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Executive Rulemaking

- 2 types of Executive regulations:
 - a. Delegated Legislation: Where statute delegates law making powers to the Executive
 - b. Policy: Where the Executive develops policies (soft law) to guide administrators in decision making
- **Rule**: General grounds of review do not apply to rule-making decisions (except inflexible application of policy/potential unreasonableness). Review for these decisions requires that the law/policy falls outside what is authorised by the statute.
- **Note**: Reviewing these actions falls outside ADJR (because legislative rather than administrative decisions)

Delegated Legislation (Regulations)

- Rule: The delegated legislation must be authorised by the primary (enabling) Act

1. Interpret the primary Act – what scope of power does it confer?

a. Consider text of Act

- Phrasing of enabling provision is crucial in determining scope of DL authorised
- Authority to make laws which are:
 - i. “Necessary or expedient”
 - Requires that the delegated law “fills in” or “carries out” the scheme of the primary Act. If it extends the primary scheme to cover a broader field, this will not be necessary or expedient → *Shanahan v Scott 1957*
 - ii. “Necessary or convenient”
 - ‘Convenient’ gives broader scope. However, still requires there to be some rational connection between the delegated law and the powers/purposes of the primary Act → *Evans v NSW 2008*
 - iii. Which “regulate”, “restrain” or “prohibit” an activity
 - a. **Regulate**: A power to prescribe conditions on the carrying out of an activity. Does not extend to a power to prohibit/suppress the activity altogether. → *Swan Hill 1937*
 - b. **Restrain**: A power to moderate, check or restrict the activity. *Usually* does not extend to complete prohibition. → *Swan Hill 1937*
 - c. **Regulate and Restrain**: Goes beyond regulation, but does not extend to prohibition (unless intent is clear in statute) → *Swan Hill 1937*
 - d. **Prohibit**: A power to totally or conditionally prohibit conduct, or to prohibit it subject to unstructured discretion → *Foley v Padley 1984*

a. Was there (apprehended) bias?

i. Test

- 3 steps: *Ebner 2000/ QYFM 2023*

1. Identify the interest of the decision-maker

- Identify the interest of the decision-maker which could give rise to potential bias
- Go to examples (ii)

2. Must be a logical connection between the interest and the potential deviation from the course of deciding the case on its merits

- **Principle:** There is no category of interest/association which will automatically create an assumption of bias. Always need to assess whether that interest actually gives the decision-maker an interest in the outcome of the litigation.
- E.g. *Ebner* – case was not significant enough to affect shareprice and thus judge holding shares in company insufficient to give them interest in outcome.

3. That logical connection must give rise to reasonable apprehension of bias

- **Objective Test:** Whether a fair minded observer *might* reasonably apprehend that (due to the connection) the decision maker *might not* bring an impartial mind to the decision → *Ebner 2000/ QYFM 2023*
- **Characteristics of fair-minded observer:** Balanced and reasonable, limited legal knowledge, aware of human frailty/possibility of subconscious influence, appreciates capacity of judges to filter irrelevant information

- **Threshold**

- Test is much easier than actual bias because of ‘double might’ → only has to be that observer *might* think that the decision maker *might not* be impartial. Does not need to be a probability.
- **However: Depends on Decision Maker** → *Jia Legeng 2001*
 - Reasonable observer is aware of the nature of the decision-makers position
 - There is a higher threshold required to establish reasonable apprehension of bias for Executive (Ministers) than judges
 - This is because Ministers are expected to be political and to make opinions/policies known to public, whereas judges are expected to have a higher level of impartiality

- **Note:** A failure to disclose a possible interest does not automatically exclude decision maker (though it may be relevant to whether bias is reasonably apprehended) → *Ebner 2000*

ii. Examples

i. Interest in Proceedings

- **Principle:** Where a decision maker holds a note insubstantial, direct, pecuniary or proprietary interest in the outcome of the decision → *Ebner 2000*
- Must determine that this interest is substantial enough for them to actually have an interest in the outcome of the litigation /decision
- E.g. Financial interest, interest in validating previous decision
- **Examples:**
 - *Ebner 2000*: Judge held shares in company which was party to proceedings. Case would not affect share price, so judge did not have any interest in outcome
 - *Hot Holdings 2002*: Officers held shares in company which had an option to purchase a mining licence from Hot Holdings, if the Minister granted that licence to HH. Decision directly affected their interest.
 - *Isbester v Knox 2015*: Committee member who had been involved with criminal conviction had an interest in the decision of the civil consequences of that conviction (vindicating own views).
 - *QYFM 2003*: Applicant had been convicted of crime and had visa cancelled. Applied for review. One of judges had been the DPP in his criminal conviction. Had bias.

ii. Prejudgement

- **Test:** Requires that the decision maker is so committed to a conclusion already formed that their mind is not open to persuasion based on any evidence or arguments → *Jia Legeng 2000*
 - It is not sufficient that the decision-maker had a predisposition/ did not go into decision with a completely blank mind. Need to show that they were not at all open to having their position changed (meaning they did not properly engage with circumstances of case).
- Includes a prejudgement as to the reliability/ un-reliability of certain witnesses or evidence (which is not open to persuasion) → *Vakauta v Kelly 1989*
- **Note:** Use of templates for decision making is not enough to establish apprehended bias, so long as decision maker still engaged with the relevant claims of the particular case → *Plaintiff M1 2022*

iii. Conduct

- **Principle:** Remarks/statements by the decision maker may exclude them from hearing a matter where such statements give rise to a reasonable apprehension that they are biased/ have already made a pre-judgement as to an aspect of the matter → *Vakauta v Kelly 1989*
- Must be more than simply stating their opinion as to the reliability of the evidence/witness (as this is inherent part of decision-makers role) → *Vakauta v Kelly 1989*

Test: A legal error will be jurisdictional where it constitutes a ‘material breach of an express or implied condition of the valid exercise of a decision making power’ → *LPDT 2024*

1. Was there a legal error?

- Question of whether there was some error – just establish the relevant ground for review
- **Note:** Does not have to be an error by the final decision-maker themselves. An error by another party/decision-maker which affected the outcome will invalidate the decision if statute intended it to have such an effect → *Wei v Minister for Immigration 2015*

2. Was it intended that the error would lead to invalidity?

- Not all errors/ violations of conditions regulating exercise of statutory powers will give rise to jurisdictional error.
- Parliament can define whether a condition is mandatory and thus breach of such will give rise to jurisdictional error

1. **Test:** Considering the language, subject matter and purpose of the statute, it implied that parliament intended that any decision which failed to meet the relevant requirement would be invalid? (ie did they intend for the error to be jurisdictional)? → *Project Blue Sky 1998*
 - **If yes:** The error is jurisdictional and thus decision invalid
 - **If no:** The error is not jurisdictional. Decision is unlawful but not invalid

2. Factors → *Project Blue Sky 1998*:

a. Was the condition an essential preliminary to exercising power?

- Consider whether the factor must exist before power can be exercised
- If yes, then the condition is probably mandatory
- Different to a condition which only regulates the exercise of powers already conferred → *Forrest & Forrest 2017*

b. What is the nature of the obligations placed on the decision maker?

- If rule-like: this suggests they are a mandatory condition and thus jurisdictional error
- If only aspirational: this suggests condition was not mandatory and thus no jurisdictional error.
- E.g. indeterminate language such as direction to carry out functions in a way “consistent” with policy etc probably only aspirational → *Project Blue Sky 1998*:
- Note: use of word “*must*” is not sufficient to create presumption that condition is mandatory. However, if contrasted with use of word “*may*” in other sections, this may suggest mandatory.

3. Remedies in Judicial Review

	Remedy	Definition	Available where:
1.	Certiorari	Quashes decision – as if never occurred	a) For jurisdictional error b) Where the error appears on the ‘record’
1.	Prohibition	Prevents decision from being made	Jurisdictional error
2.	Mandamus	Sends decision to be re-made	Jurisdictional error (due to positive obligation)
3.	Injunction	Order to do/not do something	No other remedy available
4.	Declaration	Declaration of rights/obligations of parties	Non-hypothetical

- **Note:** all are available if decision is under *ADJR* (no requirements re jurisdictional error)

A. Common Law Remedies

Prerogative Writs

Rule: These writs are typically require an invalidating (jurisdictional) error – ie an error which has a material effect on the legal outcome

1. Certiorari

- **Definition:** An order to ‘quash’ a decision. Strips a decision of its legal effects – makes it as if the decision had not occurred. Applies retrospectively to nullify decisions which have already been made
- a. **Certiorari for errors with legal consequences (jurisdictional errors)**
 - **Requirements:**
 - **Rule:** Only available where the decision had a ‘discernible or apparent’ legal effect upon rights → *Hot Holdings 1996*
 - I.e. the error must have a determinative effect on the outcome and thus legal rights/obligations (jurisdictional error)
 - **Preliminary Decisions/Reports/Recommendations**
 - **Rule:** Because only available where the decision had a legal consequence, generally not available for preliminary steps in decision making, reports etc → *Ainsworth v CJC 1992*
 - However, may be available if it was a necessary step/precondition which had a sufficient impact on the final decision → *Hot Holdings 1996*
 - E.g. if a report must be made before a statutory power can be exercised, then the decision to make that report has a discernible legal effect