

## Preliminary

- Identify the source of the power
  - What is the administrative action?
  - Who acted/made the decision?
  - What is the source of the action?
    - Statute/reasons of decision

What is the exercise of power?

\_\_\_\_ wishes to challenge \_\_\_\_'s decision to \_\_\_\_ under s \_\_\_\_.  
 \_\_\_\_ was a \_\_\_\_ (the identity of the DM)

## Jurisdiction

The aggrieved person is challenging the decision under s \_\_\_\_ to \_\_\_\_.

The partner advised that \_\_\_\_ Court has jurisdiction under \_\_\_\_.

If a whole statute: PC here

## Remedies sought available in the jurisdiction + WHY

Constitutional Writs (Judiciary Act s 39B(1), s 75(v)): against officer of the Cth

Common law writs (Judiciary Act s 39B(1A)(c)) (STS)

Certiorari has to be ancillary to a writ of mandamus or prohibition (*Aala*). The remedy of \_\_\_\_ requires a jurisdictional error

Before arguing

Remedies	Description	Authority
Mandamus	Fulfilling an unperformed public duty. Revoke the licence (alternative to certiorari)?	Cf <i>Ainsworth</i>
Certiorari (ancillary)	Quashes a decision – decision has no legal effect	Cf <i>Ainsworth</i>
Prohibition	Preventing decision-maker from completing a decision, prevent from enforcing that decision or some consequence of that decision	<i>Ex parte Aala</i>
Injunction	Prohibitory: Restrains a party from enforcing an invalid decision or acting unlawfully Mandatory: Requiring a party take a particular action	<i>Smethurst</i>
Declaration	Declaration of parties' legal rights	<i>Ainsworth</i>

**Delegated legislation:** clause or the whole Delegate legislation to be declared invalid (declaration)

**Victoria:** Orders in the nature of writs under its power of s 85 of the Victoria Constitution

**ADJR Act:**

S 16(1)(b) ADJR	order in the nature of Mandamus
S 16(1)(a) ADJR	order in the nature of certiorari
S 16(1)(c) ADJR	injunction
S 16(1)(d) ADJR	Declaration

## Standing

Standing
‘the doctrine of standing is a house of many rooms’ (McHugh J in <i>Bateman’s Bay</i> ). The onus of proving is on the applicant, and granting of standing is discretionary .

Prohibition and certiorari	<p><b>person aggrieved test:</b> subject to the court's discretion, whether the applicant is a person aggrieved whose rights 'would be adversely affected by the decision' or suffer damage more than ordinary members of the public, but strangers can have standing too (<i>Re McBain</i>).</p> <ul style="list-style-type: none"> <li>• May be too broad and court still have discretion to refuse standing?</li> <li>• No interest point away from relief (<i>Re McBain</i> McHugh J)</li> </ul>
Mandamus	'legal specific right test': the plaintiff must have specific legal rights affected. The test require that the plaintiff is the person to whom the unperformed public duty is owed (Hayne J in <i>McBain</i> ). Also, the performance of such power is for the plaintiff's benefit.
Equitable remedies	standing test for injunction and declaration is the <b>special interest test</b> in <i>ACF</i> . To have standing, the applicant must 'be adversely affected in some way to a greater extent than the public generally', which is more than an intellectual or emotional concern (Gibbs J in <i>ACF</i> ). <ul style="list-style-type: none"> <li>• Financial/legal/proprietary interests (not decisive)?</li> <li>• Other than the satisfaction of right/wrong, uphold principle, win a contest</li> <li>• No mechanical application: importance of concern/closeness of relationships to subject matter (<i>Onus</i>)</li> <li>• Nexus between the applicant's interest and the sought relief.</li> </ul>
<b>SAY</b>	<b>In Australia, the different standing tests seem to be converging to the 'special interest test' in ACF mentioned above (Maroney J in <i>John Fairfes &amp; Son</i>), but this convergence has not been confirmed by the High Court yet. The person aggrieved test's (for prohibition and certiorari) threshold is lower (and there are some controversies about any nexus between the person and the matter), so if the special interest test is met, the person aggrieved test would be met too.</b>
<b>APPLY</b>	
IF association	Associations ( <i>Right to Life</i> although jurisdiction was ADJR, <i>Argos</i> ): <ul style="list-style-type: none"> <li>• Standing is harder to establish than individuals' standing, turn on the association's constitution (objectives)</li> <li>• Incorporated (not decisive)</li> <li>• The body's detriment must be suffered more greatly than the public</li> <li>• Enough Connection between the P and the objects of the Act <ul style="list-style-type: none"> <li>◦ Purpose of the Act (a step towards whether the interest is 'intellectual, philosophical and emotional concern' (Gageler J in <i>Argos</i>).</li> </ul> </li> <li>• Indirect interest = no standing (Hayne and Bell JJ in <i>Argos</i>) landlord</li> </ul>
Discretion	Discretion not to grant

<b>ADJR Act: standing</b>	
ADJR s 5(1) (ss 6(1), 7(1)): person aggrieved whose interest is adversely affected by the decision/conduct/failure to make a decision.	<ul style="list-style-type: none"> <li>• Benefit if succeed (greater than the public) or relieve from detriment that otherwise will be greater than the public (<i>Right to Life</i>, <i>Argos</i>)</li> <li>• The standing test for ADJR jurisdiction does not change because of the scope and purpose of the substantive statute, <ul style="list-style-type: none"> <li>◦ But the legal operation of the Act can determine how applicant's interests are affected</li> </ul> </li> <li>• Interest above ordinary members of the public (<i>Right to Life</i>)</li> </ul>

- Need not to have a legal/financial/proprietary interest
- No narrowly (policy of the ADJR Act to promote facilitate JR availability)
- If association → see above

### Grounds applicable to the jurisdiction

Is there a failure to comply with one or more of the conditions on and preconditions to the exercise of the power under \_\_\_\_\_. This is a question of statutory interpretation based on the following grounds.

Procedural Fairness (Implication question)

PF ought to be accorded if the rights/interests of the person has been affected (Brennan J in *Kioa*)

- Limited/rebutted (Saeed)?

#### Procedural Fairness

- Common law
- S 5(1)(a) of the ADJR Act: that a breach of the rules of natural justice occurred in connection with the making of the decision;

#### The implication question

= does PF (including hearing and bias) apply here?

**There is a presumption that procedural fairness (PF) is implied in all statutes even if content may sometimes be reduced to bare minimum. Whether the duty to accord procedural fairness applies depends on whether the aggrieved person's interests or rights are affected and whether the presumption of PF has been rebutted by the statute (*Kioa*, *Saeed*).**

(1) The exercise of power must affect the person's interest or rights (*Kioa*).

- The duty to accord PF applies if the decision must affect an individual's rights or interests 'in a manner which is substantially different from' how the exercise of such power may affect the public (*Kioa*, Brennan J).

(2) Is the presumption of PF rebutted by statute (*Saeed*)?

- Extrinsic materials (eg second reading speech) cannot override statutory text (*Saeed*)
- Clear and unambiguous words are required to displace CL procedural fairness rights.

**The rule against bias and the hearing rule are not rebutted.**

#### Actual bias

1	Where a decision-maker is subject to an obligation of procedural fairness, the decision-maker must, in making the decision, be free from bias – meaning that the decision-maker must be impartial, have a mind open to persuasion
2	<p><b>Actual bias entails that the decision-maker's mind was not open to persuasion on the balance of probabilities (<i>Jia</i>). This determination depends on the circumstances in which the decision was made, including the statutory framework and the characters of the repository.</b></p> <ul style="list-style-type: none"> <li>• judgement that is 'incapable of alteration' (<i>Gleeson CJ and Gummow J in Jia</i>) (<i>CNY17</i>)</li> <li>• Minister can be 'forthright' with their policy (<i>Jia</i>)</li> <li>• identity of the DM and the <b>character of the repository</b> (<i>Jia</i>) <ul style="list-style-type: none"> <li>○ Delegate power to a junior officer (Administrative)</li> <li>○ Minister personally (political)</li> <li>○ Impartiality (quasi-judicial)</li> </ul> </li> </ul>

	STATE: <i>This ground depends on the difficult to make out and will not continue this ground because... Court may not find an actual bias lightly to avoid damage to the decision-maker or the system's reputation.</i>												
3	Other considerations apart from the prohibited/biased consideration CONCLUDE												
<b>Apprehended bias</b>													
1	<p>'Apprehended bias (perception, objective, integrity): The apprehended bias rule requires that a decision-maker disqualified if a fair-minded lay observer (FMLO) 'might reasonably apprehend that the decision-maker might not bring an impartial or open mind' to the decision-making (<i>Ebner</i>), and the identity and characteristics of the decision-maker is relevant (<i>Jia</i>). It is harder to make out apprehended bias if the decision-maker is politically accountable to Parliament and their electorate (<i>Jia</i>). The FMLO is deemed to know the context of the decision and key elements of the statute (<i>CNY17</i>)</p> <p>The outcome of the test depends on the FMLO's imputed knowledge. In <i>CNY17</i>, Nettle and Gordon JJ assumes FMLO's rudimentary understanding of the statute, and Kiefel CJ and Gageler J impute detailed knowledge of the statute to the FMLO. It is a thin majority, so the next section will apply both reasoning.</p> <p>If rudimentary, then ..... (Gordon and Nettle JJ) If detailed, then ... (Gageler J and Kiefel CJ)</p> <ul style="list-style-type: none"> <li>• If administrator has a continuing relation with an issue or person 'during the course of which they necessarily form a view' it will 'generally be impossible for them to bring an open mind to a new decision (<i>Isbester v Knox City Council</i>)'.</li> <li>• Courts will also consider the identity of the DM and the character of the repository <ul style="list-style-type: none"> <li>◦ Delegate power to a junior officer (Administrative)</li> <li>◦ Minister personally (political)</li> </ul> </li> </ul> <table border="1"> <thead> <tr> <th>MIGHT</th><th>Meaning</th><th>Where it fits</th></tr> </thead> <tbody> <tr> <td>A fair-minded observer might</td><td>Not guaranteed — just a <b>possibility</b> of suspecting bias</td><td>Step 2</td></tr> <tr> <td>Reasonably apprehend</td><td>The suspicion must be <b>reasonable</b>, not fanciful or far-fetched</td><td>Step 2-3</td></tr> <tr> <td>The DM might not be impartial</td><td>It's not certain bias — just a real possibility the mind might be closed or influenced</td><td>Step 1</td></tr> </tbody> </table> <ol style="list-style-type: none"> <li>1. Second <b>MIGHT</b>: What it is that might lead a decision-maker to decide a case other than on its legal and factual merits' (<i>Ebner</i>, cited by <i>Gordon and Nettle JJ in CNY17</i>). <ul style="list-style-type: none"> <li>◦ Family or personal relationships of the decision-maker</li> <li>◦ Financial interests of the decision-maker</li> <li>◦ Proprietary interests of the decision-maker</li> <li>◦ Political affiliations of the decision-maker</li> <li>◦ Irrelevant and prejudicial materials</li> </ul> </li> <li>2. First <b>MIGHT</b>: 'a logical connection ...between the identified potential source of bias and the feared deviation from deciding the case on its merits': ie <b>argument how the bias MIGHT cause the decision and why that's wrong</b></li> </ol>	MIGHT	Meaning	Where it fits	A fair-minded observer might	Not guaranteed — just a <b>possibility</b> of suspecting bias	Step 2	Reasonably apprehend	The suspicion must be <b>reasonable</b> , not fanciful or far-fetched	Step 2-3	The DM might not be impartial	It's not certain bias — just a real possibility the mind might be closed or influenced	Step 1
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	<ul style="list-style-type: none"> <li>• Might the FMLO, properly informed of the facts (including the council member's property ownership)</li> <li>• <b>reasonably apprehend</b> that the councillor <b>might not</b> approach the decision with an impartial mind? <ul style="list-style-type: none"> <li>○ Lead to Decision otherwise than on legal and factual matrix of the case (<b>CNY17</b>) that someone is not to be believed?</li> <li>○ EVEN SUBCONSCIOUSLY</li> <li>○ Independent body b/c structure of statute (<b>CNY17</b>, Kiefel CJ and Gageler J)</li> <li>○ Not so shocking as to cause subconscious bias?</li> </ul> </li> </ul> <p>3. The suspicion is reasonable, and it is not fanciful or farfetched (<b>CNY17</b>, Kiefel CJ and Gageler J)</p> <p>Court's view of the public's view</p>
2	<p>If Materiality (<b>CNY17</b>)</p> <p>Apprehended bias: <b>Materiality threshold requires:</b></p> <ol style="list-style-type: none"> <li>1. <b>Identifying the interest or factor</b> to reasonably justify an apprehension that the DM might not be impartial</li> <li>2. Showing a <b>logical and reasonable connection</b> between that interest and the risk of bias.</li> <li>3. Demonstrating that the interest is <b>not trivial or remote</b>—it must be <b>material</b>.</li> </ol>
3	<p><b>Defence</b></p> <ul style="list-style-type: none"> <li>• resourcing limitations only 1 DM available (<b>Isbester</b>)</li> <li>• legislatures exclude the operation of bias rule where DM would be excluded from function</li> <li>• waiver by parties: disclosed, apparent to parties, party could have objected but did not</li> </ul>
4	<p><b>CONCLUDE</b> in relation to each of them: any breach?</p>
	<p><b>Hearing rule</b></p> <p>Content: Nothingness</p>
2	<ol style="list-style-type: none"> <li>1. The <b>content</b> question: What does the hearing rule <b>necessitate in this case</b> with this statute? (<b>Spend more time</b>) (<b>Kioa</b>; <b>WZARH</b>). <b>The content of the hearing rule depends on the nature and scope of the power and what a 'fair and reasonable' DM would adopt in the circumstances and what is required to avoid 'practical injustice'</b> (<b>WZARH</b>, <b>Kioa</b>)</li> <li>• Minimum: The aggrieved individual must be given opportunities to comment on adverse information that is 'credible, relevant, and significant' in the decision-making (<b>Kioa</b>).</li> <li>• <b>What is required to avoid practical injustice</b> (<b>WZARH</b>) although 'legitimate expectation' is no longer part of the content question of the hearing rule. <ul style="list-style-type: none"> <li>○ Decision-making procedures change cf what was initially agreed → not necessarily oral hearing, maybe written subs depends on the statute and circumstances <ul style="list-style-type: none"> <li>▪ f2f helpful re impression, interpreter, not first language</li> <li>▪ couldn't have been in a worse position (<b>WZARH</b>)</li> </ul> </li> <li>○ At the minimum to be informed of the change of the decision maker or the process to achieve the purpose of the statute (Gageler and Gordon JJ <b>WZARH</b>)</li> </ul> </li> </ol> <p><b>Considerations: Fact- and statute-dependent</b> (<b>Kioa</b>)</p> <ul style="list-style-type: none"> <li>• Expectation may relate to the circumstances and hence determine PF content (<b>WZARH</b>)</li> <li>• Nature of power: coercive power (+ significant consequences on individuals) warrants more expansive reading of the statute allows about what PF requires. They can override tho. (PT 155–8) Eg no PF notice for deportation</li> <li>• Statute-prescribed steps</li> </ul>