Step 1: Jurisdiction

NSW: **S 23 SCA** (SUPREME COURT)

- Privative clause → ***Kirk*** (ATV accident, said Industrial Court decision final and cannot be appealed) effect is the same at the state level, means no review of non-JEs but
  make sure that you read the clause carefully, what decisions does it exclude review of???

CTH: **S 39B(1) + (1A) Judiciary Act** (FEDERAL COURT), **s 75(v) or s 75(iii) Constitution** (HCA) AND/OR **ADJR Act s 5(1)** (discuss availability in the facts):

- **S 3(1)**:
  - Administrative character ***Roche*** (removing med off the Register), does the decision determine? If yes, legislative not administrative character:
    1. Rules of general application or application to a particular case
    2. Parliamentary control of the decision
    3. Public notification of making the regulation
    4. Public consultation (and extent) of making regulation
    5. Broad public policy considerations
    6. Can they be varied or controlled by the Exec?
    7. Provision for merits review
    8. Binding effect
  - Regulations are not reviewable under the ADJR, they are legislative! ***Roche***
  - **s 3(3) *ADJR Act*** "Decision" includes a report where Act makes provision for it; ***Bond***: report = decision
  - (a) under an enactment → i.e., an Act (s 3(1); ***Chittick***).
    - ***Bond*** (Radio man not fit and proper – intermediate finding)
      - Intermediate decisions are reviewable if they contribute to the ultimate/operative decision → must be provided for in the enactment and needs to resolve important substantive issue, not procedural (e.g., adjourning a hearing)
    - ***General Newspapers*** (Telstra, made because company power not because of Act) → force or effect, auth or req by enactment
    - ***Fuller*** (Direction decision effect derived from Act, no legal efficacy without it)
    - ***Tang*** (decision auth but not req by the Act, voluntary relationship) →
      Test: (1) decision must be expressly/impliedly required or auth by the Act; (2) must itself confer, alter or otherwise affect legal rights or obligations.
    - ***NEAT*** (AWBI power to consent did not come from Act, came from incorporation) distinguish where not just a peripheral role of the private contractor, not just about profit-making personal interests OR where acting under the enactment.
    - ***Chase Oyster*** (SOPA adjudicator acting under statute), factors: (1) statutory scheme prescriptive, (2) statute gave arbitrator power to make binding determinations (non-consensual), (3) exercising statutory function not acting in self-interest cf. ***NEAT***
  - (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment
    - ***M61*** Court did not decide whether private contractor may fall into "an officer of the Cth" where aspect of exercise of statutory authority had been contracted.
    - ***Cormie*** public service, ministers, delegates, federal judges, tenured Cth office
    - ***Leerdam*** Not a solicitor providing legal services to a dept
    - ***Cohen; Post Office*** Not corporation
  - ADJR DOES NOT APPLY WHERE
    - (c) Decision by the Governor-General; or
    - (d) Schedule 1 decision:
      - (a) Fair Work, Workplace Relations, Building and Construction Industry Improvement
      - (d) ASIO, Intelligence Services, Telecommunication (Interception and Access) Acts
      - (da) Privative clause decision under s 474(2) of MA
      - (db) Privative clause decision under s 5E of MA

- Privative clause: ***S157*** (MA privative clause for protection visa) cannot exclude review of JEs
- Time limit clause: ***Bodrudazza*** (1-day late because of migration agent and then said HCA had no discretion, subverted HCA jurisdiction under s 75(v)) cannot exclude review of a jurisdictional error.
- ***Graham*** clauses in preclude court's jurisdiction e.g., prohibition on giving evidence act like a PC.

PROCEDURAL FAIRNESS (TOPIC 5)

Step 1: When do procedural fairness principles apply? I.e., is there a right or interest affected?

Kioa

Facts:	1. Mr and Mrs Kioa were Tongan citizens. 2. Mr K arrived at Aus to attend a three-month training course related to his employment by the Tongan Tourist Office. He was granted a student visa, and a temporary entry permit valid for 3 months. 3. He resigned and then remained in Aus stating there was a cyclone in Tonga. 4. He was apprehended and his visa extension was refused. 5. Deportation orders against Mr and Mrs Kioa were made under the *MA.*
Judgement:	• Common law duty to act fairly in providing procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations (does not need to be a legal right) subject only to the clear manifestation of a contrary statutory intention. • Must affect rights etc. of the individual citizen in a direct and immediate way, not indirectly and not just affecting the public generally (purely policy or political decisions) → here did bcuz immigration status. • Procedural fairness conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the case – look to whether statute displaces the duty if specific provision to that effect e.g., *MA* deportation orders to be made ex parte usually with no notice because would just facilitate evasion and frustrate objects of the statute. • For granting or refusing entry permits – no occasion for natural justice principles to apply besides applicant entitled to support his application by material he thinks appropriate and cannot complain if do not accept without further notice to him. But if considering material personal to the applicant obtained from another source not dealt with by applicant, then may be a case for saying procedural fairness requires he be given an opportunity of responding to the matter.

Is there a staged process? Does the decision maker have to do everything, or can investigations be delegated or is an early breached remedied by a later action?

Ainsworth

Facts:	1. Appellant manufactured supplies gaming and poker machines. 2. Deputy Premier of Qld sought Commissions advice on introducing poker machines to Qld. Commission's report recommended that Appellant not be permitted to participate. Appellant not aware of matters put against them or given opportunity to answer them.
Judgement:	• ***Testro Bros*** not followed → procedural fairness can be required in an investigation/inquiry. • Duty of procedural fairness arises if the power involved is one which may destroy, defeat or prejudice a person's rights, interests or legitimate expectations. • Reputation is to be protected, the Commission's report meant Appellant's would be destroyed in Qld → applies also to business or commercial reputation. • Where multiple steps before a final decision in a decision-making process – natural justice requirements are satisfied if in the entirety of the process there is procedural fairness i.e., the later stages procedural fairness breaches remedied, but not where initial breach infects the decision. • Remedy: Report NOT amenable to JR remedies (not JE) but may receive equitable relief against the report or JR of decision based on it. • Here → Parliamentary Commission redressing the unfairness i.e., by putting the matter before Appellant giving opportunity to respond, would not remedy the breach because the reputation was blackened.

O'Shea

Facts:	1. O convicted of sexual offences and subject to preventive detention. 2. Annual review of O's detention by Parole Board. 3. Medical practitioners recommended O was fit for release on licence. 4. Two-step decision making process: (1) Parole Board recommended release on licence; (2) Governor in Council decided not to act on recommendation
Judgement	• Not a general rule of administrative procedure that a person who hears a decision should decide but person must make their own decision. • A need for a further hearing by a repository of a power after hearing by an expert board may arise if in the particular circumstances, the interests of a party are affected by some new fact or matter which the decision-maker proposes to consider and which the party has had no opportunity to deal with. • Further hearing on policy alone is not necessary but maybe where impacts the individual and is closely related to the circumstances of the individual, not general public's interests.

Step 2: Is there an attempt to exclude or define procedural fairness in the statute?

(1) Emergency

Hurford

Facts:	1. Minister issued order to an insurance company forbidding it to issue or renew policies. 2. Minister argued procedural fairness was not owed because statutory power may have to be exercised urgently.
Judgement:	• Some powers exercised in emergencies (dealing with dangerous animals, infectious diseases, fire etc) – Procedural fairness e.g.., opportunity to be heard is excluded • Powers that may have to be exercised in circumstances of emergency – Procedural fairness is not excluded – But opportunity to be heard may be limited

(2) Words of necessary intendment

- ***Annetts***: when a statute confers power upon a public official to destroy or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless excluded by plain words.

Miah

Facts:	1. *MA* included a series of sections setting out procedures for visa decision making. Also included a Code for dealing fairly, efficiently and quickly with visa applications. Minister argued that the principles of procedural fairness were excluded by the provisions of the Act setting out a code of procedure. 2. Applicant from Bangladesh said he was being harassed by religious fundamentalists. 3. Refused protection visa. Delegate said new government in Bangladesh made it safe. 4. Applicant was to seek merits review in RRT but solicitor misplaced application form.
Judgement:	• No clear words that legislature intended to exclude all common law requirements of natural justice. • Use of term "code" and "fairly" too weak to conclude Parliament intended natural justice to be limited by what is in that section e.g., actual bias or corruption cannot be assumed here. • It is an error to infer from the existence of some sections that appear to deal with natural justice like obligations that all other natural justice obligations are excluded. • Person whose interests are effected must be given an opportunity to deal with relevant matters adverse to interests that repository proposes to take into account. • Not for all material, but "adverse" information that is credible, relevant and significant to the decision to be made. For example, non-adverse material which would not require comment from applicant includes country information, favourable or corroborative information in the public domain and information based on the circumstances already described in the application. • Cf. where the delegate proposes to use new material the applicant may be unaware of and which is or could be decisive against the applicant's claim for refugee status. The need for disclosure even stronger where the material concerns circumstances that have changed since the date of application and is being used after considerable delay and when the material is equivocal or contains info applicant could not reasonably have expected to be used in the way the delegate uses it.

Saeed

Facts:	1. Pakistani citizen applied for a skilled visa from offshore. Needed to show had been employed in a skilled occupation so provided information that had worked as a cook in a restaurant in Pakistan. 2. Australian officers investigated and found no evidence worked in restaurant, so visa refused on basis information provided was false and misleading. 3. Applicant not informed of investigation outcome nor given an opportunity to refute the information was false and misleading. 4. S 51A excluded natural justice requirements and s 57(3) said that 51A only applied to onshore applicants.
Judgement:	• No exclusion of natural justice i.e., the obligation to provide the adverse information to her for comment because s 51A only excludes those natural justice rules that are matters the section deals with and it only applies to onshore applicants, so does not affect Applicant's application. • Distinguished ***Miah*** – not concerned with offshore visa applications. • ***Coco***: An intention to exclude natural justice must be clearly manifested by unmistakeable and unambiguous language.

SZMTA

Facts:	1. s 438 of the MA applied to certain documents or information disclosure of which would be considered contrary to the public interest or those made in confidence. Tribunal "may" disclose this if it thinks appropriate. 2. S 438 said in s 422B to be an exhaustive statement of the natural justice hearing rule re matters it deals.

Judgement:	• Because procedural fairness requires disclosure of the fact of notification, non-disclosure constitutes a breach of the Tribunal's implied obligation of procedural fairness. • S 422B not framed in a way that excludes procedural fairness. • S 438 only confined to how Tribunal treats documents to which the section applies it does not extend to any other consequences for procedural fairness.

BVD17

Facts:	Fast track review process introduced in the MA - generally no hearing and no additional information. Limited disclosure of information which would be contrary to the public interest or provided in confidence.
Judgement:	• Distinguished ***Saeed*** and ***SZMTA***, no reference to "fair and just". Not just matters it deals with it has a more global operation as it is said to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority. • The exhaustive clause excluded procedural fairness because it did not just apply to the discrete subject matters of the provision in the relevant part of the Act, it applied to the entirety of the performance of the IAA, i.e., it expressly stated to apply to the entire review conducted by the IAA. • However, does not mean any procedural deficiency in the IAA review cannot be subject to judicial review at all. Although not through the procedural fairness ground of review a procedural deficiency may establish another ground such as legal unreasonableness. • Look to Act for what procedures to follow and then must follow in a legally reasonable manner.

Disorganised Developments

Facts:	1. Act included an offence for members of a criminal organisation to enter a prescribed place. Government of SA had power to make regulations which included declaring a prescribed place. 2. Cowirra regulations regulated the land as a prescribed place which was owned by P (members of hells angels).
Judgement:	• ***FAI; O'Shea***: mere vesting of decision-making authority in Governor in Council not a sufficient manifestation of a legislative intention to displace the common law presumption. • Law has developed so not enough that it is a broad power or there is Parl oversight to excl. proc. fairness. • Procedural fairness applied to the making of a regulation. • Owners and occupiers of land have property rights in the land and company had interests in accessing the land through its directors (P) to maintain and discharge its obligations as owner of the land. Declaring the land a prescribed place did not impact a large group of persons but indiv prop rights and interests. • Procedural fairness here: required reasonable notice to give an opportunity to provide information considered relevant within their knowledge i.e., personal to the individual e.g., information going to the characteristics of the land or its use or adverse impacts of a declaration. • Did not require an opportunity to make general submissions as to likely efficacy in disrupting serious criminal activity. Government does not have to provide the information that might form the basis of a recommendation to the Governor to declare a place to be a prescribed place.

Step 3: What does procedural fairness in terms of the hearing rule require notice of?
(1) What is the nature of the decision-maker? Judge or Minister
(2) What needs to be brought to the Attention of the Applicant?
Practical fairness

SZSSJ

Facts:	1. Department of Immigration publishes data on its website and by mistake it published the identities of 9000+ applicants for protection visas and took this down 14 days after. 2. Government obtained a report from KPMG into who may have accessed this information. Abridged version of report did not include IP addresses or give precise time of access. 3. Dept. officers instructed to assess effect of the breach on Aus non-refoulement obligations to applicants. They assumed that personal information may have been obtained by home country authorities. 4. Manual said if find a non-refoulement obligation was engaged, might be referred to Minister to consider allowing applicants to make another visa claim. Sections of MA allow Minister to lift a statutory bar to the making of a further application. Sections operate if Minister believes it is in the public interest to lift the bar, but the Minister has no duty to consider exercising the power. 5. Bangladeshi national had previously sought a protection visa and exhaustive merits and judicial review. Provided w/ letter saying data breach occurred and that a review being undertaken to see if it activated any non-refoulement obligations + invited to provide any response he wanted to be considered.