

TALBOT SAYER NOTEPOOL

LAWS2115 – Administrative Law



Grounds of Review:

Procedural Fairness (W4):

- '[procedural fairness] aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case' – [Mason J, *Kioa v West*](#)
- Involves breach of natural justice and failure to observe procedures required by law
 - o Fair hearing requirements; independent and impartial judge (bias rule)
 - o Is considered a jurisdictional error
- Deeply embedded in the law – both executive and judicial function – and predating the common law by some millennia
- Rationale:
 - o Fair procedures likely to lead to better outcomes (**utilitarian/instrumental**)
 - o Promotes public confidence and acceptance through participation
 - o Ensuring rule of law and separation of powers (**libertarian**)
 - o Demonstrates inherent dignity of the person (**dignitarian**)
 - [Lord Reid, *Osborn v The Parole Board*](#)
- Combination of ^ rationale accepted in Australia; natural justice is a right that can only be excluded in the clearest terms in legislation – [Saeed v The Minister](#)
 - o Codified in [ADJRA s5\(1\)\(a\)](#) as a ground of review

When does procedural fairness apply?

Case	Facts/Issue	Judgments
Cooper v Wandsworth	Can statutory powers act as a shield to protect statutory bodies from tortious actions in law?	HELD: No – natural justice principles apply to statutory bodies All coercive statutory powers subject to the implicit qualification that powers exercised fairly, parties given opportunity to be heard
Ridge v Baldwin	R dismissed on corruption allegations (action taken through statutory authority)	HELD: decision invalid – the body were bound by natural justice Even if quasi-judicial, statutory bodies have a duty to give notice and opportunity to respond to allegations
Banks v TRB	B's taxi licence revoked by TRB bc alleged breach of licence conditions – no particulars given	HELD: decision invalid – TRB bound by natural justice No intention by parliament to oust procedural fairness Nature of the power, consequences of decision and relationship with statute shows that the board was acting judicially – Barwick CJ
NB: ^ also applies to non-statutory bodies and individual civil servants (Keane J, <i>CPCF v Minister</i>)		
FAI v Winneke	Is Vic Governor obliged to comply with natural justice when declining renewal of licence to act as insurer of workers' comp.?	HELD: yes – where a decision adversely affects a party, they are owed procedural fairness before decision is finalised Mason J : also extends to decisions affecting 'an interest or a privilege or which deprives a person of a legitimate expectation' – FAI expected at least reasons and opportunity to raise objections (nature of decision-maker not sufficient for denying natural justice) BUT 'content of the duty varies' with the facts of the case
Kioa v West	Non-citizen K subject to deportation powers after breach	HELD: entitled to natural justice <i>even if</i> non-citizen, as decision made on prejudicial information obtained that K wasn't informed of

	of visa conditions (overstay) > K argued breach of natural justice as not given opportunity to respond to adverse material	Mason J: affirmed <i>FAI v Winneke</i> ; rights/interests: ‘relating to personal liberty, status, preservation of livelihood and reputation... proprietary rights and interests’; legitimate expectation: ‘expectations which go beyond enforceable legal rights provided they are reasonably based’ – need to be affected in direct and immediate way, subject to contrary statutory intent
Plaintiff M61/2010E v Cth	Scheme for processing claims made by asylum seekers who arrived irregularly at sea > subject to statutory bar from applying for protection visa, but could through discretionary non-statutory scheme	Applicant argued procedurally unfair scheme, govt said not required to adhere to procedural fairness bc it wasn’t conditioned by <i>Migration Act</i> and powers didn’t defeat/prejudice <i>rights</i> HELD: scheme invalid – sufficient link to statute bc of informal assessment processes undertaken <i>for the purposes of</i> determining how to exercise statutory power under <i>Migration Act</i> ; conduct of enquiries prolonged detention period, affecting fundamental rights/interests (i.e. deprivation of liberty)

Legitimate Expectation – still relevant?

- *Teoh’s case*: incl. where expectations arise from govt undertaking/ representation
- *Haoucher*: incl. expecting that helpful Tribunal recommendation won’t be overturned
- Difficulties with meaning and application of this raised by HCA in *Ex parte Lam*...
- *WZARH*: ‘recourse to the notion of legitimate expectation is both unnecessary and unhelpful... [and] may distract from the real question’, which is ‘what is required to ensure a decision is made fairly in the circumstances, having regard to the legal framework within which it is made’

What interests are recognised?

- *Isbester v Knox CC*: something some people consider ‘important’ is sufficient to attract natural justice □ difficult to administer, incoherent
- Where people’s rights/interests are affected *indiscriminately* (i.e. affecting people at large), there is no presumption that natural justice applies
- *Saraceni v ASIC*: ASIC exercised statutory power to authorise a receiver to apply to court for investigation into company officer (S) > S challenged on procedural fairness
 - o **HELD:** S only indirectly affected by exercise of ASIC’s statutory power

Statutory Context of Procedural Fairness:

Case	Facts/Issue	Judgments
<i>Miah’s case</i>	M applied for protection visa from Bangladesh > change of govt, by reason of which decision-maker denied her visa (no well-founded fear of persecution) > no NJ processes	HELD: statutory procedure codes for dealing efficiently with visa applications cannot exclude common law, so breach of NJ Gaudron J: still a question of whether M could escape persecution; existence of merits review doesn’t mean original decision-maker was no longer obliged to uphold NJ; should have had opportunity to be heard, regardless of statutory code to be efficient McHugh J: no words unambiguously excluding NJ; extrinsic material stating otherwise is superseded by statutory text
<i>Saeed v Minister</i>	Whether a provision of the <i>Migration Act</i> successfully	HELD: no – whatever parliament’s intentions ‘might’ have been, what matters is the clarity of actual statutory provisions

	displaced common law natural justice principles	Even if less NJ is statutorily required than at common law, does not mean that none is intended – still have to provide opportunity to respond (common law and statute tend to converge on this point)
<i>O'Shea's case</i>	O sentenced to indefinite detention under SA law > three-tiered admin process for parole > medical practitioners and parole board recommended release but Governor denied on 'public interest' – O argued lack of NJ	HELD: procedural fairness observed through hearing before parole board (recommending body) – sufficient to present O's case <i>Wilson, Toohey JJ</i> : even if JR would provide better protection, statute has provisions for NJ – O had only hope that Governor would follow recommendations, which is insufficient grounds BUT: if decision-maker took other material not considered by parole board, fairness <i>would</i> require opportunity to respond

Content of a fair hearing:

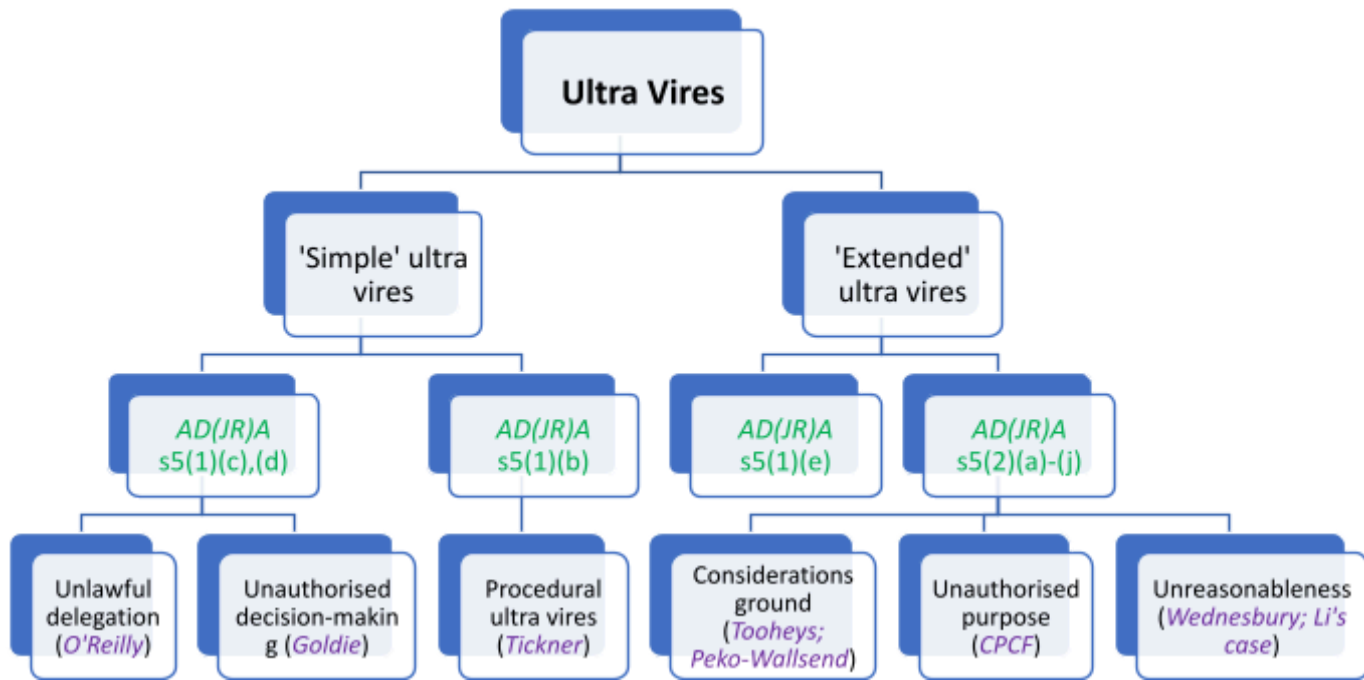
- Requires: prior notice of decision, adequate disclosure of nature of case to be met, reasonable opportunity to respond and comment, legal representation
- General statement from *SZSSJ*: need to have a procedure that gives person affected reasonable opportunity to be heard; jurisdictional error occurs if 'the procedure adopted so constrains the opportunity of the person to propound [their] case for a favourable exercise of power as to amount to **'practical injustice'**
 - o *NBNM*: practical injustice depends on the circumstances
- Prior notice: temporal and substantive elements, of a decision and case to be met
 - o NB: *Mason J, Kioa v West*: not needed in cases where it frustrates exercise of powers (SoP exists for a reason)
 - o Notice requirements per *SZSSJ*:
 - Nature and purpose of inquiry
 - Issues to be considered in conducting the inquiry
 - Nature and content of information that decision-maker might take into account – **relevant, significant, critical**
- *Brennan J, Kioa v West*: person whose interests are affected doesn't have to be given opportunity to respond to every piece of information – would clog the administrative system; only need 'opportunity to deal with adverse information that is **credible, relevant and significant** to the decision to be made'
- *VEAL*: whether an applicant to RRT should be given notice of the substance of their allegations (i.e. letter used to deny applicant a visa)
 - o HELD: content of letter should be disclosed (public interest to reveal)
 - o Adverse information, even if not regarded by the decision-maker, should be revealed – 'credible, relevant and significant' doesn't depend on decision-maker's characterisation as applied after the fact
- No universal requirement for an oral hearing (*WZARH*), representation by lawyer/agent (*Li Shi Ping*) interpreter – understanding still important though (*NAUV*)

Rules of Bias (W4-5):

- Independence and impartiality are crucial to the judicial system
- **Bias rule:** ‘justice should be done, but manifestly and undoubtedly be seen to be done’ – *Ex parte McCarthy*
- Is a common law principle applicable to every decision-maker, though not as stringent for executive decision-makers as for judiciary – *Jia Legeng*
- **Apprehended bias** (double might test): whether ‘fair-minded’ lay-observer might reasonably apprehend that the judge (or other official) might not bring an impartial mind to the resolution of the question they are required to decide – *Ebner v OTB*
 - Fair-minded lay-observer = reasonable, has common knowledge, informed, not overly sensitive – *Johnson v Johnson*
- *Gageler J, Isbester v Knox CC* – interpreted there to be a three-step analytic test:
 1. ‘requires the identification of *what* it is said might lead a [decision-maker] to decide a case other than on its legal and factual merits’ (relevant factor)
 2. ‘there must be an articulation of the *logical connection* between the matter and the feared deviation from the course of deciding a case on its merits’ (how does the factor cause deviation from neutral evaluation)
 3. Articulate the ‘nature, interest, and the asserted connection with the possibility of departure from impartial decision-making’ (sufficient connection)

Case	Facts/Issue	Judgments
<i>Isbester v Knox CC</i>	Local council officer brings charges against dog owner for statutory offences; officer then involved in proceedings to decide if dog to be ‘destroyed’	HELD: officer discharging incompatible roles Officer involved in role of ‘accuser’ and ‘adjudicator’ – involvement in first step would mean they were not requisitely detached and objective to a fair-minded layperson Had in interest in the deliberations
<i>Royal Commission into TU GIC</i>	Heydon headed RC; several TUs accused Heydon of apprehended bias because of connections to LNP (agreed to lecture at donations fundraiser for LNP)	HELD: no apprehended bias because: insufficient link between lecture and RC; lecture to be apolitical anyway; didn’t open attachment that made the link between LNP fundraising and lecture, so was unaware of the potential apprehended bias <Heydon J sat on this case himself>

Ultra Vires (W6):



Unlawful Delegation (AD(JR)A s5(1)(c)):

- Action not performed by person who is authorised to do so per statutory power, common law, prerogative power (rule of law) – *CCSU v Minister for Civil Service*
- **Delegate:** person to whom power has been delegated under *express* statutory power; legally required to exercise power without others interfering
- **Agent:** exercises power on behalf of another principal office-holder (i.e. ghost-writer)
- Where Parliament has delegated, that official cannot sub-delegate (responsible govt?)

Case	Facts/Issue	Judgments
<i>O'Reilly's case</i>	Commissioner of Taxation given statutory power to issue notice to taxpayer that could be delegated > sub-delegated to other ATO officers under written authorisation	HELD: valid delegation – recognised Carltona principle Allowing delegation promotes efficient administration (tax commissioners and deputies couldn't issue notice to all taxpayers) Practical necessity
<i>Pattenden's case</i>	Deputy Tax Commissioner (delegate) authorised Benson	HELD: unlawful delegation – distinguished from <i>O'Reilly's case</i> Logan J: 'usurpation of authority' for unauthorised subordinate to

	(agent) to conduct tax audit, but tax officer (unauthorised subordinate) added extra details B didn't have access to after B decided	insert information on behalf of a delegate, w.r.t. a decision already made by an agent; deliberate exclusion of people without requisite seniority and nature of power (affecting departure prohibition order) indicate that only those authorised were to act
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Unauthorised decision-making (*AD(JR)A* s5(1)(d)):

Case	Facts/Issue	Judgments
<i>Coco v The Queen</i>	C's conviction of bribing Cth officer based on conversations recorded on C's land; C alleged trespass to land	HELD: unauthorised – statute didn't extend to installation of device via unauthorised entry to premises – conviction quashed Principle of legality □ if parliament intended to authorise trespass, need clear language – enhances parliamentary process
<i>Goldie v Cth</i>	Immigration officer detained G on 'reasonable suspicion' that G was an unlawful non-citizen	HELD: officer relied on incorrect/outdated info, failed to make reasonable enquiries □ detention unauthorised (<i>Gray and Lee JJ</i>) Requisite state of mind needs to be met; tested through objective examination of relevant material available at the time
<i>Plaintiff M70</i> , <i>Kiefel J</i> : 'statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law... The ambiguity, to which such a construction was relevant, should not be viewed narrowly' BUT statute > international law where incompatible		

Procedural Ultra Vires (*AD(JR)A* s5(1)(b)):

- Departure from procedural standards established by law under enactment
- Statutory corollary of procedural fairness ground
- *Tickner v Chapman*: whether Minister had complied with statutory procedural requirements about public notice before 'declaring' a protected heritage area under threat of desecration > effect was prohibiting construction of Hindmarsh Island bridge
 - o HELD: notice issued was defective, so declaratory process invalidated
 - o Notice that lacks specificity re. area to be protected and which doesn't detail the nature of the activity constituting a threat, is deficient in notice and invalid
 - Impacts public's effective opportunity to participate in decision
 - o Was the case here; area specified was too general

Unreasonableness (*AD(JR)A* s5(2)):

Case	Facts/Issue	Judgments
<i>APPH v Wednesbury Corp.</i>	Did WP (local authority) <u>improperly exercise their power</u> to issue cinema licenses when they granted	HELD: not abuse of power, not unreasonable □ condition valid - Courts can only interfere with act of executive authority if the authority has contravened the law

	<p>APPH a licence on condition of age limits?</p>	<ul style="list-style-type: none"> - 'If, in statute conferring the discretion, there is found expressly or by implication matters which the authority ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely... the authority must disregard those irrelevant collateral matters' - Other permissible grounds: bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances, disregard for public policy □ BUT these are interrelated and often overlap - 'unreasonableness' is difficult to satisfy, convened with determining whether a <i>reasonable public body</i> would make – court's view of reasonableness for that public body cannot be substituted for the original decision
<i>Li's case</i>	<p>Li refused skilled overseas student visa because employment history 'not genuine' > Li applied for review and fresh assessment > agent informed Tribunal of fundamental errors in assessment > Tribunal affirmed decision</p>	<p>HELD: Tribunal discretion was unreasonable, failing to identify considerations supporting its decision and none suggested by Minister <i>Wednesbury</i> reasonableness affirmed, renamed legal unreasonableness</p> <p>French CJ: statutory discretions always constrained by law through subject matter, nature and purpose of legislation under which it is conferred; 'a disproportionate exercise of administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable' because it exceeds what is necessary for its purpose □ reflected in Tribunal's lack of reasoning</p> <p>Hayne, Kiefel, Bell JJ: same as ^; within the boundaries of power there is an area of 'decisional freedom' within which a decision-maker exercises genuine free discretion, but 'unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification' □ disproportionate responses are an example</p> <p>Gageler J: 'Absent an affirmative basis for its exclusion or modification, a condition of reasonableness is presumed'; constraints on <i>Wednesbury</i> reasonableness are (1) stringency of test, (2) practical difficulty of meeting the test given the necessary policy considerations</p>
<i>Eden's case</i>	<p>E's visa cancelled because Minister 'reasonably suspected' that E didn't pass character test (>12 months prison sentence) > 4 year delay in sentence and cancellation > primary judge held decision unreasonable > MIBP appealed</p>	<p>HELD: delay was a relevant consideration, but not enough in itself; primary judge breached (2) below, so cancellation was a lawful outcome</p> <ol style="list-style-type: none"> 1) legal reasonableness is an essential element in lawful decision-making 2) 'Court's task in determining whether a decision is vitiated by legal unreasonableness is strictly supervisory' – no merits or de novo review 3) two contexts to apply LR: where there has been jurisdictional error, and where the outcome itself is legally unreasonable 4) quoting Hayne, Kiefel, Bell JJ from <i>Li's case</i> 5) need to evaluate the nature and quality of the decision w.r.t. the subject matter, scope and purpose of relevant statute, as well as attendant common law principles and values re. reasonable decision-making

		<p>6) reasons for a decision provide focus for evaluating LR, though LR can be found even if no errors in reasoning are identified (e.g. link between reason and decision unclear, or insufficient)</p> <p>7) 'The concept of legal reasonableness is not amenable to rigidly defined categorisation or precise textual formulary' – expressions like 'plainly unjust', 'arbitrary', 'capricious', 'irrational', 'lacking evident or intelligible justification', 'obviously disproportionate' □ not a checklist</p>
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Unauthorised purpose (*AD(JR)A s5(2)(c)*):

- Exercise of power other than for a purpose outside of statutory purposes is *ultra vires*
 - Fundamental to RoL that decision-makers can't enlarge their scope of power
- Where statutory purposes are not disclosed, the courts will identify, and imply, lawful purposes from the title, structure and text of the Act, and may have regard to relevant extrinsic materials if necessary – *Schlieske v MI*

Case	Facts/Issue	Judgments
<i>Schlieske v MI</i>	Disguised extradition case	HELD: unauthorised purpose <i>Wilcox, French JJ</i> : Aus officials can only enforce <i>Migration Act</i> to deport on immigration grounds, not for unlawful extradition
<i>R v Toohey; ex parte NLC</i>	Statutory scheme where indigenous groups with traditional land claim to 'unalienated Crown land' could lodge > UCL defined as 'not town' > NLC lodged such claim > official made regulation to expand town boundaries of Darwin	HELD: purpose of statutory power to expand town boundaries was for town planning only; matter remitted to Commissioner so they could establish whether there was an ulterior purpose, and open for NLC to show that the action was invalid <i>Gibbs CJ</i> : 'fundamental to the rule of law that the Crown has no more power than any subordinate official to enlarge by its own act the scope of power that has been conferred on it by the Parliament'

Relevant Considerations (*AD(JR)A s5(2)(a)-(b)*):

- Decision may be unlawful where irrelevant matters are taken into account (*s5(2)(a)*) or relevant considerations failed to be made (*s5(2)(b)*)
- *MAA v Peko-Wallsend*: Aboriginal group made land claim in NT > Commissioner held inquiry, recommended 10% of desired area be granted > exploration companies discovered large amount of uranium here (Commissioner unaware) > companies informed Minister, but successor recommended grant without reference to this info
 - HELD: Minister bound to take into account possible detriment of exercising power, and any corrected/updated/elucidated submissions made
 - Can't base decision on false assumption when relevant material is disclosed
 - *Mason J*: statute didn't specifically require these considerations, but inferred through subject matter, scope and purpose of Act; overlaps with LR

Errors of Law:

- All of the decision-making record can be scrutinised and reviewed (including reasons)
- *AD(JR)A s5(1)(f), s6(1)(f)* – cover situations where there has been a misinterpretation or misapplication of statute, or violation of some established legal principle

Error of Law on the face of the record (common law):

Case	Facts/Issue	Judgments
<i>Craig v SA</i>	Judge held C couldn't receive fair trial till he had legal representation > trial vacated > Cth didn't provide representation > trial stayed > error on face of the record??	HELD: no JE or error on the face of the record – no certiorari Error of law = mistake in identifying relevant issues, formulating relevant questions, determining relevance/irrelevance of evidence; Record of an inferior court = as much referred to in formal order (documents initiating and defining the matter and determination), NOT transcript of proceedings, exhibits, reasons
<i>Kirk v Industrial Court</i>	Reviewing decision of the criminal prosecution of an employer under OHS Act > had superior state court departed from evidentiary rules?	HELD: yes – error appeared on decision-making record so decision could be quashed; remedy granted <i>Craig v SA</i> doesn't provide rigid taxonomy of JE, only examples; IC misapprehended the limits of its functions □ no act identified as an offence, so court couldn't convict and sentence Plurality : jurisdiction is a 'verbal coat of too many colours'

Jurisdictional fact-finding error:

- 'There is no error in law in making a wrong finding of fact in the course of making the ultimate decision' (*Waterford v Cth*, Brennan CJ)
- *AD(JR)A s5(1)(h)*: can seek JR if 'no evidence or other material to justify' decision
- *AD(JR)A s5(3)*: limits ^ no evidence of material required by statute that could satisfy the decision (a); decision made on existence of particular fact, and this didn't exist (b)
 - o Slightly more open than common law

Case	Facts/Issue	Judgments
<i>Stevedoring case</i>	Whether particular facts that were essential pre-conditions of a valid exercise of power by Stevedoring Industry Board were established	HELD: no adequate material/evidence before the Board to enliven its statutory powers; factual error of the Board went to fundamental question of its jurisdiction Absence of evidence = error in law (common law)
<i>Plaintiff M70</i>	Refugee swap deal with Malaysia > Bowen purported to make a declaration under <i>Migration Act</i> that Malaysia offered 'effective protection' because of political undertakings, DFAT advice, UNHCR lukewarm approval, Malaysia keen to improve	HELD: fact finding error by Bowen – declaration was ultra vires Plurality : relevant criteria could only be satisfied if Malaysia was 'under domestic or international obligation to provide the access described... and to secure the protection described' (i.e. of the kind that Australia undertake to under Refugee Convention) □ this objective criteria can be supervised by the court, and because Malaysia not signatory to RC, can't ensure 'effective protection'; French CJ: objective approach : court intervenes to determine application of factual criteria; subjective approach : depends on 'state of mind' of decision-maker, which is itself a jurisdictional fact – more deferential to decision-maker; statute doesn't require a subjective approach; declaration must have been re. 'continuing circumstances' in Malaysia, not hope/belief/expectation that Malaysia will meet the criteria in the future

Jurisdictional Error (JE):

- Relates to jurisdictional courts in England, who could issue prerogative writs (certiorari and prohibition) as remedies for limited range of errors by 'judicial bodies'

- o **Jurisdictional error:** court or tribunal lacked, refused (incorrectly) or acted beyond their jurisdiction □ decision deemed null and *retrospectively invalid*
- o **Errors of law (on the face of the record):** court or tribunal has jurisdiction to hear and decide matter, but the decision-making record reveals a legal error □ decision quashed and *set aside prospectively*
- o **Non-jurisdictional error:** error within jurisdiction but something goes wrong when decision-making □ appeal only; NO judicial review
- Ultra vires developed alongside JE, both related to power/capacity to act but in different fields – JE w.r.t judiciary and UV w.r.t. executive
- Under ultra vires, courts recognised broader range of legal errors/mistakes (non-JE)

Importance of Jurisdictional Error:

- Concept governing application of JR remedies at common law (similar to *s75(v)*)
- Particular ground of review under *AD(JR)A* where it bears narrower meaning
 - o Broader than *AD(JR)A* in that various restrictions (e.g. under an enactment, administrative character) aren't necessary
 - o Also narrower than *AD(JR)A* in that grounds of review aren't specified, meaning ultra vires is used most here
- Informs the application of writs under *s75(v)*, where errors of law or JE are needed

Distinction from Non-Jurisdictional Error:

- Initially more confined than ultra vires, with four grounds: exceeding, declining (existing) and ignoring limits of power, and breach of natural justice
- *Anisminic v Foreign Compensation Commission*: statutory executive body to compensate British-owned property confiscated abroad > privative clause – decisions of body not to be reviewed in any court of law
 - o HELD: because FCC misconstrued statute, they made enquiries they had no right to make, taking into account irrelevant considerations □ JE
 - In cases of JE, there is no decision in existence that can be insulated from review □ privative clause can't function as intended
 - o Any public decision-maker acting within jurisdiction at the outset, may subsequently exceed jurisdiction during course of decision-making
 - o Distinction between JE and non-JE made obsolete □ 'It is better not to use the term ['jurisdiction'] except in the narrow and original sense of the tribunal being entitled to enter on the inquiry' – Lord Reid
 - Any error of law by a public body makes its decision ultra vires
- *Craig v SA* (see above for facts): to what extent can *Anisminic* be applied in Aus?
 - o The constitutional and federal context of UK is significantly different from Australia's, and hence the removal of the JE/non-JE distinction in *Anisminic* cannot be applied here □ constitutional writs?

- o Distinction between inferior courts and tribunals – inferior courts constituted by persons with formal legal qualifications and/or practical training, and part of hierarchical judicial system – tribunals don't have this
- o **JE (inferior court):** mistakenly asserts/denies the existence of jurisdiction, or misapprehends/disregards the nature/limits of its functions/powers in a case where it correctly recognises that jurisdiction does exist – certiorari applies
- o Most obvious JE: acts outside of general jurisdiction by entertaining a matter theoretically outside its functional limits (e.g. civil court deciding criminality)
- o Less obvious JE: acting within general jurisdiction, but does something it lacks the authority to do (e.g. not fulfilling requirement, statutory considerations/criteria; misconstruing nature/function under statute – blurred)
- o Restricted application of *Anisminic* to tribunal context
- o Because of SoP and the nature of the Constitution, whilst JE applies to tribunals and inferior courts, its scope varies on the body:
 - Because tribunals lack 'authority to authoritatively determine questions of law or to make an order/decision otherwise than in accordance with the law', **any error of law by tribunals are jurisdictional errors**
 - Courts can make legal determinations ^, so error of law – i.e. error made in 'routine steps in the discharge of that ordinary jurisdiction' – are not jurisdictional errors □ can be corrected by appellate court
- For tribunals, ultra vires and JE have effectively merged in their application; for inferior courts, ultra vires is irrelevant and JE is applied more flexibly
- *Kirk's case*: court of limited jurisdiction, so error of law = JE □ certiorari

Ouster/Privative Clauses:

- **Ouster clause:** attempt to prevent courts from pronouncing on lawfulness of administrative action under statute, through:
 - o Forbidding/limiting grants of JR remedies (writs) – incl. time limits
 - o Investing decision-maker with vast discretion
- *Plaintiff S157/2002 v Cth*: P sought protection visa > refused by Minister's delegate > appealed to Refugee Review Tribunal, affirmed refusal > P wished to seek JR of decision on grounds of breach of procedural fairness, but precluded by s474 MA
 - o **Issue:** could Parliament oust entrenched original jurisdiction of HCA?
 - o HELD: no; provisions valid because it interpreted them in a way that didn't conflict with s75(v) □ **read so as to not bar JR, at least in cases of JE**
 - Inconsistent with RoL – removing judicial policing of statutory limits
 - Inconsistent with SoP – courts are the final arbiters as to what the law is and how it is to be defined (not the Parliament or Executive)
 - Denying natural justice is JE (principle of legality) – decision invalid
- o 'It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and decisive decision as to the

limits of its own jurisdiction, because that would be an exercise of judicial power' (re. **Ch III** judicial power generally) – **Gleeson CJ**

- 'Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed [by 'officers of the Commonwealth']. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted' (re. **s75(v)**) – **Gleeson CJ**

Standing:

- Whether one's connection with a particular dispute is sufficient to entitle them to bring a legal action with respect to the dispute
- **Re McHattan, Brennan J**: 'decision which affects the interests of one person directly may affect the interests of others indirectly... ripples of affection may widely extend'
- **Onus v Alcoa, Gibbs CJ**: RoL would dictate that we have open standing, but could be 'abused by busybodies and cranks and persons actuated by malice' AND desirable in adversary system that those with direct stake in outcome should bring the case
- Filters range of proceedings, ensures efficient administrative justice, lowers costs

Common Law Standing:

- Actions seeking to vindicate rights conferred for the public at large are the purview of the A-G, who may turn down requests for a relator action – unreviewable decision
 - In Qld, A-G needs to submit report tabling reasons to Parliament
- Two exceptions to A-G representation rule (per **Boyce v Paddington**):
 - Where public and private rights are simultaneously interfered with
 - Where P suffers special damages peculiar to them due to interference with public rights □ modified in Aus
- **ACF v Cth**: proposal by company to develop land for resort > ACF claimed Cth failed to consider environmental protection statute > sought declaration and injunction
 - HELD: ACF lacked standing to bring claim
 - **Gibbs J**: recast **Boyce** 'special damage' test – not limited to pecuniary loss
 - Peculiarity = 'special interest in the subject matter of the action'
 - Statute didn't enliven private rights on ACF
 - Special interest test also not enlivened because: need an interest larger than an ordinary member of public, and; interest needs to be more than 'mere intellectual or emotional concern'
 - Being a body incorporated with the object of environmental conservation not enough; members of a body possessing standing doesn't mean body does too
- **Onus v Alcoa**: action to prevent A (company) from breaking criminal law > O Aboriginal group sought to ensure enforcement of statute to protect Aboriginal relic
 - Private rights conferral argument rejected on basis of **ACF v Cth**
 - HELD: had standing under special interest test – distinguished **ACF**
 - **Gibbs CJ**: special interest varies according to nature of subject matter

- ‘The present case is not a case in which [P] sues in an attempt to give effect to his beliefs or opinions on a matter which does not affect him personally except insofar as he holds beliefs or opinions about it’
- As custodians of the relics according to the law and customs of their people, cultural and spiritual significance of relics, and their role in educating younger generations about their culture □ special interest
- O’s interest varied to general public, *and* other Aboriginal groups
- o **Stephen J:** question of standing not answered by rule of thumb – specific facts
 - Importance of concern, closeness of P to subject matter
 - Degree/weight of concern of community different to conservationists
 - ‘Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to [P] in a case of, some subject matters than others’
 - Didn’t think possession of intellectual/emotional concern would disqualify from standing to sue, but those with sufficient interest will at least also possess these concerns
- o **Brennan J:** P doesn’t have to be ‘uniquely affected’

Statutory Standing:

- *AD(JR)A* ss5(1), 6(1), 7(1); *JRA* ss20-22 – ‘person aggrieved by the conduct’
 - o *JRA* s44 (Part 5) – ‘interests adversely affected’ □ broader, not subject to s4
- *Toohey’s v MBCA*, *Ellicott J*: *AD(JR)A* standing test not to be given restrictive interpretation, considering the broad nature of discretions subject to review and procedures intended to simplify prerogative writ procedures
- *Argos v Corbell*, *French CJ*, *Keane J*: objects of *AD(JR)A* and *JRA* (RoL, improving quality of administrative decision-making, vindicating those adversely affected) support having broad scope for standing
- *Argos v Corbell*, *French CJ*, *Keane J*: statutory definition of ‘person aggrieved’ in *AD(JR)A* is important, but general law affords some assistance in ‘understanding the kinds of interest which may be relevant and kinds of effect that may be regarded as adverse’ □ unified standing rules, supported by *Gummow J*, *Marine Engineers*

Case	Facts/Issue	Judgments
<i>ACF (No 2)</i>	Minister granted licence for wood chips export, obtained by logging 2 state forests > ACF and adjoining property owner sued for statute infringement	HELD: ACF had standing; property owner didn’t (<i>Davies J</i>) Didn’t matter that ACF had been previously denied standing; Was ‘one of the major environmental issues present at the time’; Increase in public perception of the need for bodies like ACF to protect public interest in environmental concerns; ACF was ‘the major national conservation organisation in Aus’, receiving substantial funding from Cth and State govts, special interest in that particular forest area + current community values

<i>North Coast</i>	NC brought action against Minister re. 3-month export woodchip > sought reasons, denied > appealed	<p>HELD: NC had standing (<i>Sackville J</i>)</p> <p>To establish 'special interest', need to show:</p> <ul style="list-style-type: none"> - Interest that 'goes beyond that of members of the public in upholding the law... more than genuinely held convictions' - Special interest in preservation of <i>particular</i> environment; - 'objects that demonstrate an interest in and commitment to the preservation of the physical environment' is not enough; <p>Factors suggesting standing for NC:</p> <ul style="list-style-type: none"> - Is 'peak environmental organisation' in the region – other environmental groups as members; activities in the area; - Recognised by Cth as 'significant and responsible environmental organisation' – regular (modest) financial grants, participation on advisory committees** - Coordinated projects and conferences receiving Cth funding - Submissions to Resource Assessment Commission <p>Standing not of the same level as ACF, but being a regional body doesn't disqualify NC – might benefit bc closer concern; Smaller scale of activities doesn't preclude – shouldn't put 'premium on attracting financial support' as opposed to other forms of commitment, incl. activities, research, consultation; 'no other conservation body with greater interest or commitment'</p>
<i>Right to Life Association</i>	RLA public interest group seeking standing to challenge failure of health secretary to stop clinical trial of abortion drug	<p>HELD: no standing – didn't prove that they would gain greater benefit than any other member of public if claim succeeded</p> <p>RLA only had philosophical/religious concern, representing people who disagree with abortion, not those affected by abortion drugs; right to speak not same as the right to standing</p> <p><i>Gummow J</i>: construe 'person aggrieved' depending on scope and purpose of relevant enactment</p>
<i>Bateman's Bay</i>	Applicant seeking injunction to restrain statutory body from establishing funeral contribution fund	<p>HELD: applicant had standing – establishment of rival fund highly likely to detrimentally affect their financial success</p> <p><i>Gaudron, Gummow, Kirby JJ</i> (obiter): special interest test construed as 'enabling, not a restrictive, procedural stipulation'; applicant should have standing if justiciable controversy and not oppressive or abuse of process, as high costs will still deter</p>
<i>North Queensland Conservation Council</i>	NQCC sought review of Minister's decision to issue permit to develop harbour and associated works on Magnetic Island	<p>HELD: NQCC had standing (different test) – <i>Chesterman J</i></p> <p>Standing test should be 'not an abuse of process', P not 'motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience'; look at nature of legal proceedings, and extent of body's interest in it;</p> <p>Peak body = whether it's serious and responsible organisation</p>
<i>Argos v Corbell</i>	Sub-lessees operating supermarket > Minister approved proposal for commercial development near their supermarkets > sought review, arguing loss of profitability	<p>HELD: appellants had standing - standing test doesn't alter according to the scope and purpose of the enactment under which a decision is made (rejecting <i>Gummow J</i>, <i>Right to Life</i>)</p> <p><i>French CJ, Keane J</i>: likely to suffer loss of profit due to greater exposure of competition – fits meaning of 'persons aggrieved'</p>

		Gageler J: Gummow J's test would 'radically narrow the range of persons aggrieved who could seek review of decisions'
<i>Animals Angels</i>	AA (based in Germany) sought review of decision by Secretary to not give reasons re. renewal of licence of livestock exporter	HELD: AA had standing Core concern is transport and export of live animals, involved in research and investigating; large membership base (none in Aus); AA's status in area of live animal export recognised by relevant Aus govt department; sufficient presence in Aus (devoted financial resources), so ' broader and global nature of [AA's] objects and purposes do not derogate' from their engagement in Aus ; may have strongest interest compared with others

Standing under AATA:

- [s27\(1\)](#): person/s whose interests are affected by the decision
- [s27\(2\)](#): un/incorporated organisations taken to have interests affected if the decision relates to matter included in object/purposes (before decision) of the organisation
- So: need not be adversely affected; can be beneficial – *Re Control Investments*
- Less restrictive than common law test for standing, and wording makes inquiry simpler – only one relevant factor

Standing as a public policy issue:

- [McHugh J, Bateman's Bay](#): not a part of civil courts' function to enforce public law of community; not for 'unelected judges to expand doctrine of standing overcome what they see as a failure of the public process to ensure that the law is enforced'
 - Supported by [ALRC Report 27 Standing in Public Interest Litigation](#)
- Three forms of liberalisation: (1) open standing; (2) apply existing test less restrictively; (3) systematically reforming standing law – proposed by [ALRC](#) twice
- Suggested: open standing unless relevant legislation clearly indicated otherwise, or not in public interest to proceed
- Why reform? Increased means of citizen participation in processes of government ([Kirk](#)), current test not very precise ([Brennan, Kirk](#)), court have sufficient means of preventing floodgates – has become an 'extra source of unnecessary legal cost and delay', and isn't an effective filter anyway ([ALRC](#))

Part 3 – Preconditions:

Decision/Conduct:

Australian Broadcasting Tribunal v Bond:

- **Facts**: ABT could cancel media licences, conducting inquiry as to whether the licensee was 'fit and proper persons' to hold the licence > concerned after a period of B's ownership of Channel 9 (allegations that he had settled a defamation suit illegally, and used network to advance his commercial interests) > in course of inquiry, ABT decided that B controlled the corporate licensee, so the question they asked was if B was himself a 'fit and proper person' > concluded no, so licensees not either

- **Issue:** were these steps judicially reviewable under *AD(JR)A*?
- **HELD:** steps were neither decisions nor conduct under *AD(JR)A*, so unreviewable
- Majority stated that if there was a denial of natural justice, B could have raised the issue after the final decision was made
- **Mason J:**
 - Three reasons why *AD(JR)A* should not be read as just ultimate decisions: Act remedial, so should be given broad construction; textually, could say ‘final’ decision but doesn’t; traditional remedies themselves not limited in that way
 - BUT the word needs to be given more limited construction than B argued:
 - Examples of ‘making a decision’ suggests that decision has to have a ‘character or quality of finality’ □ determination of an application, inquiry or dispute, effectively resolving an actual substantial issue
 - *A(DJ)RA* s8 (conduct engaged for purpose of making a decision) would have no point if there was broad interpretation of decision
 - Two competing policy considerations:
 - RoL – broad construction as it allows more scope for review
 - Efficiency of govt – to prevent fragmentation of decision-making process, needs to be limited so that process not ‘bogged down’ by ‘cached-up litigants’
 - **‘A reviewable decision is one for which provision is made by or under statute, that will generally but not always entail a decision that is final, operative and determinative, at least in a practical sense, of the issues falling for consideration’ + substantive**
 - Conclusion reached as a step on the way to making an ultimate decision ‘would not ordinarily amount to a reviewable decision unless the statute provided for a finding or ruling on that point’ – intermediate might be enough
 - Decision that the licensee wasn’t a fit and proper person itself was reviewable, just not the steps
 - Statute didn’t call for making steps before reaching a conclusion – for it to be a decision it needs to be **explicitly required**, not implicitly allowed
 - **Conduct:** ‘essentially procedural in character’; action taken like evidence, holding an inquiry (not a conclusion reached)
 - Inquiry was substantive, so couldn’t be classified as conduct

Case	Facts/Issue	Judgments
<i>Harrison v Bryce</i>	Determination to commence inquiry of alleged sexual discrimination > attempt to review	HELD: not a decision reviewable, as it wasn’t substantive, BUT traditional remedies do apply, so considered reviewability under <i>s39B JA</i>
<i>Re Excel Finance</i>	Determination by ASIC to authorise receiver of company to examine director	HELD: was substantive enough to qualify as a decision, so potentially reviewable
<i>Bush Cliff case</i>	N/A	<i>Thomas J: Bond</i> lends itself to adjudicative adversarial decision (e.g. tribunal), not less adjudicative bodies

- Escape hatches (*Aronson, Lee, Groves*): conduct, steps in the reasoning process provided for, traditional remedies

- *JRA* s14 (to deal with *Bond* situation): court must dismiss application if satisfied, **having regard to interests of justice**: reviewable decision made in course of proceedings; review could have occurred at end of initial proceeding, and; court considers it desirable to dismiss the application to avoid interference with due and orderly conduct of initial proceedings (convenience incl. delay) □ forces applicant to wait

Administrative Character:

- Not defined in *JRA*, but appears in ss4(a)-(b)
- Imports SoP into *JRA*, surprising considering judicial review isn't limited this way
- *Evans v Freeman*, *Fox J*: character of the decision (not subject matter) to be administrative, and administration is a process □ can't have narrow construction
 - o Also as *JRA* is a remedial Act

Case	Facts/Issue	Judgments
<i>Hamblin v Duffy</i>	Vacancy arose and applicant applied for it > another promoted to the position > applicant appealed	HELD: administrative character – but unreviewable (<i>Lockhart J</i>) Difficult to impose definitive meanings of the tripartite; Legislative : 'formulation of new rules of law having general application'; Judicial : 'determinations of questions of law and fact in relation to disputes susceptible of determination by reference to established rules and principles' – distinction from bodies that 'act judicially' (i.e. in NJ); Ministerial : performance of public duty, little or no discretion permitted; Administrative (look at nature of decision itself, though person/body making it is relevant): includes at least application of general policy/rule to particular cases and making of individual decisions (incl. bodies required to act judicially, though exhaustive list is undesirable)
Administrative v Legislative <see LG p25!!>		
<i>Toohey's case</i>	Whether import duty was applicable for equipment > criteria if item was new (labelled a 'by-law')	HELD: generally, by-laws <i>not</i> administrative, but WAS in this case Application of general criteria to specific circumstances = administrative; Distinction between legislation and execution of legislation (criticised by Allars as leaves out executive role in policy-making)
<i>QML v Blewitt</i>	Power of Minister to substitute schedule of Act that regulated how much doctors could charge for medical procedures	HELD: decision of <u>legislative</u> character, as changing the law If the thing you are challenging is the law, likely not administrative; Gummow J: fine distinction, but if Minister had refused to change the schedule, then executing existing system, so would be administrative
<i>Errilinous Argentinus</i>	FAC decision to impose charge on aircrafts landing in Aus, to recover security equipment costs	HELD: administrative – under statute, there was executive scrutiny of FAC decision-making, so role of executive in overseeing decision indicated that it was not legislative in character; set up to run commercial undertaking, which it was administering
<i>ARG Capital Radio v ABA</i>	ARG holder of licence to operate commercial radio service > ABA made plan for broadcasting services in area, incl. making new licence available	HELD: <u>legislative</u> character, as determining licence area plan Difficult to have general v particular distinction, as 'there is no real dichotomy'; primary characteristic of administrative decision is maintaining and executing legislation (s61 Constitution) but doesn't mean can't make laws; leads to second characteristic of parliamentary control; Lack of merits review (esp. where other decisions are reviewable) and executive variation/control also indicate legislative character;

		Requirement of publication not compelling as a decisive characteristic
<i>Roche Products v NDPSC</i>	NDPSC's members nominated by states/territories > various classification powers, no merits review or exec. control	HELD: <u>legislative</u> character (there's a list but <i>Schwennesen</i> better) <i>Branson J</i> : compiled list from <i>ARG Capital</i> , in this case – decision determining content of rules of general application; public consultation important; policy considerations re. merits of uniform approach to controlling therapeutic goods; no provision for merits review; no exec. control/variation; decision publicised; no disallowance by Parliament
<i>Schwennesen v MERM</i>	S asked MERM for statement of reasons re. determination of rights/conditions attached to his water allocation plans > MERM refused	HELD: <u>legislative</u> character – not reviewable under <i>AD(JR)A</i> Affirms <i>ARG Capital</i> and <i>Roche</i> lists – no single factor determinative: <ol style="list-style-type: none"> 1. If decision determined rules of general application, or were application of rules to particular cases □ providing extensive set of new rules of general application here 2. If parliamentary control of decision □ not fatal, but lacked here 3. If public notification of making of decision 4. If public consultation and extent of this □ not fatal 5. If broad policy considerations imposed □ purpose of statute wider than individual entitlements to water (public benefit) here 6. If regulations could be varied □ not indicative because anything can be varied (no comparison could be made) here 7. If subject to executive variation/control 8. If provision of merits review exists □ no provision here (not weighty) 9. If has binding effect □ broad effect in catchments so binding legal effect that administrative characters wouldn't have <p>So: legislative > administrative in this case</p>

JRA s5 – meaning of making a decision includes re. determinations, certificate/direction/approval, licences/authority/instrument, imposing condition/restriction, making declaration/requirement, doing/refusing to do anything else + reference to a failure to make a decision

‘Under an Enactment’:

- Non-justiciability at common law – courts don't engage in polycentric disputes
- **JRA s4(a)** – ‘under an enactment’
- **JRA s4(b)** – ‘under non-statutory scheme/program’ involving parliament funds

JRA s4(a) – under an enactment:

- When ‘in pursuance of’ or ‘under the authority of’ statute – *Evans v Friemann*
- Requires a ‘direct link’ (*ANU v Burns*), needing to be ‘the immediate source of power rather than the ultimate source’ (*Davies J, POAAL v Australian Postal Commission*)
- Must be largely enacted under Cth statute – *Glassons v Parks Rural Distributions*

- **Griffith University v Tang**: T PhD candidate at GU > sought JR on decision made by university committee to exclude T from candidature programme (ethical standards) □ only used **Part 3 JRA** review (instead of **Part 5** as well – strange)
 - HELD: not ‘under an enactment’ per **s4(a)**
 - Examined the manner GU undertook activities □ established by legislation, which provided GU with function of conferring higher degree awards
 - **Gleeson CJ**: decision needs to ‘derive its force and effect’ from enactment
 - Grant of authority to do that which under general law a person does not have the right to do, is not sufficient grounds
 - Decision to end relationship not given legal force or effect by Act, only power to formulate those terms and conditions, and enter relationship
 - **Gummow, Heydon, Callinan JJ**: derived definition of ‘under an enactment’ from ‘administrative’ character □ ‘required or authorised by the enactment’
 - Two necessary criteria:
 1. Decision must be expressly/impliedly required/authorised by enactment (from which new rights arise)
 2. Decision must itself confer, alter or otherwise affect legal rights/obligations, and derive from the enactment in that sense
 - In this case, legislation didn’t have legal force re. the decision
 - Possibly excluding decisions affecting mere interests □ ‘matter’
 - **Kirby J (dis)**: ^ is untextual, not paying attention to ‘remedial language, structure and purpose’ of **JRA** □ sharp contrast to standing requirements

- Decisions to enter contracts/exercise rights under contracts are an area of contention

Case	Facts/Issue	Judgments
ANU v Burns	Whether dismissal of B on grounds of permanent incapacity (as allowed by contract) by ANU’s Council of University (created by statute) was a decision under an enactment	HELD: not ‘under an enactment’, but under contract Broadly-stated power in an enactment might still provide for decision, which once made would be under an enactment; The particular ground of dismissal was expressly provided for under the contract
Hawker Pacific v Freeland	Whether an award by Cth of a contract to supply an aircraft was ‘under an enactment’ for AD(JR)A	HELD: power of Cth to enter contracts is inherent prerogative of governmental power regulated by statute – not under enactment’ Fox J: ‘compliance with Regulations is but a step leading to the awarding of the contract’, not a source of power
ACTHA v Berkeley Cleaning	Unsuccessful tenderer seeking review of decision, made by ACT statutory body with power to enter contracts	HELD: ‘under an enactment’ so reviewable ANU v Burns distinguished by existence of state legislation; Hawker Pacific not mentioned but similar NB: rejected by GU v Tang and General Newspapers v Telstra
Concord Data Solutions v DGE	Review of decision to accept tender of supply of computer software to govt schools > decision not complying ‘State Purchasing Policy’	HELD: not ‘under an enactment’ – policy is not an enactment under JRA , only a statement of executive action

		Actual decision made in exercise of executive prerogative power to enter a contract, and application statutory provisions didn't intrude sufficiently to render decision as 'under an enactment'
<i>General Newspapers v Telstra</i>	GN printers approached T to indicate interest in tendering for printing > told 'on tender list' > T negotiated new contracts with existing printers without advising GN or calling for tenders > reviewable?	HELD: decisions involving the entry of contracts/conduct leading to this are not reviewable 'A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract' □ esp. in this case as powers conferred to Telecom was 'all powers of a natural person', which is mere conferral of capacity to act ; BUT : if a govt body has the power to contract conferred in an enactment, and in legislative instrument rules governing tendering process, where decision-maker deviates from this may be reviewable (procedural fairness) OR contract entered for an ulterior purpose (e.g. private gain) and challenge can be made by reference to an enactment, can be reviewable

JRA s4(b) – under a non-statutory scheme or program:

- No one has made successful application under this section – not making a difference
- **EARC report**: applies where:
 - o Decision adversely affects citizen, made under scheme operated by local council but without statutory basis
 - o Decision of primary producer body established by statute which operated under scheme without statutory basis but funded by compulsory exactions from producers pursuant to statutory authority
 - o NO review of decisions of administrative character otherwise operating in law to determine question re. rights/interests/legitimate expectations
- **EARC** didn't envisage this applying to contracts (^)

Case	Facts/Issue	Judgments
<i>Anghel v Minister for Transport</i>	Whether s4(b) applies to single project (railway line construction)	HELD: was NSSP, but dismissed under costs issue Scheme : encompasses single project Program : repetitive process
<i>Wide Bay Helicopter Service</i>	Review of decision to place community rescue helicopter in Bundaberg	HELD: not reviewable as not under enactment or NSSP 'If this review was related to a decision to make Government funds available to the provider of a rescue service in the [region] then the decision may well be within s4(b)' □ not the case here, only trying to base community provider rescue helicopter
<i>Bituminous Products</i>	Review of decision to change specs for road building materials, excluding BP's materials > publicly funded	HELD: not NSSP – remedial nature of legislation emphasises policy fragmentation of decision-making □ no specific statutory

		appropriation; not a <i>non-statutory</i> program because it was specifically required and regulated by statute
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JRA s22 – review of failure to decide where:

1. Person has a duty to make a decision if no period is fixed and there has been unreasonable delay
2. Person with duty to make a decision to which law fixes time period, and decision not made before this end

Remedies:

Remedies are the mechanisms for raising grounds of review:

- **Statutory remedies:** *JRA Part 3* – codifying the grounds
- **Common law remedies:** *JRA Part 5* – prerogative/constitutional writs
- **Equitable remedies:** *JRA Part 5* – declarations and injunctions
- **Collateral challenge:** invalidity of state regulation as a defence

Historical Background and Development:

- Development of equitable remedies for administrative decision-making in 19-20th century, but were convoluted, undefinable and ever-changing
- **Kerr Committee** (re. *AD(JR)A* and AAT) and **Ellicott Committee** (prerogative writs reform) to reform administrative law
- Three major changes through *AD(JR)A*:
 - o Simplified the application procedures for reviewing administrative decision
 - o Codified the grounds of review – educative, easy to navigate for laypersons
 - BUT: lazy codification (still reliant on common law) with significant overlap between grounds of review
 - o Right to reasons for administrative decision-making
- *AD(JR)A* focuses on legality review of *Commonwealth* executive power, generally undertaken by Federal Court and Federal Circuit Court
 - o Doesn't repeal existing remedies, so that it can be pled alongside alternatives
- **Judicial Review Act 1991 (Qld) (JRA)** – followed the lead of *AD(JR)A*, except applied in the state context, with Supreme Court undertaking review (almost exclusively)
 - o Uses same language as *AD(JR)A* □ Cth common law applicable in Qld
 - o *JRA, s16(1)*: if there are notional similarities between *AD(JR)A* and *JRA*, assume the effect is intended to be the same
 - o *JRA, s16(2)*: in case of confusion with ^, look at **Sch.3** comparative table
- **Two significant differences between *AD(JR)A* and *JRA*:**
 - o Prerogative writs and equitable remedies in *JRA Part 5*, known as 'orders in the nature of prerogative writs'
 - o No inclusion of 'officer of the Commonwealth' or equivalent in *JRA*

Part 3 Remedies:

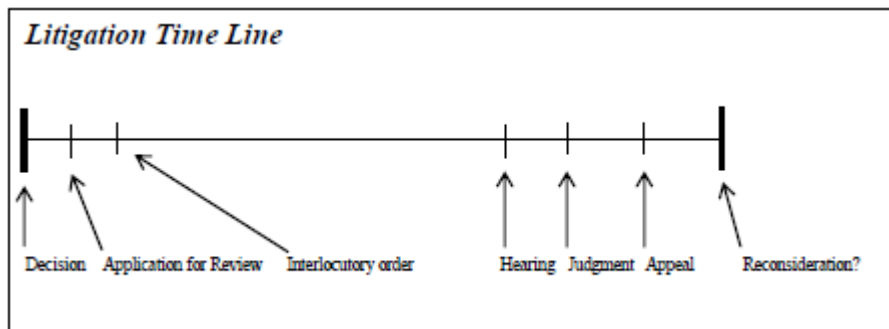
Time Limits, s26 JRA:

- Depends on the form of notice of decision given: written notice → 28 days to seek review; non-written notice → 'reasonable time' to respond
- Can extend time period (s26(1)(b)), but there is a prima facie common law rule not to allow late commencements to proceed (*Lucic v Nolan*)
- Need to give adequate explanation for delay in applying (persuasive factor, not a precondition – *Thomas J, Hoffman*)
- Relevant factors to consider in granting extension (*Thomas J, Hoffman*): what is fair and equitable, whether any prejudice will be occasioned to the decision-maker, public interest, merits of substantial application for review

Exclusions of Review (s18):

- Certain types of decisions and enactments excluded, pursuant to *Schedule 1*
- No exclusions of review by regulations allowed (not the case in *AD(JR)A – ss19-19A*)
- Ouster clauses enacted prior to the commencement of *JRA* are overridden (s18(1)), but those enacted after may still apply (BUT: see *Plaintiff S157/2002, Kirk's case*)
- *Northbuild Construction*: any attempts to exclude review of JE (as purported under specific enactments in *Schedule 1*) are to be read as only referring to non-jurisdictional errors (*White J*), and where this isn't possible, *Part 5* used (*McMurdo P*)

Power of the Courts:



- Should apply for a **stay** of the decision, where court orders that the decision you are challenging doesn't have any effect during the proceedings (s29)
- If seeking suspension of conduct, can't use s29, so call for **interlocutory injunction**
- Test (for both): (1) prima facie case to be tried; (2) balance of conveniences favours the granting of stay/injunction
 - No need for undertaking as to damages, though this is needed in private law
- Various review rights (other than ^) exist

Provision	Information
Available at the interlocutory stage	
10	Rights conferred in JR are <i>in addition</i> to other remedies → no exclusion of remedies

11	Court can (at an early stage) require JR applicant to use <i>JRA</i> where an option arises
12	Inverse of ^: require JR applicant to use other remedies where option arises
13	Court can require JR applicant to use other means of review (tribunal, other court etc.) [given a strict application because of wider scope of merits review]
14	Addresses premature review [see above, re <i>Bond</i>]
48	Power to summarily dismiss proceedings where the application is inappropriate, has no reasonable basis, frivolous/vexatious claim, or is an abuse of process (broad) [used to dismiss proceedings in <i>GU v Tang</i>]
49(1)	Unique provision where court can make beneficial costs order to JR applicant; (d) power of court to indemnify applicant for proceedings cost (prospectively) (e) power of the court that you only have to pay your own costs, regardless of the outcome of the proceedings (can apply retrospectively)
49(2)	In deciding ^, court has to consider: financial resources of all parties, public interest, reasonable basis for application by either party
49(3)	^ can be revoked or varied by the court at any point during the proceedings, having regard to the conduct of the relevant applicant and significant change in factors ^
Available at the hearing/judgment stage	
30 (1)	Powers of the court when dealing with a decision □ can quash decision on grounds that it's unlawful (various times, e.g. void ab initio, voidable at the day) or give directions as to how to go about the reconsideration
30(2)	Power of the court when dealing with conduct □ declaration of rights of parties, and order directing the parties to do/refrain from doing what is necessary to do justice
30(3)	Power of the court when dealing with failure to decide □ direct making decision + ^
	BUT: can't direct to decide in a certain way or the payment of money/damages
Appeal rights – can order appeal under ss 15(4), 48(5), 49(5) for dismissals under power of court	

Part 5 Prerogative Writs:

Time Limits (s46):

- Application made within three months after the grounds for application arose, or within the court's extended time period
- For certiorari, the day that the judgment/order/conviction made is the relevant date

General Info:

- Basic features: only available against public bodies, traditionally associated with cases of JE, breach of procedural fairness and fraud
- All prerogative writs are discretionary, and can be exercised against relief where there has been fraud, concealment, lack of frankness, futility or delay
- Why prerogative?
 - o Writs regarded as intimately connected with Crown rights, giving it equivalent force so that it isn't encroached upon – *Gaudron, Gummow JJ, Aala*
 - o Writs were awarded mainly but Courts of Kings Bench
 - o Writs lay only within the discretion of the court

- o If the Crown applies for certiorari, has certain pre-eminent rights that normal applicants don't have (*McHugh J, Re McBain*, rejected this)
 - o Writs had beneficial operation, so royalist lawyers sought to emphasise their link to the Monarch to increase Royal prestige
- Supreme court doesn't issue prerogative writs of mandamus, prohibition or certiorari (*s41(1)*), but HCA still has original jurisdiction pursuant to *s75(v) Constitution*
 - o BUT *s41(2)* – can order remedies 'in the nature of' the writs (the same)
 - o Still important in states that don't have *AD(JR)A* equivalent
- Not restricted by *s4* conditions (though standing requirements still need to be met)
- **Prohibition:** halts the decision-making process in its tracks, or prevents decision from being implemented (like *s21*) □ available before decision-maker completes function
- **Certiorari:** quashes a decision once made (like *s20*) □ available after decision made
- **Mandamus:** directs performance of public duty (like *s22*) □ public duty must exist
- Why retained? So that there **no** reduction in the scope of administrative review through enactment of *JRA*, and because they operate as an essential safeguard in our political system – *Kirk's case*

Prohibition and Certiorari:

- Apply in cases of JE, denial of natural justice, and non-jurisdictional errors amounting to fraud – *Craig v SA*
- Courts are subject to the writs – lower courts historically controlled by the King's Bench – but HCA and Supreme Courts are potentially not subject to the writs
 - o Other judicial remedies still available HCA and Supreme Court decisions
- *Atkin LJ, R v The Electricity Commissioners* (where writs were available against EC who weren't judicial): 'wherever any body of persons **having legal authority** to determine questions **affecting the rights of subjects**, and having the **duty to act judicially, act in excess of their legal authority**, they are subject to the controlling jurisdiction... exercised in these writs' – applied in *Kioa v West*
 - o Legal authority: non-statutory decisions (e.g. deriving power from Crown prerogative power) can also be subject to the writs – *Lain's case*
 - Non-governmental bodies would normally not have legal authority unless recognised by statute and functions endorsed – *Burton's case*
 - o Duty to act judicially: wide scope endorsed in *Ridge v Baldwin* – not a super-added requirement necessary for availability of writs; instead deduce from the nature of the power given to the body – affirmed in *Chase Oyster Bar*
 - o Affecting rights of subjects: **diversion** between C and P:
 - Royal commission report can't be quashed (C) as they only recommend and don't determine or affect rights – *R v Collins*

- ^ strict approach not taken for P – as long as there is an effect on the interest sufficient for NJ to arise, can apply for prohibition (highlights diminishing value of *Atkin* test) – *Ainsworth v CJC*
- Possible justification (*Cane & McDonald*): no point in quashing a decision with no legal effect, but there is merit in prohibiting making of a decision that is not procedurally fair
- *Hot Holdings v Creasy*: preliminary decision of mining warden subject to C where the making of the decision *had to be considered* by an ultimate decision-maker (who could affect rights)
- ‘right’ doesn’t have to be legally enforceable for P – *Lain’s case*
- Decisions *not* subject to P and C = exercises of delegated legislative power (though possible under s75(v)); decision of Magistrate to commit an accused for trial on charge of criminal offence (controversial)
- Issues specific to prohibition: applies before body is *functus officio*, though this has been construed broadly as when the decision is enforced – *R v Hibble*
 - Though it can be sought *too* early
- Issues specific to certiorari: uniquely available w.r.t. non-jurisdictional errors *on the face of the record* □ no outside evidence is allowed
 - The error of *law* must also be *fundamental* to the decision – *R v Tennant*
 - Most confusion lies at what constitutes a *record* – see above *Craig v SA*
 - Limits only significant if non-JE by inferior court with no appeal rights

Mandamus:

- Public duty (which is necessary) need not be judicial or quasi-judicial, but having mere discretion is not enough – need duty to hear and determine a matter
 - *Heydon J, Public Service Association SA* – ‘a grant of jurisdiction ordinarily carries with it a duty to exercise it’ – doesn’t indicate presumption of duty
- Not available against superior courts, and Crown may still be immune in certain circumstances
- If decision-maker fails to comply with writ of mandamus, a peremptory writ of mandamus may be issued – *Plaintiff S297/2013*
- Discretionary remedy of last resort

Part 5 Equitable Remedies:

- <same time limits as prerogative writs, as same section>
- Declarations and injunctions can be granted, with wide discretion
- [common features]
- Two main sources of power to make declarations/injunctions in *JRA*:
 - *JRA* s43(2)-(3) – applying; *JRA* s47(1)-(2) – issuing
 - Where appropriate, ‘having regard to’ the availability of orders in the nature of prerogative writs
 - *JRA* s43(3) – Qld Supreme Court’s *inherent* power to make declarations and grant injunctions (preserved by s10(1))

- Allows proceedings to continue as if they had been commenced as a normal action for declaration/injunction within the inherent jurisdiction

Declarations:

- **Declaration:** statement of the legal position of the parties to a dispute made by a superior Court □ carries no immediate penalty if ignored, so P would have to come back to Court, prove D ignored the declaration and seek an injunction
- Has been viewed as a mere statement of what the law is □ polite; once government knows the correct application of the law, they will act accordingly (in theory)
- *Dyson v A-G*: form requiring information for taxation purposes sent out > criminal penalty if all information not given > P was one receiver, sought declaration that some of the questions were illegal and unauthorised
 - HELD: power to make declaration exists even if Crown is a party, and could be made regardless of whether other relief was sought
 - If the inconvenience to the Crown was ever a legitimate consideration, so was the convenience to the applicant
- Granted on grounds of ultra vires, JE, failure to accord to procedural fairness
- *Street J, Sutherland Shire Council v Leyendekkers*: rejected restrictive approach to discretionary power to grant declaration – if used properly, ‘allowed for the quick, inexpensive and authoritative resolution of disputes’
- Are available to challenge decisions of non-governmental bodies/tribunals, in defence of some public right – *Onus v Alcoa*
- *Gibbs J, Forster v Jododex*: declaratory relief ‘is neither possible nor desirable to fetter... by laying down rules as to the manner of its exercise’
- **Can also be used pre-emptively** to interpret legislation or declare rights – need a legal dispute but is still extremely valuable
 - BUT limited by whether statute creates a right *and* a remedy before a tribunal
 - ^ rule not relevant in context of review of JE – *Kirk's case*
- *Ainsworth v CJC*: declaratory relief ‘is confined by the considerations which mark the boundaries of judicial power’ – affirming ‘Scottish rules’ by:
 - Directed to the determination of legal controversies
 - Not answering hypothetical or abstract questions
 - Person seeking relief must have ‘real interest’
 - Circumstances that have occurred/might happen – reasonable basis
 - Person with true interest to oppose the declaration sought – *Forster v Jododex*
- *Australian Boot Trade Employees' Federation v Cth*: union commenced proceedings for declaration that section of Cth industrial statute was beyond power of Cth
 - HELD (3:2): no declaration granted, as no prosecution was threatened, and union made clear it had no intention of contravening section in the future
 - Academic interest in legality of section is not sufficient
- *Gardner v Dairy Industry Authority*: declaration re. past government conduct with view of placing political pressure on government to extract better deal in future

- o HELD: no declaration, as it would not achieve anything, as the legislation was repealed, and would produce no foreseeable consequence to P if not granted
- *Plaintiff M68/2015*: willing to grant declaration where possibility of unlawful conduct in the future, even if it was past government conduct
- *Punton*: claim for unemployment benefits by shipyard workers who were denied statutory unemployment benefits by Commissioner (non-jurisdiction error of law)
 - o HELD: no declaration as it would have no effect
 - o <not an issue if review possible under **Part 3**>

Injunctions:

- **Injunction**: court order enforceable by imprisonment for contempt of Court, requiring a party to civil proceedings to do/refrain from doing something
- Available on grounds of ultra vires, JE (incl. preventing enforcement of valid subordinate legislation), breach of procedural fairness, interfere in *legislative* processes if there's a breach of 'manner and form' requirements
- Classified according to the stage of dispute in which they are sought, and the effect they have on the legal person to whom they are directed (i.e. mandatory – preventing positive act; prohibitory – restraining certain conduct)
- **Interim injunction**: issued in circumstances of extreme urgency, often ex parte, to maintain the status quo until other party can be brought for interlocutory hearing
 - o Proceedings prior to *Plaintiff M70/2011*, where sought before filing for substantive application for JR □ **Hayne J**: appeared to be a serious question to be tried, ordered despite of financial consequences and operate until consideration of interlocutory injunction
- **Interlocutory injunction**: used to maintain the status quo until final hearing
 - o Two step test (*Beecham*): (1) **prima facie case**, if the evidence remains that there is a probability that P would be entitled to relief; (2) **balance of inconvenience**, where inconvenience/injury P is likely to suffer outweighs the injury to D if injunction granted
 - o *ABC v O'Neill*: sufficient likelihood of success is enough for (1) – varies on the circumstances (e.g. serious question to be tried, though this doesn't replace prima facie test)
 - o **Mason J, Castlemaine Toohey's** changed to three-point test:
 - Serious question to be tried (NB *ABC v O'Neill*)
 - P will suffer irreparable injury for which damages won't be adequate compensation (normally part of balance of convenience element) – enough to show *real possibility* of irreparable injury if no injunction
 - Balance of convenience
 - o **Lord Diplock, Ethicon**: unwise to list all matters to consider, but in this case, considered: extent to which disadvantages to both parties would be incapable of compensated by damages; relative strength of each case – not preliminary trial; effect of granting an injunction on third parties
 - o *Speleological Society case*: attempt to restrain corporation from blasting cave

- HELD: interlocutory injunction would cause serious financial consequences to D, which P didn't have the funds to undertake
- **Mossop**: undertaking as to damages considered in balance of convenience in public law litigation, and separate step in private law
- **Permanent injunction**: only ask if there is a serious question to be tried
- Public officials/citizens may seek to use injunctions to make other citizens comply with the law, but confined to 'cases where an offence is frequently repeated in disregard of a usually inadequate penalty' (*Gouriet's case*, civil proceeding to enforce criminal offence – to interfere with postal and telegraphic services) –
 - Civil proceeding to grant injunction (possibly imprisonment) where Parliament thought sanction as sufficient without increasing severity
 - Civil court – without a jury – applying civil standard of proof to effectively convicting a citizen; esp. given Parliament intention otherwise
- NB: cases considered here not involving government decision-makers, so would have been sought via general jurisdiction of relevant Court

Collateral Challenge:

- Challenge to the validity of the exercise of executive power indirectly through non-administrative law proceedings, as an alternative form of challenging legality of government conduct
- E.g. targeting lawfulness of legislation
- Substance same as normal challenge

Right to Reasons:

- No common law right to reasons – *Public Service Board v Osmond*
- Right to reasons in *AD(JR)A* and *JRA* is **remedial** – courts careful to construe it technically – *Gummow J, Marine Engineers*
- Is meant to overcome grievance of those who are not told why something which affects them has been done, so that they can see how decision was made, and decide whether and how to challenge the decision – *Ellicott J, ANU v Burns*
 - **FCA** noted that an applicant who doesn't seek reasons as discretionary basis for denying JR proceedings – *Chandra v Webber* (noted in **QCA** as well)
- Also affects decision-makers □ right to reasons designed to lead better decision-making by requiring administrators to identify themselves the reasons for decisions
 - Overarching objective of the **Acts** to improve and maintain official standards of fairness, rationality and compliance with the law – *French CJ, Taveli*
- Courts have acknowledged need to balance between needs of those affected and efficient administrative decision-making without obtrusive courts – *Lockhart J, Ansett*

JRA Part 4:

- Central provision = s32 (1), providing that if you have a decision to which Part 4 applies (see above), and are entitled to make an application to Supreme Court under s20 JRA, then you can request the original decision-maker to give you a written statement of reasons in relation to that decision
- Decision to which Part 4 applies: defined in s31, essentially the same as s4, that is not:
 - o A decision for which a statement of reasons has already been given
 - o Decisions excluded by Schedule 2 JRA
- NB: AD(JR)A excludes decisions from federal equivalent also via regulations and decisions for which reasons are available under s28 AATA (s31)
- Entitled to make s20 application: applicant must be aggrieved under s20, so needs to fulfil s4 (not conduct/failure to decide) and person aggrieved by decision
 - o Parts 3 and 5 overlap here, so can obtain reasons under Part 4 when seeking review under Part 5, provided it's also potentially reviewable under Part 3
 - o 'entitled' has been interpreted generously, so can apply even if decision had ceased to operate – Sackville J, North Coast

Statutory Statement of Reasons:

- Statement of reasons needs to: set out understanding of relevant law, finding of fact which conclusions depend on, reasoning processes that led them to the conclusions, use of clear and unambiguous language – Ansett
- Evidence relied upon need only be referred to, not set out in full; specificity still needed in relation to which parts of evidence – ARM Constructions
- May be impossible in some cases for decision-maker to assign varying degrees of weight for all evidence in a statement of reasons – Ansett
- Can apply for further statement (s40 JRA) if receive non-compliant reasons

Evidentiary Points:

- Statements made under Part 4 don't have to be accepted by courts as evidence of what really were the decision-maker's reasons; if the court doesn't think the statement reflects actual reasons, may render it inadmissible - Taveli
- If statement under Part 4 doesn't include a certain factor, court can infer that factor – ARM Constructions

Procedural Points:

- Duty of decision-maker to give appropriate statement of reasons – s33
 - o Non-compliance with Part 4 = JE - Wingfoot
- Part 4 JRA only requires provision of reasons after request made
- Two possible time limits:
 - o Written record of decision □ apply within 28 days (s33(4)(a))
 - o No written record of decision □ apply 'within reasonable time' (s33(4)(b))

- Notice of refusal on basis of delay must be given within 14 days (s33(5)), otherwise decision-maker has 28 days to respond, or give notice that they think applicant not eligible for reasons (s33(2)(a))
 - Applicant (under s38) or decision-maker (under s39) can go to Supreme Court to seek relevant order

Exceptions:

- Confidential information relating to personal/business affairs of someone other than applicant (s35) and information, disclosure of which is contrary to public interest as declared by AG (s36)
- Information relating to certain commercial activities of govt (s35(2)(c))
- Deliberations or decision of Cabinet/Committee of Cabinet exempt (s36(1)(a))
- BUT: notice explaining why reasons aren't given is needed (s37)

Other means of finding reasons:

- FOI legislation (*Right to Information Act 2009 (Qld)*) will allow you to look at documents in possession/control of decision-maker (i.e. raw evidence)
- Once you commence court proceedings, court has power to order disclosure/discovery and inspection of documents
 - Can be ordered even if person has no right to reasons under Part 4, though it is discretionary and courts will take it into account
- Advantages of Part 4 over ^:
 - Right to reasons available *before* substantive proceedings commenced
 - Doesn't depend on any exercise of discretion
 - *JRA* (not *AD(JR)A*) supported by special costs rule (s50)
 - Applies regardless of status of parties in litigation (FOI only applies to bodies exercising government power)