

**4 questions:**

Q1: 15 marks : 2:30 to 2:50 (20 min)

Q2: 15 marks: 2:50 to 3:10 (20 min)

Q3: 10 marks: 3:10 to 3:20 (10 min)

Q4: 10 marks:03:20 to 03:30 (10 min)

**TWO BOOKLETS**

**1 and 2 in one booklet and 2 and 3 in another**

**Template**

Read the decision in *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 (focussing particularly on the judgment of Mason J) and answer the following questions:

1. Summarise Mason J's '5-point plan' for the 'relevancy / irrelevancy' ground.
2. What does the *Peko Wallsend* case tell us about the relationship, for administrative law purposes, between Ministers and their departments?

Q 1

In [\*Peko-Wallsend Ltd\*](#) Mason J considered the following:

1. **Was the decision-maker 'bound' to consider (or not consider) the matter in issue?** there are 3 bands of consideration. The top band are things that they must consider the middle band that they may or may not consider the bottom band that they must not consider.
2. **Deciding what you are bound to consider or not to consider is determined by construing statutory** if you are lucky the statute might expressly list all the relevant consideration. The question then becomes is that list exhaustive or inclusive. If the statute is silent or it gives you inclusive list, we will figure out what factors must be considered or must not consider and it depends upon implication from the subject matter and the scope and purpose of the act.
3. **Was the error 'material'?** if the failure could not have materially affected the decision, it does not count.
4. **Bear steadily in mind here the limited role of judicial review – don't reassess 'weight'** -it is not for the court to revisit the weight given to the particular consideration. Subject to **2 exception**: 1. It is sometimes the weighting on different consideration was so unreasonable that it stumbles into another ground altogether which is called unreasonableness. 2- a statute may require you to put weight on a particular factor
5. **If the decision-maker is a minister – make due allowance for broader policy considerations.**

Q2

Mason pointed out a Minister has constructive knowledge of whatever his department has and the minister is deemed to know about everything his department receives.

Also something are too important to be passed down and everything that is relevant end up on Minister desk and Minister and read it personally.

## Template 2

This is Federal decision so we have federal options for review. Federally we have ADJR and if is not qualified for ADJR under ADJR then we can use general law system and review under 39B of judiciary Act to Federal court.

### First ground: Procedures Required

*The procedure was XXX (minister should was told to consult with local authority) and XX did not comply with the procedure.*

*The authority on this ground is Blue Sky and the test to apply from this case is whether there is a legislative intention that the breach of this procedure should invalidate the decision. Firstly, the HC introduced a second category where they don't find an invalidating intention, it may be a conclusion that there was illegality but not invalidating illegality. So they drew a distinction between an invalidating error and non-invalidating error. If we find it is invalidating then the whole decision is invalid but that would have consequence on what has already been done. They developed a second category that the error is not invalidating.*

*They protected everything which was already in place **BUT** a person could restrain you from acting on the basis of standard in **future** activities. It is prospective remedy rather than retrospective one.*

Court held things to look at is the **statutory language, the subject matter and consequences of invalidity.**

Also in *World Best Holdings* the court held we are looking for an intention that a specific breach in front of us will invalidate and not any breach and this was applied in *SZIZO*

So we will look at if parliament intents "this" breach to be invalidating.

*Here if we apply blue sky test we have to look at the language of statute which says XXXX (160 reads as a provision that regulated a power rather than imposes essential condition to it – the language of statute says MAY rather than MUST) subject matter XXX (S 160 obligation lacked that could easily and precisely applied) and the consequences XXX (great public inconvenient if we invalidate this because there are a whole lot of other broadcasters had their licenses build on this standard).*

*If we apply world best holding and the specific breach is that XXX*

*In summary the legislative intention was that the breach of this procedure was/wasn't to invalidate the decision*

*\*\*In Oak the non-provision of failure to provide a copy of search warrant to an occupier was invalid*

#### \*\*Any exemption:

*In Goulburn-Murray the error was held to be invalidating and one of the factor was the fact that it was a procedure you could have asked for an exemption from.*

In this case if we would go under ADJR s 5(1)(b) and JRA 20(2)(b), then there is possibility of slightly different operation since it is might not be limited to more serious invalidating breaches and the working 'in connection with' is broad enough to reach more than the general law: *Ourtown FM: ground applied to post decision (failure to provide reasons)*

But we are defaulting to blue sky under statutory version: *Module 2 v BBC* and *Tesltra corp v ACC* (both case court applied blue sky)

## Relevancy/irrelevancy

In Peko Mason J 5 point approach for this ground is:

1. **Was the decision-maker 'bound' to consider (or not consider) the matter in issue?** *there are 3 bands of consideration. The top band are things that they must consider the middle band that they may or may not consider the bottom band that they must not consider.*
2. **Deciding what you are bound to consider or not to consider is determined by construing statutory** the statute might expressly list all the relevant consideration. The question then becomes is that list exhaustive or inclusive. If the statute is silent or it gives you inclusive list, we will figure out upon implication from the subject matter and the scope and purpose of the act.
3. **Was the error 'material'?** if the failure could not have materially affected the decision, it does not count.

### **\*\* Material to decision**

In Eg Lansen Court applied the Mason 3<sup>rd</sup> rule and said the consideration that is missed was such that the failure could possibly affected the decision.

4. **Bear in mind the limited role of judicial review – don't reassess 'weight' unless you are under 2** exception category which one of the them takes to another ground of unreasonableness and another the statute may require you to put weight on particular fact.
5. **If the decision-maker is a minister – make due allowance for broader policy considerations.**

*Here, addressing 5 points,*

*1-Was the decision-maker 'bound' to consider (or not consider) the matter in issue? first we have a minister and the middle band will be broader because ministers has broader considerations.*

*Or*

*Yes they have to consider. It was mandatory and fell into the first band (bound to consider)*

*2-What statute say? list all the relevant consideration? 2<sup>nd</sup> Section XXX tells us we need to consider XXX.*

*Is it inclusive or exhaustive? (Primary considerations, MUST...) The first question is if it is exhaustive or inclusive. From the wording it seems it is inclusive because (it says Primary consideration word and May). The word XXX will be more statutory direction to weight that you put weight on this fact.*

*If inclusive then? It is inclusive list then it can go broader (we will see the subject matter, scope and purpose of the Act) therefore here are the sorts of things that the Act is proposing such as XXXX*

*3-What the minister actually decided? The reasons minister gave? Minister decided XXX (proposing the grant of X by the request from the state).*

*Is that a consideration that minister allowed to consider (state view)? It is something that Minister can consider  
Second reason? What Minister DID NOT consider? Was he bound to consider?*

*4-Is he a minister? Here this is a minister and Mason J told us that we have to allow broader policy consideration*

### **\*\*detailed consideration?**

*In Foster if the statute requires the matter to be considered in enough details then you need to consider details*

### **\*\*obvious and easy inquiry material to decision**

*In SAZAI court held that failure to make an obvious and easy inquiry about a really critical fact means that you completely failed to consider it (constructive failure to exercise jurisdiction)*

### **\*\*Non mention of something**

*In Applicant 169 a non mention of something does not mean it was not considered.*

***\*\*Minister must have constructive knowledge***

*What minister has is includes things they have constructive knowledge of so what is received in his department he deemed to have received it*

***\*\*important things cannot pass down***

*Because they are too important (Caltorna) and the minister should read it personally*

***\*\* No obligation to be detailed or proactive***

*Mason J said the minister in this context was not required to go looking for more information and what was given to them would suffice.*