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Was the exclusion of a decision “made under enactment”?

Reasoning

Decision derived from university x student contract, not a statutory power so the decision's force does not come from the statute itself

Outcome

Not a decision under an enactment so not review

Ratio

A decision is only “under an enactment” if the statute confers capacity to affect legal rights / obligations directly, not just incidentally

Simplified Test for Jurisdiction of ADJR

Step 1 Is the ADJR applicable / available?	RULE → s 3(1) 1.1 Is the decision administrative? NOT legislative or judicial <ul style="list-style-type: none">• Administrative decision is applying existing rules to individual cases eg. cancelling a visa, refusing a licence application or imposing a condition on a development approval• Legislative decisions would be creating new rules such as making regulations or changing a statutory schedule (Roche)• Judicial would be resolving disputes with a binding authority such as court orders, sentencing or judicial determination• NOT EXCLUDED BY SCH 1 1.2 Was the decision made under statute / enactment? <ul style="list-style-type: none">• Cannot be a decision made under a contract (Tang)• Statute must confer capacity to affect legal rights directly (Tang)	
Step 2 Was it a decision or conduct?	2.1 Was it a decision? <ul style="list-style-type: none">• Defined under s 3(3)• Grounds for decision under s 5• Determinative of an issue of fact / law → cancelling a visa, revoking a licence, imposing a condition (ABT v Bond)• A “decision” is a substantive, operative, or determinative outcome under statute; intermediate steps may only qualify if expressly provided (ABT v Bond)	2.2 Was it conduct? <ul style="list-style-type: none">• Grounds for conduct under s 6• Procedural steps taken for the purpose of making a decision; not an outcome → refusing an adjournment, gathering evidence, issuing notice (how the decision is being reached) (ABT v Bond)• Requires a proper connection to a reviewable decision. Hypothetical or future intentions are not reviewable (Miller v Goldfields)
Step 3 Is it excluded?	Use Judiciary Act s 39B or Constitution s 75(v)	

Online Module Examples

infringed (Union Label)	<p>standing + there is little incentive to stir trouble</p> <ul style="list-style-type: none"> • AG can grant leave (fiat = consent) to private parties (relator) so they can sue in the public interest • Essentially "lending" their standing to an individual; though this is also rare due to reasons above • AG granted fiat to Bishops to challenge IVF laws where the relator action was treated as the AG's own actions; rare in practice (AU Catholic Bishops Conference)
Special Interest Test	
<p>Individuals also have a right without AG approval</p> <p>Applicant must show a greater interest than the general public, NOT just mere intellectual or emotional concern (ACF)</p> <p>Must show tangible advantage if the action were to succeed, or disadvantage if the action were to fail (ACF)</p>	<ul style="list-style-type: none"> • Injunction • Declaration • Writ of Mandamus <ul style="list-style-type: none"> ◦ Compelling government / public bodies to perform a mandatory public duty they are legally required to do → "why is P entitled to this compelled result?" (ties back to special interest) <p>[AUTHORITY] → ACF v Cth: Party must have a great interest than that of the general public where there must be if an advantage or disadvantage if the case were to succeed or fail</p>
Special Damage Test	
Same as special interest, when a private right is affected by governmental action	<ul style="list-style-type: none"> • Remedies same as special interest test • Cannot be limited to pecuniary loss (ACF) • Damage does not need to be exclusive to P (ACF)
Person Aggrieved Test	
Standing if interests are adversely affected.	<ul style="list-style-type: none"> • Certiorari <ul style="list-style-type: none"> ◦ Higher court reviews decision from lower court • Prohibition <ul style="list-style-type: none"> ◦ Legally banning something • ADJR Act s 5 <ul style="list-style-type: none"> ◦ Defined under ADJR Act s 3(4) → almost identical to special interest

ADJR Act

s 3 Interpretation

(4) In this Act:

(a) a reference to a person aggrieved by a decision includes a reference:

- (i) to a person whose interests are adversely affected by the decision; or
- (ii) in the case of a decision by way of the making of a report or recommendation – to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and

(b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

5 Applications for review of decisions

Person who is aggrieved by a decision may apply for review

12 Application be made a party to a proceeding

A person interested in a decision may apply to be made a party → court has discretion to refuse or apply or add conditions

Case Law

ACF was a national body with 6.5k members that opposed government approvals of a Japanese company's tourist resort in QLD → lacked standing ACF's objection did not give it a sufficient special interest as incorporation alone does not confer standing A mere interest from general public concern does not confer standing	ACF v Commonwealth
Aboriginal elders sought to protect relics on land threatened by development → standing granted Direct, custodial, cultural, spiritual link unlike ACF Custodians of cultural heritage have a special interest beyond the public	Onus v Alcoa
Priests challenged importation of allegedly blasphemous film → standing granted Vocational/professional interest = closer connection than general public	Ogle v Strickland
Commercial competitors may have standing if interest relates to legality of a rival's actions	Bateman's Bay Local Aboriginal Land Council
Local supermarket operator + landlords claimed loss of trade from newly-approved shopping centre Loss of profitability from new competition can amount to interests adversely affected (person aggrieved) Competitors can have standing if financial interests directly impacted; landlords with indirect effect may not	Argos v Minister
Recognised that representative environmental groups can be "persons aggrieved."	North Coast Environment Council
Mere philosophical/moral concern ≠ standing	Right to Life Association
Amicus curiae allowed to represent broader community perspective	Norrie

Government vs The Environment (Clark)

Trigger Event

FC overturned approval of a coal mine because the Minister had failed to consider conservation advice under the EPBC Act (Cth)

Government Response

AG Brandis labelled the case as illegitimate green "lawfare" + proposed repealing s 487(2) EPBC which expands standing for environmental groups → allowed people involved in environmental activities in the last 2 years to bring cases

The effect of this removal would restrict public interest litigation + limit rule of law oversight

Double Standard

Government objected to community groups litigating (the coal mine) but not to corporations successfully challenging government action on resource projects → suggested bias towards corporate financial interests over environmental / public interests

- (a) taking an irrelevant consideration into account in the exercise of a power;
 - (b) failing to take a relevant consideration into account in the exercise of a power;
 - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
 - (d) an exercise of a discretionary power in bad faith;
 - (e) an exercise of a personal discretionary power at the direction or behest of another person;
 - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
 - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
 - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
 - (i) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
- (a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he or she is entitled to take notice) from which he or she can reasonably be satisfied that the matter is established; or
 - (b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.

Ground One: Acting Beyond Scope of Power

Principle

Government decision-makers **can only act with lawful authority** where acting beyond power renders the decision invalid

Statutory Focus

Most grounds concern statutory powers → interpretation of legislation is central (though grounds exist in common law too)

Case Examples

- In **Swan Hill**, power to regulate and restrain building erection does not mean power to ban all building
 - Council overstepped by prohibiting rather than regulating
- In **Haneef**, “association” in Migration Act means association relevant to character, not any connection
 - Minister read “association” too broadly + misconstrued power
- In **McGlenn**, Commissioner asked the wrong question → “whether business activities were similar” → instead of whether they were the same business activity under statute
 - Misapplication of grouping rule in Income Tax Assessment
- Government officers and bodies must have a legal source of authority for their actions (*Entick v Carrington*)
- Government officials and bodies **ONLY** have the powers granted to them by the statute, properly interpreted (*ICAC v Cuneen*)

Key Test For Acting Beyond Scope

1. Identify statutory source of power (what does the statute authorise)
2. Ask whether decision-maker’s act aligns with the authorised power (correct kind of power)
 - a. Did the body substitute their own test for the statutory one where the wrong test was applied?

- b. May need to apply statutory interpretation with purpose, context and text
- 3. If decision differs from what the statute permits, ground is made out
- 4. **Application under ADJR:** eg. s 5(1)(d) → not authorised or s 5(1)(f) → error of law

Norrie (2014)

Facts

N was born with male reproductive organs, underwent reassignment surgery + identified with a non-specific gender

Applied to register her sex as "unspecified" under the **Births, Deaths and Marriages Registration Act**

Registrar initially accepted but later reversed the decision, claiming that the Act only permitted male or female (lower tribunals agreed)

NSWCCA overturned the decision → Registrar appealed to the HCA

Issue

Whether the Registrar's statutory power under s 32DC was confined to registering sex as "male" or "female," or whether it extended to recognising "non-specific" sex.

Reasoning

- HCA held that the Registrar's role is administrative, not moral or medical → Limited to recording facts consistent with statutory requirements
- s 32A(b) refers to correcting or eliminating "ambiguities relating to sex," so the Registrar thought sex meant only male or female so the ambiguity had to be corrected into one of the two BUT
- However, legislative history (1996 amendments) expressly acknowledged persons of "indeterminate sex."
- "Unspecified" sex is not an ambiguity but a valid legal recognition that a person's sex is indeterminate under statute
- To force a binary classification would misrepresent reality and contradict the statutory context recognising ambiguity in sex identity

Outcome

HCA upheld NSWCCA's decision as they did have power to register "non-specific" sex

Ratio

The Births, Deaths and Marriages Registration Act 1995 (NSW) recognises that sex is not always binary; therefore, the Registrar may record a person's sex as "non-specific" where ambiguity persists following a sex affirmation procedure

Commentary

Aronson expresses that statutory interpretation is used as the key tool to police misuse of power, ensuring that Parliament's intent controls admin decision-making, where scholars note this ground enforces legislative supremacy

- Reinforces legislative supremacy where decision-makers cannot expand their authority beyond Parliament's words
- Protects both institutional accountability + individual rights

Ground Two: Procedural Error

Principle

When a decision-maker fails to follow procedures prescribed by statute → Parliament has decided which procedures are essential so courts must determine if non-compliance invalidates the decision (DIFFERENT FROM PROCEDURAL FAIRNESS)

Legislation Examples

Legal Test for Procedural Fairness

Issue	Principle	Test	Authorities
Does the duty of procedural fairness apply?	Presumption of Fairness Strong common-law presumption that decision-makers exercising statutory power affecting rights, interests, or legitimate expectations must act fairly, unless excluded by clear words or necessary implication (Kioa)	Does the decision directly affect a person's rights, interests or legitimate expectations? If yes, duty presumed to apply If statute clearly excludes, no	Kioa v West — deportation decision affects individual interests → fairness applies. Miah — “code of procedure” insufficient to exclude fairness; must be clear words. Plaintiff S10/2011 — excluded where power is personal, non-compellable, and political (“public interest” discretion). BVD17 v Minister for Immigration — express “exhaustive statement” clause displaces fairness completely.
Has the duty been excluded by statute?	Exclusion Text, content + purpose, express exclusion, necessary implication eg. national security or personal ministerial discretion	Does the statute exclude procedural fairness? Expressly? Impliedly?	Miah — exclusion must be “clear and unambiguous.” Plaintiff S10/2011 — Minister’s personal “public interest” powers impliedly exclude fairness. SZMTA (2019) — “Exhaustive statement” provisions exclude fairness only for matters they expressly cover ; residual fairness may survive. BVD17 (2019) — fast-track review provisions were fully exhaustive → no fairness beyond statute.
What does procedural fairness require in the circumstances?	Hearing Rule The person must be given an opportunity to know and respond to adverse material before the decision Bias Rule The decision-maker must be free from actual or apprehended bias → part of fairness structure		Kioa v West — must disclose adverse, credible, and relevant information. Miah — failure to disclose decisive country information breached hearing rule. SZMTA — failure to notify existence of confidential material (s 438 notice) breached hearing rule.
Was procedural fairness breached?	Was the applicant denied a fair opportunity to present their case or to respond to adverse material? Did the process depart from what fairness required in context (statutory scheme, subject matter, urgency, etc.)?		Kioa v West — not told of adverse allegations → breach. SZMTA — not informed of s 438 certificate → breach.

		Lam – no breach without practical injustice (failure to follow promised procedure caused no real disadvantage).
Was there practical injustice?	Even if the procedure was irregular, no remedy unless the applicant suffered practical unfairness – a real loss of opportunity or detriment.	Ex parte Lam (2003) – fairness is concerned with practical consequences , not abstract procedural promise

Simplified Test for Procedural Fairness

1. Identify the decision and its effect→ administrative? affects rights/interests? (Kioa)
2. Apply presumption of fairness (Kioa)
3. Check for statutory exclusion (Miah, S10/2011, SZMTA, BVD17) → express? implied?
4. Determine the procedural content required if there is a duty applied (e.g. notice, disclosure, hearing).
5. Ask if the applicant suffered practical unfairness (Lam) → practical injustice test
6. **Conclude:** Was there a breach of procedural fairness? Does invalidity follow?

Summary of Authorities

Case	Facts	Issue	Outcome	Ratio
Kioa v West	Deportation decision relied on undisclosed adverse info.	Does PF apply to deportations?	Orders quashed.	PF applies to decisions affecting rights/interests directly
Annetts v McCann	Parents not heard at inquest on son's death.	Are they entitled to PF?	Yes	PF covers interests like reputation
Ainsworth v CJC	Report harming company's reputation.	Is reputation protected?	Yes	Reputational interests attract PF.
Plaintiff M61	Asylum seekers detained pending IMR review.	Does PF apply to IMR?	Yes	PF applies when detention lengthened by process.
Plaintiff S10	Minister's personal "dispensing" powers.	PF apply?	No	"Public interest," personal, non-compellable powers exclude PF.
Miah	Code of procedure in Migration Act.	Does it exclude PF?	No	Exclusion must be clear; code insufficient
Saeed	Offshore visa refusal without disclosure.	Does s 51A exclude PF?	No	Exclusion only for matters statute "deals with."
SZMTA	AAT not told applicant of s 438 notification.	Was fairness excluded by "exhaustive statement"?	No	PF applies to matters not covered by code
BVD17	Fast-track review secrecy clause.	Is PF excluded?	Yes	Full "exhaustive statement" displaces PF entirely

Ex Lam	Dept failed to follow promised procedure.	PF breached?	Yes	Must show practical injustice , not mere expectation.
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Ground Six: Bias Rule

Overview of Rule Against Bias

The bias rule is the second limb of procedural fairness ensuring that decision-makers are + appear to be impartial since bias undermines public confidence

A fair-minded lay observer is informed, aware of judicial integrity / human frailty, not unduly suspicious or complacent, representing the public's confidence

Type 1 Actual Bias

Decision-maker has a closed mind incapable of change despite evidence; subjective and hard to prove (Jia)

- Must be proven, rarely successful

Type 2 Apprehended Bias

Objective test — whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind (Ebner)

- Identify what might lead the decision-maker to decide other than on the merits
- Articulate the logical connection between that matter + feared deviation
- Determine if a fair-minded observer might reasonably apprehend bias

Consequences of Breach

- Breach = JURISDICTIONAL ERROR → INVALID
- Relief may be refused if the breach is not material (no realistic chance of a difference result) (MZAPC)

Categories of Apprehended Bias

Category	Description	Example / Case
Interest	Financial or other personal stake in the outcome	Prosecutor / decision-maker overlap (Isbester) Minor shareholding is insufficient (Ebner)
Conduct	Prejudicial statements or behaviour suggesting prejudgment	Judge's disparaging remarks (Vakauta) Permissible predisposition if mind open (Jia)
Association	Relationship with a party, lawyer, or witness affecting perception	Social contact with counsel (Charisteads) Negligible association no bias (Smits)
Extraneous Information	Access to inadmissible or prejudicial info	Unseen prejudicial material created risk of subconscious bias (CNY17)
Special Contexts	Judicial Decision-Makers: Held to the strictest impartiality due to constitutional independence (Ebner) Tribunal Decision-Makers: More flexibility; inquisitorial process allows reliance on expertise (Jia) Ministers / Political Officers: Lower standard; allowed predisposition if mind remains open (Jia)	

Exceptions to Bias Rule

1 Waiver

If the party knew of possible bias but failed to object promptly, then the right is lost (Vakauta)

2 Necessity

If only one person can lawfully decide, they may do so despite bias (Laws v ABT)

Commentary

Aronson, Groves & Weeks believe the bias rule safeguards public confidence in impartial administration where its flexibility allows adaption to context

Appleby & McDonald express that judicial recusal procedures lack transparency so reform is needed to balance fairness + efficiency

Ebner v Official Trustee

Facts

Two judges each had small shareholdings in the ANZ Bank, a party or creditor in the cases they were hearing. The question was whether such an interest automatically disqualified them for bias.

Issue

Whether a judge with a minor financial interest in a party should be automatically disqualified for bias (deemed bias) or whether the general apprehension of bias test applied.

Reasoning

HCA rejected automatic disqualification for any financial interest. Instead, it affirmed the two-step **apprehension of bias test** – identify the matter possibly leading to bias, then articulate a logical connection to deviation from impartial decision-making. Small shareholdings in large public companies were too trivial to create such a connection.

Outcome

Appeals dismissed; no apprehended bias found

Ratio

A judge is disqualified only if a **fair-minded observer might reasonably apprehend a lack of impartiality**; there is no automatic rule for financial interest, and a logical connection between interest and bias must be shown

AUTHORITY FOR THE TWO-STEP TEST

Isbest v Knox

Facts

A council officer (Ms Hughes) both prosecuted the owner of a dog for offences under the Domestic Animals Act 1994 (Vic) and later sat on the council panel deciding whether to destroy the same dog.

Issue

Whether participation in both prosecuting and deciding stages gave rise to apprehended bias

Reasoning

Ms Hughes' role as prosecutor created a personal interest in the vindication of her earlier actions, akin to an accuser's interest in seeing charges upheld. Her participation could reasonably be seen to affect impartiality, even though the final order was made by another officer

Outcome

Decision to destroy dog quashed

Ratio