ADMINISTRATIVE LAW
LAWS2010
TOPIC NOTES

TOPIC 1 – Constitutional Context

TEXTBOOK

What is administrative law?

Administrative law is the **branch of public law** that regulates how **government agencies and officials** exercise their **powers** and make **decisions**. It ensures **government actions are lawful, fair and accountable** while balancing efficiency in governance.

At its core, administrative law is about **holding government decision-makers accountable while allowing them to function effectively.** It's the legal framework that **checks government power** and protects individuals from arbitrary or unfair decisions

Introduction to Administrative Law

The Administrative State

- Modern government operates predominantly through **administrative power**, rather than **legislative** or **judicial** power
- **Administrative law** regulates the executive branch (the **administration**) by defining and controlling the exercise of government power
- Administrative government includes
    - **Adjudication** (resolving disputes)
    - **Rule-making** (creating regulations)
    - These functions differ from how courts and legislature operate

The Role of Administrative Law

- Administrative law contributes to both:
    - **Constituting** government power (setting its foundations and scope)
    - **Controlling** government power (ensuring legality and accountability)
- Other disciplines also study government administration, including political science, public administration, and sociology
- Not all accountability mechanisms are legal; some are managerial or bureaucratic (internal controls)

Features of Administrative Law Controls

- Administrative law controls involve **external** oversight mechanisms, meaning they function **outside** the decision-makers being monitored
- Common forms of external controls include:
    - **Judicial review** (courts reviewing executive action)
    - **Merits review tribunals** (assessing decisions on their substance)
    - **Ombudsman investigations** (examining government conduct)
- These controls reflect the **separation of powers** principles:
    - No single entity should have **unchecked** power
    - Government power should be subject to **external checks and balances**

Key Ideas in Administrative Law

Three Modes of Accountability

Administrative law operates within a broader **accountability framework**, consisting of:

A. Legal Accountability
- Ensures administrative power is exercised **within the law**
- Legal accountability includes:
    - Judicial review (courts determining legality)
    - Merits review tribunals (administrative appeal bodies)
    - Legislatively created complaints and investigation bodies

B. Bureaucratic Accountability
- Refers to **internal** government controls

- Includes **internal management structures** and **external administrative review mechanisms** (such as merits review tribunals)
- The distinction between legal and bureaucratic accountability is often blurred

C. Political Accountability

- Concerns policy objectives and administrative outcomes
- Parliamentary oversight and ministerial responsibility are key mechanisms
- Political and legal accountability interact (e.g. courts may consider parliamentary reporting requirements when assessing executive action)

The Merits/Legality Distinction

A fundamental distinction in administrative law:

1. Merits of Administrative Action

- The merits of a decision involve assessing **whether it is the best or most appropriate** in the circumstances
- Many statutory powers involve **discretion**, meaning decision-makers have room to choose among lawful options
- **Two main forms of discretion:**
  - **Rule-making** (secondary legislation, policies)
  - **Decision-making** (individual administrative determinations)
- **Challenges of discretion**
  - **Risks:** Arbitrariness, inconsistency, uncertainty
  - **Benefits:** Flexibility, responsiveness, tailored decision-making

2. Legality of Administrative Action

- Legality concerns whether an administrative action is **lawful** (not whether it is 'good' or 'fair')
- Courts assess legality through **judicial review,** considering:
  - **Constitutional limits** (executive power must comply with the Constitution)
  - **Statutory limits** (decisions must follow legislation and delegated legislation)
  - **Administrative law norms** (grounds of judicial review)

Grounds of Judicial review & administrative law norms

- Courts developed legal norms to ensure administrative action adheres to legal standards
- Historically, these norms emerged from prerogative writs, which were court orders requiring compliance with the law
- **Key administrative law norms** include:
  - Procedural fairness
  - Consideration of relevant factors
  - Prohibition on improper purpose
  - Rules against unlawful delegation
  - Error of law
  - Jurisdictional fact requirements
  - No evidence rule
  - Irrationality/illogicality
  - Unreasonableness

These norms shape **judicial review,** but courts are not the only entities enforcing them – other oversight bodies also ensure compliance

History of Administrative Law

Understanding administrative law history helps explain:

- Why **current mechanisms** for legal accountability exist
- How **judicial review** and other accountability tools developed
- The **relationship** between different legal controls over government power

Administrative law has **evolved** in response to:

- Political and legal practices
- Changing views on how government action should be controlled

TOPIC 3 – Authorisation to Decide (Delegation and Agency)

In administrative law, decision-making power is typically assigned to a specific person or body by a statute. However, practical governance often requires that these **powers be delegated or exercised through agents**.

The rule against unauthorised delegation

- **Key principle:** A decision-maker must exercise their powers personally unless the law **expressly or impliedly allows delegation**
- The purpose of this rule is to ensure accountability and prevent bureaucratic buck-passing
- This principle is **not explicitly mentioned** in the ADJR Act but can fall under:
    - *"The person who purported to make the decision did not have jurisdiction to make the decision"*
      Or
      "The decision was not authorised by the enactment."
      (see s 5(1)(c) and (d); s 6(1)(c) and (d))
- **Modern legislation often allows for explicit delegation:**
    - Many statutes include express powers permitting decision-makers to delegate their functions
    - If no such express delegation power exists, the presumption is that the power must be exercised personally.

Practical reality: Reliance on administrative assistance

- Ministers and senior bureaucrats **cannot personally oversee every decision** made under their portfolio
- The law allows them to rely on briefing notes, recommendations, and administrative support, provided they still **exercise personal judgement**
- In *Tickner v Chapman*, the court ruled:
    - "Nothing short of personal reading… would constitute proper consideration" regarding Indigenous representations that could not be effectively summarised.
- **Key limitation:** The assistance must be **accurate and complete** – if mandatory considerations are omitted, **the decision can be invalid**.

Delegation vs Agency

The law distinguishes between a **delegate** and an **agent:**

Delegate	Agent
Exercises power in their own name	Acts on behalf of the principal
Has independent discretion	Decision is legally that of the principal
Requires statutory authority	Can sometimes be implied from necessity

Carltona v Commissioner of Works [1943] UK

Courts accepted **implied authority** for officials within departments to act for Ministers, even absent express delegation.
PRINCIPLE: Ministers have **"multifarious functions";** "Parliament could not have intended the decision-maker to exercise all of their discretion powers personally"; officers within the department may act on their behalf

- The act is done **in the name of the Minister**
- The officer is an agent, not a delegate
- Courts accept this out of **administrative necessity**

The doctrine of **ministerial responsibility** ensures accountability – the Minister remains answerable to Parliament for decisions made by agents within their department
Analogy: Minister as principal; departmental officers as agents

O'Reilly v Commissioner of State Bank of Victoria

FACTS: Income Tax Assessment Act allowed delegation from Commissioner to Deputy Commissioner – but **not further**. Chief Investigating Officer (CIO) issued notices **using DC's signature, but without DC's knowledge**.
HELD: HCA upheld the ability of the Commissioner of Taxation to act through authorised agents, even when a formal delegation power existed.

Gibbs CJ:

- Delegee cannot sub-delegate without express statutory power.
- However, '**administrative necessity'** may justify agents acting for a delegee.
- Validity upheld due to **practical need** – but raises concerns of parliamentary sovereignty.

Mason J (dissenting):

- Delegation is not divesting power, but conferring authority to act
- Where discretion or **formation of opinion** is central, the delegate must **retain substantial control**
- **No implied power to appoint agents** if personal judgement is required (especially for quasi-judicial powers).
- Ministerial responsibility does not extend to statutory officers like the Deputy Commissioner.

***Re Reference under s 11 of the Ombudsman Act* [1987] 2 ALD 86**

Brennan J (as AAT President) accepted that **some acts may be treated as acts of the Director-General (DG)** even without express delegation

This is allowed where:

- Parliament could not have intended the DG to act personally in all instances.
- Purpose, object, and context of the statute suggest that **acts done on DG's behalf** are valid.

TEST: Depends on **purpose, character of power,** administrative exigencies, and other **contextual factors**

So, when can a decision-maker act through an agent?

There is **no clear-cut** rule, but courts consider factors like:

- **The level of discretion involved –** Broad discretionary powers should **not be exercised through agents**
- **Impact on individuals –** Decisions with serious **legal or financial consequences** should be exercised **personally** or through **formal delegation.**
- **Administrative necessity –** Where **practical realities make personal decision-making impossible**, agency arrangements may be **implied**.

Open question: Courts have not clearly defined what qualifies as "administrative necessity" or what evidence is required to justify acting through an agent.

Subjective Jurisdictional Facts – Non-Delegable

KEY CONCEPT: Minister must hold a state of mind (e.g. 'opinion,' 'is of the view', etc) is a subjective jurisdictional fact – a condition precedent to exercising power. Only named officeholder may form it.

Type	Meaning	Who Must Be Satisfied?
Objective	Fact that can be verified independently (e.g. "15 days have passed"	Anyone
Subjective	Decision-maker's opinion must be formed	Only the named officeholder

***NSW Aboriginal Land Council v Minister Aministering the Crown Lands Act (The Nelson Bay Claim)* (2014)**

ISSUE: Land claim under *Crown Lands Act*. Section 36(1)(b1): Crown land is not claimable if, in **the opinion of the Minister**, it is (or likely to be) needed for residential purposes.

- Here, 'in the opinion of the minister' is a subjective jurisdictional fact – a condition precedent to exercising power.
- **Only the Minister can form the opinion;** it is **non-delegable,** as:
  - The legislation uses **subjective language**
  - The use of land involves high policy decisions
  - Decision involved **public purpose powers** not suited to delegation.

NSWCA HELD:

- The Minister **must personally form the opinion** (not rely solely on departmental advice).
- Delegation impermissible where the **statute does not allow it**, especially for powers requiring **personal discretion**.
- **Administrative necessity** (*Carltona*) argument rejected – unlike welfare or tax cases, **no multitude of cases** here to justify agency.
- Clear statutory contrast: *ALR Act* had express delegation provision; *Crown Lands Act* did not.

TOPIC 4 – Substantive Conditions on Administrative Decisions

TOPIC 4.1 REQUIREMENT TO APPLY A CORRECT UNDERSTANDING OF A GOVERNING STATUTE

***Corporation of the City of Enfield v Development Assessment Commission* (2000)**

FACTS: The South Australian Development Assessment Commission (DAC) was to determine whether an expansion of a waste dump was a **'special industry'** or **'general industry'** under planning laws. DAC found it was a *general industry*, depriving:

- Third parties of notice and comment rights, and,
- Enfield Council of its right to **concur in consent**

HELD (HCA):

- The classification between **special and general industry** was an **objective jurisdictional fact** – a **condition precedent** to DAC's power to grant development consent.
- DAC's misclassification was a **jurisdictional error** – it lacked the legal authority to proceed on an incorrect basis.
- The HCA rejected the **doctrine of deference** (used in the US) that would leave interpretive questions to administrators.

KEY PRINCIPLES:

- **Jurisdictional facts** are **threshold facts** which must exist **before** a statutory power can be exercised
- Whether something *is* a jurisdictional fact is a **question of statutory interpretation**
- Where the fact is **objective**, courts will **independently assess** whether it exists.
- Courts can **read in** such conditions even if not made explicit in the statute, particularly where third-party rights are affected or where consequences are severe.
- This limits administrative discretion and affirms the courts' **constitutional role** in enforcing lawful decision-making.

***Timbarra Protection Coalition Inc v Ross Mining NL* (1999)**

The legislation required that a **species impact statement be submitted** if it was *likely* the land was a **critical habitat**

- "If it is likely…"= **Objective jurisdictional fact**

Decision-makers must correctly determine this fact **before** exercising discretion – failure to do so vitiates jurisdiction

***May v Military Rehabilitation and Compensation Commission* [2015]**

FACTS: Appeal from the AAT regarding whether adverse effects from vaccinations amounted to an 'injury'.
ISSUE: Is 'injury' a factual or legal concept?
HELD: The meaning of 'injury' was **not purely a question of fact** – it was a **statutory concept**, the meaning of which had to be determined via **principles of statutory interpretation.**

- As statutes become more complex, the **distinction between law and fact blurs –** many questions involve mixed fact and law.

KEY PRINCIPLE: Courts will treat interpretive questions as questions of law where constructional choices or application of statutory language are involved.

TOPIC 5 – Procedural Conditions on Administrative Decisions

TOPIC 5.1 PRESUMPTIVE IMPLICATION PRINCIPLE

General Principles

Rules of Procedural Fairness

Procedural fairness consists of two fundamental rules:

1. **The rule against bias –** Ensures that decision-makers are not, and do not appear to be, biased
2. **The fair hearing rule –** Requires that a person who may be adversely affected by a decision has a fair opportunity to present their case before the decision is made

These rules uphold natural justice and the legitimacy of administrative decisions, ensuring government accountability.

The Rule Against Bias

The rule against bias has two forms:

- **Actual bias**
  - Actual bias exists when a **decision-maker's mind is improperly influenced by a factor that should not be considered**
  - This is a substantive issue rather than a procedural one, as it relates to the reasoning process rather than how the hearing was conducted
  - Courts are reluctant to remit a decision invalidated for actual bias back to the same decision-maker, preferring to challenge the decision on other grounds, such as:
    - Acting for improper purpose
    - Considering an irrelevant matter
    - Applying an inflexible policy
- **Apparent bias**
  - This focuses on **whether a reasonable observer would suspect bias**, rather than proving the decision-maker was actually biased
  - This rule is strictly procedural: it concerns how the process appears to those affected, rather than the decision-maker's actual thought process
  - *"It is outward appearances that matter, not facts about how the decision-maker reasoned."*

The Fair Hearing Rule

This is a core aspect of procedural fairness, ensuring participation in decision-making

- **Key principles**
  - A decision-maker must deal with all significant aspects of the claim, particularly where *"the facts on which it rests are established or not in dispute."*
  - A failure to consider key aspects of a case can be seen as a denial of procedural fairness
- **Instrumental vs intrinsic justifications**
  - **Instrumental justification:** Fair process leads to better decision-making
    - Increases the chance that all relevant information is received
    - Even in open-and-shut cases, hearings are required to ensure all the facts are examined
    - If further procedures are unlikely to change the outcome, a hearing may not be required
  - **Intrinsic justification:** Procedural fairness is valuable in itself, regardless of whether it leads to better outcomes
    - Enhances human dignity and self-respect
    - Expresses and promotes values of justice and legitimacy
    - *"The fair procedure serves as an expressive purpose – embodying and promoting values of justice, regardless of whether it leads to preferable decisions."*

Procedural Fairness and Accountability

Procedural fairness is closely linked with government accountability, ensuring affected individuals can participate in decisions impacting them.

- Social science research shows that people are more likely to accept and comply with decisions when they believe a fair process has been followed

- Allowing judicial review of procedural fairness breaches reinforces this commitment to accountable decision-making
- *"Whether or not this commitment actually promotes better decisions in individual cases is irrelevant to the persuasive force of procedural fairness as a justification."*

***Kioa v West* (1985) 159 CLR 550**

BACKGROUND: Landmark decision establishing that procedural fairness applies to administrative decisions affecting individual interests, but not those affecting the public generally.

FACTS: Mr and Mrs K, Tongan citizens, remained in Aus beyond the expiration of their visas. Mr K initially entered Aus on a student visa for a 3-month course but later took up employment. In July 1983, immigration authorities apprehended him, and his visa extension application – filed in Dec 1981 – was rejected in Sept 1983. The Department of Immigration subsequently issued deportation orders under the *Migration Act 1958* (Cth). A submission recommending deportation cited concerns regarding Mr K's involvement with other Tongan illegal immigrants and the impact of 'queue-jumping' on lawful immigration. Deportation order was challenged under the *ADJR Act* on the ground that procedural fairness had not been observed. The Fed Court and Full Fed Court dismissed the application. HCA allowed the appeal, quashing the deportation order.

ISSUE: Whether the principles of natural justice applied to the deportation decision and whether procedural fairness had been denied.

HELD: HCA (Mason, Brennan, Wilson, and Toohey JJ, Gibbs CJ dissenting) found that procedural fairness applied to the deportation decision because it directly affected the Kioa family's interests. The decision-maker failed to provide Mr K with an opportunity to respond to prejudicial material, breaching procedural fairness. HCA quashed the deportation order. Procedural fairness had been breached because

1. Mr K was not informed of the adverse inferences drawn against him in the Department's submission (at 588)
2. He was denied an opportunity to respond to allegations re his involvement with illegal immigrants (at 588)
3. The principles of natural justice apply where a decision directly and uniquely affects an individual (at 619)

REASONING:

1. **Procedural fairness and the common law duty to act fairly**
    - Mason J reaffirmed that **procedural fairness applies where a decision directly affects an individual's rights, interests, or legitimate expectations**, subject only to clear statutory exclusion
        - *"It is a fundamental rule of the common law doctrine of natural justice… that generally speaking, when an order is to be made which will deprive a person of some right or interests or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it"* (at 582)
        - The **duty to act fairly** is not limited to decisions affecting legal rights but extends to **"legitimate expectations"** (at 583), which arise from regular administrative practice or explicit undertakings by public authorities (*FAI Insurances Ltd v Winneke*)
2. **The distinction between decisions affecting individual's vs the public generally**
    - Mason J distinguished between decisions affecting individuals and broad policy decisions that impact the public generally:
        - *"A decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers… does not attract this duty to act fairly."* (at 584)
        - The duty applies to administrative acts affecting specific individuals, not general policy decisions (*Salemi [No 2]*, per Jacobs J)
3. **The role of legitimate expectations**
    - Brennan J emphasised that natural justice protects interests beyond legal rights, including legitimate expectations:
        - *"There are interests beyond legal rights that the legislature is presumed to intend to protect by principles of natural justice"* (at 616)
        - The principle of legitimate expectations should not be the sole criterion for procedural fairness but is a relevant factor (at 617)

- If a decision is *"apt to affect an individual's interests in a substantially different manner from the public at large,"* the duty of procedural fairness is presumed (at 619)

4. **When procedural fairness requires a hearing**
   - The Court acknowledged that procedural fairness does not require a hearing in all deportation cases, particularly where the sole reason for deportation is unlawful presence
     - Mason J held that **no hearing is required** where deportation follows automatically from unlawful status (at 587)
     - However, **if additional reasons are relied upon**, such as personal conduct or alleged wrongdoing, fairness requires an opportunity to respond.
     - Here, the Department's submission raised concerns about Mr K's involvement with other illegal immigrants, which was not disclosed to him. This prejudicial material should have been disclosed, and he should have been given a chance to respond (at 588)
5. **The scope of judicial review**
   - Mason J clarified that s 5(1)(a) of the *ADJR* Act does not impose natural justice in every case. Instead, it reflects common law grounds of review (at 577).
   - The **statute's purpose and framework** determine whether procedural fairness applies.

"The statutory power must be exercised fairly... in light of statutory requirements, the interests of individuals, and the interests and purposes... which the statute seeks to advance or protect" (at 585).

***Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326**

FACTS: Concerned the application of procedural fairness in administrative decision-making, and more specifically, the role of legitimate expectations in determining whether procedural fairness is required and its content. The Full Court of the Fed Court had applied the legitimate expectation principle to determine the content of procedural fairness in WZARH's case. The Minister appealed to the HCA, arguing that 'legitimate expectation' is not a proper basis for procedural fairness obligations. While the HCA agreed that legitimate expectation should not have been used, it nonetheless found that procedural fairness had been breached.
ISSUE: Did the Fed Court err in using the concept of 'legitimate expectation' to determine procedural fairness obligations? Is legitimate expectation still relevant in Australian administrative law?
HELD: HCA unanimously allowed the appeal, rejecting the legitimate expectation doctrine in determining procedural fairness obligations. However, the court still found that a breach of procedural fairness had occurred, based on traditional common law principles. The Fed Court erred in using the legitimate expectation doctrine to determine procedural fairness.
REASONING:

1. **Rejection of legitimate expectations in procedural fairness**
   - HCA confirmed the rejection of legitimate expectations in both the implication principle (whether procedural fairness applies) and the content of procedural fairness (what fairness requires in a particular case).
   - Kiefel, Bell and Keane JJ stated:
     - *"The use of the concept of 'legitimate expectation' as the criterion of an entitlement to procedural fairness in administrative law has been described in this Court as 'apt to mislead', 'unsatisfactory' and 'superfluous and confusing'* (at [28]).
     - They referred to Hayne J in *Lam,* who criticised the doctrine for **"posing more questions than it answers",** such as:
       - *What is meant by 'legitimate'?*
       - *Is 'expectation' a reference to some subjective state of mind or to a legally required standard of behaviour?*
       - *Whose state of mind is relevant?* (at [28])
2. **Legitimate expectation adds no value to procedural fairness**
   - The Court emphasised that procedural fairness exists independently of legitimate expectations:
     - In *Plaintiff S10/2011 v Minister for Immigration and Citizenship*, Gummow, Hayne Crennan, and Bell JJ had already stated:

- Kirby's view reflects a more symbolic and principled approach to apprehended bias, centred on **public expectations** of transparency and absolute impartiality.

PRINCIPLES

- The **test for apprehended bias** applies equally to administrative decisions: a fair-minded observer must reasonably apprehend that the decision-maker might not bring an impartial mind to the matter.
- However, **impartiality is assessed with reference to the actual decision-maker**, not peripheral contributors. **Bias must relate to a person with a significant role** in the formation of the decision.
- **Mere departmental involvement** by officers with a financial interest does not necessarily invalidate an administrative decision, especially where the Minister is personally impartial and unaware of the conflict.
- **Vicarious or transferred bias** is not sufficient unless the person with the interest played a determinative or central role in the process.
- This case clarifies limits to the scope of procedural fairness and bias claims — particularly in **complex administrative processes involving multiple contributors**.

Prejudgement

***Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507**

FACTS: Mr Jia, a Chinese national, entered Australia on a student visa and later sought **refugee status** and a special entry permit. Around this time, he was **convicted of multiple serious offences** involving assault and sexual assault of a former partner and sentenced to 6 years and 3 months in prison. Despite this, the Administrative Appeals Tribunal, through Deputy President Barnett, **twice found him to be of good character** and eligible for a Transitional (Permanent) Visa, noting "mitigating circumstances" in the assaults and describing the conduct as going beyond "the sometimes stormy 'give and take' of lovers' quarrels" ([11]).

Media and political criticism followed. The **Minister publicly expressed disagreement** with the Tribunal's reasoning, including a **radio interview** where he stated: "I don't believe you are of good character if you've committed significant criminal offences involving penal servitude" ([17]) and suggested he could grant then cancel the visa on character grounds ([18]). Departmental advice proposed several options, including visa cancellation under s 501 of the *Migration Act*, which the Minister ultimately pursued.

Mr Jia challenged the Minister's decision to cancel the visa, alleging actual and apprehended bias in breach of procedural fairness under s 75(v) of the Constitution.

ISSUE: Did the Minister's public statements and conduct give rise to a reasonable apprehension of bias such that the visa cancellation decision was affected by jurisdictional error?

HELD: No. The HCA (Gleeson CJ, Gummow, Hayne, and Callinan JJ; Kirby J dissenting) held there was **no apprehended bias.** The Minister's decision was valid despite his prior public comments and political role.

REASONING (Gleeson CJ & Gummow J)

- **Flexible standard for ministers:** The apprehended bias standard must accommodate the **institutional context** and the **nature of the decision-maker**. A Minister exercising statutory discretion under ss 501 and 502 is **not akin to a judge**, and "it would be wrong to apply to his conduct the standards of detachment which apply to judicial officers or jurors" ([102]).
- The Minister was acting in a **political capacity**, and was **accountable to Parliament and the electorate** ([102]). The character test under the Migration Act required **evaluative judgment**, and the Minister's correspondence and comments acknowledged the need to weigh seriousness of crime, support from the community, and hardship ([26], [30]).
- The Court emphasised that the Minister was **not required to maintain the same standards of impartiality** as a judge and was permitted to hold views or express dissatisfaction with Tribunal decisions ([101]–[105]).
- Public statements did not preclude the Minister from giving "genuine consideration" to the merits of cancellation. He was only required to "bring to bear on those issues a mind that was open to persuasion" ([105]).
- The Court declined to infer bias from the Minister's statements, holding that "it would require a significant qualification" of the principle in *Ebner v Official Trustee in Bankruptcy* to apply judicial standards to executive officers ([99]).

Dissent (Kirby J)

TOPIC 12 – Entrenched Judicial Review

TOPIC 12.1 NO EXCLUSION OF ENTRENCHED MINIMUM PROVISION FOR JUDICIAL REVIEW

The Constitution's Guarantee of Judicial Review

- The Constitution guarantees judicial review of **jurisdictional error** in both Cth and State executive action
- This guarantee stems from:
    - **Entrenched provisions** for review (e.g. s 75 of the Constitution and the inherent jurisdiction of state Supreme Courts)
    - **A constitutional separation of powers mandate,** preventing non-courts from conclusively determining the limits of their own jurisdiction.

What is "Guaranteed"?

- The guarantee of judicial review refers not to a single 'provision', but a **system of entrenched legal authority** to enforce jurisdictional limits on decision-making power
- Parliament cannot **deprive courts of their entrenched supervisory jurisdiction** or **impose restrictions incompatible with its constitutional function**

Commonwealth: Entrenched Review under s 75

- Section **75(v) of the Constitution** confers original jurisdiction on the HCA in matters where writs (mandamus, prohibition, injunction) are sought against a Cth officer.
- Though **certiorari** is not expressly mentioned, it may be issued:
    - **Ancillary** to the named writs under s 75(v)
    - In cases involving s 75(iii) or s 76(i) jurisdictions (*Re McBain, Plaintiff S157*)
- These powers are **entrenched** and **cannot be excluded** by statute (*Plaintiff S157*)

Separation of Powers Mandate for Review

- Parliament **cannot confer on a non-court body** the power to conclusively determining the limits of its jurisdiction.
- This is a **constitutional implication** derived from **Ch III** of the Constitution.
- Non-court bodies **exercising executive power** cannot have the final say on their legal limits – judicial review is essential to prevent the from acting ultra vires.
- This mandate is **not a direct review provision**, but a **limit on legislative power:** if Parliament confers power on a non-court and simultaneously denied judicial review of that power's limits, the law is invalid.

Federal Subject Matters and Non-Courts

- In ***Burns v Corbett*****,** the HCA confirmed that Ch III **prevents states from conferring judicial power on non-courts** in federal matters
- When Cth or state law confers **power over rights and obligations** in federal subject matters (ss 75 and 76), **judicial review for jurisdictional error is constitutionally required.**

Key Distinction: Judicial vs Executive Authority

- Executive decisions affecting legal rights and obligations **derive their force from law.** If unlawful, they have **no binding legal effect** unless validated by courts.
- By contract, **judicial decisions are binding** even if jurisdictionally flawed, until set aside.
- Therefore, denying review of executive decisions amounts to granting non-courts a **quasi-judicial power,** which is unconstitutional.

Entrenched Review of Commonwealth Executive Decisions

1. **Entrenched Judicial Review via s 75(v)**
    - Section 75(v)'s reference to **mandamus and prohibition** necessarily implies the ability to issue these remedies against **invalid acts by Cth officers**
    - The principle that governs these writs are **those of jurisdictional error,** as confirmed in *Plaintiff S157*
2. **Role of Certiorari and s 75(iii)**

Problem Question Structure

1. **Jurisdiction of the courts: Federal or NSW?**
    - **If federal** (and the decision is by a **Commonwealth officer**):
        - Potential pathways:
            - **High Court original jurisdiction**: **s 75(v) Constitution** (constitutional writs against Commonwealth officers)
            - **ADJR Act** review (if it applies)
            - **Common law judicial review** (where ADJR not available or alongside it)
    - **If NSW**:
        - Judicial review generally in the **Supreme Court of NSW** (common law and any applicable NSW statutory pathways)
    - **Appeals pathway (general)**:
        - **Supreme Court → Court of Appeal → High Court** (special leave required for HCA)

ADJR Act threshold (must all be satisfied):

- **Decision** (or conduct) of an **administrative character**
- **Made under an enactment**

2. **Standing**
    - Identify whether the plaintiff has a **sufficient interest** in the subject matter to bring the review.
3. **Delegated legislation**
    - Ask whether any **delegated legislation (DL)** involved is **valid**.
    - If the DL is **invalid**, decisions made under it are often **infected** (strong basis for review).
    - Even if DL looks invalid, **still plead alternative grounds** (do not stop at one point).
4. **Jurisdictional error by the decision-maker**
    - Frame the core question: **Has the decision-maker exceeded authority?**
    - Common ways to show this:
        - **Wrong question / wrong test / misunderstanding the statute** (eg *Melbourne Stevedoring*)
        - **Objective jurisdictional facts** (court determines existence independently)
        - **Subjective jurisdictional facts** (where statute conditions power on satisfaction, but still reviewable for legal limits)
    - Practical indicator: decision-maker **misconstrued the source of power** or **misapplied legal criteria**.
5. **List all grounds of review**
    - **Substantive / legality grounds** (typical):
        - **Relevant considerations** not considered
        - **Irrelevant considerations** taken into account
        - **Improper purpose**
        - **Fettering discretion / rigid policy**
        - **Dictation** (acting under another's direction)
        - **Unauthorised delegation**
        - **Unreasonableness / illogicality** (where applicable)
        - **No evidence / findings not open on material** (where available)

MERITS REVIEW

1. Is Merits Review Available?

a. Is the decision a "*reviewable decision*"?

- To determine whether merits review is available, the first question is whether the decision is a "reviewable decision" under statute.
- Under **s 12(1)** of the ***ART Act 2024* (Cth),** a decision is a 'reviewable decision' if an Act of legislative instrument expressly provides for it.
- Even if made by an unauthorised person, a decision made under a statutory power remains reviewable under **s 12(2)**.
- **Apply:** Check whether the enabling legislation permits review by the Tribunal. State it explicitly on the facts.

b. Does the applicant have standing?

- Under **s 17(1)**, a person may apply for review if their interests are affected by the decision.
- Section **17(2)** confirms this includes Cth agencies and authorities.
- **Apply:** Identify whether the applicant's interests are directly or practically affected. If so, merits review may be available.

2. What is the Role of the Tribunal

a. De novo review – correct or preferable decision

- Under **s 54** of the ***ART Act***, the Tribunal 'steps into the shoes' of the original decision-maker and re-exercises all powers and discretions conferred under the enabling Act to make the 'correct or preferable' decision (***Shi* [40], [35]**).
- **Apply:** Clarify that the applicant is not alleging jurisdictional error but seeking a better outcome, and that the Tribunal determines the matter afresh.

b. The Tribunal's approach must comply with its objectives

- The Tribunal must act fairly, efficiently, and in a way that promotes public trust and transparency (**s 9(a)-(e)**)

3. What Evidence Can the Tribunal Consider?

a. Is the Tribunal confined to the original record?

- No. Under **s 52**, the Tribunal is not bound by the rules of evidence and may inform itself as it sees fit.
- Under **s 55(1),** parties must be given a reasonable opportunity to present evidence access material relied upon, and make submissions.
- The Tribunal must have regard to the 'best and most current information available', and post-decision conduct may be considered where the statutory language or purpose supports it (***Shi* [41]**).
- **Apply:** If the facts indicate new or updated material, explain that the Tribunal may (and must) consider this in its decision-making process

b. Disclosure obligations of decision-maker

- Under **s 23(a)-(b)**, the decision-maker must provide the Tribunal with a statement of reasons and relevant documents.
- These must be shares with the other parties under **s 27(1),** unless a public interest certificate applies (**s 27(2)).**
- **Apply:** Ensure that procedural fairness in the form of document disclosure is addressed, if relevant.

4. Can the Tribunal Consider Government Policy?

- Yes – the Tribunal may treat ministerial or government policy as relevant consideration but must not treat it as binding – 'may depart sparingly' (*Drake 1* and *Drake 2*)
- In *Drake 1,* the Federal Court held the Tribunal erred in applying a deportation policy without assessing its merits in the individual case ([84]-[85]).
- In *Drake 2*, Brennan J held the Tribunal is as free as the Minister to apply or reject policy, but must be open to contrary argument ([91]-[93]).
- The Tribunal may adopt a general practice of applying lawful policy unless it would lead to injustice

JUDICIAL REVIEW

I. JURISDICTION OF THE COURTS

1. If the Decision is made under Commonwealth Legislation

a. High Court of Australia – Original Jurisdiction

- **S 75(iii) Constitution –** Where the Commonwealth or its agent is a party
  - Broad original jurisdiction for all matters (civil suits, tort claims etc.) where the "Commonwealth, or a person suing or being sued on behalf of the Cth is a party"
  - Can be used to found an application for certiorari, even without a jurisdictional error on the face of the record
  - Includes proceedings for declarations, injunctions, or prerogative relief
  - The HCA has held the provision ensures the Cth is always amenable to judicial process: "political organisation called into existence under the name of the Cth… fell in every way within a jurisdiction in which it could be impleaded" (*Bank of NSW v Commonwealth* (1948) at 363 per Dixon J)
- **S 75(v) Constitution –** Writs against an officer of the Commonwealth
  - This is an **entrenched constitutional guarantee** of judicial review against unlawful executive action (*Plaintiff S157*).
    - HCA held that **privative clauses cannot exclude jurisdiction for judicial review of jurisdictional error** under s 75(v)
  - Applies only where the respondent is an **"officer of the Commonwealth":**
    - Formally appointed, removable, paid by the Cth (e.g. Ministers, AAT members, public servants)
    - Excludes some corporate entities or contractors
  - Remedies available: **mandamus, prohibition, injunction,** and (per *Aala* at [18]) **certiorari** as an incident of prohibition or mandamus.
- **Appellate jurisdiction**
  - The HCA also has an appellate jurisdiction from the Federal Court and all State and Territory Supreme Courts (s 73).
- **Remittal Power of the HCA – s 44 Judiciary Act**
  - HCA can remit matters within its original jurisdiction to any federal, State or Territory court with jurisdiction over the subject matter: s 44(1)
  - Includes s 75(v) matters: s 44(2A) allows remittal to the Federal Court
  - Once remitted, matter proceeds in that court unless HCA directs otherwise: s 44(3)

b. ADJR Act (Cth) – Federal Court

- **Threshold requirements: s 3(1) ADJR Act:** Judicial review is only available under the ADJR Act where there is:
  - **A decision…**
    - Refer to ADJR Act s 3(2)
    - Must be substantive, final or operative and determinative of an issue, not merely a step along the way in a course of reasoning (*Bond* at 336)
      - In *Bond*,
  - **… of an administrative character…**
    - Must arise from **administrative (not legislative or judicial) action** (*Roche* at [25]-[27])
      - In *Roche*,
  - **… made under an enactment.**
    - Test is from *Tang* ([89]) and was confirmed in *Fuller* ([13]):
      - **(1)** Decision must be **expressly or impliedly authorised by statute;** and

        - **(2)** The decision must **confer, alter or affect <u>legal</u> rights or obligations,** deriving its legal force from statute
    - **Cases:**
        - *General Newspapers*:
        - *NEAT*:
        - *Tang*:
        - *Fuller*:

c. Federal Court Jurisdiction – *Judiciary Act*

- The federal Court can hear judicial review matters via ss 39B, 44 of the Judiciary Act:
    - **S 39B(1)**
        - Mirrors s 75(v) jurisdiction: applies where a person seeks **mandamus, prohibition, or injunction** against a Cth officer
        - Extends HCA review powers to the Federal Court
        - **Source of review is still common law/equity;** this provision only grants jurisdiction
    - **S 39B(1A)(c)**
        - Confers jurisdiction in any matter "arising under federal law"
        - Includes cases involving a right, duty or immunity under a Cth statute
        - Applies regardless of whether the respondent is a Cth officer
        - **Rarely invoked by applicants**, but important in cases where a statutory connection is present but ADJR is unavailable (e.g. *NEAT*)
    - **S 44 – remittal power of HCA (see above)**

- **PARA:** Given the matter concerns a decision made under Cth legislation, the HCA has entrenched original jurisdiction under s 75(v) of the Constitution where a party seeks a constitutional writ—mandamus, prohibition, injunction, or certiorari (where incidental: *Aala* at [18])—against an officer of the Commonwealth. This guarantees judicial review of unlawful executive action and cannot be excluded by a privative clause where jurisdictional error is present (*Plaintiff S157* at [76], [83]). The HCA's appellate jurisdiction is also preserved under s 73 of the Constitution, though proceedings may be remitted to the Federal Court under s 44(2A) of the *Judiciary Act* or another appropriate court under s 44(1), unless otherwise directed (s 44(3)). [**If decision doesn't involve Cth officer state:** For decisions not involving an officer of the Commonwealth], judicial review may still/also be available under the ADJR Act. To invoke jurisdiction under the ADJR Act, the decision must: (i) be final and operative, not merely procedural or reasoning (*Bond* at 336); (ii) be of an administrative character (not legislative or judicial: *Roche* at [25]–[27]); and (iii) be made under an enactment—i.e. expressly or impliedly authorised by statute and confer, alter, or affect legal rights or obligations (*Tang* at [89], confirmed *Fuller* at [13]; see also *General Newspapers*, *NEAT*). Jurisdiction under the ADJR Act would be helpful here, as it provides access to a simplified and codified basis of review. Alternatively, the Federal Court may exercise common law judicial review under s 39B(1) of the *Judiciary Act*, which mirrors s 75(v) jurisdiction for mandamus, prohibition, or injunction against a Commonwealth officer. Section 39B(1A)(c) also permits review in any matter 'arising under a law made by the Parliament', which may support jurisdiction even where no officer is involved (e.g. *NEAT*)

2. If the Decision is made under NSW legislation

a. Supreme Court's Jurisdiction

- The Supreme Court of NSW possesses inherent supervisory jurisdiction inherited from the English superior courts: s 23 *Supreme Court Act 1970* (NSW).
- This is constitutionally entrenched via s 73(ii) of the Constitution which prescribes for the HCA's appellate jurisdiction (*Kirk*).
    - *Kirk* held that parliament cannot legislate (i.e. use privative clauses) to oust this jurisdiction with respect to jurisdictional error ([100]).
- **PARA**: Given the decision is made under NSW legislation, the Supreme Court of NSW has inherent supervisory jurisdiction to review for jurisdictional error, derived from the English superior courts and preserved in s 23 of the *Supreme Court Act 1970 (NSW)*. This supervisory jurisdiction is constitutionally entrenched by s 73(ii) of the Constitution, which secures the High Court's appellate jurisdiction over state Supreme Courts (*Kirk*).

VI. HAS THERE BEEN A BREACH OF PROCEDURAL FAIRNESS?

1. The hearing rule

a. Implication

General Rule

- **PARA:** Procedural fairness will be implied into the exercise of statutory power where the decision is apt to affect an individual's rights, interests, or legitimate opportunities in a way that is personal and significant (*Kioa*), unless statute clearly excludes it (*Miah*). However, this does not apply where the decision involves high-level political discretion or policy change (*Quin*), as ....
  The concept of legitimate expectations is no longer a test for implication, having been described as "misleading" and "unhelpful" in *WZARH* (2015) 256 CLR 326 at [28]–[30]. Instead, the inquiry is whether, in context, fairness is required having regard to the legal framework and nature of the decision (*WZARH* at [30]). Accordingly, fairness will be implied unless clearly excluded, unless the nature of the power (e.g. change of policy, executive discretion at the apex) rebuts the presumption.

  Specific scenarios:

  - **If statute excludes procedural fairness:**
    - **PARA:** The implication arises unless displaced by clear words or necessary intendment (Miah at [126]). Statutory procedural codes will not suffice unless they **expressly or necessarily exclude** the common law duty (*Miah* at [128]–[131]; *Saeed* at [42], [56])
    - ***Miah*:** High Court held that Subdiv AB of the *Migration Act*—although styled a "code"—did not exclude procedural fairness. The delegate breached that duty by relying on decisive, post-application country reports not disclosed to the applicant. McHugh J emphasised that exclusion must be based on "plain words or necessary intendment," not "uncertain inferences" (at [126]).
    - ***Saeed*:** Procedural fairness was not excluded for offshore applicants because s 57 (the relevant disclosure section) applied only to onshore applicants. As s 51A declared the code exhaustive only for "matters it deals with," and offshore applicants were not one of them, fairness still applied (at [42], [56]).
    - ***BDV17*:** High Court held that s 473DA(1) did exclude procedural fairness in the IAA "fast-track" context. The section **expressly codified** the entire content of the hearing rule for IAA reviews, leaving no room for implied fairness obligations beyond what was stated (at [33]–[35]). However, the Court confirmed that legal unreasonableness remains available as a ground of review (at [37]).
  - **Investigative procedures or recommendations where reputational or personal interests are affected**
    - **PARA:** Procedural fairness may be required even where a decision is not determinative or binding — if it carries real-world consequences, such as damage to reputation or livelihood. In *Ainsworth*, the CJC's report was investigatory, not adjudicative, yet fairness was required because it publicly criticised the company and had the effect of excluding it from the gaming industry (at 576). What matters is "the nature of the power, not the character of the proceeding which attends its exercise" (*Ainsworth* at 576). The High Court confirmed that personal and business reputation is a protected interest (at 578), following *Annetts v McCann* where Brennan J held that fairness is required if reputation will be damaged by official findings (at 578).
    - ***Ainsworth*:** The CJC's report recommended excluding the Ainsworth companies from the gaming industry without prior notice or a chance to respond. Even though the CJC was not making a binding decision,

the High Court held that fairness was required because the report seriously damaged their reputation (at 578). Investigative powers may attract the duty of fairness.

- ***Annetts v McCann*:** Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person… has had a full and fair opportunity to show why the finding should not be made" (at 578, cited in *Ainsworth*).

- **Where individuals are singled out**
  - Look for:
    - Regulations or orders general in form but specific in effect
    - A statutory power exercised in a way that targets identifiable individuals
    - Absence of notice or opportunity to respond, despite serious personal or proprietary consequences
  - **PARA:** Procedural fairness is presumptively required where the exercise of a statutory power adversely affects individuals in a **targeted or exceptional way**, even if the power is regulatory or broad in form. In *Disorganised Developments*, a regulation declaring land to be a "prescribed place" was facially general but had **direct, personal, and adverse consequences** for two company directors linked to the Hells Angels. The High Court held that the regulation was invalid due to a failure to afford procedural fairness. What matters is not the form of the power, but its practical effect: if the measure impacts a **discrete and identifiable person or group**, fairness may be required (at [33]–[35]).
    This applies even where the decision is made by **Cabinet or the Governor in Council**, and even where public policy or criminal disruption is at stake. Policy considerations will not negate fairness where "the considerations are peculiar to the individual" (at [40], citing *O'Shea*). However, fairness may not require disclosure of sensitive security intelligence or general strategy (at [45]).
  - ***Disorganised Developments*:** A regulation under s 370 of the *Criminal Law Consolidation Act 1935* (SA) was declared invalid because it failed to afford procedural fairness to landowners whose property was declared a "prescribed place." Although the power was broad and regulatory, its effect was individualised and adverse, and fairness required notice and a chance to respond (at [33]–[35], [45]). Cabinet-level action does not displace fairness unless Parliament clearly says so (at [38]–[40])

- **Multi-staged decisions and Cabinet processes**
  - Look for:
    - A statutory scheme involving a **preliminary recommendation** by one body (e.g. tribunal, board), and a **final decision** by another (Minister, Governor in Council, Cabinet)
    - The individual has already been heard at an earlier stage
    - The final decision-maker **does not rely on new or undisclosed material**
  - **PARA:** Where an administrative decision follows a multi-staged process—such as a tribunal making a recommendation and a Minister or Cabinet making the final decision—procedural fairness may not require a second hearing, provided the individual was fairly heard at the earlier stage and no new material is introduced. In ***O'Shea***, the Parole Board had recommended release following a full hearing. The