ADMINISTRATIVE LAW

(PREVIEW)

LECTURE NOTES

TABLE OF CONTENTS

NATURAL JUSTICE RULES

Content of Natural Justice

- Hearing rule
- No bias rule

Natural justice comprises of 2 components; the threshold test (as to when natural justice will apply, in what circumstances is a decision maker required to give a person affected by the decision natural justice or the right to be heard). With the threshold test (from Kiao v West where a person's rights, interests or legitimate expectations are defeated, destroyed or prejudiced by a decision subject to a contrary statutory intention unless there is a clear statutory intent that natural justice be abrogated in those circumstances). Today we will be looking at the second element of natural justice; the content of natural justice. So in circumstances where a decision maker does have to afford natural justice, what is the content of natural justice; what do we mean by giving natural justice, what does the person have to do? For this, there is also 2 components, the hearing rule and the no bias rule.

Hearing Rule

- Features
    - Content variable
    - Limits within which content varies
    - Nature of content

The requirement for hearing rule basically arises because quite often a government decision maker is one party to a decision and is also the decision maker and so they know what the case is on, on their side of the decision, but they are making the decision as well. The hearing rule is basically to hear the other party, the other side so that the decision maker, who knows their own case, hears the other case before they actually make the decision. The common law requirement where unless legislation says something about what content is allowed for the hearing rule, the common law basic requirement is a right to be heard, and a right to be heard by a disinterested decision maker (not an uninterested decision maker).

The feature to note about the hearing rule is the content of it is variable. At one end of the hearing rule, you've got courts where there is the right to make written submissions, the right to make oral submissions, the right to examine, cross-examine, re-examine, so that is the zenith of the hearing rule, at one extreme. At the other extreme of the hearing rule, it might be all that is required is the right to make a written submission, so natural justice might be satisfied if a person has the right to make a written submission and no more so it is a matter of working out where in the spectrum each particular case will fall, what is required to do justice or to do natural justice in a particular situation? This is the variable content, which we will talk about today and the limits within which the content varies and then looking at some examples from the cases as to what content will be required in particular situations, when will it be that natural

justice is served by having a written submission only, when is something more required than that? The minimum requirement is generally notification that a decision is to be made, the substance of the information on which the decision is to be made and the opportunity to present the alternative case (an applicant to present their own case).

In Commissioner for ACT Revenue v Alphaone, the full federal court said a person was entitled to put submissions for an outcome that supports their interest to rebut or qualify adverse information, the decision maker had to advice or adverse consequences which weren't obvious and the decision maker wasn't required to expose their mental process in reaching a decision. So basically allowing the person to know the decision was going to be made, what might be adverse and then hearing the case on the other side. In Kioa, Brennan J talked about the opportunity that had to be given to deal with adverse information that was creditable, relevant and significant, so the right to make submissions in regard to adverse information that met those conditions. The rules in regard to the hearing rule are still evolving as new circumstances arise, essentially the amount/ the content of the hearing rule do natural justice in a particular situation will vary with all the circumstances.

Variable Content

- *Russell v Duke of Norfolk* –
    - req'ts of natural justice varies
- *Mobil Oil Aust v FCT*
    - law requires fairness; what is fair depends on circumstances
- *Kioa* – Brennen J
    - – construe statute for reqt for natural justice and procedural steps
- *Ex parte Lam*
    - avoid practical injustice
- Grounds
    - no hearing
    - unfair hearing

In Russell v Duke of Norfolk, Lord Justice Tucker talked about the requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. So it is not a complete list, he said he didn't derive much a system from definitions of natural justice but whatever standard that is adopted, one essential is that the person concerned should have a reasonable opportunity in presenting their case. So in each circumstance, it needs to be decided what is a reasonable opportunity in this particular situation.

In Mobil Oil, Kitto J said what the law requires in the discharge of a quasi-judicial function is judicial fairness. This is not a label for anyone, what is fair in a given situation depends upon the circumstances, so again saying in a court there has to be fairness, natural justice, what is required in other cases is some degree of fairness, what it will take to give that fairness will depend on the circumstances of that particular case.

Going back to Kioa again, Brennan J said to ascertain what must be done to comply with the principles of natural justice, the starting point is the statute creating the power, you look at the statute giving the power to the decision maker by construing the statute, one ascertains not only whether the power is conditioned on the observance of the principles of natural justice but also whether there are any procedural steps. You look at the statute giving power firstly to see what the statute says about natural justice in that situation, does it say natural justice has to be given or does it try to exclude natural justice? If the statute is silence, then it is not excluding natural justice so then you need to interpret the statute to see what it is saying about what content of natural justice will be required and it might not expressly say anything but from what the statute says, you need to imply what natural justice will be required here. What content of a hearing rule will be required of a particular case?

In Lam, Gleeson CJ said fairness is not an abstract concept, it is essentially practical, the concern of the law is to avoid practical injustice. So there needs to be enough content of the hearing rule to avoid practical injustice in a particular situation.

Factors to consider

- statutory context
- seriousness of consequences
- nature of decision
- decision maker
- persons affected by decision
- administrative practice

Now we've talked already about this spectrum of the content of the hearing rule or natural justice generally, where at one extreme, you've got the courts which have to give full natural justice and the hearing rule in a court allows for written submissions, oral submissions, examination, cross examination, re-examination, so a full exploration for a person to be able to put their case, so that is the hearing rule at its best. At the other end, you've seen there may be no right to a hearing at all, we've seen with ministerial decisions, with Peko v Wallsend, the court said no right to natural justice, no right to a hearing, cabinet which is part of the executive can make decisions without having to hear the other party. For administrators and tribunals, it will generally fall somewhere between those, along that area, it will depend on the circumstances, what you would expect is the more judicial-like a body is, the closer it will be to the court. So with tribunals like the AAP and those sorts of merits review tribunals, even though they are not judicial bodies, you would expect them, because they act quasi-judicially, to be closer to the hearing rule that applies in a court and that is what you will find where people get to present cases, depending on the circumstances, they can examine witnesses, make written and oral submissions as well. So for that sort of bodies, you are getting more judicial like, when you've got just a person making a decision (member of the department) that is probably getting further away from the courts, because they are not acting in any judicial like way, they are just

making decisions as part of their jobs everyday. So the hearing rule content in those cases may be less than those in tribunals. It is a matter of looking at the particular situation and seeing where it falls in that spectrum. We've said the hearing rule is part of natural justice and must apply when natural justice applies. So when will there be a breach of the hearing rule? Either than there is no hearing given at all when there should have been a hearing or if there is a hearing, it is an unfair hearing, so the ground can be breached in a couple of ways, either denial of a hearing altogether or a hearing but not adequate hearing or an unfair hearing. The sorts of things the courts have talked about that you look at to determine what the content will be in a particular situation are listed above. Factors to determining how much of the hearing rule will apply:
Statutory context- in Kioa, Brennan said that is where you start, you start with the statute to see what the statute says about what content of natural justice or content of the hearing rule will be required. Again, in Mobil Oil, Kitto J talked about the statutory framework being of crucial importance of determining the content of natural justice, the necessity of allowing the full effect of every case of the particulars of statutory framework.

Seriousness of consequences- this was something we talked about with natural justice as well, the more serious the consequences to the person then the more content of the hearing rule they should be entitled to. With Copper, he had his house knocked down without a hearing, so in that sort of case, you would expect a reasonable degree of content, maybe a written submission, maybe a chance to make an oral submission as well.

Nature of the decision- is there a need of urgency? There is a need for necessity in some decision making which can override some of the requirements for natural justice because necessity creates its own laws so it may be there will be less of a hearing where there is greater degree of urgency without the need to make a decision.

Decision maker- the more judicial-like they are, the more you would expect them to be giving a greater content of the hearing rule up to the court's level, not going that far, but going that end of the spectrum. The less judicial-like the body is, the further away from that they will be.

Administrative practice- again we saw in the Council of Civil Union, administrative practice where there has always been consultation meant that in this case there should be a hearing given, there should be consultation.

All of those factors can impinge on the content of the hearing rule.

Nature of content

- Right to know matters
    - to answer allegation
        - *Re Macquarie University v Ong* – informed of kind of matters
        - *Re MIMA v Miah* – new information
    - whether material to be used

- *Applicant VEAL of 2002 v MIMIA* – cannot assert no weight given
- *Bond v ABT (No 2)* – limits to this

The minimal requirement is the right to know the content and to respond in some way, so that the allegation can be answered, a person or the applicant will need to know the allegations so that they can address the matters that are in dispute and not address matters that aren't in dispute.

In Re Macquarie University v Ong, the university committee established that to determine whether to remove a head of school, the committee gave prior notice of some of the matters that would be considered but not all of the matters, and later they added further matters. The court said there was a failure to accord natural justice because the applicant hadn't been notified about these additional matters, the court said a person must be informed of the kind of matters the decision maker is considering, not necessarily the precise nature of all of the matters that will be taken into account but the kind of matters that the decision maker will be looking at.

In Re MIMA v Miah, there was non-disclosure to an applicant of a decision maker's decision to rely on new information which had been received so the applicant was not told about that. The non-disclosure and the lack of opportunity to respond to it meant there was a breach of the hearing rule, a breach of natural justice. So the person had to be told about the new information and given a chance to respond.

More recent case- is Plaintiff M61/2010E v Cth, the reviewer in this migration case had contrary information about the plaintiff and didn't disclose that to the plaintiff so that was a breach of the hearing rule because the plaintiff should have known that there was new information available and should have had the chance to respond to it.

Does it matter whether the material that wasn't disclosed was actually relied on or not? In Applicant VEAL of 2002, there were Eritrean nationals who were seeking protection visas and they won't told of a letter which alleged that the husband in this case had been involved in a political killing in Eritrea, but the letter was given to the tribunal who was sitting in judgment, the unanimous HC said there had been a breach of natural justice, they noted that the decision maker cannot excuse non-disclosure by ascertaining that no weight was given to it. So they can't say the applicant didn't need to be told because we didn't rely on this information. What the court was essentially saying is once the decision maker has seen the information they can't then sort of close their mind to it and exclude it because they are aware of it. so natural justice, the hearing rule requires that the applicant be told about it.

But there are limits on that, in Bond v ABT which we've talked about previously, Bond in this case wanted particulars of all matters the tribunal would be considering. Wilcocks J in denying that said the inquiry will become unmanageable if in relation to every party potentially disadvantaged by each possible result, the tribunal was required to supply every party with particulars of possible contemplated decisions. So there is this balancing of the individual's

interest and the public's interest. Government decision making and the need for efficiency in decision making against the rights for review.

Submissions

- Right to submission
    - *Chen v MIEA* – disadvantage from written submission
- Right to legal representation
    - *Cains v Jenkins* – status and circumstances of applicant
    - *WABZ v MIMIA* – applicant's capacity and ability
- Right to cross-examine
    - *Harrison v Pattison* – credibility of witness
    - *Hurt v Russell* – contested claim

What about making submissions, what has the court said about the hearing rule in regard to the right to make submissions? Generally this has to be an entitlement to an adequate opportunity to address matters but does that mean in every case there has to be oral submissions or can written submissions be held to be enough in particular circumstances? Generally, the courts have said there is no absolute right to an oral hearing, it will depend on the circumstances. So the minimal requirement is generally the right to make a written submission and then there can be more added to that depending on the circumstances. In Chen v MIEA, the full federal court said an oral hearing may be required where there is a real issue of credibility involved or where the applicant is obviously disadvantaged by having to rely solely on written submissions, we will see this as a recurring theme, if there is a real question as to creditability particularly of witnesses then there will be more content required to try to establish the creditability or lack of it (of the evidence).

What about a right to legal representation? Generally, other than in criminal proceedings, courts are reluctant to treat legal representation as being a right, so even if a person gets to make oral submissions, they may not be able to have a legal representative. In Cains v Jenkins, a union member was denied a right to be accompanied by an article clerk at the hearing, the full federal court said the committee here had not denied natural justice, it depended on the circumstances and the status of the applicant, whether they could understand the proceedings an whether they can defend themselves, and if they could, then there is no automatic right to legal representation. In WABZ v MIMIA, the court looked at the factors to consider in determining whether natural justice would require legal representation, they said you look at the applicant's personality to understand the nature of the proceedings and the issues, the applicant's ability to communicate effectively, the legal and factual complexity and the importance of the decision to the applicant's liberty and well-being. So again, the seriousness of the consequences, so you look at the applicant themselves, can they understand the proceedings, can they represent themselves? Do they understand what is going on? You look at the circumstances, what are the consequences of the decision?

Is there a right to cross-examine? Again, there is no necessary right to cross-examine in every case, it will depend on the circumstances as to whether a right to make an oral submission extends to examining witnesses. In Harrison v Pattison, the court said where the creditability of a witness was critical in the circumstances then natural justice require the right to cross-examine. Where there is a question about credibility of a witness or creditability of evidence then there is a greater content of natural justice required to try to establish the creditability or lack of creditability of that evidence or that witness because that will be crucial to the decision being made.

In Hurt v Russell, the court said cross-examination would be required if there was a contested claim in an adversarial situation so where there is a dispute in an adversarial situation and evidence is not being accepted, again to establish that there might be a right to cross examine. So you can see depending on the circumstances and the status of the decision maker, the content of the hearing rule can vary. The greater the seriousness of the consequences, then the greater the content of the hearing rule. Where a person's freedom or liberty is starting to be at stake, then more content, more of the hearing rule is required, so more than just written submissions, the right to make oral submissions, may be a right to contest evidence.

Breach

- Decision void
- 'Minor' breaches
    - not fatal in courts – *Stead v GIC*
    - normally fatal for tribunals

What happens if there is a breach of the hearing rule? We've talked about breaches of natural justice and whether it makes the decision void or voidable. Generally when there is a breach of the hearing rule, the decision is void but there can be cases where there might be a minor breach of the hearing rule and the court will be prepared to overlook that minor breach because it will say the result will be the same anyway. That starts to be looking at the merits of the case, we have an example of where it may be that a minor breach of the hearing rule, won't be fatal, where the decision maker is an administrator or a tribunal then a breach of the hearing rule will always be fatal. Where it is an executive, administrative decision maker who is making the decision, then a breach of the hearing rule will be fatal. But there are some cases where in a court, a breach of a hearing rule will not be fatal and the example they give was if for example somebody sought to rise an issue on a point of law and they were denied, then if an appeal court would have decided that point of law was wrong, then they've lost nothing but not being able to rise it. It is in those sorts of situations, the courts have said, where they will disregard a minor breach of the hearing rule, because the same decision would have been made anyway, the decision would not have changed because the point of law that the applicant sought to

make was wrong, so it would not have affected the outcome, so that is the very limited circumstances where courts have said a minor breach of the hearing rule might be disregarded.

No-bias Rule

- When
    - applies to most decisions unless excluded
- What
    - neither actual or apprehended bias

So that's the first part of the content of natural justice. The threshold test we talked about last time, if there is a requirement for natural justice in a particular decision making situation, what does that mean? What is required? We've said the minimum is the right to be heard, and the right to be heard by a disinterested decision maker. So we've talked about the right to be heard, and have seen how that is variable, the other part is the right to be heard by a disinterested decision maker, someone who is not biased. The second component of natural justice is the no bias rule, what this is based on again drawing from the judiciary, is that the whole legal system can be applied and executed without favour. The idea is to extend that down into tribunals and bureaucratic and administrative decision makers as well. So again the high water mark of the no bias rule is in courts because we expect our judges to be unbiased. As it comes down the scale, then it may be with different sorts of bodies, the no bias rule might not be so strict.

When does it apply? It is a ground of review at common law and under ADJR, as it is part of natural justice, which is a ground of review at common law and under ADJR. Two components; when does it apply and the general rule is as with natural justice, it applies to most decisions unless it is excluded. It can be excluded by statute or by waiver, an individual can waive their rights to a hearing by an unbiased person. The second component is what does it contain? Basically the requirement is that the decision maker must not be actually biased and there shouldn't be a reasonable apprehension of bias.

Content

- Variable
    - highest standard from judiciary
    - lesser standard from tribunals
    - lesser standard from Ministers

As with the hearing rule, there is a range/ degree of how strongly the no bias rule will be invoked. The courts are the high water mark of the no bias rule and then as you come into less judicial type bodies, we will expect the no bias rule to be enforced less. The highest standard is expected from the judiciary and lesser standard from ministers, as they are members of political parties, they will have a political view on things. In some cases, natural justice does not apply to decisions of ministers and cabinet, so too we will see that ministers are not expected to comply

with the no bias rule, so courts at one end, ministers at the other, every other decision maker somewhere in between.

Types of Bias

- Actual bias
    - *MIMA v Jia* – state of mind so committed
    - seldom encountered

There are two types of bias; actual bias and apprehended bias. Actual bias is very difficult to prove. In JIA, it was said that it is a state of mind in the form of pre-judgment, one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented, so someone who has a mind that is totally made up, it doesn't matter what evidence or arguments were presented, they've got a closed mind. Obviously very difficult to prove and seldom encountered.

Apprehended bias

- Not an impartial mind
    - *Ebner v Official Trustee in Bankruptcy*
        - reasonable apprehension - objective test
            - identify impartiality factor
            - connection between factor and 'feared deviation'
    - hypothetical by-stander
        - *Johnson v Johnson* – qualities and knowledge
        - *Smits v Roach* – 'fictitious postulate'
        -

What is encountered more often is apprehended bias. A recent example of this is Duncan v Ipp (ICAC), the commissioner David Ipp, there was a challenge to have him removed as commissioner on the basis of apprehended bias.

Apprehended bias is where someone has not an impartial mind. The leading case in Australia now is Ebner v Official Trustee in Bankruptcy, this involved some litigation involving banks before judges who had a financial interest in the banks as they had bank shares so there was a financial interest in the banks, were the judges bias? Should they not sit on this case? The HC majority said the reasonable apprehension of bias test applies to cases of suggested partiality by judges, they said the test is an objective test and the judge would be disqualified if a fair minded lay observer might reasonable apprehend that they might not bring an impartial mind to the resolution of the question. It was subject to exceptions of waiver and necessity. They said the test is a two part test, and both of the parts have to be met. The first part is to identify, what it is said might lead the judge to decide a case other than on its legal and factual merits. What is the bias factor? What is it that will lead the judge to make a decision other than on its merits? That is the first component, but that in itself is not enough because then what you need to do is that there has to be an articulation of the logical connection between the

matter and the feared deviation from the course of deciding the case on its merits. You have to show how that biased factor has lead to the decision not being made on its merits. The bare assertion that a judge has an interest in litigation or an interest in a party to it will be of no assistance until the nature of the interest and the asserted connection with the possibility of departure from impartial decision making is articulated. Only then can reasonableness of the asserted bias be assessed. You have to show what is the biased factor and then you have to show the legal connection between that bias factor and the feared deviation from an impartial path, not enough to say that is the biased factor so the judge should step aside or the decision maker should step aside, you then need to show the legal connection of that factor to the feared deviation from an impartial path. In this case, what also became apparent is that I've said the exceptions to the no biased rule, generally statutory exclusion or limitation, waiver or necessity. In this case, the practicality of necessity probably came up. Where are you going to find a federal court judge that doesn't have shares in a bank?

We've said it is an objective test and it needs to be judged by a hypothetical bystander. Overtime, the court has added extra elements to the character of this hypothetical bystander who is judging the reasonable apprehension of bias. They have to be both reasonable and objective, they have to give the issues raised some thought rather than making a snap judgment, they shouldn't consider the claim in isolation but in the whole context, they must be fair minded, responsible, of average intelligence, have little knowledge of the legal system, be moderately informed about the case itself and have no personal knowledge of members of the relevant court. Kirby in particular has been critical of this hypothetical bystander.

In Johnson v Johnson, he talked about this hypothetical bystander being a member of the public, neither complacent or unduly suspicious. This increasing tendency of the court to add these qualities, in Smits v Roach, Kirby said this fictitious postulate of the reasonably intelligent fair-minded law observer had been stretched virtually to breaking point. He was basically saying it was just a shield used by the judges to mask their decision as to whether the decision maker was biased or not. So that is our test for apprehended bias.

Circumstances

- *Webb v R* – Deane J – 4 categories:
  - direct or indirect interest
  - conduct and statements
  - association, relationship
  - extraneous information

What are the circumstances that might give rise to bias? In Webb v R, Deane J came up with 4 distinct categories of bias, although they overlap. The sorts of things that could give rise to bias were:

1. Interest in proceedings, either a direct or indirect interest in the proceedings.
2. Conduct of the decision maker or statements made by the decision maker might create a reasonable apprehension of bias in this fair minded lay observe

3. Associations or relationships the person had or experienced, might also lead to a reasonable apprehension of bias or
4. There might be extraneous information the person has which might suggest the reasonable apprehension of bias

They are the 4 categories that can give rise to this reasonable apprehension of bias.

Examples

- Prosecutor and judge
  - *Re Macquarie University: Ex parte Ong* – VC acting as prosecutor and judge
- Pre-judged outcome
  - *Re RRT: ex parte "H"* – member constantly interrupting evidence
  - *Baker v Canada (Minister of Citizenship & Immigration)* – decision maker lacking humanity and compassion

The particular application of the no bias rule will depend on the circumstances of the case, the decision maker, the consequences of the decision…etc. All we can do is look at some of the cases and try to get a feel as to what the court expects regarding the reasonable apprehension test. For example if the decision maker is seen as both prosecutor and judge, that will give rise to a reasonable apprehension of bias. In MQ case, the university counsel dismissed the head of school but the court said the vice chancellor could be perceived as being bias because the vice chancellor could be perceived as both the prosecutor and judge (decision maker) because the vice chancellor had instigated the investigation, so in that role, the prosecutor, also the vice chancellor sat on the committee on the university counsel.

If it looks at a prosecutor has pre-judged an outcome, will that be a reasonable apprehension of bias? In Re RRT, a member of the refugee review tribunal had constantly interrupted an applicant's evidence, constantly challenged the truthfulness and plausibility of his account and the HC said in this case, that amounted to a reasonable apprehension of bias, a fair minded observer or a properly informed lay person might infer that there was nothing that could be said or done to change the decision maker's pre-conceived view that the applicant was telling lies. So she had already made up her mind, there was nothing that could change her view that the applicant was fabricating the evidence, her conduct indicated that.

In Baker v Canada, an applicant had sought to avoid deportation on humanitarian and compassionate grounds but the court said the decision had been made by someone who was lacking in humanity and compassion. This particular decision maker had been scoffing about Canada's soft heartedness to single mothers with psychiatric problems, huge families and a long term future of welfare dependence. The Canadian Supreme court said there was a reasonable apprehension of bias, the decision had to be made by someone with sensitivity who was willing to recognise diversity but this decision maker was not open to persuasion in this case because of prior comments and conduct.

- Private communication

- *Keating v Morris* – exchanges and informal meetings
- Hostility or favouritism
  - *Livesey v NSW Bar Assn* – judges had expressed strong views

What about where the decision maker has private communication with the party involved? In QLD case of Keating v Morris, an official inquiry into the CJC was shut down for a reasonable apprehension of impartiality. There had been exchanges between a commissioner conducting the enquiry and witnesses, there had been informal meetings between the commissioner and the witnesses. These informal chats and meetings gave rise to a reasonable apprehension of bias and so the enquiry was closed down.

What about when a decision maker exhibits hostility or favouritism? In Livesey v NSW Bar Assn, the NSW court of appeal had strike off a barrister for misconduct but two of the judges who had expressed strong views on the facts and the creditability of crucial witnesses in an earlier case in a related matter. The HC said because of that, there was a reasonable apprehension of bias in the circumstances. So 2 of the 3 members of the court sitting in judgment of whether the no bias rule had been broken. 2 of the 3 judges deciding whether the barrister should be strike off had already expressed strong views about related matters and being very critical. So those views and previous comments gave rise to a reasonable apprehension of bias.

Components

- Previous hearings or dealings
  - *Livesey v NSW Bar Assn* – judges had expressed strong views – reasonable apprehension of bias
  - *MIMA v Jia Legeng* – Minister forthright in views
- Personal or financial interest
  - *Smits v Roach* – doubtful in familial relationship

In Jia Legeng, a minister cancelled a visa on the basis of bad character, the minister had previously made a lot of public statements being very critical of the AAT overturning visa refusals and he talked about the characters of convicted criminals who were being given visas, did that amount to a reasonable apprehension of bias in the decision making in this particular case? The HC here said no, there was neither actual or reasonable apprehension of bias. The standard is different for ministers than for other decision makers, the HC emphasised the nature of the decision making process, and the identity of the decision maker were critical in determining whether there was a reasonable apprehension of bias, the minister they said, is an elected official accountable to parliament and the public so they are entitled to be forthright and open in their views. The HC said it would be an error to apply the same standards of the no bias rule to a minister as applied to a court. So ministers are subject to a lot less version of the no bias test than other decision makers, particularly courts, the other extreme.

What about where there is a person or financial interest? Does that amount to a breach of the no biased rule? In Smits v Roach, the judge's brother was chairman of Freehills, Freehills was being sued for negligence, the action before the judge was a related claim where the party who was suing Freehills were themselves being sued by somebody else. So could this judge sit on this case when his brother who was chairman of Freehills was obviously involved in the related case? The court said there was no reasonable apprehension of bias, they said the idea of a reasonable apprehension of bias arising from familiar relationships with the party not involved in the hearing was at least doubtful. Even though they were related cases, there was no reasonable apprehension of bias in that case.

Standard of no-bias rule

- Different for administrators and courts
    - *Hot Holdings v Creasy*
        - interest of relative insufficient
        - subordinate role played
        - interests of information providers don't affect decision
        - Ministers consider wider factors

The stringency of the no bias rule will depend on the circumstances, with the court on one end where you expect that the judges be unbiased and there is no question about it, ministers at the other end, where the court has said ministers don't have to be bound by the no bias rule. Hot Holdings- Australian case, it involved a departmental minute making a recommendation to a minister on a mining licence, the person who was preparing the departmental minute held shares in the company with an option to buy an interest in the licence. Also another person at the meeting held shares with the company with an option, did that amount to a reasonable apprehension of bias in that decision making process? This depart mental minute making a recommendation to the minister? The court said no, it didn't, the interest of the relative was insufficient to give rise to a reasonable apprehension of bias, the person preparing the minute gave a subordinate and peripheral role so there was no reasonable apprehension of bias. Just because people held an interest and that people were involved in making a recommendation, didn't mean the whole decision making process would be tainted by bias because ultimately the minister had to make the decision anyway, this was only a recommendation. They also said, ministers are not judges, they can take account of various factors, they can take account of government policies, their own aspirations, the political fortunes of the government, and all those sorts of matters, the no biased rule does not apply to ministers anywhere near as strongly as to other decision makers because ministers can consider political matters, policy matters, their own political aspirations. Ministers are answerable to parliament and the people, that is where they should be judged as to apprehension of bias.

Exceptions

- Necessity – 'necessity creates its own law'

- Waiver
  - express or implication
- Statutory abrogation

The exceptions to the no bias rule: Necessity creates its own law- if it is unavoidable that a person hearing or making a decision has some interest or formal connection or prior information that could lead to a reasonable apprehension of bias then the bias rule will be put aside, it is more important that a decision be made than the no bias rule ruled out the chance of making a decision. So where it is not possible to find somebody without a reasonable apprehension of bias, then someone with that apprehension of bias will have to make that decision anyway. With Ebner, where do you find a federal court judge in Australia who either directly or indirectly doesn't have shares in a bank? Generally seen as a mixture of principle and pragmatism that necessity must prevail over the no bias rule where there is no alternative decision maker.

What about waiver? Wavier is where a party waives its right to be heard by an unbiased disinterested decision maker. It can be either express or implied, the person can expressly waive their right and that will overcome any concerns about bias, and allow the decision to be made by the decision maker so they waive their right to an unbiased hearing but more concern is the implied waiver when a person is said to have impliedly waived their right to a no biased rule. The difficulty that arises there is at what stage of proceedings do you raise the no biased rule? If you do it too soon, or too early in the proceedings, and the decision maker isn't found to have a reasonable apprehension of bias and doesn't have to stand aside, then you may have antagonised that decision maker, it might make it more difficult to convince them of your argument. If you leave it till later in the proceedings or after a decision has been made, and then try to raise the no bias rule, it may be that a court will say you've impliedly waived your right to the no biased rule, you didn't do it soon enough, you should have done it earlier and that amounts to an implied waiver, so the difficulty can be getting the timing right as to when the no bias rule is raised.

Statutory abrogation- statute can as with natural justice can exclude the right to the no bias rule as part of natural justice, generally what statute will do is not try to exclude the hearing or no bias rule totally but they might seek to limit it in some way. Certainly if statute tried to exclude it, then it must be by clear express words in the statute. With natural justice generally, courts will not readily apply an exclusion of natural justice or the no bias rule. If the court's view is that the legislature wants to exclude the no bias rule then they do so by clear express statutory words. But courts may be prepared to imply a limitation on the no bias rule, not an exclusion altogether but some limitations. They might allow conduct that might otherwise contravene some part of the rule but not all of the rule.

Consequences

- Prior to decision – person cannot participate
- After decision – decision invalid

What are the consequences if there is bias, if the no bias rule is breached? If the no bias rule is found to have been breached prior to the decision being made, then the decision maker has to step aside and an unbiased decision maker has to come in. That is what happened in ICAC (Duncan v Ipp) until it has been found that there was no reasonable apprehension of bias, and so he continued. If the no bias rule is to have found to be breached after the decision has been made, then the decision is void, it is an illegal decision illegally made because it was made in breach of the rules of natural justice, one of the grounds for establishing legality of decision.

PRINCIPLE OF LEGALITY GROUNDS

Grounds

1. Procedural requirements
2. Decision not authorised
3. No evidence
4. Error of law

With judicial review, we've seen the different elements that need to be looked at. Is there jurisdiction, is the issue justiciable? Is standing available for an applicant to seek judicial review? What are the remedies available for judicial review? Now we are working our way through the grounds because to establish that a decision is invalid or illegal for judicial review to establish that there has to be some ground to show whether the DM acted unlawfully. Last week, we looked at the ground of natural justice which is a ground of both statute and under common law, specifically provided for in s5(1)(a) of the ADJR act that a breach of the rules of natural justice occurred in connection with the making of the decision. We saw with natural justice, there were two elements, the threshold test (when is a DM required to give natural justice to someone affected in the making of a decision) and we saw there that the requirement from Kiao v West was that natural justice needs to be given where there is an administrative decision which can destroy, defeat or prejudice a person's rights, interests or legitimate expectations subjection to a contrary statutory intention. That was the threshold, when it is attracted, what is the content of natural justice? We saw the 2 components of that; the hearing rule (that the person is entitled to know the case against them and to be heard, and we saw with that that content can vary from a written submission, oral submission through to examination of witnesses, and the second rule is the no bias rule (when a person has a right to be heard, they have a right to be heard by an unbiased observer or DM). That was natural justice, which is the first of our grounds. Today we will look at some other grounds which fall within broad categories. They fall broadly under the principle of legality.

Principle of legality

- Legal authority for decision making
  - ★ legislative powers
  - ★ prerogative powers
  - ★ *Clough v Leahy*
  - ★ *CCSU*
- Lack of power – unlawful decision
  - ★ *Entrick v Carrington* (1765)
  - ★ *A v Hayden (No 2)*

What is this principle of legality? Basically this is sort of a foundational principle of administrative law which says that government DM needs some authority to be able to make decisions, they need a legal authority, the fact that a legal government has been elected and then form part of the executive doesn't alone give authority to implement their actions, there needs to be some lawful authority for DM to act, we've seen that this can come from 2 places, more commonly, it comes from a legislative power, a statutory power which gives the DM power particularly where there is punitive or primitive powers or powers that have a financial impact, impose some burden on taxpayers. The second source of power which is still there is the prerogative power, the common law power of the executive. Because the government actually exists and is the government, from that it is derived these prerogative powers which evolved from the Crown in the UK. But there are constraints in these prerogative powers. In Clough v Leahy, it talked about the prerogative powers can't override or be inconsistent with statute, so if there is an inconsistency with the statute then the statute will prevail over a prerogative power. Prerogative powers can't justify an act which would be actionable at common law so they can't justify acts like defamation and those sorts of elements. Also, prerogative powers generally don't authorise coercive, punitive or threatening actions so if there are powers which have those sorts of effect, then generally they have to be under statute. The main exception there is the power to declare war which is obviously a threatening action, that is a prerogative power of the government.

We've seen already the Council of Civil Service Union, Lord Russell talked about the right of the executive to do a lawful act protecting the rights of the citizens is founded on the giving of the executive of the power enabling it to do that, in most cases, the power is derived from statute, it may still can however be derived from the prerogative so there is still the two sources of power, so the principle of legality is saying for government to act, for the executive arm of the government to act and make decisions, it has to abide by the law, it has to have a source of power to be able to make those decisions, if it doesn't then it has acted unlawfully.

Some examples of that in Entrick v Carrington (1765), there was a search warrant for Entrick's house, Entrick sued for trespass, and the court found that there was no legal authority to issue a warrant. There is a necessity to maintain the legality of the warrants and to show the secretary of state had jurisdiction to cease the defendant's papers, so the seizure of the papers of the unlawful entry was unlawful because the warrant was not found, there was no valid warrant so without that, there wasn't power to act.

A more recent case, an Australian case in A v Hayden (No 2), this involved staff on a security training program in a city hotel where the security training program didn't go according to plan, there was an injunction sought to prevent the release of the names of people who had been involved and the HC refused the injunction to prevent the release of the names, Gibbs CJ

said it was fundamental to our legal system that the executive has no power to authorise a breach of the law. The executive can't authorise a breach of the law.

- Manifest in ADJR:
- ★ procedural requirements – s 5(1)(b)
- ★ no jurisdiction – s 5(1)(c)
- ★ decision not authorised – s 5(1)(d)
- ★ error of law – s 5(1)(f)

2 aspects to the principle of legality

1) Parliament is assumed to want the power of the grants to be exercised in accordance with the rules of law, such things as accountability, fairness, protection of rights, so when parliament passes legislation, the assumption is parliament wants that legislation to be acted upon in accordance with the principle of legality and in accordance with the rule of law so DM should act in accordance with that.

2) Courts can require a government if it intends an act to be made other than in accordance with the rules of law, it has to say so in clear statutory terms. Courts will not be readily implying that laws should be interpreted to allow a breach of the rule of law or the principle of legality.

The principle of legality appears both at common law and in the ADJR act and some of the grounds we are looking at today fall broadly within this principle of legality; that the government cannot act unlawfully and these grounds specifically address that. It is at common law and also under statute, it appears in the ADJR act and some of the ones we will be looking at today and amongst the ones we are looking at, where there is a procedural error in s5(1)(b). The procedures that were required by law to be observed in connection with the making of the decision were not observed. Where there is no jurisdiction, we will look at that next time. A decision not authorised, one of the grounds in ADJR that the decision was not authorised by the enactment in pursuance of which it was purported to be made and that there was an error of law s5(1)(f) that the decision involved an error of law, whether or not it appears on the face of the record. All of these grounds are grounds whereby the DMs have acted outside their authority in some way, which is what judicial review is all about.

Procedural Requirements

- Common law
- ADJR – ss 5(1)(b) & 6(1)(b)

S5(1)(b) and 6(1)(b) of the ADJR act and it is also a ground at common law. There are some differences between the common law and the ADJR and they will become apparent as we look at some of the cases.

Common law

- Procedure
- ★ step or process in making decision
- Relationship with decision
- ★ procedures set down
- ★ ADJR wider

Effectively where there is some procedure laid down by statute and the DM has not followed that procedure in the making of the decision or in the conduct relating or in connection with the making of the decision. Some of the issues that arise around this is whether the ADJR act is wider than the CL, whether the ADJR act will only relate to these procedural requirements where a breach would produce invalidity, where a breach of the procedural requirements would make the decision invalid. There was some suggestion originally that ADJR would be wider than the CL in Minister v Yusef, Gaudron J said the procedural error ground was not tied to invalidity, the court implied that the procedural error ground in the ADJR was not tied to invalidity, we will see that when we are looking at some of the cases that there can be procedural error and the decision will not be found to be invalid, it might be unlawful but it is not necessarily found to be invalid. So what do we need to make out this ground of not complying with the procedures required by law. The first thing is there needs to be a procedure; so what is a procedure? It may be anything from a bare discretion that a DM has through to a step required by the legislation but generally seen as a step or process in the decision making. More importantly, what is the relationship of the procedure with the decision? At CL, the procedures have to be set down for the purpose of making the decision. If you wanted to make out the ground of procedural error, procedural ultra vires, the procedure had to be set down and described as a procedure that had to be followed. Under ADJR, the interpretation from the courts have been wider because when you look at the wording of the legislation in s5(1)(b), it talks about the procedures that were required by law to be observed in connection with the making of the decision were not observed. Under s6(1)(b), procedures that are required by law to be observed in respect of the conduct have not been, were not and were not likely to be observed. So it is in connection with the decision or in respect of the conduct and the courts have interpreted that more widely than the CL requirement that the procedure has to be laid down because it can be in connection with. So the courts have said this would include any procedure required by the law to be followed as part of the decision making process, a procedure can proceed, accompany or follow the actual making of the decision. So a

procedure can be a procedure after the decision, it doesn't have to be a step on the way to the decision so a wider interpretation under ADJR than at CL.

Requirements

- Status of procedures
- ★ lesser than substantive
- ★ *Boddington v British Transport Police*
- whether invalidity
- ★ mandatory - invalidity
- ★ directory – lesser importance
- ➢ substantial compliance – procedural ultra vires
- ➢ truly directory – not procedural ultra vires

What about the status of procedures? When will breach of a procedure lead to invalidity of a decision or when may it be unlawful but not invalidate the decision? It is in the nature of procedures that they can often be breached, frequently a breach of procedure may be overlooked. It may be waived because it is only a minor breach or something like that. So procedural requirements, generally are not seen as being as strong if you like as substantive requirements. Procedural requirements suggest they are of a lesser order than substantive requirements, but having said that the courts have also said it is very difficult to draw the distinction between what is procedural and what is substantive. In Boddington v British Transport Police, Lord Stein talked about how easily and invalidating procedural error can be characterised as a substantive error so in identifying what is procedural, you need to distinguish between what is procedural or whether it is substantive and that is a very fine line. A distinction between substantive and procedural invalidity will often be difficult or impossible to draw. The grounds of judicial review have blurred edges and tend to overlap, thus the taking into account by DM of an extraneous consideration may variously be described as procedural or substantive. When we look at the grounds, the grounds overlap, they have blurry fussy edges, they are not nice little neat grounds that you can make out in a particular case.

In many cases, there will be 3 or 4 or more grounds that may apply, so whether something is procedural or substantive when you are looking at, is it a procedural breach or a substantive breach of the legislation that is not always easy to identify. There is no bright line distinction between what is procedural and what is substantive. What the courts started to look at was to identify this, saying well its hard to work out what is procedural and substantive but what we should be looking at is where it looks like something is a procedure, is it a mandatory procedure or is it a directive procedure? If it is a mandatory procedure, then breach of that procedure would lead to invalidity of the decision but where it is a directive procedure, directive procedures in legislative will be of lesser importance than mandatory procedures. The case of

ABC v Redmore, the ABC claimed a contract that it had entered into was unenforceable because one of the procedures to make the contract valid was to get ministerial approval, that had not been done so therefore the ABC said this particular contract was unenforceable. Mason CJ, Deane and Gaudron J talked about the question for determination being whether these statutory section was merely directory or merely it operated to confine the actual powers of the ABC and they said the question whether the section should be construed as confining power or being directory was a finely balanced one. So this is coming to this difference between when a procedure is mandatory and if it is a mandatory procedure breach of that procedure will invalidate the decision, or is it directory only? But then the courts decided that if procedures which were not mandatory, were only directory then people could flout directory procedures; decision makers could flout directory procedures without risking invalidity. So they decided that within directory procedures, there needed to be two different types.

So we are looking at procedures in legislation giving a DM power and the court is saying is it a mandatory procedure whereby breach of that procedure will make decision invalid? Or is it only a directory procedure? But within that they said some directory procedures required substantial compliance and if they were breached, that would create invalidity of the decision whereas other directory procedures were truly directory, they could be breached within making the decision ultra vires, without invalidating the decision so it could be unlawful but wouldn't be enough to invalidate the decision and set the decision aside.

New test

- Legislative intent
- ★ *Project Blue Sky v ABA*
- ➢ whether legislation inconsistent with treaty
- ➢ labels outlived usefulness; deflect attention from real issue of whether breach is invalid
- ➢ whether purpose of legislation that breach produces invalidity
- ➢ consider inconvenience and uncertainty

The difficulty then became the court decided that having come up with all these different categories, they decided that that wasn't really a very useful approach because all that did was put a label on something after a court had decided. So if the court decided that a breach of this procedure should invalidate the decision, then they would call it mandatory. They said really all that is is a label after a decision has been made, so they decided they needed a new test. They said that the reasons for classifying one way or another were hidden, all it was doing was to announce a conclusion, put a label on it, after it had been decided. So they decided that there needed to be a new test, this is our current authority from Project Blue sky v ABA.

The new test and the old test tie up very much, they still relate. What Project Blue Sky was about was the ABA had a power to make regulations to determine Australian content on TV particularly in regard to children's TV. The regulation giving them power said the standard should not be in consistent with Australian overseas treaties and it was argued that where the broadcasting authority had set a 55% level of Australian content for children's TV that was contrary to the trade agreement with NZ. The legislation said that whatever decision should be consistent with Australian treaties. So did the fact that it was inconsistent with the treaty, was that enough to invalidate the decision? McHugh, Gummow, Kirby and Hayne all said these labels of mandatory and directory had outlived their usefulness because they deflect attention away from the real issue which is whether an act done in breach of the legislative provision is invalid, they said the classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds.

The classification is the end of the inquiry not the beginning so they are saying all they are doing is having decided whether a breach of the procedure should invalidate the decision, they were putting a label on it, they said what the real test should be is look at the legislation, did parliament intend that a breach of this statutory procedure should invalidate the decision? So you needed to determine the parliamentary intent behind that statutory provision so again statutory interpretation. The better test they said is to ask whether it was the purpose of the legislation that an act done in breach of the provision should be invalid. Now, to determine the purpose they said you have regard to the language of the relevant provision and the scope and object of the statute as a whole. An act done in breach of a condition regulating the exercise of statutory power, an act done in breach of a statutory procedure need not be invalid, if parliament didn't intend that a breach of that procedure invalidate the decision. So you needed to work out the intent of parliament when it legislated that procedure in the statute.

Whether breach of a procedure would invalidate a decision they said depended on whether there could be discerned a legislative purpose to invalidate any act which fails to comply with that condition so you look at the language of the statute, the subject matter and object of the statute. They also said you look further, you look at the consequences to the parties of holding invalid every act or every decision that breached that statutory procedure. What would be the consequence if every procedural breach caused invalidity? That was an element they looked at here, they looked at the inconvenience that would arise to the parties and the uncertainty that would be created in an industry in need of clear guidance from the regulator. So if every breach of the statutory procedure made the decision or the act invalid, that would created inconvenience and uncertainty and so that was one of the elements that the court needed to look at to discern the legislative purpose. Did parliament intend that every breach even if it caused uncertainty and inconvenience should lead to invalidity?

So that is the test we now have from Project Blue Sky but you will see from the cases, the court still talk about mandatory and directory, they still use those same labels.

Application

- *COT v Futuris*
- ★ tax assessment reviewed through objection and appeal process
- *McGovern v Kur-ring-gai Council*
- ★ plan not invalid if non-compliance
- *SAAP v MIMIA*
- ★ statute req'd notice
- ★ req't mandatory – not discharged statutory function

Some of the application of that test is seen in COT v Futuris, which was a case seeking judicial review of a tax decision, the court said that judicial review was not available, the legislative intent was that errors in tax assessment be reviewed through the statutory procedures in the tax legislation. The tax administration act sets down the path to follow if a tax payer is unhappy with an assessment and the court said that is the legislative path to follow, you can't seek judicial review of that.

In McGovern v Kur-ring-gai, the court said it was not a legislative intent that a draft environmental plan would be invalid if it failed to comply with onerous statutory requirements. So even though there were statutory requirements, the court decided it wasn't the intent of parliament that if a draft environmental plan didn't comply with them all, that it would be invalidated. I should have said when we were looking at project blue sky, what the court decided in that case was that the decision was unlawful but not invalid. So it was in breach of the law but it was not a serious enough breach to invalidate the decision.

In SAAP v MIMIA, the statute on the conduct of the refugee tribunal said applicants had to be given notice of a reason for a decision. In this case, the applicant was given oral reasons but not given a written notice of the reasons. McHugh J talked about the requirements being mandatory because of the overall importance and the failure to comply meant that the tribunal had not discharged its statutory function. He said it would be **annanomous** if the tribunal's decision was found to be valid notwithstanding that it had failed to discharge its obligation. So the court in this case said yes, the parliamentary intent was that if this procedure was not complied with, then the decision should be invalidated, and you look at the seriousness of the consequences and from that you could discern a legislative intent that a breach of the procedure would be enough to invalidate the act and again the court used the terminology mandatory and directory.

ADJR application

- ADJR – includes procedure in connection ith decision
- ★ *Our Town FM v ABT (No 1)*
- ★ 'in connection with' has wider meaning
- *Minister for Health & Family Services v Jadwan Pty Ltd*
- ★ statutory procedures

That is looking at the development through the common law, what does ADJR add to that? There is a wider application for the ADJR act than under the common law because the terminology in the legislation (if you apply statutory interpretation to the ADJR) would be a wider application because under s5(1)(b) it talks about procedures that were required by law to be observed in connection with the making of the decision or its conduct in relation to the making of the decision so those terms suggest a wider range of circumstances where a breach of the statutory procedural requirements would make out a ground for judicial review.

In Our Town FM v ABT (No 1) the statute required the tribunal to grant a license and provide a report to the minister setting out its reasons. In this case, it was done in reverse, the procedure followed the decision and didn't come before the decision. Davies J said in connection with has a wide meaning, requiring a relation between one thing and another but not necessarily a causal relationship. So there had to be some relationship but not necessarily a causal relationship.

In Minister for Health v Jadwan, the minister here had separate statutory powers in relation to nursing homes, had a power to revoke a license if a nursing home didn't comply with the conditions for its approval and it had a power to issue a declaration that a nursing home didn't meet the standards determined in accordance with a specific process but if he wanted to issue a declaration, if the minister wanted to issue a declaration, the minister could only do so after the matter had gone to a review panel, the nursing home had an option to go to a review panel before a declaration could be issued. So a power to revoke a licence, power to issue a declaration that it didn't meet standards, but if the minister was going to issue a declaration, the nursing home could firstly go to a review panel. In this case, the minister decided to revoke a licence but follow the procedure for the issue of a declaration in other words went through a review panel prior to revoking a license, it took the advice of a review panel to revoke a licence. The argument was the minister hadn't properly complied with the procedure because revoking a licence you didn't need to go through a review panel but the court said in this case that the procedure followed by the minister hadn't been required in connection with the decision to revoke the licence. So in fact the minister had done more than was required to be done.

That is our first ground looking at failure to comply with some statutory procedural requirement or a prerogative procedural requirement but normally most often you would be looking at procedural requirements which are laid down by statute as part of the decision making process.

Decision Not Authorised

- Legislative - decision-maker lacked power
- ★ *Mark v ABT*
- ➢ no power to refer matter to ABT
- ★ *London County Council v Attny General*
- ➢ trams and busses separate businesses
- ★ *Vickers v Minister for Business & Consumer Affairs*
- ➢ seizure of good and money
- ★ *Paull v Munday*
- ➢ regulating emission of air impurities

S5(1)(d), the decision was not authorised by the enactment in pursuance of which it was purported to be made or s6(1)(d) that the enactment in pursuance of which the decision is proposed to be made does not authorise the making of a proposed decision. So the DM is acting under or purporting to act under a power granted by the statute but that statute doesn't authorise what the DM is wanting to do. Some examples where a decision was not authorised by statute. In Mark v ABT, this involved the president of the state anti-discrimination board who referred complaints of racial vilification on radio to the ABT (Australian Broadcasting tribunal) but the court said that the president of the state anti discrimination tribunal had no power to refer the matter to the ABT, the state legislation under which the president was acting required the president to deal with the matter himself. So the president should have dealt with the matter of racial vilification on radio, not referred on, he had no power to refer it to the ABT. So that decision was not authorised.

In London County Council v Attorney General, a local authority purchased a tram company which ran both buses and trams. There was a statutory power for the local authority to operate trams but there was no mention of buses. So the question was could the local authority run a company that operated trams and buses, it had statutory power for trams but not buses. The court said it couldn't, it was said that this was carrying on two businesses, trams and buses, there was express authority for one but not the other. You may think, when we talk about statutory interpretation, and some maxims and rules we've looked at there that some of the rules like … generous and those sort of things with a class of items, that if you had power to operate trams that might extend to other modes of transport but the court said no in this case, it was two different things, trams and buses, statutory power for one but not the other.

In Vickers, there was statutory provision for the seizure of goods, moveable property and money in the form of cash. The court said that didn't extend to amounts recorded in a bank account statement, it had to be money in the form of cash. If there was money represented by a bank account statement, then the authority to seize didn't extend to that.

In Paull v Munday, there was legislation regulating the emission of air impurities and it gave a delegated power under the legislation for the making of regulations and there was a regulation made to prevent lighting open fires and the question was could a regulation to prevent lighting open fires be valid under legislation that was regulating and controlling emissions of air impurities? The court said no, Gibbs J said the power to make regulations to regulate and control emissions of air impurities does not enable regulations prohibiting the source of those impurities. Power to do one thing is not validly exercised by doing something different even if the effect is the same as doing what was permitted. So the legislation to control air impurities didn't give power to create a regulation to prevent open fires, even though the effect was the same, it was doing something different the court said. In determining whether the regulation was valid, the court said courts are not concerned with its wisdom or expediency only whether the statute permits the making of the regulation. Stevens J said the legislation doesn't deal with emissions of air impurities as it should, the regulation was authorised to be made on a particular subject matter and no other. Murphy J in a strong dissent basically said don't be so silly, the legislation was directed towards preservation of the environment and public health and it should be given a beneficial construction. But the court took a narrow approach and said no legislation to control air emissions doesn't authorise the making of a regulation that prevent open fires. So the making of the regulation wasn't authorised by the legislation.

Decision Not Authorised

- Executive power – uncertain foundation
- ★ *MIMA v Vadarlis*
- ➢ French J – executive power to prevent entry
- ➢ Black CJ - no executive power for deportation or detention

That is looking at whether there is a statutory power. We've talked about the other power the executive has which come from common law or the prerogative power, can there be decisions which aren't authorised by that prerogative power? That is not so clear because the prerogative power is not clear. The courts have talked about executive power being an uncertain and fragile foundation for government action which is why most of the situations we will look at is where there is statutory power for the DM to act and they are not acting on a prerogative power. One example is in MIMA v Vadarlis, this involved the Tempa rescuing the boat people, it was boarded by the SAS to prevent the movement of those people to Australia.

French J said there was an executive power to prevent entry to Australia, a prerogative power to prevent entry into Australia. Black CJ in that case said the authority that the executive power had didn't extend to deportation, detention and extradition and those sorts of matters, because of the consequences of the individuals, so it is uncertain as to how far prerogative power goes and when a DM might be making a decision or doing an act which is not authorised by that prerogative power, it is much more firm ground when the DM is acting under statutory power.

No Evidence

- Common law
- ★ *ABT v Bond* – existence of evidence is a question of law
- Elements
- ★ decision-maker found fact
- ★ fact is material
- ★ lack of evidence
- ➢ UK – insufficient evidence
- ➢ Australia – no evidence

Again there is some differences here between CL and the ADJR. At common law, to make out the ground of no evidence, it must be shown that there is no evidence for the making of a decision. Not that there was insufficient evidence, but that there was no evidence. This might be looking at the merits of the case, and going pass looking at the legality, but no because the court said it is not in ABT v Bond, Mason J said the law has always recognised that the existence or otherwise of evidence to support a factual conclusion is a question of law so whether the evidence exists to support a conclusion is a question of law. So making a finding or drawing an inference in the absence of evidence would be an error of law. The court can look to see if there is evidence to draw a conclusion or to make a decision because if there is not, and the DM has acted in the absence of evidence, that is an error of law and that is what judicial review is all about. So the no evidence rule is available for judicial review.

What are the elements required at CL?

1) The DM has to have found some fact

2) That fact has to be a material fact (it was used in making the decision and if the fact had been different, the decision would have been different, so it is a fact on which the decision turned, it has to be a material fact).

3) There has to be a lack of evidence to support the finding that that fact existed

There are 2 views about the lack of evidence, the way the UK common law has developed is that in the UK the ground is made out if there is insufficient evidence, so the court can decide if there was insufficient evidence for that finding of fact. Australia has not gone that way, at common law, to make out the no evidence ground, you need to show that there was no evidence at all for a finding of fact. No evidence that a decision could be based on, not insufficient but none at all.

Application

- *Parisienne Basket Shoes v Whyte*
  - ★ factual intervention limited
- *R v Aust'n Stevedoring Industry Board; Ex parte Melbourne Stevedoring*
  - ★ distinction between insufficiency and absence of evidence
- *R v District Court; Ex parte White*
  - ★ some basis for inference

In Parisienne Basket Shoes v Whyte, this involved the case of employees being paid under award rates, but the employer thought they were immune from prosecution because the summons were issued too late and served too late. The HC talked about it being dissatisfied with instances of factual intervention beyond where it was clearly specified in legislation that the jurisdiction of the DM depended on the existence of a fact, sot he court will not delve further into the matter about whether the DM made the right decision based on the fact but what the court will look at is; is there any evidence at all for the DM to draw a conclusion? It won't go further than that, if it finds that there is some evidence then it will not go further than that to say was that sufficient evidence or was the right decision made? All the court will look at is, was there any evidence at all? If there is no evidence then the no evidence ground is made out and if there is evidence, the court will not go further, it will stop there.

In R v Australian Stevedoring, there was an inquiry into registration of the Stevedoring company, and the HC granted prohibition to prevent the inquiry from continuing, Dixon CJ, along with 3 other judges draw a distinction between a mere insufficiency of evidence or other material to support a conclusion of fact and the absence of any foundation of fact. So mere insufficiency of evidence was not enough, if it can be shown that there was some evidence at all, no matter how little, then the court will not find that there was no evidence.

In R v District Court, Menzies J said so long as there is some basis for an inference no matter how illogical the reasoning then there is no place for judicial review, no error of law has taken place, so if there is some evidence, even if the reasoning based on that evidence was totally illogical the court will not intervene because that is getting into the merits. All the court can look at is was there evidence to based that conclusion on.

- *Sinclair v Mining Warden at Maryborough*
    - ★ material to warrant affirmative conclusion
- *Pochi v MIEA*
    - ★ speculation not evidence

Sinclair v Mining Warden involved sand mining on Frazer Island some years ago, the Warden recommended a mining licence for 11,000 hectares, despite there being contrary evidence, Barwick CJ said it is essential that there be some material before the DM that warranted an affirmative conclusion on the substance of the application, so long as there was some evidence warranting the decision that has been made, or warranting the making of a decision, the court could not intervene further, at CL, it will only intervene where there is no evidence at all for the conclusion. So that rises the question of what will constitute some evidence? Can mere speculation or suspicion be considered to be evidence? Can that be construed as some evidence?

In Pochi v MIEA, the minister sought to deport the applicant based on a conviction of one year or more. Before the AAT hearing the appeal, the minister sought to establish facts beyond those used in the original conviction. Brennan J said the evidence raised only a suspicion and not a positive finding that Pochi was involved in commercing marijuana, for an important decision such as deportation, it would be wrong to make adverse findings on the basis of mere speculation or suspicion, such slender basis would not constitute a rational probative basis for decision making. So suspicion and speculation are not 'some evidence'. If that is all there is, then there will be no evidence, it needs to be something more, something that is a rational probative basis for decision making.

A decision based on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, the DM must not spin a coin or consult an astrologer but take into account any material which has probative value and the weight to be attached to the material is for the DM, the court will only look to see if there is some evidence and if there is then the no evidence ground can't be made out under common law.

ADJR

- Sec 5(1)(h) – no evidence or other material to justify decision
- Sec 5(3)

a) decision only if matter established, and no evidence, OR
b) decision based on existence of fact that doesn't exist

What about the ADJR act? In s5(1)(h), it talks about there was no evidence or other material to justify the making of the decision. But then further in s5(3), it talks about the grounds specified in (1)(h) will not be taken to be made out unless, and then there are 2 further limbs that need to be met as part of this no evidence rule; the person who made this decision was required by law to reach that decision only if a particular matter was established and there was no evidence for other material from which he or she could reasonably be satisfied that the matter was established. Or paragraph b, the person who made the decision based the decision on the existence of a particular fact and that fact didn't exist.

First limb

- 'reach a decision only if particular matter established'
  - ★ *Chen v MIMA*
    - ➢ precondition in law to making decision
  - ★ *Western Television v ABT*
    - ➢ making of decision depends on establishment of matter
- 'could reasonably be satisfied'
  - ★ *ABT v Bond*
    - ➢ lesser burden than common law

Terminology in the first limb, it is a restrictive condition, it says the DM is required by law to reach a decision only if a particular matter is established. So it only applies where the legislation requires the existence of a certain fact where a particular matter has been established, if that matter hasn't been established, then the DM can't act, it is not enough that the legislation permits the DM to rely on a fact. You've got to be able to discern from the statute giving power that the DM can only make a decision, can only act if that particular matter has been established. It is like the jurisdictional fact doctrine; the DM only has power if that fact exists. In Chen v MIMA, the full federal court said it was necessary that there be a pre-condition in law to the making of the decision or a clear legislative intent that the making of the decision depended on the establishment of that particular fact.

In Western TV v ABT, Pinkus J said this would apply only where legislation expressly or impliedly provided that the making of decision A depended upon the establishment of fact B, so it is only where the legislation says the DM can only act where this fact has been established not that the DM can rely on it but only has power to act once the fact has been established. It also talks about in that first limb, there is no evidence or other material from which the DM could reasonably be satisfied that the matter was established. What does it mean that the DM could reasonably be satisfied? It is not really clear yet but this is still being explored and fully tested.

But again going back to ABT v Bond, Mason J said you need to show an absence of evidence or material from which the DM could reasonably be satisfied that the particular matter was established. An absence of evidence or material from which the DM could reasonable be satisfied that the matter was established, that suggests a lesser burden than the common law, the common law was no evidence, the statute is saying that there is no evidence from which the DM could reasonable be satisfied. So that suggests not as stringent, not as strict a test as provided by the common law. No requirement to show a complete lack of evidence because the requirement is to show that there is a lack of evidence from which the DM could reasonably be satisfied. So the courts generally had a confined role for the first limb, they say it is not enough for the statute to say that the decision maker should have regard to the certain facts, it says this particular matter relied on must be a condition precedent to the making of the decision. The DM only has power to act where that particular matter has been established.

Second limb

- 'decision based on particular fact that did not exist'
    - ★ *Australian Retailers Assoc v Reserve Bank*
        - ➢ opinions are not facts
- *Curragh Qld Mining v Daniel*
    - ★ decision based on fact shown to be incorrect

What about the second limb, the person who made the decision on the existence of a particular fact and that fact didn't exist. There are 3 issues to look at. Firstly, what is a particular fact? There is a distinction drawn between decisions based on facts and decisions based on an opinion or a point of view which will not be reviewable decisions. Findings, assumptions, those sorts of things are not particular facts. In Australian Retailers v Reserve Bank, the court said opinions are not particular facts.

In Curragh Qld Mining v Daniel, there was a mining company which was importing mining equipment to meet a particular contract it had signed for the supply of coal and it sought **tariff of concession, the tariff of concession** was available on the importation of mining equipment where there wasn't equivalent or suitable equipment that could be manufactured locally. There was locally manufactured equipment, it wasn't available. If that was the case, then there can be a tariff concession on the import.

In this case, the tariff concession was rejected because the DM said the mining company could have used locally manufactured equipment, it went to the full federal court which allowed judicial review. There had been a rejection of the application for judicial review, the full federal court allowed an appeal against that rejection, they said the decision to refuse the tariff concession was based on a fact shown to be incorrect, it was based on the fact that the

applicant could have negotiated with the contract for a later delivery to give them time to get locally manufactured equipment. So that was the particular fact that the DM relied on to deny them the tariff concession, that they could have renegotiated or negotiated the contract to get a later delivery and the court said that particular fact was in correct because the company couldn't have negotiated that contract for a later delivery so the DM relied on that particular fact and that fact was incorrect.

- 'based on particular fact'
  - ★ *Bond* – fact critical to making decision
  - ★ *MIMA v Rajamanikkam* – more than 'had regard to'; non-existent fact the base of decision
- 'did not exist'
  - ★ not limited to evidence before decision-maker

What does it mean when it says in the legislation that the decision was based on the existence of a particular fact? In Bond again, Mason said a decision will be based on a particular fact where the fact is critical to the making of a decision. In MIMA V Rajamanikkam, the refugee review tribunal affirmed a decision of a delegate of the minister, rejecting application for protection visa on the basis that the applicant didn't satisfy the criteria for refugee status which was a well founded fear of prosecution. The refugee review tribunal gave 8 reasons for rejecting the application. 2 of those reasons were based on assumptions that the applicant had deliberately conveyed a false impression that it was unsafe for him to return. The question was could you say this decision was based on those facts? When it was 2 of the 8 reasons, did that mean it was based on it? The full federal court said these were facts of central importance without which the tribunal could not have reached its decisions. So the full federal court said yes, 2 of the 8 reasons was enough to say that it was based on this fact which was shown to be false that the applicant was giving a false impression. When it went to the high court, it said it was not prepared to describe these facts as facts without which the tribunal would not have reached its decision, they were facts which the tribunal took into account but they said the refugee review tribunal decision was not based on that non-existent fact, that wrong assumption. Callinan J said based on implies more than have regard to or took into account. It requires a finding that the non-existent fact was the base or the foundation for the decision. Gaudron and McHugh said that the finding of fact must be one without which the decision in question either could not or would not have been reached. It is effectively a 'but for' test, 'but for' these facts, the decision would not have been made. So quite a strong reliance, where 2 of the 8 reasons were based on a false assumption, a wrong fact, you could not say the refugee review tribunal was based on the wrong fact because there were other reasons as well.

The third requirement in the second limb of s5(3) is that the fact didn't exist, the fact relied on didn't exist. How do you prove a fact doesn't exist? You can prove a fact does exist, but just because there is no evidence to establish a particular fact doesn't prove the fact doesn't exist. All it means is that there is no evidence yet to prove that the fact does exist. So it is a difficult test to prove that a particular fact does not exist. It is not limited to the evidence before the DM, there can be new evidence which is subsequent to the decision to determine whether the fact did not exist.

Interaction of sections

- *Curragh*
  - ★ FFC – cumulative approach
- *Rajamanikkam*
  - ★ Gleeson CJ & Callinan J – cumulative
  - ★ Gaudron & Gummow JJ – expansive
  - ★ Kirby J – 'difficult to read'

We've got s5(1)(h) which talks about there was no evidence or other materials to justify the making of a decision. We've got s5(3) which talks about in addition to 5(1)(h) these matters must be made out, how do they relate? Are they cumulative? Is s5(1)(h) and s5(3) together or do they each stand alone separately, how are they to be interpreted? We don't know, there is still a lot of doubt about it. In the Curragh case, the full federal court took a cumulative interpretation, you needed to show both there was no evidence or other material under s5(1)(h) and you needed to make out one of the limbs of s5(3) as well. So s5(3) didn't stand alone, if you could make out one of the limbs of s5(3), that was not enough. You need to show s5(1)(h) as well. When it got to the HC, in Rajamanikkam, the HC considered this cumulative approach, Gleeson CJ and Callinan J agreed that the cumulative approach was the better view.

Gaudron and Gummow disagreed and adopted a more expansive interpretation that you didn't need to show both s5(1)(h) and s(5)(3) if you could show on of the limbs of s5(3), that would make out s5(1)(h), that would be enough to establish s5(1)(h). So they said 5(3) was how you show 5(1)(h) could be satisfied. Kirby is difficult to read on this issue, he appeared to endorse a cumulative approach but his conclusions were methods were inconsistent with the cumulative approach. So 5 HC judges, 2 one way, 2 the other way, 1 sitting on the fence. So until the matter gets back for further adjudication to the HC, it is not clear whether they are to be read cumulatively or separately.

Error of law on the face of the record

- Common law

- ★ error of law
    - ➢ law/fact distinction
- ★ error must be on the face of the record
- ➢ *Craig v South Australia*
- ➢ record of inferior courts does not include transcripts, exhibits or reasons for decision
- ➢ record means:

1. documents initiating proceedings
2. pleadings
3. order itself

A further ground; error of law, both at common law and under statute. But again they differ. At common law, we talk about error of law on the face of a record. What does all that mean? The development of judicial review involved superior courts of record sitting in review of decisions made by inferior courts. When the inferior court makes a decision, that goes on the court record. When the superior court sat in judicial review of that inferior court decision, if it overruled the decision; if it had found there was some error of law, then it could invalidate the decision but that decision is still on the record because the inferior court decision is on the record so the superior court would call out the record of the inferior court and expunge the decision from the record. So for common law there had to be an error of law and it had to be an error of law on the face of the record. The law/fact distinction: because judicial review is only looking at correction of legal errors, it can't reevaluate the facts, it is only looking at a correction or expunging a legal error. So an error of law on the face of the record, the question becomes what is on the record where the court can look at the record to see if there is an error of law on the face of the record? So from the record, can it find an error of law?

The thread originally was to expand the definition of what was on the record, so there will be more elements on the record but that has been reversed in the case of Craig v SA, the order in this case that was sought to be reviewed was a stay of a trial until the accused was able to get legal aid. What we are interested in at this stage is that the HC ruled against the proposition that the record included the trial judge's reasons for the decisions, as well as the transcript of the proceedings. The court said in the absence of some statutory provisions to the contrary, the record of an inferior court for the purposes of certiorari does not ordinarily include the transcript, the exhibits or the reasons for decision. What the record will include are the initiating documents, the documents that initiated the impugn decisions, any pleadings and the impugned order itself. That will be what is on the record, so the judges' reasons and the transcripts of the case will not be part of the record unless the judge refers to that in the order that the judge makes, so in making the order, the judge can refer to the reasons or refer to the transcripts, the order is part of the record and so if the order refers to other matters, those other matters will then be part of the record but other than that Australia takes a very narrow

approach as to what is on the face of the record, what can the court look at when they are sitting on judicial review? It can only look at what is on the face of the record and the record is the initiating documents, the pleading and the order itself. The court said in Craig, it was not desirable to widen the scope of the remedy in respect of inferior courts, less it be transformed into a general appeal for error of law because they want to keep judicial review looking at legal errors, not becoming a general appeal process.

At CL, it has to be an error of law on the face of the record, so the court looks at the face of the record to see if there is an error of law there, if there is, then it will issue some order and it can remove that error from the face of the record.

Error of law

- ADJR s5(1)(f)
- ★ error of law whether on face of record
- ★ *ABT v Bond*
- ➢ error contributed to decision in some way

Under ADJR, s5(1)(f), that the decision involved an error of law, whether or not the error appears on the record of the decision. It is different from CL, because the error doesn't have to appear on the record, even though it is listed in 5(1)(f) as a separate ground being an error of law whether or not it appears on the face of the record, it is in fact, what judicial review is looking for is an error of law, in fact, everything all of the grounds are some sort of errors of law, even though it is listed there as a ground in itself, it is also an all-encompassing ground, because there is a breach of a natural justice, there has been an error of law, if there has been a breach of procedural requirements, there has been an error of law, so they are all errors of law, that is what judicial review is looking for but it is also there as a separate ground. The grounds are not little self-contained modules, they all overlap and relate. What the courts have said, generally to make out an error of law, will involve some misinterpretation or misapplication of legislation. In Bond, Toohey and Gaudron JJ said to establish an error of law, needs more than a mere occurrence of an error, the error must have contributed to the decision in some way, an error wouldn't be involved in a decision if it didn't contribute to the decision or if the decision would have been made the same regardless of the error. So it is saying it needs to be a material error in that it contributed to the decision.