

Jurisdiction

NSW statute/NSW authority	NSW Supreme Court - <u>Supreme Court Act 1970 s 69</u> Must be a reviewable decision (under the enactment)
CTH statute/CTH authority	Federal Court <u>Administrative Judicial Review Act s 3(1) + s 8</u> - 'decision' (<i>Bond</i>) - conduct in making a decision (s6) - s 6(1)(a) breach of the rules of natural justice - s 6(1)(b) procedures required are not being done - s 6(1)(c) no jurisdiction to make the decision - s 6(1)(d) enactment does not authorise the making of that decision - s 6(1)(e) improper exercise of power - s 6(1)(f) error of law - s 6(1)(g) engaged in fraud - s 6(1)(h) no evidence to justify decision - s 6(1)(i) decision is contrary to law - failure to make a decision (s7)) - 'of an administrative character' (<i>Roche</i>) - made under an enactment (<i>Griffith</i>) - not excluded by schedule 1 If conduct – <i>ADJR</i> s 6(1) + s 3(5) – to be reviewable, the conduct must be part of the procedure undertaken for the purpose of making, or leading up to making, a reviewable decision. <u>Judiciary Act s 39B(1)</u> - 'matter' (<i>McBain</i>) - listed remedy sought (certiorari, mandamus, prohibition, injunction, or declaration) - against Cth officer
	High Court <u>s 75(v) Constitution</u> - 'matter' (<i>McBain</i>) - listed remedy sought (certiorari, mandamus, prohibition, injunction, or declaration) - against Cth officer

Decisions excluded under *ADJR* schedule 1:

- Review is also not available under s39B of the *Judiciary Act*.
- Where a well-established alternative scheme already exists.
- Where review has the potential to fragment or frustrate another legal process which is already underway.
- Where the review could pose a risk to personal safety.
- Decisions relating to the management of the national economy.

Standing

Common Law test	<u>'special interest' test (Ogle)</u> - Individual must have a 'special interest' in the decision beyond the interests of the general public (<i>Evans</i>) - Interest distinguishing them from the wider community. - More than a mere intellectual or emotional concern (<i>ACF</i>) - Where they will gain some advantage or suffer some disadvantage from the action (<i>ACF</i>) - Applicants with particular proximity to the subject-matter are likely to have standing (<i>Alcoa</i>) Public interest groups: interest must be more than 'mere emotional or intellectual concern' (<i>ACF</i>) Union/Representative group: has standing if substantial number of members are affected and the group represents members' affected interests (<i>Shop Distributive</i>)
ADJR test	<u>'person aggrieved' test (Ogle) & ADJR s5(1)</u> - If the applicant could establish that they had a 'special interest', then they will qualify as 'persons aggrieved' for the purpose of the <i>ADJR</i>. If a person wishes to be joined as a party to the proceedings commenced by another, the test under the <i>ADJR</i> is whether they are 'a person interested' in the relevant decision, conduct, or failure to make a decision: s12(1)

Reasons

Where there is a statutory right to reasons.

Common Law	ADJR Act ss 13, 13A	Uniform Civil Procedure Rules (UCPR) (NSW) r 59.9
No right to reasons (<i>Osmond</i>)	Grants a right to reasons upon request (not automatic): - If they are entitled to commence an application for review under the <i>ADJR</i> Act	Available once there is a review sought against a 'public authority'

Grounds: Acting Without Power

- What acts are authorised by statute?
- How should acts be carried out according to the statute?
- Who is authorised to act under the statute?

To be ascertained by reference to the language, subject-matter, and objects (*Project Blue Sky*)

ADJR Act s 5(1)(d) – that the decision was not authorised by the enactment in pursuance of which it was purported to be made.

Misconceiving the nature/scope of the power:

If the statute confers the power to do one thing, and the decision-maker does something different.

- By misconstruing a particular word or phrase in the statute (*Norrie*)
- By asking the wrong question (*McGlinn*)
- By applying a different test

Grounds: Procedural Error

If Parliament intended a particular set of procedures to be followed, a failure to follow the procedures may invalidate a decision.

- Failure to comply with statutory procedures is a ground of review at common law and under s 5(1)(b) of the *ADJR* Act.

s 5(1)(b) of the *ADJR* Act: 'procedures that were required by law to be observed in connection with the making of the decision were not observed.'

1. Is there a procedural requirement in the legislation?

- where the decision-maker 'must' or 'shall' follow a particular procedure or 'may not make a decision unless...'

2. Has the decision-maker failed to comply with this requirement?

3. Is it a purpose of the statute that failure to comply with the requirement should result in the invalidity of the decision?

- statutory construction
- 'whether it is invalid depends upon whether there can be discerned, a legislative purpose to invalidate any act that fails to comply with the condition' (*Project Blue Sky*)
- to be ascertained by reference to the language, subject-matter, and objects.
- soft statutory language, such as that the decision-maker 'should' follow a particular procedure may reveal an intention that non-compliance was not intended to invalidate a decision.
- the gravity of the procedural error is an important factor (*SZIZO*)
- a decision is less likely to be invalid if there are other means of giving effect to the statutory requirement (*Forest*)

Grounds: Fact-finding Errors

Jurisdictional Facts: facts that must exist in order for the decision-maker to have power to act (*Enfield*)

-Argued under *ADJR* Act s 5(1)(c) – ‘the person who purported to make the decision did not have the jurisdiction to make the decision.’

Objective Facts	Subjective Facts
The actual existence of a state of affairs in the world for the decision-maker to exercise a power lawfully. The applicant must establish: 1. That <u>a particular matter is a jurisdictional fact</u>; and 2. That <u>the fact did not objectively exist at the relevant time</u>. - Determining whether a particular fact is a jurisdictional fact is a question of statutory interpretation. - Signalled by the use of expressions such as ‘where X exists’ or ‘when X takes place’ (<i>Anvil</i>) If the fact does not exist before power is exercised, this will be a ground of review.	A decision may only be made if the decision-maker has reached a particular state of mind. - The fact is the decision-maker’s subjective opinion. ‘if the decision-maker is satisfied’, ‘if the decision-maker reasonably suspects’ 1. The <u>decision-maker must, subjectively hold the opinion</u>. 2. The <u>opinion must be based on a correct understanding of the law</u>. 3. The <u>opinion reached must be reasonable, logical, and rational</u>. (<i>Connell</i>) -if any of these elements are missing, the decision-maker will not have jurisdiction to make the decision. If the decision-maker fails to form the required state of mind, this will be a ground of review.

Grounds: Improper Delegation

- Argued under *ADJR* Act s 5(1)(c) – ‘the person who purported to make the decision did not have the jurisdiction to make the decision.’

- Some acts expressly provide for the delegation of certain powers.
- In the absence of an express power of delegation, in some circumstances, it is permissible for an agent to exercise power on behalf of the decision-maker.
- **The Carltona Principle** (*Carltona*)
 - A decision of an official is a decision of the Minister.
 - A Minister is responsible – it is him who must answer before Parliament for anything that his officials have done under his authority.

Statutory interpretation:

- It may be permissible for statutory powers to be exercised by an agent in circumstances of 'practical administrative necessity' (*O'Reilly*)

Courts are less likely to hold that acting through agents is permissible in cases of high-level policy decisions, decisions that have adverse effects on individual rights, or decisions that involve the formation of opinions and the exercise of discretion, rather than application of objective criteria.

Grounds: Procedural Fairness

TEST: The rules of procedural fairness will apply **to an administrative decision affecting rights or interests in a direct and immediate way** (*Kioa*)

- 'right or interest' – relating to personal liberty, status, reservation of life and reputation, as well as to proprietary rights and interests (*Kioa*)
- 'direct and immediate' – e.g. decision to close a road, decision to impose a rate, etc...

Fair Hearing Rule	Rule Against Bias
1. Practical Injustice – the applicant <u>must explain why the process followed was unfair</u> in the circumstances of their case. (<i>Ex parte Lam</i>) 2. Materiality – the error must be material (if it could have <u>realistically affected the result</u>) (<i>SZMTA</i>) The fair hearing rule requires that a person who may be adversely affected by a decision be: - Given <u>notice that the decision is going to be made</u>; Notice must be given before the decision is made and must allow a person a reasonable opportunity to prepare and present their case before the decision is made (<i>SZSSJ</i>) - <u>Disclosure of the case against them</u>; opportunity should be given to deal with adverse information that is credible, relevant, and significant to the decision to be made (<i>Kioa</i>) and - An <u>opportunity to present a case in response</u>. Statutory context is always crucial (<i>Mobil Oil</i>) - If the statute sets out detailed statutory procedures, these will generally operate alongside the common law requirements.	Actual Bias Where the decision-maker has 'a state of mind so committed to a conclusion already formed as to be incapable of alteration' (<i>Jia</i>) - High threshold - Subjective test: the person affected must show that <u>the decision-maker actually held the relevant state of mind</u>. (actual bias is difficult to prove) Apprehended Bias Where 'a fair-minded lay observer might reasonably apprehend that the decision-maker might not be an impartial and unprejudiced mind.' - Low threshold - Objective test: depends on <u>what the hypothetical fair-minded lay observer might perceive, rather than the actual state of mind of the decision-maker</u>. - Fair-minded observer: may appear to the public to be a departure from the standards of impartiality and independence (<i>Chariteas</i>) 1. Identify what fact or information or interest might lead the decision-maker to decide the case other than on its merits. - other than on the relevant law and facts. 2. Identify a 'logical connection' between that fact or information or interest and the outcome of that decision. - is there a realistic possibility that the interest will affect the outcome? (<i>Ebner</i>)

	- Interest – some direct or indirect interest in the proceedings gives rise to a reasonable apprehension of prejudgement (<i>Ebner</i>) If a particular outcome will result in the decision-maker receiving a material benefit (<i>Isbester</i>) - Conduct – that creates the impression that the decision-maker holds preconceived views about issues relevant to the decision (<i>Webb</i>) - Association – favouring one party or being disposed against a party (<i>Webb</i>) Analyse the association closely and consider how it might lead the decision-maker to decide the case other than on its merits. - Extraneous information – where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias (<i>CNY17</i>)
--	--

Exceptions to the rule against apprehended bias

- Waiver
Where the right to object the bias has been waived (*Vakauta*)
- Necessity
Under some situations, it may be necessary for a biased decision-maker to make a decision, as there may be no-one else available/appointed (*ABT*)