort of invasion of privacy**, **Kalaba v Commonwealth [2004]** meaning that legal protections outside of statutory frameworks remain limited however individuals (not corporations) may have a claim for breach of privacy where private or sensitive information is unlawfully disclosed. (**ABC v Lenah Game Meats Pty Ltd (Lenah Game Meats) (2001)**).

Privacy issues in administrative law often arise in the context of:

- Government data handling and access to personal records.
- Freedom of Information (FOI) requests and privacy exemptions.
- Interference with privacy through surveillance, data breaches, or unauthorized disclosures.

The Privacy Commissioner, under the **Office of the Australian Information Commissioner (OAIC)**, plays a key role in **investigating breaches, enforcing compliance, and providing remedies**. This answer will assess **whether privacy protections apply, whether there has been a breach, and what remedies are available**.

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## Issue:

### Has There Been a Breach of Privacy and What Legal Remedies Are Available?

- Does the Privacy Act apply to the entity handling the personal information?
- Has an interference with privacy occurred under the Australian Privacy Principles (APPs)?
- Are there any applicable exemptions under the Privacy Act?
- What remedies can the affected person seek?

✓ **Conclusion:** If privacy protections apply and have been breached, the applicant may seek **investigation, enforcement actions, or legal remedies**.

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## 1. Does the Privacy Act Apply to the Entity Handling the Information?

- Is the entity covered by the Privacy Act?
  - **s 6 Privacy Act** – Covers Commonwealth government agencies and some private sector organisations.
  - **s 7B Privacy Act** – Small businesses are generally exempt unless handling sensitive data.
- What type of privacy is at issue?
  - **Information privacy** – Protection of personal data (e.g., medical, financial records).
  - **Bodily privacy** – Protection from intrusive medical or security procedures.

- **Privacy of communications** – Protection of emails, phone records, and online data.
- **Territorial privacy** – Protection against surveillance or intrusion.

✓ **Conclusion:** If the entity is subject to the **Privacy Act**, privacy obligations apply.

## 2. Has There Been an Interference with Privacy Under the Australian Privacy Principles (APPs)?

- **Collection and Use of Personal Information**
  - **APP 3** – Personal information must be **collected lawfully and with consent**.
  - **APP 6** – Limits the use and disclosure of personal information.
  - **APP 11** – Requires **security measures to protect data**.
- **Right to Access and Correction**
  - **APP 12** – Individuals have the right to access their personal data.
  - **APP 13** – Right to **request corrections** to inaccurate data.
- **Key Case Law**
  - **VQ v Secretary to the Department of Home Affairs (2020)** – Privacy vs. national security in access to personal records.
  - **VI v CSIRO (2020)** – Employer's improper access to employee medical records breached privacy obligations.
  - **VU v VV & VW (2020)** – Unauthorized disclosure of personal data can lead to legal consequences.
- **Ash v McKennitt [2007] 3 WLR 194:** The English Court of Appeal confirmed that a person has a right to privacy over personal and confidential information even if it was **disclosed in a personal relationship, reinforcing that privacy protection extends** to private and intimate matters.
- **Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (Lenah Game Meats) (2001) 208 CLR 199:** The High Court of Australia held that while there is no general tort of privacy in Australia, individuals (but not corporations) **may have a claim for breach of privacy where private or sensitive information is unlawfully disclosed**.
- **Douglas v Hello! Ltd (No 3) [2006] QB 125:** The court recognised that **the unauthorised publication of photographs from a private wedding violated the subjects' privacy rights**, confirming that privacy extends to personal events even where some public interest may exist. Also commercial contract. i.e. had a contract with one party for publication but another party published.
- **Giller v Procopets [2008] VSCA 236:** The Victorian Court of Appeal held that the unauthorised distribution of a private intimate video breached confidence and caused emotional distress, recognising that **breach of confidence can provide remedies for invasions of privacy**.
- **Grosse v Purvis (2003) Aust Torts Reports 81:** The Queensland District Court recognised a direct tort of invasion of privacy, finding that **sustained harassment and stalking constituted a serious invasion of privacy deserving of damages**.
- **Kalaba v Commonwealth [2004] FCA 763:** The Federal Court found that no general right to privacy exists under Australian law unless protected by statute, **confirming the absence of a general tort of privacy in Australia**.

- **Murray v Express Newspapers PLC [2007] EWHC 1908:** The court held that a **child's right to privacy was breached by the unauthorised publication of photographs taken in a public place**, recognising that minors have enhanced privacy protections.
- **Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479:** The High Court of Australia rejected a claim for breach of privacy when a radio station broadcasted information about horse races, finding that **no property or privacy right existed over publicly observable events**.
- **Von Hannover v Germany [2004] ECHR 294:** The European Court of Human Rights held that Princess Caroline of Monaco's right to privacy was violated by the publication of photos showing her in a private capacity, **establishing that public figures have a right to privacy for private and family activities**.

#### Key Privacy Principles Established:

- ✓ **No General Tort of Privacy:** Australian courts have not recognised a broad tort of privacy, but protection may arise through other legal doctrines (e.g., breach of confidence, defamation).
- ✓ **Public Interest vs Privacy:** Courts balance the right to privacy against public interest and freedom of expression.
- ✓ **Breach of Confidence:** Disclosure of intimate or private information can give rise to a claim for breach of confidence.
- ✓ **Enhanced Protection for Minors:** Children and vulnerable individuals receive greater protection under privacy law.
- ✓ **Tort of Harassment:** Some courts (e.g., Queensland in *Grosse v Purvis*) have recognised harassment and stalking as actionable invasions of privacy.

**Conclusion:** If the agency **improperly collected, used, or disclosed** personal information, a privacy breach has occurred.

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### 3. Are There Any Exemptions Under the Privacy Act?

- **s 7C Privacy Act** – Political parties are exempt.
- **s 33 Privacy Act** – National security exemptions.
- **s 80G Privacy Act** – Law enforcement may override privacy rights for investigations.
- **s 16A Privacy Act** – Permitted disclosures in cases of **serious threats to public safety**.

✓ **Conclusion:** If an exemption applies, privacy obligations **may not be enforceable**.

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### 4. What Remedies Are Available for a Privacy Breach?

- **Complaint to the Privacy Commissioner (s 36 Privacy Act)**
  - The **OAIC** can investigate breaches and issue determinations.
- **Mandatory Data Breach Notification Scheme (s 26WK Privacy Act)**
  - Organizations must notify affected individuals of **serious breaches**.
- **Judicial Review and Damages**
  - **s 52 Privacy Act** – Privacy Commissioner can order **compensation for loss or damage**.