Australian Government
Department of Social Services

Administrative Decision Making

Making a determination under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*

DSS 02.08.2024

Contents

Administrative Law in Perspective

Australian Constitution

The power of the Commonwealth derives from the Constitution. The Constitution is important because:

- it creates the Commonwealth;
- it defines the Commonwealth's legislative, executive and judicial powers; and
- it is the ultimate source of authority for everything that Commonwealth public servants and officials do.

The Commonwealth's legislative powers are limited. Parliament does not have the power to legislate on any matter which it wants to. The matters in relation to which Parliament may make laws are listed in the Constitution, principally in s 51. Most of the Commonwealth's legislative powers are concurrent with those of the States e.g. both the States and the Commonwealth can impose income tax. However, where a State law is inconsistent with a valid Commonwealth law, the Commonwealth law prevails by virtue of s 109 of the Constitution.

There are three branches of government in Australia - the **Legislature**, the **Judiciary** and the **Executive**. Each branch has its own powers and can generally exercise only its own powers. This is known as the doctrine of the 'separation of powers'.

The Constitution (in chapters I ('The Parliament'), II ('The Executive Government') and III ('The Judicature')) sets out the powers of each branch of government. Section 1 vests the legislative power of the Commonwealth in 'a Federal Parliament'. Section 61 vests the executive power in 'the Queen' and provides that it may be exercised by the Governor-General as the Queen's representative. Section 71 vests the judicial power of the Commonwealth in a 'Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'.

For the most part, the Commonwealth's executive power can be exercised only in respect of matters within its legislative power. The executive power may be exercised either by Commonwealth departments or by statutory bodies created by the Parliament. The responsibilities of Commonwealth departments are defined in the Administrative Arrangements Order, which is published in the Commonwealth Government Gazette. The functions and powers of a statutory body are principally found in the legislation creating the body, although other legislation may also confer functions and powers upon the statutory body.

Laws made by Parliament

Acts of Parliament (also known as Statutes, or just "Acts") are the premier laws in the Commonwealth, and are subject only to the Constitution. Bills become law only once they have been passed by both houses of Parliament and have received the royal assent from the Governor-General. Acts may not commence operation immediately. It is common for Acts to become operative, for example, on royal assent or on a date specified in the Act.

Delegated Legislation

Acts of Parliament often allow for the creation of subordinate laws or delegated legislation, particularly where it is necessary to deal with complex, detailed or procedural matters. Delegated legislation can be made by the Governor-General (as is the case for Regulations), by Ministers or by officers of the Commonwealth. Delegated legislation can take the form of:

- Regulations;
- Rules;
- Orders;
- Proclamations;
- By-laws;
- Ordinances;
- Determinations; and
- Declarations.

Generally, delegated legislation must be registered on the Federal Register of Legislative Instruments, which is accessible from the Federal Register of Legislation website at www.legislation.gov.au. It is important to note that the *Legislative Instruments Act 2003* contains provisions which govern the making, registration, scrutiny and "sunsetting" (expiry) of delegated legislation.

Many decisions made by Commonwealth departments and statutory authorities are not made under legislation but in the exercise of the executive power of the Commonwealth.

Common law

It is generally accepted that judges "make" law as well as apply the existing law to resolve disputes between parties. As this occurs on a case-by-case basis, the process of creation of common law is slow and evolutionary. The areas of contract law and tort law (including actions such as negligence, trespass and defamation) are areas in which the common law has historically had a large role to play.

Although judge-made law is still important in Australia, in many cases it has been restated or modified by legislation. For example, the common law relating to negligence has largely been codified in the civil wrongs legislation in Australian States and Territories.

International law

International law does not directly form part of Australian law and is not of itself enforceable in Australian courts. However, Australian legislation may incorporate international law in the form of Australia's treaty obligations. International law may also influence the development of the common law.

Although Australia's international obligations do not directly form part of Australian law, international law may nonetheless be a relevant consideration for decision makers in some instances. Where Australia has ratified an international convention, this of itself may create a "legitimate expectation" that government decision makers will act according to the convention (see *Minister for Immigration and Ethic Affairs v Teoh* (1995) 183 CLR 273, which concerned the Convention on the Rights of the Child; also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1).

Administrative law

Administrative law is concerned with the review of administrative action of Government, i.e. the actions of the Executive. When the Commonwealth came into being in 1901, there were two well established methods of doing this.

Firstly, the merits of a decision could be questioned in the Federal Parliament by pursuing the doctrine of ministerial responsibility.

Secondly, the legality or form of the decision could be challenged in a legal action brought in the courts. Actions of officials have traditionally been able to be challenged through court proceedings involving the use of the common law prerogative writs. The writs most applicable to administrative law are listed below.

- **Mandamus** may be used to compel the performance of a public duty under statute, for example the determination of an application for a licence or permit.
- **Certiorari** will have the effect of quashing the previous decision and removing the matter to the relevant court, for example where there is a denial of natural justice.
- **Prohibition** prevents the inferior tribunal from making an invalid order or continuing to act on it and is often used in conjunction with certiorari.

Other remedies used in administrative law proceedings are declarations and injunctions.

Declarations may be sought to obtain from the court a statement of the legal status of a given matter, for example a declaration could be sought that a person has made a valid application for redress or is eligible for redress under the scheme, as part of judicial review proceedings. *Injunctions* can be used to restrain the taking of a particular act by a public authority or to require the taking of particular action.

The right of persons affected by Commonwealth administrative action to challenge the legality of that action is referred to as 'judicial review'. This is entrenched in s 75(v) of the Constitution which gives original jurisdiction to the High Court in respect of mandamus, prohibition and injunction sought against an officer of the Commonwealth. Proceedings to challenge decisions under the Redress scheme would most likely be brought against the National Redress Scheme Operator.

In the 1970s and 80s, the Commonwealth legislated to simplify judicial review, provide for open government and administrative accountability generally. The administrative law legislative package included the following pieces of legislation:

- *Administrative Appeals Tribunal Act 1975*
- *Ombudsman Act 1976*
- *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act)[1]
- *Freedom of Information Act 1982*
- *Archives Act 1983*
- *Privacy Act 1988*

It is important to note that the administrative law package did not replace the prerogative writs. Rather, it gave additional means of seeking judicial and merits review of certain decisions and introduced further means of scrutiny and access to information. Persons affected can often use one or both systems.

[1] Decisions under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* have been expressly excluded from the ADJR Act. However, judicial review remains available under s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903*.

To alleviate the pressure on the High Court of Australia from the s 75(v) Constitutional prerogative writs, the Parliament enacted s 39B of the *Judiciary Act 1903* giving original jurisdiction to the Federal Court in matters seeking the prerogative writs of mandamus or prohibition, or an injunction against 'officers of the Commonwealth'.

The High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 made the following statement regarding the proper role of the Court in judicial review (at 272):

> *...the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision.*

This statement from the High Court makes it clear that the Court recognises that in judicial review proceedings it is the legality of the decision which is under review, rather than whether it is the decision which the Court would have preferred.

Judicial review and merits review

Judicial review concerns the lawfulness of decisions. It is concerned with how decisions are made and the reasoning underlying a decision, not which decision is the best considering the overall facts and circumstances of the case. Accordingly, judicial review is the process a court undertakes to ensure that executive decision-makers act within their legal limits, use correct legal reasoning and follow correct legal procedures. A successful judicial review challenge would likely see the Court issue the writ of **Certiorari** to quash the IDM determination and a writ of *Mandamus* to compel the IDM to remake the determination in accordance with law.

A court can only intervene if a decision was outside that authority; in other words, if the decision was unlawful. In general, courts exercising judicial review do not substitute a decision, rather a court will normally set aside the decision under review and remit it to the decision-maker to be made 'according to law.' This can be distinguished from merits review in which a decision-maker reconsiders the facts and the law in order to remake a decision afresh.

Merits review is concerned with what is the 'correct or preferable' decision and do not need to find any legal error to intervene. In a merits review, the whole decision is reconsidered and, in general, new evidence can be considered. In a merits review, a new decision can be substituted in the place of the previous one. Merits review is available for some, but not all, administrative decisions. Merits review can be internal, for example, a review determination made under s 75 of NRS Act in which a different administrative decision-maker can reconsider the decision.

Merits review can also be external, where a different administrative body can remake the decision. For example, certain types of decisions can be reviewed by the Administrative Appeals Tribunal (AAT). External merits review is not provided for in the NRS Act and therefore a person who disagrees with an IDM's s 75 review determination cannot seek review in the AAT.

Judicial review originated in the English common law. The principles of judicial review were applied in Australia from the date of British settlement and s 75 of the Constitution recognised a right to judicial review by vesting in the High Court original jurisdiction to hear matters in which the Commonwealth is a party.

Thus, judicial review was well established in Australia prior to the enactment of the administrative law package including the ADJR Act. The ADJR Act supplemented and codified existing judicial review principles but did not replace pre-existing means of judicial review, and the latter remain in active use today. Unlike the constitutionally enshrined review rights under s 75 of the Constitution which apply where the constitutional writs can be sought against an officer of the Commonwealth, Parliament can and has excluded the right to seek judicial review of NRS determinations under the ADJR Act.[2]

Therefore, whilst a s 29 or 75 determination is not subject to an external merits review process, nor judicial review under the ADJR Act, a determination which contains certain legal errors may be overturned on application to the High Court[3] or the Federal Court.[4]

Because judicial review is undertaken by the courts, all the normal court rules and processes apply. Court proceedings have these features:

- **Cost**: the general rule is that the unsuccessful party will pay the successful party's costs.
- **Speed:** Court proceedings are generally slower than merit review processes.
- **Formality:** Legal representation (with both barristers and solicitors) is the norm in judicial proceedings. The rules of evidence apply. Courts have etiquette rules.
- **Disclosure:** Unlike the AAT Act, there is no automatic right to documents or reasons. However, a person can apply under the *Administrative Decisions (Judicial Review) Act 1977* for a statement of reasons.

As noted above, the role of judicial review is to consider the lawfulness of the decision under review. As Justice Brennan held in *Attorney-General (NSW) v Quinn*, the role of the judiciary is to declare what the law is: '*the proper role of the federal courts is to determine if the relevant ... executive act or decision was in breach of or unauthorised by the law or was beyond the scope of power given to the decision maker by the law*'; the merits or demerits of the decision '*are beside the point*'.

When is a decision unlawful?

An administrative decision will be unlawful if there has been a breach of a ground of review. The grounds of review are set out in s 5 of the *Administrative Decisions (Judicial Review) Act 1977*, or the **ADJR Act.** A summary of the main grounds of review is below:

[2] See Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977.*
[3] Pursuant to the original jurisdiction of the High Court in s 75(v) of the *Constitution.*
[4] By virtue of the power bestowed on the Federal Court in s 39B of the *Judiciary Act 1903.*

Ground of review	Summary
Breach of natural justice	The rules of natural justice (or procedural fairness) require a decision-maker to give a person an opportunity to make representations before a decision is made that affects that person's interests. The rules of natural justice also include a requirement that the decision-maker not be biased.
Failure to follow procedures	If the legislation sets out a procedure to be followed in the making of a decision, then that procedure must be followed.
No evidence	A decision-maker will commit an error if the decision-maker makes a decision which is based on no evidence at all. For example, in ***Plaintiff M13/2011 v Minister for Immigration and Citizenship*** **[2011] HCA 23**, Justice Hayne of the High Court held that a finding that an applicant for a refugee visa could relocate within Malaysia was made without any evidence because the decision-maker did not know where in Malaysia the applicant had previously been living.
Taking into account an irrelevant consideration	Taking into account an irrelevant consideration in an administrative decision is a breach of this ground of review. In ***Ex parte S F Bowser & Co; Re Municipal Council of Randwick*** **(1927) 27 SR (NSW) 209**, the Supreme Court of NSW considered a decision which allowed (under local planning laws) the erection of petrol pumps on a pavement so long as the pumps were Australian-made machines. The Supreme Court held that the location of manufacture of the pumps was an irrelevant consideration for the purposes of the planning laws.

Ground of review	Summary
Failing to take into account a relevant consideration	This ground of review applies where legislation requires that a matter be taken into account in the making of a decision, but it has not actually been taken into account by the decision-maker. In ***Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities*** **[2013] FCA 694**, the Federal Court declared invalid a decision by the Minister to approve an iron ore mine in Tasmania. The Minister was required under legislation to 'have regard to' an approved conservation advice in deciding whether to approve the mine. The conservation advice was not provided to him in the decision briefs and the Minister's reasons for the decision contained only brief, generic references to him having considered 'conservation advices' and 'any relevant conservation advice'. There was no reference to the actual advice. While the Court considered that most of the information contained in the advice was before the Minister by other means, it found that the statutory requirement that the Minister have regard to the Advice meant that 'genuine consideration must be given to the document'. For this reason, the Court found that the Minister's failure to do so rendered the decision invalid.
Inflexible application of a policy	The inflexible application of a policy without regard to the individual merits of the case is a breach of this ground of review. It was demonstrated in the case of ***Seiffert v Prisoners Review Board*** **[2011] WASCA 148** where the Prisoners Review Board adopted a policy of not allowing prisoners an oral hearing. This was because (according to the Board) '*decisions were being made out of an understandable but inappropriate sympathy for the position of the prisoner and his or her family, rather than from a clear understanding of the prisoner's conduct and an application of the requirements under the relevant legislation*'. The WA Supreme Court held that the policy was an '*invalid fetter upon a discretionary power given to the Board*'.

In addition to the prospect of a decision being overturned by the Courts, a determination which is not legally sound or defensible risks undermining public confidence the Redress Scheme and receiving scrutiny by other means, such as parliamentary committees.

Principles of Administrative Decision Making

When making an administrative decision, it is important that the decision-maker has an awareness of the principles that govern the decision-making process, and operates within those principles. Then, if the applicant or institution seeks to challenge that decision through judicial review, the decision-maker can be confident in defending the process (if not the merits) by which they made that decision. However, even if the decision-maker makes a well-balanced, cohesive decision that follows the decision-making principles of administrative law to the letter, it is quite possible that an applicant or institution will seek judicial review (or merits review, where available) in an attempt to require the decision-making process to begin again, until such time as the applicant receives a decision in their favour.

The following key steps to ensuring good decision making apply to both primary and review decision makers:

Ensure the decision maker has authority

The starting point is that the person making a decision must have the proper authorisation to make it. The authority to make a decision may be conferred on a person (such as a Minister) directly by legislation. If the decision maker is not specifically identified in the legislation, the authorisation will typically be made through a delegation of power to a delegate to act on his or her own behalf when making the decision.

Ask the right question

The decision maker must correctly identify any relevant legislation, policy, international instruments and case law which may be relevant to making a decision. Not only will this help to ensure that the process results in a proper decision, but it will assist in determining who has the power to make the decision, the prescribed steps that must be followed and the correct tests to apply when making the decision.

Apply policy correctly

Before making a decision, it is important to be aware of and follow any steps which may be set down by relevant policy documents. Policy documents can provide a useful tool in ensuring fair and consistent decision making within an agency.

Undertake appropriate fact finding and weighing up the evidence

Having identified the applicable legal principles, the decision maker must then determine the facts and apply the law to those facts in reaching a decision. Rules of evidence can guide, but not limit, administrative decision makers in identifying, gathering and analysing relevant evidence.

Afford natural justice

While there is no general duty on a decision maker to conduct inquiries, it is important that natural justice is accorded before a decision is made against a person. This includes providing the person with the opportunity to respond to adverse material.

Provide clear and sufficient reasons for decisions

Finally, when a decision is made, some Acts provide that a person may request a written statement of reasons, or that a statement of reasons must be given to the person. It is important that the decision making process is well-documented.

Authority to make decisions

A fundamental, although sometimes forgotten, principle is that government agencies need legal authority for *any* action that they take and are themselves subject to the law - this principle is part of the concept known as the "rule of law".

Before making a decision, a decision maker must identify the legislative provisions that give him or her the authority to make the decision, and any provisions that set out the procedure that must be followed. This is an important step, as a decision may be invalid if the decision maker does not have authority to make a decision or has exceeded their authority in making that decision.

Source of legal authority to make administrative decisions

The two primary sources of legal authority for governmental action are legislation and executive power:

- **Legislation:** Legislation, whether primary or subordinate, is the main source of government power. Power conferred by legislation can only be exercised by a person with authority to make a decision. Commonly it will be a Minister, a Secretary of a Department or a board. In order to ensure that decision making is done at a sensible level within organisations, most legislation provides that the authorised body can delegate their powers - this may either be to an expressly identified person or body or to the occupant of a position. This means that both the principal and the delegate have power to make the relevant decision.
- **Executive power:** Section 61 of the Constitution allows the Commonwealth to exercise "executive power". This means that the Commonwealth Government can undertake activities that are necessary to enable it to function. For example, in reliance on the executive power, the Commonwealth Government can lease premises, hire staff, acquire property, enter into contracts, conduct inquiries, create administrative policies and structures, engage in public relations and establish government departments to administer its policies.

  Importantly, the executive power of the Commonwealth does not confer the government with an unfettered capacity to enter into contracts. That is, the executive power vested in the government by section 61 is not unlimited.

Ensuring the decision maker has authority to make the decision

To be valid and effective, a decision must be made by an officer who is authorised to make it. The relevant legislation will ordinarily say who is authorised to make a decision. However, legislation often provides for decision makers to delegate decision making to others. It is important to check the provisions relating to delegations carefully, as sometimes legislation may provide that certain decisions cannot be delegated.

A power is delegated by the repository of the power (for example, the Governor-General or a Minister) signing an instrument which delegates that power to a delegate. A delegate exercises this power in his

or her own right and generally should identify themselves as the decision maker in the formal decision record.

Unless specifically authorised by legislation, a delegate cannot further delegate their decision making power.

The Federal Court considered the issue of delegated authority in ***Friends of the Gelorup Corridor Inc v Minister for the Environment and Water*** **[2022] FCA 944** (**FOGC**). In this case, a delegate approved the construction of a 10km freeway near Bunbury, Western Australia and attached several conditions. The conditions required the Commissioner for Main Roads in Western Australia (the proponent) to submit fauna, habitat fragmentation and vegetation management plans to the Minister for approval. The management plans were approved by a different delegate.

FOGC challenged the authority of the delegate who approved the management plans as required by the conditions. The Court accepted that there was considerable merit in an argument that the instruments of delegation (pursuant to s 515 of the EPBC Act) did not confer authority to give approval for the purposes of conditions and approached this issue by looking to the construction of the approval conditions.

The Court determined that authority to approve plans was conferred by operation of the conditions of the approval. This is because the conditions provided for the Minister to approve the plans and the Minister was defined to include a delegate of the Minister. The Court determined that a delegate in this context was a person who has delegated authority under the EPBC Act to grant an approval (at [64]). The Court also determined that the conditions did not involve a conferral of statutory authority to approve a controlled action (at [62]-[66]).

FOGC also raised that different delegates approved the controlled action and management plans required by the conditions. The Court took no issue with this and found there was no reason why the delegate who approved the controlled action was the only person who could be authorised by the conditions to approve the management plans (at [68]).

Legislation may also provide specific arrangements for decisions made by statutory office holders. For example, section 205 of the Trade Marks Act makes arrangements for the Deputy Registrar of Trade Marks. Section 205(2) provides that subject to any direction by the Registrar of Trade Marks, the Deputy Registrar has all the powers and functions of the Registrar, except the powers of delegation. Sections 205(5)-(6) provide that if the exercise of a power or function, or the operation of a statutory provision is dependent on the opinion, belief or state of mind of the Registrar, that power, function or statutory provision may operation on the opinion, belief or state of mind of the Deputy Registrar.

Consequences of not having authority to make a decision

A decision which is made by a person who is not properly authorised or delegated to make it is likely to be set aside by a court. This can have far-reaching consequences if the decision sets off a train of other processes. If that is the case, then all the other processes may be invalid as a result of the initial decision being invalid: see, for example, *Kutlu v Director of Professional Services Review* [2011] FCAFC 94.

Asking the correct question

When exercising the power to make a decision, a decision maker must be careful to identify the correct legal question and to apply the correct legal test. Decision makers must not make assumptions about what the legislation requires and must not proceed on the basis of a perception of the legislative requirements. It is important that decision makers carefully work through each of the criteria in the legislation. A failure to do so may result in the decision maker making an error of law.

Look to the legislation

Although secondary materials such as case law may be a useful guide to decision making, there is no substitute for applying the precise legal standards set out in the relevant legislation. As the High Court stated in ***Project Blue Sky v Australian Broadcasting Authority*** **(1998) 194 CLR 355** at [69]:

> *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.*

The High Court has repeatedly made statements along the following lines:

> *...questions presented by the application of the legislation can be answered only by first giving close attention to the relevant provisions. References to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute or statutes* (*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [92]).

Evidence

In the context of administrative decision-making, evidence can encompass a wide range of information and materials. For evidence to be considered and given weight, there is no requirement that (for example) it is given by way of formal statement admissible in legal proceedings, or orally. Evidence can, and often does, include letters, photos, medical reports and files retained by government agencies. It is this broader meaning of evidence which is used below.

Evidence must be considered and analysed. A well-founded decision is one based on relevant evidence and the findings that can be made from that evidence. Evidence can include and will often wholly consist of the person's own recollection of the events they are seeking redress for. There is no requirement under the NRS Act that the claims be supported by corroborative evidence from an external source, although this may strengthen the weight that can be placed on the evidence.

An IDM may also need to assess competing evidence to determine whether it is reasonably likely that a person is eligible for redress.

The evidence assessment process incorporates within it the need to consider if additional information should be sought. The NRS Act contains powers to request information from applicants and institutions (ss 24 and 25) and sets out consequences of a failure to comply with a request (s 26).

The assessment of evidence involves a number of distinct considerations. These considerations relate to the fact-finding process which the courts recognise is particularly within the purview of administrative decision-makers and not the courts.

- **Relevance:** as a decision-maker you should consider only evidence which has a bearing on a relevant matter which you have identified, having regard to the statutory scheme and the

nature of the power you are exercising. Evidence which has no such bearing should be excluded from further consideration.

- **Weight:** In some cases a statute will require special weight be given to certain factors.[5] An example of this is contained in s 63(7) of the NRS which provides that "greater weight" must be given to certain evidence. Further, the weighting of factors will be reviewable where it appears to be seriously irrational.[6] Beyond those caveats, courts recognise that the weight to be given to evidence is generally a matter for the decision-maker, and that they should not 'second-guess' a decision-maker's weighting of factors.[7]
- **Consistency:** a means to assign weight and resolve conflicts in the evidence is to consider the consistency of an aspect of the evidence, with the evidence as a whole.
- **Credibility:** an assessment of which evidence has more inherent authority and why can be another means of determining weight and resolving conflicts.

Even though the NRS Act provides for the relatively low "reasonable likely" standard of proof, there may still be times where an IDM's assessment of the relevance, weight, consistency and credibility results in a conclusion that the chance of the person being eligible is fanciful or remote or not more than merely plausible.[8]

Administrative decision makers are not bound by the rules of evidence that apply in court proceedings. Consequently, decision makers are able to draw from a wide variety of sources in making a decision - for example, they may consider unsubstantiated claims and assertions, draw on their own knowledge and experience of "the way the world works" (that is, to apply wisdom and common sense) and consult with other officers.

It is for the decision maker to decide what weight or significance to attach to particular items of evidence or information that are before them. That is, it is for the decision maker to decide the merits of the decision to be made.

However, it is important that there is some evidence to support a decision, or the findings on which it is based. When there is no evidence to support a decision, or a critical finding on which it is based, then the decision may be regarded as legally erroneous. Furthermore, a decision may be invalid if a court forms the view that no reasonable decision maker would have reached the same conclusion. The fact finding process is fundamental to decision making, and further detailed guidance is available in the linked *ARC Best Practice Guide 3. 'Decision Making: Evidence, Facts and Findings'.* Where the courts can see from a decision that these sorts of fact-finding processes have been applied to the evidence by a decision-maker, they are more likely to defer to the decision-maker's assessment of the evidence.

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[5] Where a statute requires that factors be weighted a certain way and a decision-maker fails to weight the factors accordingly, this can also be an error of law: *Perez v Minister for Immigration and Multicultural Affairs* (2002) 119 FCR 454, 488 (Allsop J).

[6] A mandatory consideration requires proper, genuine and realistic consideration. The High Court has suggested that complaints that a decision-maker's treatment of a particular consideration was inadequate are best conceived as claims of 'serious irrationality': *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174-176.

[7] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41 (Mason J).

[8] See definitions at s 6 of the NRS Act.

However, the courts will enforce the rules that: a decision must have evidence to support it; and cannot be contrary to the overwhelming weight of evidence against it. From an evidentiary point of view, a good decision is one which:

- **considers all relevant evidence**, does not ignore relevant evidence, and is not reliant on irrelevant evidence
- **is based on evidence and not on a lack of evidence** (arising by means of an assumption, or speculation, or otherwise); and
- **deals with the evidence according to the accepted processes and methods** (relevance, weight, etc) outlined above to reach findings of fact.

Although the rules of evidence do not apply in administrative decision making, they are nevertheless regarded as important guidelines to follow when making decisions. Examples include:

- a fact can be accepted more easily if there is corroboration of it;
- an opinion of a person is generally regarded as having greater weight if it falls within the acknowledged expertise of the person expressing it;
- hearsay evidence (that is, one person's account of what another person said) is not necessarily reliable; and
- as a guiding proposition: "he/she who asserts must prove."

Other points of guidance include:

- **Probative evidence rule**: This is an administrative law principle, which states that an adverse finding or decision should not be based merely on suspicion, speculation, gossip or rumour. An adverse finding against a person must be supported by facts or information that logically tend to lead to that conclusion;
- **Legislative criteria**: The legislation that is being administered will, expressly or by implication, define the criteria to be applied in making a decision. The facts and circumstances on which a decision is based must be relevant to those statutory criteria. A decision maker can inquire and explore widely while investigating what decision to make, but must be cautious to ensure that the decision is not based on irrelevant considerations;
- **Burden of proof**: There is no burden of proof in administrative decision making, in the same way that there is in court proceedings. A decision maker should therefore hesitate before saying to a person "the onus is upon you to prove/disprove". In legislation where the decision maker needs to be satisfied about certain matters, the task of the decision maker is to decide whether or not they are satisfied on the basis of the material before them; and
- **Precedential findings**: In administrative proceedings, a decision maker cannot go behind a decision made by a court. For example, if a court has decided that a person was guilty of an offence, an administrative body should generally accept that finding, if it is directly applicable to a decision to be made. Beyond that, a decision maker is entitled to make factual findings that are inconsistent with findings made by other officers.

Relevant versus irrelevant considerations

Two common grounds for seeking judicial review are that the decision-maker 'took an irrelevant consideration into account' or 'failed to take a relevant consideration into account' (together, the 'relevancy grounds' of review). This does not mean that in every case where a decision-maker considers something irrelevant, or fails to consider something relevant, that the decision is open to

review – very few decisions would be flawless enough to withstand scrutiny if the boundaries of the relevancy grounds of review were mapped that literally.[9]

For this reason, it is necessary to differentiate between mandatory, permissive and forbidden considerations in relation to a particular decision. The relevancy grounds of review will only be open where a decision-maker takes into account a **forbidden** consideration, or the decision-maker fails to take into account a **mandatory** consideration. A decision is not open to review merely because a decision-maker failed to take into account a relevant consideration, where that relevant consideration was a **permissive** (as opposed to a *mandatory*) consideration.[10]

Identification of the relevant permissive or forbidden considerations in respect of a particular decision is an exercise in statutory construction. The relevant act must stipulate not only that a decision-maker is bound or forbidden to consider a particular matter, but also that breach of the relevancy criteria in question is meant to result in invalidity. Identification of the mandatory, permissive and forbidden considerations will involve consideration of the express terms of the legislation, an analysis of the subject matter, scope, purpose/intent of that legislation, and a consideration of the nature of the repository of the relevant decision making power.[11]

In some cases, the statute may include mandatory considerations. For example, s 15(4) of the NRS Act sets out matters that "are relevant" to determining whether an institution is primarily responsible or equally responsible for the abuser having contact with the applicant.

An example of the irrelevant consideration ground can be seen in *Ex parte SF Bowser & Co; Re Randwick Municipal Council* (1927) 27 SR (NSW) 209. In that case, the local Council had the power to consent to the erection of a structure on a public place. The council adopted a policy of only consenting to the erection of Australian made structures. However, the relevant legislation did not require, as a condition of consent, that the structure be Australian-made. The Court held that it was extraneous to the limited powers of local government to adopt a policy of giving preference to Australian-made goods.

The task of identifying the relevance of a particular consideration is more difficult and debatable where the legislation merely adds 'and such other considerations as the decision-maker may find are relevant' (such as in s 63(6)(f) of the NRS Act), where the legislation is silent on the point or where there is no applicable legislation. Then the exercise becomes one of identifying what matters it would be sensible to consider, taking the overall circumstances of the given case into account.

Unreasonableness

An underlying expectation of government is that it will act reasonably and rationally. The community expects that administrative decision-making will be guided by good sense and sound judgment, that the process will be logical, and that decision will correspond to the facts on which they are based. Unreasonableness as a ground for legal challenge comes from the decision in *Associate Provincial Picture Houses Ltd v Wednesbury Corporation*, where Lord Green MR accepted that unreasonableness can constitute a free-standing ground of legal challenge, but only in the sense that a decision 'is so

9 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375 (Deane J).
10 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39.
11 *Peko-Wallsend,* 39-40 (Mason J).

unreasonable that no reasonable authority could ever have come to it'. This is known as the *Wednesbury principle*.[12]

In many cases, unreasonableness, irrationality and illogicality are treated as interchangeable or overlapping terms. The logic or reasoning used in a decision, like the outcome, will be viewed more or less favourably by different parties. Some will agree or disagree, occasionally with vehemence. A decision which is the subject of dissatisfaction, however, still will usually have a logic or rationale which can be appreciated and is within acceptable bounds and the legal standard. In this sense, the potential path or paths of logic which a given decision may follow are broad, and provide various routes by which decisions can be reached.

Examples of unreasonableness

In ***Minister for Immigration and Citizenship v Li* [2013] HCA 18**, the High Court considered whether the Migration Review Tribunal (MRT) had acted unreasonably in refusing to grant the adjournment. Ms Li had applied for a type of visa which required a skills assessment from Trade Recognition Australia (TRA). Ms Li's visa application was refused by a delegate of the Minister for Immigration and Citizenship, and she applied to the MRT for review of the delegate's decision. After the MRT hearing, Ms Li's migration agent asked the MRT not to make its decision until the TRA had reconsidered Ms Li's skills assessment application (Ms Li's initial skills assessment by the TRA was unsuccessful, but the migration agent explained to the MRT why the TRA's decision was incorrect). The MRT declined to wait to make its decision until after the TRA's assessment, as Ms Li "*[had] been provided with enough opportunities to present her case and [the MRT] is not prepared to delay any further.*" The MRT then refused Ms Li's application for review (Ms Li was later granted the skills assessment by TRA).

All five members of the High Court held that the decision to deny Ms Li's request for an adjournment amounted to unreasonableness. Of particular note was the joint judgment of Hayne, Kiefel and Bell JJ, who stated at [76] that:

> "[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification." Their Honours found at [85] that "[i]n the circumstances of this case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute."

In ***Miles v Commissioner of Patents* (2013) 306 ALR 349**, the applicant, Mr Miles, argued that a delegate of the Commissioner of Patents had inflexibly or otherwise unreasonably applied guidance in policy documents prepared by IP Australia in her decision to refuse a divisional application for a patent. The applicant argued that the Commissioner refused the application because no objection was received within a time period specified in the policy documents, without having regard to the merits of Mr Miles' application. The Federal Court rejected this argument.

The court referred to the specific guidance in the policy documents and concluded that the policy directed certain procedural steps for divisional applications but it did not mandate refusal of applications, let alone without regard to the merits of an application. The court observed that the imposition of sensible, reasonable time limits in which to receive submissions on an application is consistent with the Act and distinguished the statutory regime and facts from those in *Li* in finding

12 [1948] 1 KB 233.

that the decision reached by the commissioner was not so unreasonable that no reasonable person could have made that decision. In reaching this conclusion, the Court also referred to the specific circumstances of the applications and found that in any case, the objections were reviewed at a later time.

Under the relevant cases, the standard of 'unreasonableness' is quite high and is rarely met in practice. The courts are reluctant to reach such a view and will usually read reasons for decisions generously in this respect, and defer where possible to the decision-maker's fact finding, evaluation and judgement. As noted above, this indicates that the requirements for logic and rationality, while very important, are broad rather than specific in nature.

Logic is employed throughout the course of a decision. The identification of issues, the analysis of evidence, the making of findings and the reaching of conclusions are all logical processes. A decision must explain its preference for particular views, and should always use the language of logic and reasoning when doing so. The careful planning and structuring of decisions, and the clear explanation of them, illustrate the intrinsic role which logic and rationality plays. Such decision making processes have the added benefit of preventing or curing gaps in logic and ensuring that the decision reached is a rational one.

A decision which is based on irrational or illogical findings by a decision maker may also be set aside by a court on review.

The High Court explored this issue in the case of ***Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16**. In this case, the Minister for Immigration and Citizenship appealed a Federal Magistrates Court decision that the Refugee Review Tribunal (RRT) erred by conducting an illogical process of reasoning that the respondent, SZMDS, was not a homosexual, and so not a member of a particular social group. SZMDS was a citizen of Pakistan who had arrived in Australia in 2007. He applied for a protection visa on the grounds that he faced persecution in Pakistan because of his homosexuality. The visa application was refused, and this decision was affirmed by the RRT. The RRT accepted that homosexual men constituted a particular social group in Pakistan, but did not accept that SZMDS was a homosexual, and so was not considered to be a member of that group. The RRT relied on SZMDS's 3 week visit to Pakistan before travelling to Australia and his failure to seek asylum during a visit to the United Kingdom in 2006.

On appeal, the majority of the High Court upheld the RRT's decision and held that the test for illogicality or irrationality is to ask whether logical or rational or reasonable minds might adopt a different reasoning or might differ in any decision or finding to be made on the evidence. A decision is not illogical or unreasonable simply because one conclusion is preferred to another possible conclusion. Crennan and Bell JJ stated (at [130]) that:

> *"illogicality" or "irrationality" sufficient to give rise to jurisdictional error means the decision ... is one which no rational or logical decision maker could arrive on the same evidence.*

In ***Loielo v Giles* [2020] VSC 722**, Ms Loielo (the plaintiff) argued that the introduction of COVID-19 lockdown restrictions, specifically the 9pm - 5am curfew in Melbourne, made by the Victorian Chief Health Officer had significantly impacted her restaurant's revenue. Accordingly, Ms Loielo sought to challenge the validity of those restrictions, in part on the basis that the curfew decision was unreasonable, illogical and breached Ms Loielo's rights to liberty and freedom of movement in an unreasonable and disproportionate way.

In finding that the curfew decision was not illogical, Ginnane J considered the evidence of the Chief Health Officer which established that there was a public health purpose for the curfew decision in circumstances where it was part of a 'package of restrictions' to eliminate or reduce the risk to public health. Ginnane J determined that the Chief Health Officer's conclusions that the curfew decision was one of several restrictions that were reasonably necessary to protect public health 'was not irrational or illogical or [revealed] any material misconception by her' and noted that when different opinions are reasonably open, a decision to adopt one of them cannot be described as irrational or illogical (at [202]). Stated simply, a decision which provides clear and logical reasons, with reference to the evidence considered in relation to each finding of fact, would be unlikely to result in a finding of unreasonableness, irrationality or illogicality.

Application of Government Policy

Before making a decision, it is important to identify any policy which may be relevant to making the decision. This will assist in determining who has power to make the decision, and any prescribed steps which may guide the decision maker.

Some Acts confer a power upon Ministers to formulate a written statement of policy, or to give written directions that are binding upon agency decision makers. Internal manuals that explain the meaning of legislation or lay down guidelines for decision making in difficult areas are another form of policy. Precedents from cases, internal opinions and even accepted "belief systems" can play a similar role in providing guidance on the issues to be considered in reaching a decision.

The Scheme has Policy Advices and the Assessment Framework Policy Guidelines that decision-makers should have regard to in making their decisions.

Policy is relevant but it should be applied flexibly and with regard to the individual circumstances of the decision to be made. Policy promotes consistency and fairness. It allows the Executive to express a preferred view concerning the interpretation and application of statutory provisions. It also fills in much of the detail about the wide variety of issues which are beyond the scope of the legislation.

If a policy is relevant, it is permissible to make it an element in a decision, along with the legislation and the facts. The courts have often noted the utility of policy in ensuring consistent, transparent and open decision making (see, e.g., *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189). However, decision makers must be careful to avoid relying on policy, rather than looking to the legislation before them, to identify the correct question. A policy document may misinterpret or misstate the legislative provision. A good decision is one that applies relevant and lawful policy, considers the weight to be given to the policy and evaluates whether a departure from that policy is warranted.

A decision-maker must test the policy to see if it is consistent with the law. Policy is subordinate to the law, and policy must be disregarded if it is inconsistent with the law. An instance of this is where policy purports to prescribe stricter criteria for the grant of a benefit than exists under the applicable legislation. In this case, the policy should be disregarded to the extent of the inconsistency, and the decision made under the criteria specified in the legislation. Policy may also have its own internal inconsistencies, for example where two conflicting policy provisions apply to the same case, and it is necessary for the decision-maker to prefer one policy over the other.

Application of policy must also involve the consideration of the individual circumstances of each case and whether those circumstances justify a departure from policy. Policy is essentially recommendatory and states what the preferred view usually is in such matters. Since it is not law, policy is not binding and must be applied in light of the possibility that an exception is warranted. The policy may not have anticipated a given set of circumstances, or may simply not fit a given case.

Before a decision-maker decides to depart from policy they should be prepared to discuss why they think there are cogent reasons to depart from the policy, having regard to the particular facts of the application for redress.

In summary, a good decision is one which:

- appreciates the role of policy in promoting consistency and fairness in decision making;
- identifies relevant policy;
- evaluates whether the policy is consistent with the law and legislation;
- considers whether the policy is properly applicable, current, complete and consistent with other relevant policy; and
- determines if the circumstances of the present case justify a departure from policy.

Common errors made by decision-makers include treating policy as though it were law and adhering to policy irrespective of the individual case.

Policy is formulated and settled at different levels within Departments and within government generally. Most policies will carry Departmental sanction and authority and should be applied consistently with the approach referred to above.

Acting under dictation or direction

Traditionally the courts have taken the view that a decision-maker must personally exercise a discretion conferred on him or her by statute unless the statute expressly or by implication authorises delegation of that discretion to another. This means that the decision-maker must not act under the dictation or direction of another person, be that person a superior officer or even the responsible Minister of the department of which the decision-maker is an officer.

The common law principle against acting under dictation was first applied in *Drake v Minister for Immigration and Ethnic Affairs*,[13] where a decision of the AAT was set aside by the Federal Court because the Tribunal automatically followed a ministerial policy without having due regard to the individual merits of the case. One ground of the appeal was that the Tribunal had attached such importance to the policy statement issued by the Minister, that it failed to exercise its own independent judgement in the matter.

As noted above, government policy may be a relevant factor to which a decision-maker should have regard when reviewing a decision on the merits. However, the decision-maker should not apply the policy uncritically to the facts of a particular case. Rather, the decision-maker should apply the policy but make it clear that they have considered the propriety of the particular policy.

Acting under bad faith

[13] (1979) 24 ALR 577, 590.

An allegation of bad faith is a serious matter involving personal fault on the part of the decision-maker and circumstances where a court may find that the decision-maker had not acted in good faith are rare. Poor decision making or errors of fact or law will be insufficient to ground a finding of bad faith.

The question of whether a decision was infected by bad faith is a question of fact. The onus of proving bad faith is on the person making the allegation. General allegations are not sufficient and the nature of the bad faith must be clearly formulated. The requirement of a person to specifically outline the facts on which the allegation is based alerts the person being attacked to the precise issues to be negated in order to defend the allegation. It is difficult to succeed in making out a case for review on the basis of bad faith, especially where there is a basis for finding of abuse of power on some other ground, such as unreasonableness or taking into account irrelevant considerations.

Decision-makers are required to exercise their powers honestly and within the confines of the lawful authority given to them by the Act which confers its power.[14] If a decision does not fall within the decision-maker's lawful authority, then the error is a jurisdictional error and as such cannot be a valid action or decision.

Procedural Fairness

In determining disputes, administrative decision makers are under a duty to comply with the legal requirements of procedural fairness. Procedural fairness is synonymous with natural justice. Australian law now prefers the former term because it "*more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case*".[15]

The fundamental question, when considering what is required to ensure a decision maker affords procedural fairness, is what is fair in the circumstances of the decision-making process. As stated by Gleeson J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* [2003] HCA 6; 214 CLR 1 at [37]:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*

Procedural fairness may be regarded as having three limbs: the no bias rule, the hearing rule and the evidence rule. For present purposes, the focus is on the hearing rule and the no bias rule.

Why is Procedural Fairness Required?

The simple point is that natural justice improves the decision-making process. In *Cooper v Board of Works for the Wandsworth District*,[16] the Court of Common Pleas considered whether the Wandsworth Board of Works could demolish the house of Mr Cooper because Mr Cooper had not

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14 By s 185(4) of the NRS Act, IDMS are 'officials' for the purposes of specific provisions of the *Public Governance, Performance and Accountability Act 2013*. This includes provisions which impose a duty of care and diligence, a duty to act honestly, in good faith and for a proper purpose, and a duty to disclose interests.
15 *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J).
16 (1863) 143 ER 414.

given prior notice to build. The Board demolished Mr Cooper's house without first giving him notice and opportunity to be heard. Erle CJ, who gave the leading judgment, held:[17]

> *I think the board ought to have given notice to the plaintiff, and to have allowed him to be heard. The default in sending notice to the board of the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill-will against the party, is a power that the legislation never intended to confer. I cannot conceive of any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive of a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute ...*

In *John v Rees*,[18] Megarry J put it this way:[19]

> *It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' ... As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*

The High Court's ultimate decision in *Kioa v West*[20] (that a deportation power attracted an obligation to afford natural justice) can probably also be explained by reference to the rationale for natural justice. Mr Kioa arrived from Tonga on a student entry permit. His wife and child followed shortly after. Mr Kioa obtained another type of entry permit, but disappeared when that entry permit expired. The Australian immigration authorities assumed that Mr Kioa and his family had returned to Tonga. They were in fact living in Australia; Mr Kioa was employed and he and Mrs Kioa had another child while in Australia.

Mr Kioa was arrested at his workplace. The Legal Aid Commission of Victoria made a representation to the Minister about why Mr Kioa should be allowed to stay in Australia. One of the reasons advanced was:

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[17] Ibid, 417-418.
[18] [1969] 2 All ER 274.
[19] Ibid, 309.
[20] (1985) 159 CLR 550.

> *Mr Kioa has been on the Executive Committee of the Tongan Christian Fellowship and has done much in this regard. ... He is also a member of the Immigration and Ethnic Committee for the United Church and only recently was in discussion with your own department concerning the difficulties of illegal immigrants from Tonga.*[21]

A submission was prepared for a delegate which recommended that Mr Kioa be deported. In part, the submission said:

> *Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern.*[22]

Mason, Wilson, Brennan and Deane JJ (with Gibbs CJ dissenting) found that the failure to allow Mr Kioa to respond to that allegation was a denial of natural justice. In this regard, Wilson J held:[23]

> *It is argued that the reference to "his active involvement with other persons who are seeking to circumvent Australia's immigration laws" implies that Mr Kioa was not merely concerned over the plight of Tongan illegal immigrants in Australia but was actively assisting them to evade those laws as distinct from assisting them to regularize their position in accordance with those laws. The source of the allegation does not appear in the submission and there is nothing in the material submitted to the delegate on behalf of Mr and Mrs Kioa which would justify or support it. The allegation was clearly prejudicial to the application to be allowed to stay in Australia. Ordinarily, procedural fairness would require that such an allegation be put to them and they be given an opportunity to answer it before a decision was made. Unfortunately, that course was not followed.*

The submission, and the allegation contained in it, demonstrates the rationale for natural justice very well. As Wilson J held, Mr Kioa's assistance to other migrants may have had nothing to do with them "circumventing" Australia's immigration laws.

When is procedural fairness required?

One of the lasting legacies from the High Court's decision in *Kioa v West* is that it is now generally accepted that all administrative decisions which affect rights or interests carry with them an obligation to afford natural justice. In this respect, Mason J held:[24]

> *The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.*

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[21] Ibid, 556.
[22] Ibid, 557.
[23] Ibid, 602.
[24] (1985) 159 CLR 550 at 584.

While the other members of the court adopted different reasons to get the conclusion that natural justice obligations were owed, it is Mason J's decision which seems to have stuck. In fact, his Honour went on to say in *Kioa v West*:[25]

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*

An administrative decision maker that fails to comply with the legal requirements of procedural fairness commits a legal error, which invalidates their decision and can provide grounds for judicial review.

The Hearing Rule

Essentially, the hearing rule is founded on the principle that a person has a right to know and comment on the case against them before a decision affecting their interests in made. The hearing rule requires that a person who will be adversely affected by a decision must be given an opportunity to present their case, be told the substance of the case to be answered and be given an opportunity of replying to it, whether orally or in writing.

What kinds of decisions attract the hearing rule?

In *Kioa v West*,[26] Brennan J observed:

> *The presumption that the principles of natural justice condition the exercise of a statutory power may apply to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation.*

Earlier in his reasons Brennan J said:[27]

> *There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests – licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of pensions or benefits at the discretion of Ministers or public officials – intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights.*

Because of the broad range of interests affected by the hearing rule, it follows that an administrative decision maker owes a duty of procedural fairness to any person whose rights or interests may be adversely affected by an administrative decision. For example, if the Department proposes to make a decision that is adverse to the interests of another person or organisation, it must first notify the person or organisation and give the person or organisation an opportunity to respond.

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[25] Ibid, 585.
[26] Ibid, 619.
[27] Ibid, 616-617.

Case example: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564

In *Ainsworth*, the Criminal Justice Commission of Queensland was given responsibility to prepare a report about the introduction of poker machines into Queensland and to furnish a copy of the report to the chairman of the Parliamentary Criminal Justice Committee, the Speaker of the Legislative Assembly and the relevant Minister. The Commission's report included references to the Ainsworth group of companies which manufactured poker machines, and the managing director of the companies, Mr Leonard Ainsworth. The report recommended that the Ainsworth group of companies should not be allowed to participate in the gaming industry in Queensland. The Ainsworth group was not given an opportunity to be heard on the matters raised about it in the report, and were not aware of the report until after it had been tabled and publicised. The High Court determined that the Commission was obliged to afford the plaintiff procedural fairness before tabling the report given that personal reputation, or business or commercial reputation, are interests which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made.

To whom is the obligation owed?

One of the fundamental tenants of natural justice is, of course, that a person whose interests are likely to be affected by a decision are given notice (*Cooper v Board of Works for the Wandsworth District* (1863) 143 ER 414, 417).

The Full Federal Court in *Kong v Minister for Health* [2014] FCAFC 149 had to consider how far that obligation extended. The issue in that case was a decision, by the Minister for Health, to approve the Mahonys supplying pharmaceutical benefits at premises located in Moree. Mr Kong was the owner of two other pharmacies in Moree. Originally, the Secretary had refused the Mahonys' application. However, the Mahonys applied to the Minister to personally exercise a power which she had under the *National Health Act 1953* (Cth) (**National Health Act**) to set aside the Secretary's decision and substitute a favourable decision. The Minister did so on two bases: first, the Secretary's decision would result in a community being left without reasonable access to pharmaceutical benefits; and secondly, it was in the public interest to grant approval.

Mr Kong sought judicial review of the Minister's decision on the basis that he had been denied natural justice because the Minister had not given notice of the possibility that a decision adverse to his interests might be made (namely, the approval of a competitor pharmacy).

Justice Jacobson held that in order for a natural justice obligation to be owed to a party, that party must have a "sufficient interest". His Honour said that the authorities '*make it clear that the question is one of construction of the statutory framework in order to determine whether the affected party has a sufficiently direct, or "real" interest*'. His Honour found that there were three primary reasons why the Minister was not required to notify Mr Kong of the possible decision to approve the Mahonys' pharmacy:

- First, Mr Kong's interest was not of an applicant for the pharmacy. Rather, he was a stranger or third party to the application made by the Mahonys.
- Secondly, the interest of Mr Kong was financial or commercial. His Honour found that protection of such interests would not be 'consistent with the subject matter, scope or purpose of the statutory scheme'.

- Thirdly, his Honour held that 'serious practical difficulties would arise in the administration of the statutory scheme if the decision-maker were required to give notice to all persons whose commercial interests might be adversely affected by an exercise of the discretion'.

Pagone J reached the same conclusion, but for different reasons. His Honour preferred to characterise Mr Kong's interest under the National Health Act as the authority for the two existing pharmacies in Moree. His Honour reasoned that that interest would not be affected by the granting of an authority to the Mahonys. Logan J dissented on this point and focused on the statutory precondition on the Minister's power to grant approval only if satisfied that refusal *'will result in a community being left without reasonable access to pharmaceutical benefits'* (at [163]). His Honour held (at [165]):

> *[T]here is something quite disconcerting about a construction of s 90A of the Act which yields an outcome whereby a professional person possessed of a valuable right may be subject to a conclusion by a Minister of State that he or she is not providing reasonable access to a community to pharmaceutical benefits, without there being any obligation on the part of the Minister to afford that person an opportunity to be heard before such a conclusion is reached. That conclusion does not just diminish the worth of a proprietary right. It also entails a finding about how that right is being adapted and employed by its holder to meet the demand of that community for the supply of pharmaceutical benefits. It is to be remembered that the right confers the ability to supply pharmaceutical benefits both "at" as well as "from" particular premises. There is, in my view, a reputational element entailed in a Ministerial conclusion under s 90A.*

Discharging the obligation - notice of relevant, credible and significant adverse material

Ordinarily, and as a matter of practicality, the notice of a possible decision adverse to a person's interests will be given in writing (*Andrews v Mitchell* [1905] AC 78, 81.). Although it may be possible, or even necessary in some situations, for the notice to be given by some other means, providing notice in writing leaves little room for argument that notice was given or the content of the notice. This is especially important to demonstrate that adverse material has been disclosed to the person affected.

Procedural fairness requires disclosure of potentially adverse material, whether or not it has been relied upon by the decision-maker.

In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural Affairs* (2005) 225 CLR 88, the High Court considered whether adverse material should be disclosed even when a decision-maker disavows reliance on that material. The High Court confirmed that the Tribunal had an obligation to disclose material which was 'relevant, credible and significant' to the decision (at [14]-[15]), noting that a statement in a decision to the effect that the decision-maker did not take a particular thing into account may not absolve the decision-maker of the duty of disclosure.

That case concerned an applicant for a protection visa from Eritrea. The Department of Immigration had received an unsolicited "dob in" letter which said that the applicant had admitted to killing a prominent political figure in Eritrea and that the applicant worked for the government of Eritrea. The

Refugee Review Tribunal recorded in its statement of reasons that it gave the letter 'no weight' (at [5]).

The test is not whether the decision-maker considered it to be relevant, credible and significant; rather, the test seems to be whether the material is objectively capable of being relevant, credible and significant. In this regard, the Court held (at [20]):

> *The information set out in the letter about the appellant could not be dismissed from further consideration by the Tribunal as not credible, or not relevant, or of little or no significance to the decision. The author of the letter purported to record what the appellant had told him; the author alleged that the appellant was working for the present government of Eritrea. What the appellant was alleged to have admitted, and whether the appellant was working for the present government of his country of origin, were matters that bore upon whether he had a well-founded fear of persecution for a Convention reason. Both what he was alleged to have done, and the fact that the allegation had been made, could be seen as a reason not to wish to return to Eritrea. His alleged support of the current government of Eritrea reflected upon whether he had a well-founded fear of persecution in that country. Neither the alleged admission nor the allegation of support for the current government could be dismissed as a matter of no relevance or of little or no significance to the decision. Further, neither the alleged admission, nor the allegation about where the appellant's political sympathies lay, could be dismissed from consideration as material to which the Tribunal could not give credence.*

Having decided that the Refugee Review Tribunal should have allowed the applicant to respond to the allegation, the High Court considered whether it would be necessary for the Tribunal to give the complete letter to the applicant. The problem with that course was that the dob-in letter was expressed to be confidential. The High Court held that it be sufficient to disclose the substance of the allegation and that it was not necessary to disclose the letter itself (at [29]).

Where there is an inclination to make an adverse decision based on material adverse to the interests of a person, what will constitute adequate notice of this will depend on the circumstances of the particular case and the severity of the effect which the decision will have on the person.

It is sufficient if the substance of the adverse information is provided or has already been provided to the person.

The need to contact an applicant to seek comment on critical issues or to respond to adverse material is likely to occur where an institution provides information that is contrary to what the person included in their application (such as where the institution indicates it has no records of the applicant having attended), where this would have a negative impact on the assessment.

Before requesting the Scheme to contact an applicant, decision-makers should firstly undertake an assessment of the adverse information (in particular its relevance, weight, consistency and credibility) and come to a preliminary conclusion as to whether the totality of the evidence means that the decision-maker can't be satisfied that it is reasonably likely the applicant is eligible for redress. It is not necessary to contact an applicant about adverse information unless that information is likely to have a material impact in respect of eligibility or assessment.

If contact is necessary to afford procedural fairness, decision-makers should take steps to ensure that any contact with the applicant is minimised as much as possible to avoid unnecessary re-traumatisation (i.e. contact the applicant once with all queries rather than multiple times with one or two queries)[28].

In *Coutts v Close* [2014] FCA 19, Griffiths J of the Federal Court was asked to find that an Australian Federal Police officer, Mr Coutts, was denied procedural fairness in the decision to terminate his employment. The case centred on an Australian Federal Police (**AFP**) internal investigation into an allegation that Mr Coutts used excessive force against a member of the public. Mr Coutts claimed he was denied procedural fairness by not being provided full and unredacted transcripts of the interviews between the AFP internal investigators and other officers who were present at the scene; Mr Coutts had only been provided "dot-point" summaries of the salient points of the interviews.

Mr Coutts alleged that there was a denial of procedural fairness because, although the material was not adverse in the traditional sense, by not being provided it he missed the opportunity to deploy it in his favour in submissions he made to the AFP about why his employment should not be terminated. Griffiths J held that the focus of natural justice was about avoiding practical injustice. His Honour held (at [120]):

> *Generally speaking, ... and subject naturally to the particular statutory context, procedural fairness does not require that a decision maker adopt an "open file" policy which would have the effect of disclosing every submission or piece of evidence to an affected party. Ultimately, the fundamental issue here is whether the applicant was given a reasonable opportunity to address issues relevant to his interests.*

The Court held that Mr Coutts was given that reasonable opportunity. Griffiths J held:

> *[T]he dot-point summaries in the investigation report were sufficient to discharge the relevant requirements of procedural fairness in the circumstances here. I accept the respondents' submission that the investigation report ... contained an adequate summary of the evidence given by the various witnesses which was relevant, significant and credible and to which the applicant was otherwise entitled to have notice.*

In *Khazaal v Attorney-General* [2020] FCA 448, the Federal Court considered whether the Attorney-General had denied procedural fairness in making a decision to refuse parole to a person convicted of terrorism related offences. The Court found the appellant (Mr Khazaal) failed to demonstrate that the Attorney-General had failed to disclose all credible, relevant and significant adverse information concerning the applicant and parole decision concerning him.

In doing so, the Court very succinctly stepped through the case law and the general principles regarding the fair hearing rule and the circumstance in which jurisdictional error may arise (see paragraphs [50] to [59]). It concluded that (among other things) disclosures of adverse assessments that had been made about the appellant by other agencies were not made at such a high level of generality to make a meaningful response impossible. In doing so, the Court considered that, while the report did not itself contain any details of any specific incident or observation that was said to

[28] See Part 2.4 of the Internal Assessment Guide

support the assessment, the Attorney-General was entitled to rely on it, without inquiring into the specific incidents that may have formed the basis of that assessment.

The Hearing Rule – Guiding Principles

It is possible to distil several guiding principles that govern the application of the hearing rule:

- ***A hearing appropriate to the circumstances***: An administrative hearing is different to a judicial hearing. Usually, all that is required in an administrative hearing is an exchange of letters - for example, a letter from a government agency to a person warning that an adverse decision might be made, and inviting the person to make a submission in reply. Unless the legislation expressly requires it, an oral hearing will only be appropriate in exceptional circumstances - for example, where a person's honesty or truth is in issue.
- ***Full disclosure before the decision***: A person is entitled to know "the case to be met" before a decision is made. The person should be provided with a description of the possible decision, the criteria for making that decision, and the information on which any such decision would be based. The person is entitled to know the '*relevant, credible and significant*' information on which a decision could turn. So, if the decision-maker has information that is adverse to a person who is likely to be affected by the decision, the decision-maker must give that person an opportunity to address that adverse material. Sometimes it is necessary to give a person more than one opportunity to address material where additional adverse information is received.
- ***Disclosure of confidential information***: While the hearing rule requires a decision maker to put each interested party on notice of credible, relevant and significant information that may be adverse to their interests and invite them to respond, it does not necessarily require the decision maker to provide a complete copy of each document that they will consider to every party. If you are able to inform the party of the substance of the issue disclosed without providing the confidential information, you may do so without breaching procedural fairness. It is best to confer with the party that gave the information to you before giving a summary or description of it to other parties, to ensure that the summary or description does not contain any confidential details. If it is not possible to put an interested party on notice of the substance of an issue that is adverse to them without providing confidential information, it may be necessary for you to disclose the information despite it being confidential. If you need to disclose confidential information, it is best to inform the party who claims confidentiality over it first, and explain why you need to disclose the information. Simply refusing to consider information because it is confidential is not a valid option, as doing so may breach a decision maker's procedural fairness obligations to the party that gave them the information, as well as the obligation to have regard to all relevant evidence. • ***A reasonable opportunity to respond***: A person must be given a reasonable period in which to consider their position and to respond. What is reasonable may vary from, say, a day to a month, depending upon the complexity of the issue, whether an urgent decision is essential, and other relevant factors.
- ***Genuine consideration of any submission***: It is essential that the decision maker is fully aware of everything said by a person in defence of their position, and that proper and genuine consideration is given to what they said and to the material they provide with their response.

Case study: the Hearing Rule

Polaris Coomera Pty Ltd v Minister for the Environment [2021] FCA 254 ('Polaris')

This case concerned a proposal to develop medium and high density development at Coomera in Queensland which would require the destruction of around 135 hectares of koala habitat. The proponent, Polaris Coomera Pty Ltd, sought judicial review of the delegate's decision that the proposed development was a controlled action on the basis that the proposed development was likely to have a significant impact on the koala habitat.

The proponents argued, in part, that

- it was not given a reasonable opportunity to be heard in relation to the delegate's use of information published by the Department (the koala Species Profiled and Threats Database (SPRAT Profile)) in the context of considering the proponent's submissions concerning habitat connectivity; and
- the delegate failed to disclose that he may rely on the SPRAT Profile, including the way in which he intended to rely on the SPRAT Profile, and that the delegate misconstrued and misunderstood the SPRAT Profile.

The proponent's arguments were rejected by the Court.

Rangiah J found that the proponent's arguments could not succeed where the proponents' own materials referred to the SPRAT Profile (at [106]) and the delegate's fact finding did not demonstrate a misconstruction or misunderstanding of the SPRAT Profile (at [107]). Rangiah J found that in any case, the delegate's conclusions in relation to habitat connectivity would have made no ultimate difference to the decision, and even if it is assumed that the delegate denied the proponent procedural fairness in the manner alleged, that denial would have made no difference to the outcome of the decision (at [110]).

The proponents also made similar arguments in relation to the delegate's use of the Koala Listing Advice (approved under s 266B of the EPBC Act). Rangiah J determined that there was no denial of procedural fairness where the proponent 'expressly drew' the delegate's attention to the Koala Listing Advice in the referral form and therefore the proponent's argument that it was unaware that the delegate might make use of the Koala Listing Advice could not be accepted.

In rejecting the proponent's submission that the delegate should have disclosed that he may rely on the Koala Listing Advice, Rangiah J observed that the:

> *[O]bligation of procedural fairness did not require the Delegate to expose his mental processes or provisional views, but only to identify to the applicant any issue critical to the decision not apparent from the nature of the decision or the terms of the statute" (at [121]).*

No Bias Rule

A central requirement of administrative justice is that the decision maker be impartial and disinterested so that he or she is open to persuasion and able to judge the case on its merits. Bias means a predisposition to approach the issues in the case otherwise than with an impartial and

unprejudiced mind. In other words, bias connotes the *'absence of impartiality'* (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348). The presence of bias may be inferred from behaviour, statements, personal interests and associations, or from the way the decision making process is conducted. The High Court stated that the test for apprehended bias is whether fair minded people might, not would, reasonably apprehend bias. In that case, the Court held that there could be no apprehension of bias where the decision-maker was a beneficiary of a trust that held shares in a bank that had a financial interest in the proceedings.

A decision–making process may be defective for reasons of bias if:

- the decision–maker is *actually* biased in making the decision; or
- the circumstances are such that if a hypothetical fair minded observer might find a 'reasonable suspicion' or 'real *apprehension'* that the decision maker might not bring an impartial mind to the making of the decision (this is known as "apprehended" or "apparent" bias).

The vast majority of challenges to courts and tribunals under the bias rule allege apparent bias rather than actual bias, since the former is easier to prove and less pejorative.

In *Webb v R* (1994) 181 CLR 41,[29] Deane J identified four main categories of cases where a decision maker may be disqualified by reason of apprehended bias:

- Disqualifying interest, where the decision maker has a pecuniary or other personal interest in the decision outcome (i.e., has a conflict of interest).
- Disqualifying conduct, where the decision maker's conduct in the course of the proceedings or outside the particular proceedings gives rise to an apprehension of having prejudged the issue to be decided.
- Disqualifying association, where the appearance of bias arises from the decision maker's association or relationship with a person interested in the proceedings.
- Disqualification by extraneous information, where the decision maker has knowledge of some damaging information obtained outside the proceedings.

An expression by an administrative decision maker of provisional views does not give rise to disqualifying conduct. Indeed, it is helpful to affected persons if, in the course of administrative decision-making, a decision-maker discloses a provisional view on an issue or directs the affected person to weaknesses in his or her case. Furthermore, doing this promotes the purpose of the hearing rule by alerting the affected person to what the decision maker is thinking and giving an affected person an opportunity to persuade the decision-maker to take another view. Care should be taken, however, when expressing a provisional view, or exposing weaknesses in an affected person's case, that the decision maker does not give the impression of having made up their mind before receiving any further information from an affected person. Use words such as: 'My provisional view, subject to what you may say, is...'; 'This *might* suggest, subject to what you might say, that...'.

Bias can manifest in different ways, for example a decision-maker may have a conflict of interest because of some financial interest in the outcome of the decision, or an association with another

[29] at 74-75.

person interested in the outcome of the decision, that gives rise to a reasonable apprehension of prejudice, partiality or prejudgment.

Reasonable apprehension of bias may arise from hostility, sarcasm or aggression shown by a decision maker to an affected person.

Illustrative Cases

The following principles of law illustrate the requirements of the no bias rule:

- ***Minister for Immigration v Jia Legeng* (2001) 205 CLR 507:** it is necessary in applying the bias rule to take account of the character of the person chosen by the Parliament as the decision maker and the circumstances in which they operate. Accordingly, a Minister having a public and political role is not expected to exhibit the same air of detachment as a judge.
- ***Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438:** there is no automatic rule of "vicarious bias" attaching to a Minister in relation to the actions of the advisers. In Hot Holdings, the ownership of shares by senior Departmental officers who prepared a Minute recommending that an exploration licence be granted was not bias because the Minister had made an independent decision.
- ***Rustom v Ismail* [2009] VSC 625:** statements by a decision maker that he or she will bring an impartial mind to the exercise of power may not be enough to displace an impression of bias created by other circumstances. In that case, the decision maker had made adverse comments about the credibility of a party and referred to adverse comments about that party made by the same decision maker in a previous case. The combination of comments created a reasonable apprehension of bias, which was not displaced by assurances that the decision maker would bring an impartial mind to the proceedings.
- ***Lohse v Arthur (No 3)* (2009) 180 FCR 334:** decision makers must be careful when asking questions of parties and witnesses not to give the impression that the issues have been prejudged. In that case, a decision maker conducting an inquiry into alleged workplace misconduct was considered by the Federal Court to have made suggestions to witnesses during interviews that supported one party and had made comments to witnesses that ***impliedly accepted their evidence before the other party was given an opportunity to comment.***
- ***Gaudie v Local Court of NSW* [2013] NSWSC:** At paragraph [78] the Court held: "A judicial officer is disqualified if a fair-minded lay observer or bystander ... might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question or questions that the Judge is required to decide". The test is one of possibility (real and not remote), and not probability. In that case, a Magistrate was requested to disqualify himself from hearing a criminal matter in which the accused was represented by the Aboriginal Legal Service (**ALS**). The Magistrate had previously made a number of statements to the media about the conduct of matters by the ALS. Justice Johnson of the Supreme Court of NSW held that the language used by the Magistrate in his media interview about the ALS was vehement and trenchantly expressed. His Honour highlighted (at [180]) a number of aspects of the Magistrate's interview with the media, including:

> *"the reason you're speaking to me is I haven't told anyone I'm going to speak to you, because I have no doubt that if I had indicated I was going to, they would have told me not to"*
>
> *"I felt personally affronted by the mention of Bourke and Brewarrina and that attacked my integrity as a Magistrate and as a human being"*
>
> *The interviewer said "you've obviously expressed anger yesterday that the ALS appears to be on a campaign about this" and the Magistrate replied "Absolutely"*
>
> *"when my integrity is challenged I feel seriously affronted"*
>
> *"there certainly appears to be [a campaign being run by the ALS concerning the magistracy]"*
>
> *"I think it's very unwise for practitioners to enter into a public debate where there's constant criticism of a particular group of Magistrates as Mr Lawrence [an ALS lawyer] has done. He won't do himself any favours doing that"*

Weighing up all of the statements made by the Magistrate, Justice Johnson concluded:

> *Given the unusual accumulated statements and events relied upon in this case, and the strength of the language used by the Magistrate, the conclusion should be reached that the bystander might reasonably apprehend that the Magistrate might not bring an impartial mind to the resolution of the questions that his Honour would be required to decide in the criminal prosecution against the Plaintiff. This conclusion is reached as a matter of real and not remote possibility, and not probability.*

- ***Isbester v Knox City Council* [2015] HCA 20**: Izzy was a Staffordshire terrier who had attacked another dog; a person who had tried to separate the fighting animals was injured by Izzy. Following an investigation by the Council, Izzy's owner, Ms Isbester, was charged with and pleaded guilty to an offence in the Magistrates Court under the Victorian domestic animals legislation. That conviction meant that the Council could consider making a decision to destroy Izzi the dog. The Council convened a panel to decide Izzy's fate and ultimately the Chairperson of the panel decided that Izzy should be destroyed.

  The challenge to the Council's decision was on the basis that one of the members of the panel, an officer of the Council (Ms Hughes), was also involved in the investigation and laying of the charges against Ms Isbester in the Magistrates Court. Ms Isbester argued that a fair-minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision.

  The High Court found that Ms Hughes was involved in every aspect of the Council's decision making process. Ms Hughes directed Council employees to investigate the circumstances of the attack by Izzy and to ascertain Izzy's identity. She spoke to the complainant. She directed the charges be laid and instructed the Council's solicitors to prosecute Ms Isbester and negotiate pleas. Following the conviction in the Magistrates Court, Ms Hughes wrote to inform

Ms Isbester that the Council was giving consideration to ordering the destruction of Izzy. Ms Hughes was part of the three-person panel and provided notes to the panel made in preparation for, and following, the Magistrates Court hearing (including comments made by the Magistrate adverse to Ms Isbester). All in all, Ms Hughes played a "major role" in the decision-making process.[30]

The Court compared Ms Hughes' interest in the outcome of the matter to that of a prosecutor. The Court said:[31]

> *A "personal interest" in this context is not the kind of interest by which a person will receive some material or other benefit. In the case of a prosecutor or other moving party it refers to a view which they may have of the matter, and which is in that sense personal to them. The interest of a prosecutor may be in the vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment. It is not necessary to analyse the psychological processes to which a person in such a position is subject. It is well accepted,... that it might reasonably be thought that the person's involvement in the capacity of prosecutor will not enable them to bring the requisite impartiality to decision-making.*

The High Court found that Ms Hughes' roles in the Magistrates Court hearing proceeding and the panel were incompatible.[32] That conflict of interest gave rise toa conclusion that a "fair-minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision".[33]

- ***Hinton v Alpha Westmead Private Hospital* [2016] FCAFC 107**: The Judge at first instance in the Federal Court made sharp criticisms of the appellant's case (for example, that the appellant's claim was the equivalent of a "*bag of chips*", was a "*try on*", was a "*baseless trifle*", was "*doomed*", depended on a proposition that was "*rubbish*", and was an obvious "*abuse of process*"). The Full Court held that:[34]

> *The test to be applied for apprehended bias, which isa basis for a judge being disqualified form hearing a matter, is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to resolution of the question the judge is required to decide (Ebner v Official Trustee in Bankruptcy(2000) 205 LCR 337 at[6]). In the present case, the fair minded lay observer would identify from the strong conclusions expressed by the primary judge in the hearing and his reasons ... that his Honour might be caused to decide the case on other than its merits.*

- ***Sharma v Minister for Immigration and Border Protection* [2017] FCAFC 227**: The Migration Review Tribunal questioned Mr Sharma about his study history. During the course of the questioning, the Tribunal said:

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[30] *Isbester v Knox City Counci*[2015] HCA 20at[10].
[16] Ibid, [46].
[32] Ibid, [49].
[33] Ibid, [50].
[34] *Hinton v Alpha Westmead PrivateHospital*[2016] FCAFC 107at [25].

> *It's not a hard question to answer, and I interrupt because, in my view, is that you were going to answer a different question. As I said earlier, if I think you're being evasive, Mr Sharma, that can count against you. We are looking at the cancellation of your student visa. I expect you to be honest with me about your life. You know about your life.*
> *Slow down please. You're speaking too fast. I know you want to tell me this. And you have thought about this before but you speaking so fast, you're sounding a little rehearsed as well. I ask you to slow down. I just don't understand why you're not starting classes on the first day, while you've changed institutions. This is all not in your written submissions. Are you making it up? Are you telling me the truth?*
> *I'll stop you there. Mr Sharma, you're being rehearsed. You've rehearsed all these words it seems to me and you're not answering the question. And that's not good. This is your life, and if I think you're making this up, you're trying to mislead me, I've got to make a decision as to the discretion to cancel your visa. So please, don't be evasive, it counts against you. Do you understand? Do you understand Mr Sharma?*
> *Mr Sharma, you enrolled in hospitality after the master of accounting. You didn't go straight to the bachelor of business. So are you attempting to mislead me? Again, I need to indicate to you this is an issue that concerns me. That you've got these rehearsed lines: When I finished my masters, I applied for hospitality.*
> *Mr Sharma can't answer it for you. I think you understand the question, and you're deciding not to answer it. I may form the view, as I've indicated to you, is open to me in the circumstances to consider that you never intended to complete the Masters of Professional Accounting.*

North, Logan and Charlesworth JJ found that the Tribunal member was affected by apprehended bias. Their Honours based this conclusion on the following features of the Tribunal hearing:

- The Tribunal interrupted the applicant before the applicant had a chance to answer. Their Honours also considered that it should have been obvious to the Tribunal that the applicant did not understand the questions and that the Tribunal rebuked the applicant for a failure to understand. Their Honours held at [58]:

> *That process created an impression that the Tribunal was not interested in hearing what the appellant wanted to say, but rather was intent on determining the matter against the appellant in any circumstances.*

- The tone of the Tribunal member, which the Court held was "*demeaning and dismissive*".
- The speed with which the Tribunal decided the matter. The hearing commenced at 10.06am and the decision was published at 4.49pm. Their Honours said at [67]:

> *Such speed in the delivery on reasons which canvass a number of issues is unusual. The reasonable lay observer might regard that circumstance as providing some explanation for the way the interview was conducted.*

- ***Dimech v Tasmania* [2016] TASCCA 3:** The Judge presiding over Mr Dimech's trial, in an apparent slip of the tongue, accidentally referred to Mr Dimech as "Mr Guilty" while the jury was present. Mr Dimech appealed against the guilty verdict, which was eventually delivered by the jury, partly on the basis that this slip of the tongue had prejudiced the jury against Mr Dimech. In rejecting this ground of appeal, the Court of Criminal Appeal held that:[35]

> *A slip of such a nature, when listened to in real time, could not by any dint of imagination have prejudiced the jury against the appellant, or caused the jury to believe that that judge either thought or was implying that the appellant was guilty.*

A Duty to Enquire

There has been some speculation as to whether a decision maker, particularly a review tribunal, is under a duty to make further inquiries, for example, when presented with unclear, missing or conflicting information and the means and opportunity to clarify that information.

In *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 the High Court confirmed that it will be difficult to establish that a decision maker has a positive duty to inquire. *SZGUR* concerned a decision of the Refugee Review Tribunal (**RRT**) where the RRT wrote to the applicant inviting his comment on what the RRT viewed as contradictions and inconsistencies in his evidence to the RRT. The applicant's migration agent wrote back to say that the applicant suffered from bipolar disorder, depression and forgetfulness. The applicant provided a certificate from a psychiatrist and statutory declarations to support these contentions. The applicant's migration agent also invited the RRT to obtain an "*independent assessment of his mental health, if required*". The RRT did not do so, and affirmed the decision to refuse the application.

Section 427(1)(d) of the *Migration Act 1958* (Cth) empowers the RRT to require the Secretary to "*arrange for the making of ... any medical examination ... that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that ... examination.*"

The question for the High Court was whether, in the circumstances of the applicant's contentions before the RRT, the RRT had a duty to exercise that power in s 427(1)(d) and request a medical examination.

The High Court overturned the decision of Rares J in the Federal Court and found that there was no such duty. French CJ and Kiefel J found that the RRT had clearly read the letter from the applicant's migration agent and that there was no duty to obtain any further information or exercise the power to obtain an independent report. Their Honours held (at [37]) that:

> *the Tribunal was entitled to come to the conclusion that the contradictions and inconsistencies it had Identified were not explained by the brief, uninformative statements in the psychiatrist's certificates, nor by anecdotal lay accounts of forgetfulness set out in the statutory declarations.*

Their Honours went on to conclude (at [38]) that:

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[35] *Dimech v Tasmania* [2016] TASCCA 3 at [46].

> *the Tribunal was under no obligation to make further inquiry in relation to the significance of [the applicant's] medical condition. It acted upon its view of the limitations of the evidence provided to it. In so doing, it did not fail to discharge its duty ...*

Although *SZGUR* indicates that it may be difficult for an applicant to establish that a decision maker had a duty to make further enquiries, more recent High Court authority suggests that, if there are obvious omissions or obscurities in the information before the decision maker, it may nonetheless be prudent for a decision maker to clarify or seek further information on those matters. A failure to make further enquiries where there are obvious omissions in the information before the decision maker may be found to be an unreasonable exercise of decision making power.

Case study: failure to make proper enquiries
Minister for Home Affairs v DUA16 [2020] HCA 46

The High Court held that the Immigration Assessment Authority's decision not to seek clarification and/or additional submissions from a protection visa applicant, CHK16, was legally unreasonable, in circumstances where it was clear that the original submissions provided contained information in relation to another individual (who was not the visa applicant). CHK16 had engaged a migration agent whose practice was to submit information to the Department using templates of pro forma information, which were not always thoroughly reviewed prior to submission. The result was that CHK16's submissions contained no information in relation to them and instead was entirely comprised of personal information in relation to another person. Although the Authority was not aware at the time of its decision that CHK16's migration agent had acted fraudulently, it was clear that the submissions included a significant amount of information pertaining to a person who was not CHK16 that had been included in error.

The High Court considered that the circumstances of CHK16's case were "extreme", noting that the submissions that had been provided by the agent were in relation to a different person, and none of the personal information related to CHK16. The High Court held that the approach taken by the Authority was legally unreasonable, and rejected the Minister's argument that the lack of enquiry by the Authority was not unreasonable because such enquiries could not have reasonably expected any useful result. The High Court went on to state that the fact that the Authority did not know at the time that the migration agent that had provided the submissions was engaged in fraud did not impact whether the Authority's failure to request additional information in relation to the submissions once it became clear to the Authority that those submissions did not relate to CHK16 and had erroneously included information in relation to another person.

Another client of the fraudulent migration agent, DUA16, also sought judicial review on the grounds of unreasonableness. DUA16's submissions to the Department had also been prepared using the migration agent's template, but had been updated to reflect instructions provided by DUA16 to the migration agent. As with CHK16, the Authority was not aware of the migration agent's fraud at the time of the decision. The High Court considered that DUA16's case was not affected by legal unreasonableness. While it was apparent from DUA16's submissions to the Authority that additional information had been included in error, the High Court considered that the Authority's approach of expressly disregarding those submissions and noting that the information could not in any event have been considered even if it had not been included by mistake was sufficient.

Materiality

The High Court has determined that a breach of procedural fairness, or other legal error, will not constitute a jurisdictional error if the breach was not "*material*" to a decision, and that a "*breach is material to a decision only if compliance could realistically have resulted in a different decision*" (*Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3).

A person who claims that an administrative decision is affected by jurisdictional error will be expected to positively demonstrate that, if that error had not occurred, they could reasonably have achieved a different result (*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17).

Case study: failure to make proper enquiries
MZAPC v Minister for Immigration and Border Protection [2021] HCA 17

In MZAPC, the High Court upheld a finding that a breach of an implied condition of procedural fairness by the Refugee Review Tribunal did not result in jurisdictional error in the Tribunal's decision to affirm a decision by a delegate of the Minister to refuse the appellant a protection visa. The breach of procedural fairness was that the Tribunal did not disclose to the applicant a 'Court Outcomes Report', which indicated the appellant had been convicted of some driving offences and one count of giving a false name. The Tribunal found that the appellant did not face a real chance of persecution in his home country. Its reasons did not refer to that report or any of the information it contained.

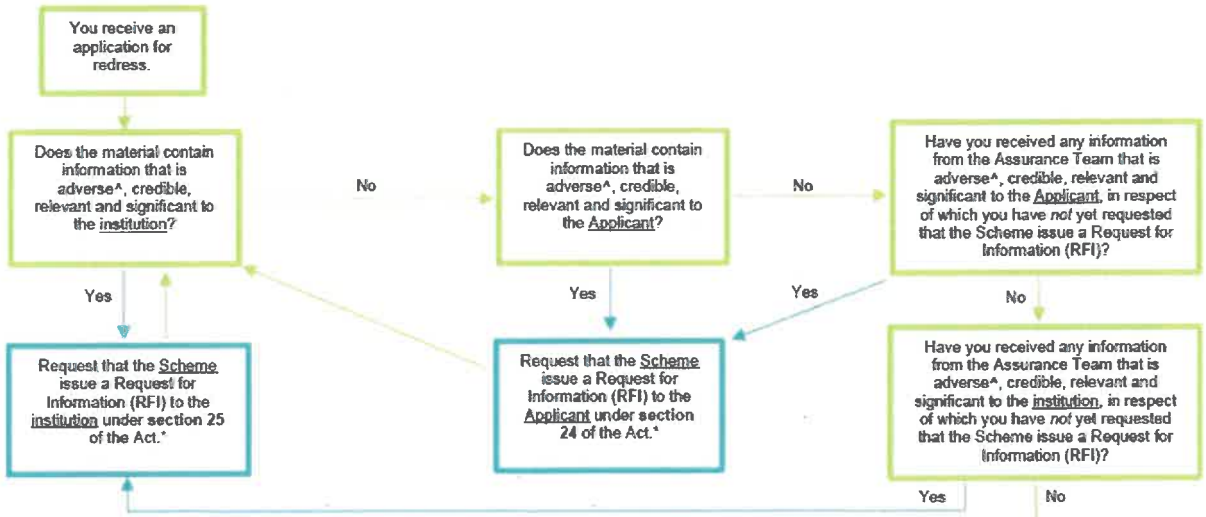
The majority found that the process for establishing a material legal error requires the applicant to establish that there is a legal error in the administrative decision. Then the applicant must demonstrate that the error was material to the outcome of the decision - if the error was not material, the legal error will not amount to a jurisdictional error of the kind a court would set aside or redress.

To establish materiality, the applicant has to show that there was a "realistic possibility" that a different decision could have been made if there had not been a legal error of the kind identified. This is a question of fact that must be established on the balance of probabilities by inferences drawn having regard to all of the evidence before the Court. The majority held that the test is whether there could have been a different outcome, not whether there would have been a different outcome.

Flow chart – making a determination as to whether approve an application for redress

Procedural fairness is owed to applicants who apply for redress under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) (the Act) and to participating institutions.

Procedural fairness is not a 'one and done' process. You may need to repeat the process if relevant significant adverse information is received at any point throughout your decision-making process, and the person or institution to whom it relates has not yet had the opportunity to comment on that material.



*Always be mindful that requesting that the Scheme issue a RFI to an Applicant or institution may trigger the need for further requests to the Scheme for additional RFIs to be issued, to give applicants and/or institutions a further opportunity to comment on adverse material that is credible, relevant and significant.

^Adverse information is information that is detrimental or disadvantageous to a person's interests. For example, information that may lead you to determine not to approve an application for redress.

#Carefully consider any information received in response to any RFI (where relevant).

Reflect your consideration of this information in your Statement of Reasons.

Determine eligibility. Is the Applicant 'reasonably likely' to be entitled to redress (sections 6, 12, 29 of the Act)? Use the Internal Assessment Guide.

Ensure that you have had regard to relevant legislation and policy, including the Act, the *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018*, the Assessment Framework Policy Guidelines, and the Internal Assessment Guide.

Reflect this consideration in your Statement of Reasons.

Prepare your Statement of Reasons. Use Trauma Informed Language and refer to relevant material upon which any findings are based.

Make a determination (sections 29 or 75 of the Act). The Scheme will communicate your determination to the Applicant and the institution.

#Ensure that you have repeated the process of requesting that the Scheme issue RFIs, and considering whether the responses to RFIs contain any adverse material that is credible, relevant and significant to the Applicant or institution, until you are satisfied that there is no adverse material before you that is credible, relevant and significant upon which either the Applicant or institution has not yet had the opportunity to comment.

The Statement of Reasons

A good statement of reasons explains the reasons for the decision well. The obligation to give reasons and explain the basis for a decision appears in a wide range of Commonwealth legislation. Many Commonwealth Acts, when conferring a decision making power, also impose a requirement that reasons be given. Section 34 of the NRS provides:

> *If the Operator makes a determination under section 29 on an application for redress for a person, the Operator must give the person written notice of the determination stating:*
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> *a) whether or not the application has been approved; and*
> *b) **the reasons for the determination**; and*
> *c) that the person may apply under section 73 for review of the determination during the review period for the determination*

A similar requirement to provide reasons exists in s 77 in relation to review determinations made under s 75 of the NRS Act.

The concept of 'reasons' has a standard content across Commonwealth legislation, which is reflected in s 25D of the *Acts Interpretation Act 1901,* which provides:

> *Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "reasons", "grounds" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.*

In addressing the importance of an ability to obtain a clear statement of reasons, Woodward J in *Ansett Transport Industries (Operations) P/L v Wraith* (1983) 48 ALR 500 at 507, said that:

> *... s.13 of the ADJR Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'*

Another purpose of a statement of reasons is to remedy the real grievance persons experience when they are not told why something adversely affecting them has been done.

Further, there is a public policy interest in open government and part of this involves the disclosure of the decision-making process. The provision of statement of reasons in this context engenders confidence in the community that the decision-maker has gone about the task appropriately and fairly.

Finally, there is further purpose to be served in the provision of a statement of reasons. An obligation to give reasons imposes upon the decision-maker an intellectual discipline: the possible need to justify a decision in formal terms (at a later date) tends to encourage more careful decision-making.

Putting together a statement of reasons

There is no general, common law obligation to give reasons for administrative decisions. However, legislation often imposes such an obligation, whether as an aspect of a general review procedure, or under the legislation under which the decision is made.

Legislation often allows a person who has been adversely affected by an administrative decision to request a statement of the reasons for that decision. This occurs where there is a right of merits review by the AAT, a right of judicial review by the Federal Court, or where the legislation under which the decision was made requires reasons to be provided when notifying the person of the decision.

The NRS Act does not require that a statement of reasons be in a particular format. However, often Statements of Reasons are structured to include a preamble and sections such as 'Finding of Facts', 'Reasons for Decision' and, 'Evidence on which findings were based'. What to include in reasons statements is principally guided by legislation, in particular section 28 of the AAT Act and section 13 of the AD(JR) Act. A statement of reasons should contain:

- a description of the decision(s);
- relevant legislation and section(s) under which the decision was made;
- identification of the decision maker, and the source of that person's authority to make the decision (most likely a delegation);
- an outline of the procedure that was followed in making the decision (for example, any enquiries made, other agencies consulted);
- the material that was before the decision maker when the decision was made (for example, papers, submissions, agency policies); and
- the following aspects of the reasoning:
    - the facts/findings that support each of the statutory requirements for the decision. Findings should be expressed in appropriate language (e.g., "I find/accept/am satisfied/am not satisfied");
    - the conclusion reached on any disputed fact, and why that conclusion was reached; and
    - if any aspect of the decision was discretionary, the option that was chosen and why.

Reasons should also be directed to the point in issue and not depart from that point, or add any gloss on the right test. The Administrative Review Council has provided the following guidance in relation to preparing a statement of reasons:

> *State the real reasons for your decision. Do not rewrite history ... Your statement must contain all steps of reasoning, linking the facts to your decision, so that the person seeking the statement can understand how your decision was reached.*
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> *Your statement must go further than [stating] your conclusions - you must give real reasons for those conclusions. You should also indicate any relevant policy statements or guidelines or other agency practices you took into account. In essence, you need to include any detailed background to the making of your*

> *decision, so that the person who receives the reasons will understand them (and not have to guess at any gaps)."*

It is important to remember that a statement of reasons does not need to contain reference to every aspect of the factual circumstances - there is a limit to what is reasonably required. For example, in *Chief Executive Officer of Customs v ICB Medical Distributors* (2007) 97 ALD 746, the Federal Court held that:

> *... an obligation to give reasons ... did not oblige the Tribunal to give a subset of reasons why it accepted or rejected individual pieces of evidence. It is sufficient if the Tribunal ... sets out its finding on those questions of fact which it considered to be material to the decision which it made and the reasons it had for reaching that decision.*

For ease of decision making, agencies may appropriately adopt different formats and templates for reasons which can provide differing ways to satisfy the same substantive obligation to provide reasons. Whilst the NRS Act doesn't dictate the use of a particular format, the Scheme encourages decision-makers to follow the guidance contained in its decision templates to ensure decisions remain of a consistent and high quality and are legally defensible if subject to judicial review. While the use of such templates is acceptable and understandable given the imperatives for decision making in busy agencies, it should not mean that the decision maker fails to consider the particular issues relevant to the circumstances before them; and it should not conceal the real reasons for the decision. As was stated by the High Court in *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259 at 266:

> *A statement of reasons for a decision reviewable under the AD(JR) Act is not invalid merely because it employs a verbal formula that is routinely used by persons making similar decisions ... On the other hand, if the decision maker uses the formula to cloak the decision with the appearance of conformity with the law when the decision is infected by one of the grounds of invalidity prescribed by the Act, the incarnation of the formula will not save the decision from invalidity. In such a case, the use of the formula may even be evidence of an actionable abuse of power by the decision maker.*

The Full Federal Court (Rares and Jagot JJ, Flick J in dissent) recently endorsed this approach in *Minister for Immigration and Citizenship v SZQHH* [2012] FCAFC 45 in which it was held that template paragraphs used by an Independent Merits Reviewer when recording his assessment of the applicant's claims did not give rise to an apprehension of bias. As long as the decision maker can demonstrate the decision was made after consideration of the individual circumstances of the case the use of templates will be permissible.

Templates should be treated with caution and decision makers must make sure that each decision based on a template is carefully proofread. For example, in *SZCMU v Minister for Immigration and Citizenship* [2006] FMCA 117, the decision under review stated:

> *Having considered the evidence as a whole, the Tribunal is not satisfied that the Applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore, the Applicant does not satisfy the criterion set out in s.36(2) of the Act for a protection visa.*

However, on the next page, the decision stated:

> *The Tribunal is satisfied that the Applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore, the Applicant satisfies the criterion set out in s.36(2) of the Act for a protection visa.*

While the decision was not set aside on this basis, the Federal Magistrates Court said the error was "*impossible to excuse*" and indicated that either the decision had not been proof-read or had been proof-read in a "*negligent or slapdash way.*" A statement of reasons will typically be a key piece of evidence in any judicial review proceeding.[36] Accordingly, decision-makers should be aware of some of the basic principles courts have developed when assessing statements of reasons. Courts have noted that statements of reasons should be read benignly, without "an eye keenly attuned to the perception of error."[37]

To show that the decision-maker has not failed to take account of a relevant consideration, as a matter of best practice the statement of reasons should show that he or she has given proper, genuine and realistic (and not merely tokenistic) consideration to all relevant available material. An assertion by the decision-maker that he or she has acted in this fashion will not necessarily conclude the matter; it must be shown that consideration in a real sense was given (*Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291). In the reasons for decision, the decision-maker must relate the material to the issue to be determined when applying the relevant criteria (*Williams v Minister for Environment and Heritage* [2003] FCA 535)). The importance given to each factor should also be stated.

In *Polaris Coomera Pty Ltd v Minister for the Environment* [2021] *FCA 254*, the appellants submitted that the Minister's delegate failed to provide adequate reasons and relied on the threshold for adequate reasons in *Wingfoot Australian Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [55], "*that the Delegate was required to explain his, "actual path of reasoning" in sufficient detail to enable a reviewing court to see whether the Decision was affected by an error of law*" (at [195]). The Federal Court rejected this argument in finding that the delegate's reasoning, that is the delegate's findings of fact in relation to koala movement and impacts on koala populations at the project site, were explained in sufficient detail to satisfy the threshold in *Wingfoot.*

It is important to note that if a statement of reasons refers to other documents (such as a decision brief), those documents should be made available in full to a person requesting access to that statement of reasons. In *The Wilderness Society (Tasmania) Inc v Minister for Environment* (2019) 275 FCR 287, Justice Mortimer considered that it is not acceptable for a decision maker to refer to documents which a person requesting access to a statement of reasons cannot access in circumstances where the contents of the brief are asserted to have been adopted by the delegate and to reflect their reasons and, risks frustrating the statutory purpose of the obligation to provide a statement of reasons under section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (at [30]-[31]).

In *Lodhi v Attorney General (Cth)* [2020] FCA 1383 the Federal Court considered the adequacy of reasons (which was 6 paragraphs long) for a decision not to grant parole by the Commonwealth

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[36] We note ss 104(2) and (3) of the NRS Act permits disclosure of protected information and information that is contained in the assessment framework policy guidelines in judicial review proceedings.
[37] *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287 (Neaves, French and Cooper JJ).

Attorney-General, in the context of the Attorney-General having received a detailed submission with 16 attachments from the Attorney-General's Department. Mr Lodhi argued that the Attorney-General had failed to give adequate reasons in the circumstances. The Court emphasised that in order for this ground of review to be made out, the reasons must fall short of what is legally required, having regard to the statutory framework in which the decision is made (at [89]). Noting that the statutory test in this case was simply whether the Attorney-General was satisfied that exceptional circumstances existed so as to warrant the grant of parole, the Court considered that the reasons given were sufficient to set out the key bases of the Attorney-General's decision. The fact that the reasons were brief did not mean that the reasons were inadequate.

Flow chart - key steps for Independent Decision Makers

Follow the steps below when making decisions pursuant to the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth)

1. **Carefully comply with the legislative requirements** outlined in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) (**Act**).

2. **Apply policy correctly and flexibly**. Ensure that you have had regard to the Assessment Framework Policy Guidelines and the Internal Assessment Guide.

3. **Give procedural fairness**: Do you need to provide a procedural fairness opportunity to comment to an applicant and/or institution? If so, request that the Scheme issue a Request for Information to an applicant and/or institution pursuant to ss 24 or 25 of the Act. This means providing the individual or institution with the relevant adverse information and giving them an opportunity to respond. **Carefully consider any information received in response** in accordance with the following steps.

4. Procedural fairness is not a 'one and done' process. Does the additional information received require you to **provide a further procedural fairness opportunity** to comment to an applicant and/or institution? This may arise in circumstances where, for example, an institution provides information that is contrary to what is provided by an applicant in the application.

5. **Assess relevant evidence**, noting that the standard of proof is 'reasonable likelihood' (ss 6, 12 and 29 of the Act), which is a lower threshold than the 'balance of probabilities'. Consider the relevance of the information, the weight to be afforded to certain factors, the consistency of the evidence and its credibility. Determine the significance of each piece of evidence and ensure that you have a basis for any findings made.

6. **Reflect your consideration and decision-making process accurately in the Statement of Reasons**, including to demonstrate that you have given procedural fairness and had regard to any information received from an applicant and/or institution.

7. Use the appropriate **Statement of Reasons template** and ensure that it is prepared in accordance with relevant policies including the use of trauma informed language. Keep a detailed record of the decision-making process.