UNIVERSITY OF NOTRE DAME AUSTRALIA

SCHOOL OF LAW

ADMINISTRATIVE LAW IN THE WILD WEST: CORPORATE KNOWLEDGE, THE HEARING RULE AND RELEVANT CONSIDERATIONS IN DISCRETIONARY MINISTERIAL DECISION-MAKING

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Many, many thanks…

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INTRODUCTION

I MINISTERS AND DECISION-MAKING

Judicial review, the process by which a court rules on the legality of an act, omission or decision of a governmental or administrative body,[1] is a legal control exercisable over administrative decision-making. This thesis focuses on judicial review in the context of discretionary ministerial decision-making. The primary research question relates to situations in which different natural persons occupy a ministerial office. In those circumstances, theoretical issues regarding the corporate knowledge of ministerial decision-makers may affect the judicial review ground of procedural fairness. The legal issues examined in this thesis relate to the requirements of the hearing rule aspect of procedural fairness in circumstances where the natural person responsible for making a decision may not have knowledge of material within the corporate knowledge of the decision-maker stipulated under an Act. A secondary issue relates to the interaction between the hearing rule and the judicial review ground of failure to consider relevant considerations in the context of discretionary ministerial decision-making.

This thesis proposes two arguments regarding the application of the hearing rule in Ministerial decision-making. Firstly, this thesis argues that, unless a statute provides otherwise, corporate knowledge is relevant in determining what information ought to be disclosed by a Ministerial decision-maker. Secondly, this thesis suggests there is an inherent interaction between the hearing rule and relevant considerations and that because of this interaction, there ought to be only

[1] Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, Pyrmont, NSW: Lawbook Co, 2004) 14.

one test to determine whether the decision-maker has complied with both grounds of review. The thesis proposes that establishing one test would simplify the ministerial decision-making process not only for the decision-maker and the affected parties but also for the courts who must decide on the validity of administrative decisions. This outcome also accords with the values of 'good government' which underlie the rationale for judicial review.

II THE RATIONALE FOR THIS RESEARCH

A *Clarifying Requirements and Obligations*

The requirements of procedural fairness are 'flexible' and the application of its rules depends on the circumstances of the situation being reviewed by the courts.[2] This flexibility allows the requirements of procedural fairness to be applied to many different situations. However, it may be useful to identify the proper application of the rules of procedural fairness before a particular issue reaches a decision-maker rather than for the courts to examine the legality of a decision when it is later challenged. As Aronson, Dyer and Groves have observed, too much flexibility in what is required for 'fairness' has the 'potential to undermine certainty and predictability'[3] in administrative decision-making:

> The effectiveness of the hearing rule is seriously undermined if its content can be properly determined only when it is declared ex post facto by a reviewing court.[4]

Proper procedures and processes for administrative decision-making ensures 'certainty and predictability'[5] — and, equally importantly, credibility — and may

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2 See *Kioa v West* (1985) 159 CLR 550, 614 (Brennan J).

3 Aronson, Dyer and Groves, above n 1, 471 referring to Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 28.

4 Aronson, Dyer and Groves, above n 1, 471 referring to Brennan, above n 3, 28.

5 Aronson, Dyer and Groves, above n 1, 471 referring to Brennan, above n 3, 28.

prevent costly delays, unnecessary litigation or embarrassing controversy arising out of contested administrative decision-making. This issue has recently arisen in the context of the mining industry,[6] which is currently a very crucial component of Western Australia's economic, political and social framework. A decision relating to tenements and land tenure made by the Minister under the *Mining Act 1978* (WA) ('the *Mining Act*'). may have a massive economic impact on the State and, indeed, Australia as a whole. Eliminating or reducing the incidence of contested administrative decisions in this area is highly desirable objective.

In light of the fact that the judicial review of administrative action in Western Australia is governed solely by the common law, distilling the applicable law on this particular issue may be useful both in establishing guidelines for proper decision-making and concluding any future litigation. The analysis made by this thesis may also be of assistance during debates on any proposed statutory judicial review scheme.

B *The Cazaly Litigation*

Many aspects of the procedural fairness issues in this thesis were discussed in the Western Australian Court of Appeal's recent decision in *Cazaly.*[7] The case dealt with, amongst other issues, the corporate identity of Ministerial decision-makers and the requirements of procedural fairness in circumstances where different natural persons occupy a Ministerial office. The case concerned a decision made by the Minister for Resources ('the Minister') exercising discretionary powers under s 111A of the *Mining Act*. Under this section, the Minister has a wide

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6 See discussion below of *Re Minister for Resources; ex parte Cazaly Iron Pty Ltd* [2007] WASCA 175 ('*Cazaly*').

7 [2007] WASCA 175.

power to terminate an application for a mining tenement where it would be 'in the public interest' to do so.[8] On the application of a third party (Rio Tinto Pty Ltd), the Minister exercised his discretion to terminate an application by Cazaly Pty Ltd ('Cazaly') for an exploration licence over a multi-million dollar iron ore deposit in the Pilbara.[9]

Cazaly applied for judicial review of the decision on the basis that, amongst other things, they were denied the opportunity to respond to material referred to in submissions made to the decision-maker.[10] The Minister who made the decision ('Minister Bowler') responded to this claim by arguing that as he did not actually consider the SoPs matters, he was not under an obligation to disclose it. Furthermore, Minister Bowler argued that the SoPs matters were only known to his predecessor, the Hon Alan Carpenter. The SoPs matters dealt with commercially sensitive information that the State and Rio Tinto did not want disclosed. While not discussed in the case, these facts raise a question in regards to the application of the judicial review ground of relevant considerations in the

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[8] The *Mining Act 1978* (WA), s 111A relevantly provides:

> **111A. Minister may terminate or summarily refuse certain applications**
>
> (1) The Minister may —
>
> (a) by notice served on the mining registrar or the warden, as the case requires, terminate an application for a mining tenement before the mining registrar or the warden has determined, or made a recommendation in respect of, the application; or
>
> (b) refuse an application for a mining tenement,
>
> if in respect of the whole or any part of the land to which the application relates —
>
> (c) the Minister is satisfied on reasonable grounds in the public interest that —
>
> (i) the land should not be disturbed; or
>
> (ii) the application should not be granted;
>
> …
>
> (4) The powers conferred by subsection (1) are in addition to any other powers of the Minister under this Act.

[9] A more detailed outline of the facts of this case is provided in Appendix A of this thesis.

[10] Referred to as the 'SoPs matters'. The material related to the 'Statement of Principles' being negotiated between the WA Government and Rio Tinto.

context of discretionary ministerial decision-making. While Minister Bowler had not considered the contested material, was he under an obligation to consider it? If he was under such an obligation to consider it, was he also under an obligation to disclose it in order to accord procedural fairness even though he had not considered it?

The Court of Appeal unanimously dismissed the application for judicial review of the Minister's decision under the *Mining Act*. In the lead judgment, Buss JA held that Minister Bowler did not breach his obligation to afford procedural fairness for several reasons.[11] At the time of writing, Cazaly has applied for Special Leave to appeal the decision in the High Court of Australia and this thesis will examine the procedural fairness issues which are being contested. The grounds of appeal contest Buss JA's conclusion that only the actual knowledge of the Minister is relevant in determining procedural fairness questions and argue that the hearing rule requires the disclosure of information even where the decision-maker has not considered that material.[12]

III THE LEGAL ISSUES AND RESEARCH QUESTIONS

There are no concrete guidelines as to how procedural fairness is to be accorded and as Mason J has noted, the 'critical question in most cases … is: what does the duty to act fairly require in the circumstances of the particular case?'[13] Ultimately, the object of this thesis is to examine the legal basis behind the requirements of the hearing rule in circumstances where Ministers are statutorily

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[11] See Chapter Two.

[12] The application for special leave to appeal is expected to be determined by the High Court sometime after mid-November 2007.

[13] *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

incorporated as 'corporations sole'. Justice of Appeal Buss's conclusion that '[c]onstructive or corporate knowledge is not relevant in determining whether the natural person who is the Minister has accorded procedural fairness'[14] is the only dicta on this issue and this thesis will examine that proposition both in the context of the Cazaly litigation and in more general circumstances related to ministerial decision-making.

The requirements of the hearing rule raise a secondary question regarding the interaction of hearing rule disclosure obligations and the judicial review ground of failure to consider relevant considerations. The hearing rule requires decision-makers to disclose any information which is 'credible, relevant and significant' to the decision.[15] The research question asks if there is any theoretical connection between the hearing rule and the requirement that decision-makers consider relevant considerations and if there is a point at which the requirement for material to be considered triggers the need to disclose that material to the affected party. In circumstances where a decision-maker (a Minister) has a significantly wide discretion, do the requirements of the hearing rule extend to material which *could possibly* be relevant or only to material which is not actually considered?

IV RESEARCH METHODOLOGY AND OUTLINE OF THE PAPER

This paper will take both a descriptive and an analytical approach in dealing with the topic. The rationale and established requirements of procedural fairness and relevant considerations are described in order to analyse the requirements of the hearing rule and the interaction between the two grounds of judicial review. The

[14] *Cazaly* [2007] WASCA 175, [328] (Buss JA).
[15] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

examination of the issues will also include an outline of case law and legal theory regarding the corporate identity and corporate knowledge assignable to ministerial offices as well as the issue of relevant considerations.

Chapter One of this thesis examines the rationale and general principles of procedural fairness before outlining specific requirements of the hearing rule in relation to the disclosure obligations of a decision-maker. Chapter Two will deal with the issue of a 'Minister' as a decision-maker. In some circumstances, an Act may provide that the office of the Minister administering the Act is to be a corporation sole. This legal entity can have dual capacities, that of the corporate office and that of the natural person holding the office.[16] These conceptual issues raise contention regarding knowledge of information which must be disclosed by the decision-maker and to whom this knowledge is attributable. Chapter Three then deals with the judicial review ground of failure to consider relevant considerations and its interaction with procedural fairness.

V CONCLUSIONS

This thesis will argue that in circumstances where the statutory framework incorporates a Ministerial office as a body corporate, corporate knowledge is relevant in determining whether the Ministerial decision-maker has afforded procedural fairness. Subsequently, this thesis will assert that there is an inherent link between the relevant considerations and procedural fairness grounds of judicial review. There are complicated rules, requirements and factors that surround the hearing rule, the relevant considerations ground and judicial review

[16] *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22, 35 (Mason, Wilson, Brennan, Deane and Dawson JJ) ('*Crouch*').

in general. This thesis will argue that in order to avoid unnecessary complication and confusion in regards to knowledge, considerations and statutory framework, the integration of the 'relevant considerations' test with the 'credible, relevant and significant' hearing rule test could simplify both judicial review and the decision-making process.

CHAPTER ONE: PROCEDURAL FAIRNESS

I INTRODUCTION

Procedural fairness is the requirement that administrative decisions are to be made following a fair and unbiased hearing of the facts and circumstances surrounding the decision to be made. The concept is also referred to as 'natural justice' and the terms are often used interchangeably.[17] Before analysing the questions discussed in the thesis, this chapter will provide a basic outline of procedural fairness, including its rationale and requirements. There are two rules of procedural fairness, the bias rule and the hearing rule. The issues in the thesis focus primarily on the hearing rule, which requires a decision-maker to provide the person who will be affected by the decision with an opportunity to present their case and respond to adverse material before the decision-maker.

II THE RATIONALE FOR PROCEDURAL FAIRNESS

Aronson, Dyer and Groves view administrative law as 'a legal system which addresses the ideals of good government'.[18] Ideas of 'good government' in administrative decision-making also underpin the rationale for the doctrine of procedural fairness. British commentators have asserted that '[i]t is self-evident that fairness, in some form, is a highly desirable characteristic in any system of

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[17] See *Kioa v West* (1985) 159 CLR 550, 585 (Mason J), 601 (Wilson J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489-490 (Gleeson CJ). Some of the quotations cited may refer to 'natural justice' but for consistency this thesis will use the term 'procedural fairness' for discussing the obligation to act fairly and with due process in administrative decision-making.

[18] Aronson, Dyer and Groves, above n 1, 1.

public administration'[19] and Lord Steyn has observed that procedural fairness plays 'an instrumental role in promoting just decisions'.[20] A judge of the Federal Court has noted that:

> The principles of procedural fairness are reflective of the concern which the courts, as the guardians of the rule of law, have enshrined in principles directed to the protection of the individual from the state.[21]

According fair treatment to individuals 'respects their dignity and value as members of the community, rather than characterizing them as the objects of an arbitrary and authoritarian governmental process.'[22] Adherence to the rules of procedural fairness also helps to ensure that 'the affected individual is made aware of the basis upon which he or she is being treated unfavourably' and enables 'the individual to participate in the decision-making process.'[23] The requirements of procedural fairness also encourage the making of better decisions. The process of taking submissions and responses from the affected parties allows the decision-makers to have access to a more complete range of material upon which to base their decision.[24] In turn, better decisions promote 'public confidence in the decision-making process and the correctness of decisions',[25] and support the values of 'good government.'

Ultimately, the rules of procedural fairness exist to ensure 'openness, fairness, participation [and] accountability' in administrative decision-making and these

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19 Mark Elliot, *Beatson, Matthews and Elliot's Administrative Law: Text and Materials* (3rd ed, Oxford: Oxford University Press, 2005) 292.
20 *Raji v General Medical Council* [2003] UKPC 24, [13].
21 Steven Rares, 'Blind Justice: The Pitfalls for Administrative Decision-Making' (2006) 50 *AIAL Forum* 14, 18.
22 Elliot, above n 19, 292.
23 Justice J W von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *AIAL Forum* 1, 3.
24 Aronson, Dyer and Groves, above n 1, 376.
25 Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Chatswood NSW: LexisNexis Butterworths, 2005) 516.

values are an integral part of 'good government'.[26] Justice von Doussa argues that the 'principles of natural justice are intended to promote individual trust and confidence in the administration [of government].'[27] According to His Honour, the encouragement of 'certainty, predictability and reliability in government interactions with members of the public … is a fundamental aspect of the rule of law.'[28] It is necessary to keep these objectives in mind when discussing the requirements of procedural fairness..

III THE REQUIREMENTS OF PROCEDURAL FAIRNESS

A discussion of the general requirements of procedural fairness may assist in analysing the doctrine's requirements in the specific situation of discretionary ministerial decision-making as well as the relationship between relevant considerations and the hearing rule. The seminal procedural fairness case in Australia is *Kioa v West*.[29] In that case, the majority of the High Court found that before a decision-maker makes a decision which affects a person's rights, interests or legitimate expectations, the decision-maker must afford the person a fair and unbiased hearing.

A *The Application of Procedural Fairness*

The threshold question, whether the exercise of a statutory power attracts the requirement of procedural fairness, is the first stage in determining an application for this ground of judicial review.[30] Procedural fairness applies where it is

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[26] Aronson, Dyer and Groves, above n 1, 1.
[27] von Doussa, above n 23, 2.
[28] von Doussa, above n 23, 2.
[29] (1985) 159 CLR 550.
[30] Hilary Manson and Tom Howe, 'Natural Justice and the 'Hearing Rule' – Fundamental Principles and Recent Developments' (2006) 78 *Legal Briefing* 1, 2.

expressly required by legislation or where the circumstances are such that the courts will imply that procedural fairness ought to be accorded.[31] The threshold question is a necessary element in determining whether procedural fairness has been breached: a party must be entitled to procedural fairness in order for a decision-maker to be obliged to accord it.

There are several broad categories of circumstances where there is an obligation to afford procedural fairness including, where rights or interests such as personal liberty, legal status, financial or property rights, livelihood or where reputations may be affected.[32] While the general principles rationalising procedural fairness focus on the 'individual' who may be affected by governmental processes, the principles also apply to businesses and companies who are subject to administrative decision-making.[33]

Dyer has noted that while 'issues concerning implication [of procedural fairness] have tended to dominate, as the courts have relentlessly expanded the boundaries of the duty', case law indicates that 'the emphasis is shifting to the content of procedural fairness.'[34] In *Kioa v West*,[35] Mason J noted that:

> The law has 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 intention.[36]

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31 *Cooper v Wandsworth Board of Works* (1863) 143 ER 414 , 420 (Byles J).
32 Manson and Howe, above n 30, 2.
33 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey and Gaudron JJ) (a business or commercial reputation 'is an interest attracting the protection of the rules of natural justice').
34 Bruce Dyer, 'Determining the Content of Procedural Fairness' (1993) 19 *Monash University Law Review* 165, 165, citing *Kioa v West* (1985) 159 CLR 550, 585 (Mason J), 612 (Brennan J); *Haoucher v Minister for Immigration and Indigenous Affairs* (1990) 169 CLR 648, 53 (Deane J).
35 (1985) 159 CLR 550.
36 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

Further comments by the High Court[37] suggest the contemplation of 'an approach that obviates any need for a threshold test.'[38] Where courts find that procedural fairness does indeed apply to the situation at hand, the next step for this ground of judicial review is to determine the content of the obligations owed by the decision-maker to the affected person.[39]

B *The Flexible Rules of Procedural Fairness*

Procedural fairness is a 'flexible'[40] concept and general rules are adopted according to 'circumstances of the particular case'.[42] These 'circumstances' include, amongst other things, 'the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting'.[43] The contemporary understanding of procedural fairness encompasses two factors: the rule against bias and the hearing rule. The rule against bias requires that a decision-maker acts and appears to act free of any reasonable suspicion or apprehension of bias.[44] The content of the hearing rule requires that a person who has a right, interest or legitimate expectation that will be affected by the decision must be given the opportunity to be heard before that decision is made.[45] The relevant issue in this

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37 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653 (Deane J), quoted in *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

38 Aronson, Dyer and Groves, above n 1, 386.

39 Manson and Howe, above n 30, 2.

40 See Dyer, above n 34, 166-170.

42 *Kioa* v *West* (1985) 159 CLR 550, 585 (Mason J).

43 *Kioa* (1985) 159 CLR 550, 584 (Mason J). This approach can be traced back to cases such as *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ).

44 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288. The legal maxim *nemo debet esse judex in propria sua causa* translates to 'no one can be a judge in his or her own cause': Aronson, Dyer and Groves, above n 1, 370.

45 *Ridge v Baldwin* [1964] AC 40. The legal maxim *audi alteram partem* maxim translates to 'hear the other side': Aronson, Dyer and Groves, above n 1, 370.

thesis deals with the application of the hearing rule to discretionary decision-making.[46]

IV THE HEARING RULE

The basic purpose of the hearing rule is to allow a person who may be potentially affected by a proposed decision to respond to the case against them.[47] According to Tucker LJ in *Russell v Duke of Norfolk*,[48] the 'irreducible minimum' of natural justice requires that 'the person concerned should have a reasonable opportunity of presenting his case'.[49] In *Cooper v Wandsworth Board of Works*,[50] Byles J traced the heritage of the hearing rule to *Dr Bentley's Case*,[51] where the Vice Chancellor of Cambridge had deprived a scholar of his qualifications without notice or an opportunity to be heard. In finding the Vice Chancellor's actions unlawful, Fortescue J remarked:

> The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any … even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art though? Hast though not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also.[52]

The hearing rule has several requirements including the requirement to provide prior notice of the subject matter and issues to be addressed at the hearing and potential legal consequences of the hearing. For this thesis, the key requirement

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[46] Further details regarding the application of procedural fairness and the content of the rule against bias can be found in the key textbooks: Aronson, Dyer and Groves, above n 1, 378-388 (the threshold test), 563-617 (the bias rule); Creyke and McMillan, above n 25, 521-523 (the threshold test), 578-596 (the bias rule).

[47] Manson and Howe, above n 30, 4.

[48] [1949] 1 All ER 109.

[49] *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118.

[50] (1863) 143 ER 414, 420.

[51] *R v The Chancellor of Cambridge* (1723) 1 Str 557.

[52] Cited in Von Doussa, above n 23.

of the hearing rule is the disclosure of the substance of the case and an opportunity to make submissions and comment on the case to be met.[53].

A *Disclosure of the Case to be Met*

In *Kanda v Government of Malaya*,[54] the House of Lords noted that a person whose interests are likely to be affected by a decision must be given the opportunity to deal with relevant matters adverse to their interests which the decision-maker proposes to take into account. The Privy Council went on to say:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

Kioa v West[55] provides a starting point for outlining the key requirements for this aspect of the hearing rule.[56] According to Mason J, it is 'a fundamental rule of the common law doctrine of natural justice' that an affected person is 'entitled to know the case sought to be met against [them] and to be given an opportunity of replying to it.'[57]

Justice Mason further noted that decisions such as *FAI Insurances Ltd v Winneke*[58] and *Cole v Cunningham*[59] illustrate the 'importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn' so that the issue may be

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[53] See Roger Douglas, *Douglas and Jones's Administrative Law* (5th ed, Sydney: Federation Press, 2006), 541-556 and Creyke and McMillan, above n 25, 572.
[54] [1962] AC 322 ('*Kanda*'), 336.
[55] (1985) 159 CLR 550.
[56] See Aronson, Dyer and Groves, above n 1, 506-511 for a very thorough outline of case examples.
[57] *Kioa v West* (1985) 159 CLR 550, 582 (Mason J, citations omitted).
[58] (1982) 151 CLR 342.
[59] (1983) 81 FLR 158.

properly dealt with.[60] Other aspects of the principle, outlined by the Full Court of the Federal Court of Australia in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*,[61] include:

- the right to rebut, comment on or qualify, by further information and submission, adverse material from other sources which is put before the decision-maker;
- the requirement that the decision-maker identifies any issue critical to the decision which is not apparent from its nature or the terms of the statute under which the decision is to be made; and
- the requirement that the decision-maker informs the affected person of any adverse conclusion which may be arrived at but would not be obvious from the known material.

B *Adverse Information*

The decision-maker has an obligation to disclose 'adverse information' in order to allow the affected person to respond. This information was described by Mason J as 'some consideration personal to the applicant on the basis of information obtained from another source'.[62] In *Kanda*[63] the material not presented to the appellant was a report which 'contained a severe condemnation of Inspector Kanda'.[64] Other examples from seminal procedural fairness cases include

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60 *Kioa v West* (1985) 159 CLR 550, 587 (Mason J).
61 (1994) 49 FCR 576, 592 (Northrop, Miles and French JJ).
62 *Kioa v West* (1985) 159 CLR 550, 587 (Mason J).
63 [1962] AC 322, 335.
64 *Kanda* [1962] AC 322, 335.

allegations regarding involvement with and assisting other illegal immigrants,[65] accusations related to criminal conduct[66] and charges of academic fraud.[67]

However, the type of information that the hearing rule is concerned with is not restricted to merely negative allegations against the affected person. The hearing rule also attaches to information which is adverse to the affected person's interests. If the decision-maker proposes to consider such information it must be disclosed in order to comply with the rules of procedural fairness.[68] For example, new evidence[69] or submissions from opposing parties[70] must be disclosed. There is High Court authority that in circumstances where a decision-maker has to determine between two competing interests, the rules of natural justice require the disclosure of competing parities' submissions.[71] In addition to ensuring fairness, the requirements promote good administration by encouraging the making of more informed and, hopefully, more accurate decisions.

C *Credible, Relevant and Significant*

The core of the hearing rule was succinctly outlined in *Kioa v West*,[72] where Brennan J laid out the following oft-cited principle:

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65 *Kioa v West* (1985) 159 CLR 550.

66 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 ('*VEAL*').

67 *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 113; *Hall v University of NSW* [2003] NSWSC 669 (unreported, McClellan J, 15 August 2003).

68 *McLachlan v Australian Securities & Investments Commission* (1999) 85 FCR 286, [44].

69 *Muin v Refugee Review Tribunal* (2002) 190 ALR 601.

70 *Re Minister for Mines; Ex parte Roberts* (1997) 18 WAR 408, 418 (Steytler J).

71 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 58 (Brennan J) ('The general rule … is that information must not be taken into account without giving the parties whose interests might be affected by the information an opportunity to correct or contradict it').

72 (1985) 159 CLR 550. This principle was applied by the Supreme Court of Western Australia in *Re Minister for Mines; Ex parte Roberts* (1997) 18 WAR 408 and *Re Plutonic Operations Ltd, Sipa Resources Ltd and the Minister for Mines; Ex parte Roberts* [1999] WASCA 133 (unreported, Malcolm CJ, Pidgeon and Ipp JJ, 20 August 1999).

> [I]n the ordinary case where no problem of confidentiality arises an opportunity should given to deal with adverse information that is credible, relevant and significant to the decision to be made.[73]

In deciding what information needs to be disclosed in order to accord with the requirements of the hearing rule, it is necessary to determine whether the adverse information is in fact 'credible, relevant and significant'. In *VEAL*,[74] the High Court held that 'credible, relevant and significant' is to be understood as 'referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision.'[75] This factor will play an important role in this thesis' discussion of the relationship between the judicial review ground of relevant considerations and procedural fairness.

Once information which falls into the 'credible, relevant and significant' category comes to the attention of the decision-maker it must be disclosed even if the decision-maker disavows reliance on that information.[76] In this situation, the requirements of procedural fairness would have been breached where there was a 'real risk' of prejudice arising from the information.[77] However, Justice Brennan held that there will generally be a 'real risk' where the information is 'credible, relevant and significant'.[78] As a result, the proper question to be determined in the circumstances is whether the material in question *could* have influenced the decision-maker, not whether it *had* in fact influenced the decision.[79]

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[73] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).
[74] (2005) 225 CLR 88.
[75] *VEAL* (2005) 225 CLR 88, 96.
[76] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J); *VEAL* (2005) 225 CLR 88.
[77] *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561, [94].
[78] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).
[79] *Johns v Release on Licence Board* (1987) 9 NSWLR 103, 116. This statement was approved by the High Court in *VEAL* (2005) 225 CLR 88, 96.

D *Limits on the Obligation to Disclose*

The requirement to 'disclose' adverse information does not oblige decision-makers to hand over verbatim copies of documents in every instance. However, a summary of the adverse information must still be disclosed so that the affected-person has an opportunity to respond to the material against them.[80] The obligation to disclose adverse information still applies where documents are privileged and while the whole document does not need to be handed-over procedural fairness still requires the decision-maker to disclose a summary of the adverse information in the document.[81] The same applies for confidential documents; the High Court has held that in some situations documents which contain 'relevant, credible and significant' material do not have to be disclosed in their entirety for reasons of confidentiality.[82] However, decision-makers must again provide a summary of the confidential material so that the affected person is afforded an opportunity to respond to the 'gravamen or substance' of the issue.[83]

In addition to the qualified exceptions regarding privileged and confidential information, further limits on the duty provide that disclosure is not required for policy considerations or material which amounts to general factual information.[84] The High Court has also held that the decision-maker had complied with the relevant obligations of the hearing rule even where 'adverse' material on departmental files was not disclosed because the decision-maker was unaware of

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[80] *Hall v University of New South Wales* [2003] NSWSC 669 (unreported, McClellan J, 15 August 2003).

[81] *Re Real Estate and Business Agents Supervisory Board; ex parte Cohen* (1999) 21 WAR 158, [112].

[82] *VEAL* (2005) 225 CLR 88, [27].

[83] *Pilbara Aboriginal Land Council Corporation In v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 103 FCR 539, 557 (Merkal J).

[84] See *Kioa v West* (1985) 159 CLR 550, 588 (Mason J). See also Aronson, Dyer and Groves, above n 1, 509, fn 293 for further case examples.

that information and did not rely on it in making the decision.[85] Another qualification on the obligation of disclosure, that really goes without saying, is that a decision-maker has no obligation to disclose information where the material is 'not credible, or not relevant, or of little or no significance to the decision'.[86]

In summary, there is a positive obligation upon a decision-maker to disclose information that fulfils the three-pronged test of credibility, reliability and significance to the decision. The limits to this obligation are only mere qualifications and not exceptions to the rules, resulting in the duty imposed by the hearing rule in common law being a robust obligation.[87]

V METHODS AND MERITS

A key aspect of procedural fairness is that the ground of review is concerned with the *procedure* in which the decision is made and not its merits. For the following discussion, it may be appropriate to set out Brennan J's comments on this issue from *Kioa v West*[88] in full:

> It does not diminish the importance of the principles of natural justice to say that they are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise — 'that the procedure … shall be fair in all the circumstances', as Lord Reid said in *Wiseman v Borneman*[[89]]. The distinction between method and merits is sometimes elusive. The merits are for the repository of the power alone, and a repository of power is not to be held

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85 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants 134/2002* (2003) 211 CLR 441, 458-460; see also *McLachlan v Australian Securities & Investments Commission* (1999) 85 FCR 286 (delegate of the Australian Securities and Investments Commission ('ASIC') was not required to disclose all documents concerning the affected company in ASIC files).

86 *VEAL* (2005) 225 CLR 88, [17].

87 Note that express legislative provisions may abrogate or exclude the hearing rule. For example, *Migration Act 1958* (Cth), s 503A prohibits the disclosure of information communicated to officers or the Minister by specific agencies. The Federal Court has held that this provision permits the withholding of information which would otherwise have to be disclosed in order to accord procedural fairness: *Evans v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 320 (Gray, Kenny and Downs JJ).

88 (1985) 159 CLR 550.

89 [1971] AC 297, 308.

> in breach of the principles of natural justice merely because he has come to a decision which, to the eyes of the court, appears unjust: [compare with] *Chief Constable v Evans*[90]; *Re Evershed and the Queen*[91].[92]

The High Court continues to apply this approach and as the Court held in *VEAL*:[93]

> The relevant inquiry is: what procedures should have been followed? The relevant inquiry is neither what decision the decision-maker should have made, nor what reasons did the decision-maker give for the conclusion reached.[94]

This approach results in procedural fairness being a judicial investigation of the process of the decision and the practicalities of the decision-making process become the central concern of the review. According to Gleeson CJ, fairness is a 'practical' concept and 'the concern of the law is to avoid practical injustice.'[95]

Procedural fairness can be seen as being 'somewhat vague because of its variable content'.[96] As Lord Reid noted in *Ridge v Baldwin*,[97] the 'great difference between various kinds of cases in which it has been sought to apply the principle' has resulted in difficulties in reconciling the different authorities on natural justice.[98] The following chapter will outline issues related to Ministerial decision-making and the application of procedural fairness in circumstances where the power to make decisions are granted to Ministers statutorily incorporated as corporations sole.

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90 [1982] 13 All ER 141, 143-144, 155.
91 (1984) 5 DLR (4th) 340, 344.
92 *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).
93 (2005) 225 CLR 88.
94 *VEAL* (2005) 225 CLR 88, [19].
95 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14.
96 *Kioa v West* (1985) 159 CLR 550, 614 (Brennan J).
97 [1964] AC 40.
98 *Ridge v Baldwin* [1964] AC 40, 65.

CHAPTER TWO: THE HEARING RULE AND MINISTERIAL DECISION MAKING

I INTRODUCTION

As discussed in Chapter One, the rules of procedural fairness require a decision-maker to disclose any 'credible, relevant and significant' information that will be considered in making a decision in order to allow the person whose rights, interests or legitimate expectations will be affected to respond.[99] This chapter examines legal issues regarding the decision-maker's obligations under the hearing rule in the circumstances where the decision-maker is a 'Minister' established by an Act to be a 'corporation sole'. In these situations, there may be issues to be determined concerning the decision-maker's knowledge of information which may be 'credible, relevant and significant' to the decision.

These issues include questions regarding the identity of the decision-maker and the impact of circumstances where different natural persons occupy the office of 'Minister' responsible for administering an Act. Ultimately, this chapter attempts to identify the required content of the hearing rule in relation to discretionary decision-making and the corporate knowledge of a Ministerial decision-maker. The central question asks if there is a legal basis for requiring a Minister to disclose material which was within the knowledge of a preceding holder of the Ministerial office or the department but was not actually known to or considered by the person of the Minister who made the ultimate decision in question. This chapter will examine case law and legal theory regarding the corporate identity

[99] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

and corporate knowledge assignable to ministerial offices which are incorporated by statute.

II MINISTERS AND CORPORATE PERSONALITY

A *Background*

As noted in the introductory chapter of this thesis, the factual situation in *Cazaly*[100] raised the question of whether a Minister ought to provide an affected party with information within the possession of their department, or known to the previous holder of the ministerial office, even though the Minister did not have actual knowledge of this information nor consider it. Once it is established that procedural fairness is to be accorded in making a decision there may be an issue with who actually owes the relevant duties. At face value, this may appear to be a simple question; the identity of the decision-maker could be easily determined by referring to the interpretation Act applicable in the relevant jurisdiction. For example, s 19 of the *Acts Interpretation Act 1901* (Cth) and s 12 of the *Interpretation Act 1984* (WA) provide that a reference to 'Minister' in legislation is to read as being 'the Minister of the Crown to whom the administration of the Act … is for the time being committed by the Governor'. This would indicate that the 'decision-maker'[101] who is the 'repository of the power'[102] and must ensure procedural fairness is accorded is the natural person appointed to occupy the ministerial office at the time the decision is made.

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[100] [2007] WASCA 175.
[101] *VEAL* (2005) 225 CLR 88, [19].
[102] *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J).

However, some Acts provide for the office of 'Minister' to be 'a corporation sole, with perpetual succession'.[103] A corporation is an artificial person created by law to carry on business as a separate entity from its participants.[104] A corporation sole is an artificial legal entity occupied by just one person in succession. Sir William Blackstone's definition of a corporation sole notes that the entity consists of one person and their successors 'in some particular station' and that the entity is incorporated by law 'in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had.'[105]

Examples of corporations sole include the Crown (that is the 'King' or the 'Queen') and religious positions such as the Archbishop of Canterbury.[106] While Ministers of the Crown are not common law corporations sole,[107] they can be established as statutory corporations sole.[108] The incorporation of a ministerial office provides the office with the legal capacity to enter into contracts, hold property, sue and be sued[109] as an entity separate from the 'Ministers' who may occupy that office from time to time. This provides for the continuity of government administration when, for example, Cabinet members move to different portfolios or when new political parties take over following elections.

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[103] See, for example, *Mining Act 1978* (WA) s 10.
[104] Pamela Hanrahan, Ian Ramsay, Geof Stapledon, *Commercial Applications of Company Law* (7th ed, Sydney: CCH Australia Ltd, 2006) 4.
[105] Cited in James P O'Hara, 'The Modern Corporation Sole' (1988) 93 *Dickinson Law Review* 23, 23.
[106] O'Hara, above n 104, 23.
[107] *Hubbard Association of Scientologists International v Attorney-General (Vic)* [1976] VR 119, 123-125.
[108] *Cazaly* [2007] WASCA 175, [321].
[109] For example, see *Mining Act 1978* (WA), 10(2)(b).

B *One Office, Two Persons*

In Buss JA's discussion of the corporate knowledge issue in *Cazaly*,[110] His Honour quoted passages from *Salmond on Jurisprudence* and the High Court's judgment in *Crouch*,[111] which outlined the conceptual problems that arise when an artificial entity created by statute can have its own capacity as well as the capacity of the natural person holding the office.[112] There is a difference between 'the transient natural person who happens to hold the particular office at a particular time and the continuing corporate identity which the law attributes to the office.'[113] It is therefore possible that there will be ambiguity regarding the identity of the decision-maker who owes duties of procedural fairness: is it the natural person occupying the office of Minister and appointed by the Governor to administer the Act,[114] or is it the office of the Minister as a body-corporate as stipulated in the Act? The answer to that question may dramatically effect whether procedural fairness has been accorded in certain situations.

III KNOWLEDGE AND MINISTERIAL OFFICES

A *Knowledge and Corporations*

The establishment of a corporation provides for the artificial, separate legal entity to own property or other assets, enter into contracts, sue and be sued in its own name and exist in perpetual succession.[115] The establishment of a corporation sole provides for the same characteristics to be attributable to the incorporated entities

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[110] [2007] WASCA 175.
[111] (1985) 159 CLR 22.
[112] *Cazaly* [2007] WASCA 175, [322]-[323] (Buss JA).
[113] *Crouch* (1985) 159 CLR 22, 35 (Mason, Wilson, Brennan, Deane and Dawson JJ).
[114] *Acts Interpretation Act 1901* (Cth), s 19; *Interpretation Act 1984* (WA), s 12.
[115] See, for example, *Macaura v Northern Assurance Co* [1925] AC 619.

of public offices.[116] As a corporation sole is a legal entity occupied by just one person, the term 'corporation sole' is, by some descriptions, a little self-contradictory. As one commentator noted in 1900, 'the essence of corporateness [is] in the permanent existence of the organised group, those 'body' of 'members,' which remains the same though its particles change, and … this phenomenon [cannot] exist where only one [person] is concerned.'[117] It is, however, possible to have 'one-person companies' with a sole director and shareholder.[118]

Aside from the fact that a corporation sole only consists of one office-holder from time-to-time,[119] there is, however, no reason to suggest that there are differences in the characteristics and behaviour of a corporation sole and a 'regular' corporation as legal entities. Just as a corporation is a separate entity from its shareholders or directors,[120] a corporation sole is a separate entity from the natural person occupying that office.[121] The extract from *Salmond on Jurisprudence* quoted in *Cazaly*[122] describes the dual 'beings' of a corporation sole:

> One is a human being, administering for the time being the duties and affairs of the office. He alone is visible to the eyes of laymen. The other is a mythical being whom only lawyers know of, and whom only the eye of the law can perceive. He is the true occupant of the office; he never dies or retires; the other, the person of flesh and blood, is merely his agent and representative, through whom he performs his functions. The living official comes and goes, but this offspring of the law remains the same for ever.[123]

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[116] James P O'Hara, 'The Modern Corporation Sole' (1988) 93 *Dickinson Law Review* 23, 33.
[117] F W Maitland, 'The Corporation Sole' (1900) 16 *Law Quarterly Review* 335, 339.
[118] *Salomon v Salomon & Co Ltd* [1897] AC 22.
[119] *Cazaly* [2007] WASCA 175, [322] ('A corporation aggregate is an incorporated group of co-existing persons, and a corporation sole is an incorporated *series* of successive persons').
[120] R P Austin and I M Ramsey, *Ford's Principles of Corporations Law* (13th ed, Chatswood, NSW: LexisNexis Butterworths, 2007), [4.140].
[121] *Crouch* (1985) 159 CLR 22, 35 (Mason, Wilson, Brennan, Deane and Dawson JJ) citing *McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521, 534 (Dixon, Williams, Fullagar and Kitto JJ).
[122] [2007] WASCA 175.
[123] Citied in *Cazaly* [2007] WASCA 175 [322].

However, there is essentially no difference between the 'living official' acting as the 'agent and representative' of the incorporated public office and a director, agent or manager of a regular corporation. Based on rudimentary elements of corporate law, the knowledge assignable to a corporation sole could be determined by attributing the knowledge of the 'directing mind and will' to the office itself.[124] If the natural person holding that office obtains some knowledge, that knowledge should, theoretically, be attributable to the corporate entity of that office.[125]

B *The Identity of the Decision-Maker*

The obligations of procedural fairness and the hearing rule are to be accorded by the 'decision-maker'[126] who is the 'repository of the power'[127] stipulated in an Act. For example, within the context of the *Cazaly* litigation, the s 111A power is vested in the 'Minister'. Section 10(2) of the *Mining Act* provides:

> The Minister -
> (a) shall be a corporation sole with perpetual succession and shall have an official seal; and
> (b) may, in his corporate name, acquire, hold, lease and otherwise dispose of real and personal property, and may sue and be sued in that name.

It will be suggested that Buss JA's decision on corporate knowledge in the Cazaly litigation was ultimately correct for reasons discussed below. However, without considering any other statutory provisions, where the statutory framework expressly provides for the Act to be administered by legal entity specifically

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[124] See, for example, *Lennard's Carrying Co v Asiatic Petroleum Co* [1915] AC 705; *Tesco Supermarkets v Natrass* [1972] AC 153; *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 172 (Lord Denning) (the knowledge of directors or managers is imputed upon and attributed to the company).

[125] See, for example, see *Jones v Lipman* [1962] 1 All ER 442 (corporate defendant acquired title to land with notice of the plaintiffs' prior equitable interest. The director's knowledge of the prior contract would have been ascribed to the company he controlled so that it was not a bona fide purchaser without notice).

[126] *VEAL* (2005) 225 CLR 88, [19].

[127] *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J).

established to provide for separation between the holder of the office and the office itself, the decision-maker who is under a duty to accord procedural fairness is not the natural person occupying the office. Unless the statute provides that the actual knowledge of the natural person is relevant, corporate knowledge is relevant to the determination of whether procedural fairness had been accorded where the Act incorporates a ministerial office as a body corporate.

The ambiguity regarding whether the grant of powers to make a decision (and correspondingly, the obligation to accord procedural fairness) is directed to the natural person or to the corporate entity of the office can be resolved by examining the provisions of the statute. In *Crouch*,[128] Mason, Wilson, Brennan, Deane and Dawson JJ noted that

> while sometimes blurred, the distinction between the natural person who holds the office … and the artificial corporate personality of the office which he or she holds is expressly averted to [for example, by the Act providing for a power to be exercised by the office "as such corporation"] or inherent in many provisions of the Act.[129]

The examples of references to the natural person cited in *Crouch*[130] referred to provisions in the Act regarding receiving salaries, holding the office and being dismissed from office.[131] The references to the 'the continuing corporate personality of the corporation sole' dealt with, for example, employing staff, holding property, taking part in legal action[132] — official functions in the exercise of powers granted by the Act.

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[128] (1985) 159 CLR 22.
[129] *Couch* (1985) 159 CLR 22, 35 (Mason, Wilson, Brennan, Deane and Dawson JJ).
[130] (1985) 159 CLR 22.
[131] *Couch* (1985) 159 CLR 22, 35 (Mason, Wilson, Brennan, Deane and Dawson JJ).
[132] *Couch* (1985) 159 CLR 22, 36 (Mason, Wilson, Brennan, Deane and Dawson JJ).

In the *Mining Act*, s 111A is a grant of discretionary power as an official function to the continuing corporate identity of the Ministerial office and does not relate to administrative arrangements regarding the natural person holding the office. The 'decision-maker'[133] who is the 'repository of the power'[134] stipulated by the Act is the corporate entity, not the natural person occupying that ministerial office. Looking at these provisions in isolation from any other sections of the *Mining Act*,[135] it can be said that the duties of procedural fairness are correspondingly reposed to the corporate entity, not the natural person and therefore corporate knowledge is relevant in determining whether procedural fairness has been accorded in a ministerial decision-making process.[136]

C *Ministers and Departmental Knowledge*

The conclusion that corporate knowledge is relevant to determining the validity of ministerial action is supported by the established principles regarding imputing the knowledge of a department to the responsible Minister. There is authority that when material is in the possession of the department, it 'must clearly be treated as being in the possession of the Minister'.[137] According to Brennan J, a Minister

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[133] *VEAL* (2005) 225 CLR 88, [19].

[134] *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J).

[135] See the discussion of *Mining Act 1978* (WA), s 12, below.

[136] The authorities which provide that unless the 'adverse information' was considered by the decision-maker, there is no obligation to disclose material which may be on departmental files, for example, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants 134/2002* (2003) 211 CLR 441, 458-460; *McLachlan v Australian Securities & Investments Commission* (1999) 85 FCR 286, may be distinguished on the basis that they do not deal with ministerial decision-makers.

[137] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ('*Peko*'), 31; *Daganayasi v Minister for Immigration* [1980] 2 NZLR 130, 148. In *Cazaly*, Buss JA distinguished *Peko* (1986) 162 CLR 24, the key case dealing with departmental knowledge, on the ground that the latter case concerned the judicial review ground of failure to consider relevant considerations: [2007] WASCA 175, [333] (Buss JA). However, the following chapter of this thesis argues that, as relevant considerations and the hearing rule are theoretically interlinked, reasoning from *Peko* should be applicable in a discussion of ministers and departmental knowledge in a procedural fairness case.

cannot be regarded as being 'unaware of information possessed by his Department' in the exercise of statutory powers.[138] In Lord Diplock's words:

> The collective knowledge, technical as well as factual, of the civil servants in the department and the collective expertise is to be treated as the minister own knowledge, his own expertise.[139]

This approach is necessary given the fact that governments and ministerial portfolios are not static. Where decision-making processes can be started with one natural person occupying a ministerial office and concluded with another natural person occupying that office,[140] ensuring the continuity of information within administrative agencies even when 'Ministers' may change from time to time is of practical importance.

IV PARTICULAR CIRCUMSTANCES

It is well established that the requirements of procedural fairness depend on the specific factual circumstances surrounding the decision being reviewed.[141] Whether or not 'corporate knowledge' is relevant to determining whether procedural fairness has been accorded by a Ministerial decision-maker depends on the particular statutory and factual circumstances of the case. In *Cazaly*,[142] Buss JA held that the issue of corporate or constructive knowledge was not relevant in determining whether procedural fairness had been accorded in the particular circumstances of that case.[143] While Buss JA's conclusion that 'constructive or corporate knowledge is not relevant in determining whether the natural person who is the Minister has accorded procedural fairness' may not be the correct

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[138] *Peko* (1986) 162 CLR 24, 66 (Brennan J).
[139] *Bushell v Environment Secretary* [1981] AC 75, 95.
[140] See, for example, *Cazaly* [2007] WASCA 175, [46]; *Peko* (1986) 162 CLR 24, 35.
[141] See *Kioa v West* (1985) 159 CLR 550, 584 (Mason J), 614 (Brennan J); *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ).
[142] [2007] WASCA 175.
[143] *Cazaly* [2007] WASCA 175, [328] (Buss JA).

approach in other cases where a Ministerial office is established as a corporation sole, it appears to be correct in the 'circumstances of the particular case'.[144] As the High Court is to yet rule on Cazaly's application for special leave to appeal, I would submit that Buss JA's decision on this point should not be disturbed for three main reasons.

A *'Practical Fairness'*

Firstly, the fact that a corporation sole has knowledge of all previous holders of the Ministerial office does not necessarily mean the natural person who actually makes the decision must disclose that knowledge. His Honour's decision was based on eight considerations.[145] The first two related to the identification of procedural fairness as a 'practical concept'.[146] As noted by Gibbs CJ, the doctrine of procedural fairness exists to prevent 'practical unfairness'[147] and Brennan J's formulation of the hearing rule provides that affected persons are to be given an opportunity to respond to adverse information 'which the repository of the power [the decision-maker] proposes to take into account in deciding upon its exercise.'[148]

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[144] *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

[145] See *Cazaly* [2007] WASCA 175, [329]-[336] (Buss JA) (no practical unfairness; practical difficulty of requiring material within corporate knowledge to be disclosed; statutory framework contemplates actual knowledge to be relevant; applicant's contentions inconsistent with *VEAL* (2005) 225 CLR 88, 96; case distinguishable from *Peko* (1986) 162 CLR 24; applicant's contentions inconsistent with *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants 134/2002* (2003) 211 CLR 44; applicant's contentions inconsistent with *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; applicant's contentions inconsistent with *McLachlan v Australian Securities & Investments Commission* (1999) 85 FCR 286).

[146] *Cazaly* [2007] WASCA 175, [329]-[330] (Buss JA).

[147] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14.

[148] *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J). Furthermore, as the only information which was held to be 'credible, relevant and significant' had in fact been disclosed (*Cazaly* [2007] WASCA 175, [298]-[299]), Cazaly 'lost no opportunity of advancing [their] case': *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14.

According to the evidence before the Court of Appeal, Minister Bowler had not actually considered the contested material nor did he have any actual knowledge of it.[149] Justice of Appeal Buss determined that requiring a decision-maker to disclose all information which may be within their corporate or constructive knowledge which they had not actually considered 'would be inconsistent with the status of procedural fairness as an essentially practical concept which is concerned to avoid practical injustice' and would give rise to 'significant practical difficulties'.[150] Applying a 'practical fairness' test provides another limitation on the often onerous requirements of the hearing rule.

B *The Corporate Knowledge of the Material in Question*

Secondly, the ultimate outcome of the Court of Appeal's decision is satisfactory because of a finding of fact regarding knowledge of the information which Cazaly claimed should have been disclosed. On the facts, Buss JA held that the SoPs matters were known to a member of Cabinet acting in a different capacity to the Minister responsible for making the decision in question. The Hon Alan Carpenter came to know of the SoPs matters while taking part in negotiations regarding State Agreement Acts[151] in his capacity as the Minister for State

[149] *Cazaly* [2007] WASCA 175, [318].
[150] *Cazaly* [2007] WASCA 175, [330].
[151] State Agreements are contracts between the government and resource project developers that establish rights and responsibilities in the development of resources. The agreements provide for issues such as the long term security of title and managing inconsistencies with current laws, The agreements are ratified by Parliament as 'State Agreement Acts'. See *State Agreement Acts* (2005) Department of Industries and Resources <http://wwsw.doir.wa.gov.au/aboutus/A98C862789A44114A9AC5D3DEB503354.asp> at 14 October 2007; *State Agreements* (2004) Chamber of Minerals and Energy Western Australia <http://www.cmewa.com.au/UserFiles/File/Publications%20-%20Industry%20Policy/State%20Agreements.pdf?PHPSESSID=5908f1ba882b8d3f5d1c06c7c2548e0b> at 14 October 2007.

Development and not in his capacity as the Minister administering the *Mining Act*. Justice of Appeal Buss concluded that:

> The knowledge which [Mr Carpenter] acquired in the course of the Negotiations was not the knowledge of the corporation sole established under s 10(1) of the *Mining Act*. That body corporate did not have, as one of its functions, the negotiation of amendments to State agreements ratified by other Acts. Accordingly, even if the knowledge of the corporation sole is relevant, it did not have any relevant knowledge concerning the Statement of Principles.[152]

On this finding of fact, the corporation sole responsible for administering the Act did not have the required knowledge of the contested information. While this factual situation did not have an effect on outcome of the case, the result may have been different in a different factual scenario. Had Mr Carpenter obtained 'credible, relevant and significant' information in his capacity as the Minister administering the *Mining Act*, it is possible that a successor minister could have been obliged to disclose that information under the requirements of the hearing rule.[153]

C *Statutory Framework*

Thirdly, Buss JA held that the provisions of s 12 of the *Mining Act* contemplate that a power granted to a Minister may be exercised according to the 'belief or state of mind of the Minister in relation to a matter'.[154] According to this reasoning, the knowledge of the natural person acting as Minister would be the

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[152] [2007] WASCA 175, [324].

[153] As an aside, if those facts had been in existence Buss JA might not have come to the ultimate decision on corporate knowledge that he reached, but that may be a question to examine in a paper on legal realism rather than within this thesis. Legal realism is a philosophical theory which essentially argues that 'in deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons (the latter figuring primarily as ways of providing post hoc rationales for decisions reached on other grounds)': Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 *Ethics*, 278, 281.

[154] *Mining Act 1978* (WA) s 12(3)(b) cited in *Cazaly* [2007] WASCA 175, [331] (Buss JA). Section 12(2) may also be indicative of the identification of actual knowledge of the natural person appointed to the office of Minister as the relevant knowledge (see below for the relevant text).

relevant knowledge in determining whether the decision-maker had accorded with obligations under the rules of procedural fairness. Provisions such as this may alleviate the problems which arise when a Ministerial office is statutorily incorporated, but in this particular situation, the identification of the relevant knowledge was implied from a section which dealt with the delegation of the Minister's powers.[155] In order to avoid ambiguity, it may be appropriate for legislative drafters to expressly provide for a clarification regarding a decision-maker's knowledge or state of mind when exercising statutory powers.

V CONCLUSION AND FOLLOW-ON ISSUES

This chapter has examined issues related to the knowledge relevant in determining whether procedural fairness has been accorded by a decision-maker in the context were a ministerial office may be statutorily incorporated as a corporation sole. The Cazaly litigation has demonstrated the complex legal issues which may arise when dealing with an incorporated ministerial office. This situation results in two

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[155] The text of *Mining Act 1978* (WA), s 12 relevantly provides:

12. Delegation

(1) The Minister may —

(a) by instrument in writing delegate any of his powers and functions (except this power of delegation) to —

(i) any officer of the Department; or

(ii) the person for the time being occupying a position in the Department,

being an officer named or a position specified in the instrument of delegation; and

(b) vary or revoke a delegation given by him.

(2) Any delegation of a power or function under this section by the Minister ceases to have effect upon the appointment (other than in the capacity of an acting Minister) of another person to be the Minister for the purpose of this Act.

(3) A power or function delegated by the Minister under this section —

(a) shall, if exercised or performed, be exercised or performed in accordance with the instrument of delegation; and

(b) may, if the exercise of the powers or the performance of the functions is dependent upon the opinion, belief or state of mind of the Minister in relation to a matter — be exercised upon the opinion, belief or state of mind of the delegate in relation to that matter.

legal 'beings', a natural person and the incorporated legal entity, existing at the same time and there may be ambiguity regarding the identity of the decision-maker who must accord procedural fairness. In the particular circumstances of the Cazaly litigation, Buss JA was correct in finding that only the actual knowledge of Minister Bowler was relevant in determining whether contested material should have been disclosed to the affected party according to the principles of procedural fairness. However, the principles concerning corporate and departmental knowledge in ministerial decision-making suggest that if 'credible, relevant and significant' material was within departmental files, it would have to be disclosed unless the statutory framework provides for the actual knowledge of the decision-maker to be the relevant factor.

In coming to his conclusion regarding corporate knowledge in *Cazaly*,[156] Buss JA distinguished *Peko*,[157] which specifically dealt with circumstances where different natural persons occupied a ministerial office, because that case concerned a decision-maker's failure to consider relevant considerations.[158] The following chapter will discuss the relationship between the relevant considerations ground of review and the hearing rule.

[156] [2007] WASCA 175.
[157] (1986) 162 CLR 24.
[158] *Cazaly* [2007] WASCA 175 [333] (Buss JA).

CHAPTER THREE: THE HEARING RULE AND RELEVANT CONSIDERATIONS

I INTRODUCTION

The judicial review ground of failure to consider relevant considerations provides that an administrative decision may be invalid where the decision-maker fails to consider a relevant consideration.[159] The fact that a cornerstone of the hearing rule deals with matters which are 'credible, *relevant* and significant' to a decision to be made raises a question as to whether there is any theoretical interaction between these two grounds of review. Aspects of the factual situation in the Cazaly litigation, such as the fact that the decision-maker disavowed reliance of information which may have been 'credible, relevant and significant' to the disputed decision in order to argue against a breach of the hearing rule, highlights the possible interaction.

This chapter will examine the basic principles of the 'relevant considerations' ground of review and will focus on the interaction of this ground of review with the hearing rule in circumstances where a ministerial decision-maker has wide discretionary powers to make a decision. The chapter suggests there is an inherent interaction of these two grounds and that this interaction results in practical difficulties for decision-makers in identifying their obligations. The chapter concludes by proposing that because of those theoretical similarities the same test should apply in order to simplify decision-making processes and judicial

[159] R *v Australian Broadcasting Commission; Ex parte Hardiman* (1980) 144 CLR 13, 34.

review proceedings in order to ensure certainty, accountability and predictability in administrative processes.

II RELEVANT CONSIDERATIONS

While a decision-maker may either reject or accept evidence depending upon its persuasiveness, they cannot ignore that information altogether if it is a relevant consideration.[160] The rationale for this ground of review also reflects the values of 'good government' discussed in Chapter One. Ensuring that decision-makers focus only on considerations which are relevant to the exercise of a statutory power ensures that they 'do not exceed their authority by deciding matters on bases that are not open to them.'[161] In order to successfully argue this ground of review, an applicant must show that there was an obligation on the decision-maker to consider a particular matter and that the failure to consider that matter invalidates the decision.[162]

A *Obligation to Consider*

This ground of review, which has been described 'one of the most frequently detected errors in judicial review',[163] is heavily based on statutory interpretation. Aronson, Dyer and Groves observe that the ground 'is available only where the Act in question *bound* the decision-maker to take account of the omitted consideration.'[164] The factors which a decision-maker is obliged to consider may

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[160] *Barrier Reef Broadcasting Pty Ltd v Australian Broadcasting Tribunal* (1992) 27 ALD 730, 737 (Wilcox J); *Riverina Broadcasters (Holdings) Pty Ltd v Australian Broadcasting Tribunal* (1992) 28 ALD 813, 818 (decision-maker ignored tendered evidence of depreciation charges claimed by a disappointed applicant for a commercial radio license when this evidence was relevant to the issue of commercial viability).

[161] Rares, above n 21 , 18.

[162] *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375 (Deane J).

[163] Creyke and McMillan, above n 25, 482.

[164] Aronson, Dyer and Groves, above n 1, 256 (emphasis in original).

be identified from express provisions of the statute (in which case 'it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive'[165]) or 'by implication from the subject-matter, scope and purpose of the Act'.[166] Statutory implication of decision-makers' obligations can, as noted in the previous chapter, lead to instability and uncertainty in decision-making processes. These problems can be even more pronounced in the context of the relevant considerations ground where a statute confers an undefined and wide discretion.[167] In those circumstances, it may be very difficult to determine what considerations the decision-maker is *bound* to consider.

The factual circumstances in *Peko*[168] included the change of natural persons occupying a Ministerial office and the existence of material on departmental files which was 'relevant' to the decision in question. The material in question was a letter which corrected information in a prior submission that was sent to the predecessors of the ministerial office. It was held that the decision-maker's failure to consider that letter invalidated the decision.[169] The obligation to consider that material was implied from 'the subject-matter, scope and purpose' of the Act and by taking 'a short and logical step to conclude that a consideration of that factor must be based on the most recent and accurate information the Minister has at hand'.[170]

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[165] *Peko* (1986) 162 CLR 24, 39 (Mason J).
[166] *Peko* (1986) 162 CLR 24, 39-40 (Mason J).
[167] Robin Creyke and McMillan, above n 25, 482-483.
[168] (1986) 162 CLR 24.
[169] *Peko* (1986) 162 CLR 24, 46 (Mason J), 66 (Brennan J) ('his ignorance of the facts does not protect the decision').
[170] *Peko* (1986) 162 CLR 24, 45 (Mason J).

However, identifying what is 'relevant' to a decision can often be more difficult than merely making short steps of logic. It is often not possible for legislation to comprehensively cover every matter that should be taken into account in making a decision and in some instances[171] a statute may only provide for a decision to be considered in the context of a wide topic such as 'the public interest'.[172] In *Cazaly*,[173] Buss JA noted that the use of 'in the public interest' as a criterion for the exercise of a statutory power 'usually imports a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation.'[174]

A principle developed by Deane J while His Honour was sitting on the Federal Court bench provides that where a statute does not specify relevant considerations, it is up to the decision-maker to determine what is relevant and the weight to be accorded to those issues 'in light of matters placed before him by the parties'.[175] Justice Mason approved of and applied this reasoning when noting that, in the determination of an application claiming the relevant considerations ground, it is not a reviewing court's role to 'determine the appropriate weight to be given to matters which are required to be taken into account in exercising the statutory power.'[176]

Thus, the obligation to consider relevant matters is distinct from the Ministerial discretion to determine the weight that should be attached to each relevant

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[171] For example, *Mining Act 1978* (WA), s 111A.
[172] Chris Wheeler 'The Public Interest: We Know its Important, but do we Know what it Means' (2006) 48 *AIAL Forum* 12, 21.
[173] [2007] WASCA 175.
[174] *Cazaly* [2007] WASCA 175, [19] (Buss JA).
[175] Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363, 375 (Deane J).
[176] *Peko* (1986) 162 CLR 24, 41 (Mason J) (His Honour held that 'unreasonableness' is the more appropriate ground of review).

consideration, which may be freely exercised and will not be circumvented by the courts. While a Minister has an obligation to consider all relevant matters, they can then use their discretion to determine the cogency of that consideration. This issue can have a practical impact on a reviewing court's role in determining whether there was a breach of this ground, but it highlights the difference between judicial review and merits review.[177]

B *Limits on the Obligation*

The obligation to consider relevant considerations could be very wide indeed. Once the relevant factors are identified, it may be simple to require a decision-maker to 'consider every relevant fact of which the decision-maker was or ought to have been aware of.'[178] However, as Creyke and McMillan note, this approach may lead to 'the dangerous implication that [a decision-maker] might be called on to prove that they had pondered over every statement and every document on the file.'[179] Justice Mason, again in *Peko*,[180] held that where a factor was 'so insignificant' to the decision, the failure to consider it will not be held to have 'materially affected the decision'.

The formulation of the test was clarified in *Lu v Minister for Immigration, Multicultural and Indigenous Affairs*,[181] where Sackville J held that the issue is 'whether the applicant has been deprived of the *possibility* of a successful outcome by the decision-maker's failure to observe the requirements of the

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[177] See *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J) for the application of this distinction in the context of procedural fairness.
[178] Creyke and McMillan, above n 25, 482.
[179] Creyke and McMillan, above n 25, 482; *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375.
[180] (1986) 162 CLR 24.
[181] (2004) 141 FCR 346 ('*Lu*').

statute' rather than 'whether the decision-maker would *probably* have reached the same result even if the omitted consideration had been taken into account'.[182] According to Sackville J, the test is to be applied with 'reference to the material actually before the decision-maker and, where the decision-maker's reasoning processes is known, taking into account his or her approach to the exercise of the particular statutory power'.[183] In *Lu*,[184] the departmental summaries before the decision-maker contained errors of fact and Sackville J held that the Minister's failure to consider the correct facts, which he was bound to consider, resulted in the applicant being denied the 'possibility of a successful outcome.'[185] According to Black CJ, the denial of this 'possibility' amounted to an error 'despite the strength of the considerations that support the Minister's decision'.[186] The notion of 'insignificance' is therefore a very particular concept that cannot to be applied lightly.

III CONSIDERATIONS AND THE HEARING RULE: SEPARATE GROUNDS OR CONNECTED CONCEPTS?

In judicial review of administrative action, it is possible for the same set of facts to give rise to several grounds of review. In *Peko*,[187] Mason J noted:

> Although it was not argued in the present case that the failure to consider the respondents' submissions amounted to a denial of natural justice, the foregoing reasoning [that the submissions should have been considered] confirms to the principles of natural justice, on the assumption that they are applicable. No doubt those principles would also require a Minister who has received additional submissions from one party, before acting on them, to afford the other interested arties an opportunity to answer them.[188]

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[182] *Lu* (2004) 141 FCR 346, [64] (Sackville J).
[183] *Lu* (2004) 141 FCR 346, [64] (Sackville J).
[184] (2004) 141 FCR 346 ('*Lu*').
[185] *Lu* (2004) 141 FCR 346, [69] (Sackville J), [32] (Black CJ) .
[186] *Lu* (2004) 141 FCR 346, [32] (Black CJ).
[187] (1986) 162 CLR 24.
[188] *Peko* (1986) 162 CLR 24, 45-46 (Mason J).

According to this proposition, the decision-maker's obligation to consider those submissions is linked with the obligation to afford the affected party and opportunity to present their case[189] and to 'hear the other side'.[190]

An examination of the facts in the Cazaly litigation suggests that the relevant considerations ground of review could also have been argued. The applicants suggested[191] that the fact Minister Bowler made his decision '"following [his] careful consideration" of the submissions and counter submissions of each of the parties and of advice provided by the State Solicitor's Office'[192] must logically mean that he 'had pondered over every statement and every document on the file.'[193] In arguing against an obligation to disclose information related to the 'Statement of Principles', Minister Bowler's contentions included the fact that he had no knowledge of those matters.[194] Theoretically, had the SoPs matters been 'credible, relevant and significant' to the decision, the Minister may have been under an obligation to consider them. The applicant sought access to information on the SoPs matters but if they felt that they were relevant to the decision, it may have been logical to argue that the decision should be invalid for failure to consider relevant considerations.[195]

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189 *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118.
190 Aronson, Dyer and Groves, above n 1, 370.
191 *Cazaly* [2007] WASCA 175, [313].
192 *Cazaly* [2007] WASCA 175, [49] (Buss JA).
193 Creyke and McMillan, above n 25, 482; *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375.
194 *Cazaly* [2007] WASCA 175, [316]. In *Peko*, it was held that 'if the Minister relies entirely on the departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with the law': *Peko* (1986) 162 CLR 24, 31 (Gibbs CJ).
195 For example, in *Tickner v Chapman* (1995) 57 FCR 451, the Chapmans, proponents of the Hindmarsh Island bridge project, argued that the decision should be quashed as the Minister had failed to consider submissions dealing with 'secret women's business'. These submissions

A *Mirrored Terminology*

Aronson, Dyer and Groves claim that there is 'an obvious overlap' between the obligation of a decision-maker to afford a hearing under the rules of procedural fairness and 'the "considerations" ground'.[196] While this assertion is based on the requirement that a decision-maker consider an affected party's submission, Mason J's observation regarding the consideration of submissions and the requirement to disclose those submissions to other interested parties[197] highlights the interaction between relevant considerations and disclosure aspect of procedural fairness discussed in this thesis.

The terminology which deals with aspects of the relevant considerations ground of review is similar to the principles regarding a decision-maker's obligation to afford procedural fairness. As observed in the discussion of procedural fairness in Chapter One, the key element of the disclosure obligations of the hearing rule concerns material which is 'credible, relevant and significant' to the decision. The High Court held in *VEAL*[198] that 'what is "credible, relevant and significant" information must be determined by a decision-maker before the final decision is reached.'[199] According to Deane J's reasoning, a decision-maker with a wide discretion must go though the same determinative process in order to decide whether a consideration is relevant to the decision.[200] When discussing what a decision-maker ought to consider, Brennan J held:

> A decision-maker who is bound to have regard to a particular matter is not bound to bring mind all the minutiae within his knowledge relating to the matter. The

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may well have been contrary to the Chapmans' interests in the decision itself but the failure to properly consider that information assisted them in having the decision quashed.

196 Aronson, Dyer and Groves, above n 1, 256.

197 *Peko* (1986) 162 CLR 24, 45-46 (Mason J).

198 (2005) 225 CLR 88.

199 *VEAL* (2005) 225 CLR 88, [17].

200 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375 (Deane J).

> facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, it they are not considered, it could not be said that the matter has been properly considered.[201]

The determination of relevance and significance affects the application of the both hearing rule and relevant considerations; there is an inherent overlap between these two grounds of review.

It is also possible to draw parallels between the 'materially affected'[202] limitation on what a decision-maker must consider and the 'practical unfairness'[203] limitation of what amounts to a denial of procedural fairness. The effect of Sackville J's 'possibility of a successful outcome'[204] test for the relevant considerations ground can also be reconciled with the High Court's stipulation that procedural fairness is concerned with the procedures that should have been followed when the decision was made.[205] The 'real risk' of prejudice arises where material is 'relevant, credible and significant'[206] and a decision-maker's failure to consider relevant information may result in the applicant being 'deprived of the *possibility* of a successful outcome'.[207]

B *Interlinked Obligations*

In circumstances where a decision-maker (such as a Minister) has a significantly wide discretion, do the requirements of the hearing rule extend to factors which *could possibly* be relevant but are not actually considered? In other words, is

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[201] *Peko* (1986) 162 CLR 24, 61 (Brennan J).
[202] *Peko* (1986) 162 CLR 24, 30 (Mason J) (no breach where factor was 'so insignificant' that the failure to consider it will not 'materially' affect the decision).
[203] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 (no breach where, despite lack of disclosure, applicant 'lost no opportunity of advancing his case').
[204] *Lu* (2004) 141 FCR 346, [69] (Sackville J), [32] (Black CJ) .
[205] *VEAL* (2005) 225 CLR 88, [19].`
[206] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).
[207] *Lu* (2004) 141 FCR 346, [64] (Sackville J).

there a point at which the requirement for material to be considered triggers the need to disclose that material to the affected party? It is possible to argue that the inherent connection between the two grounds of review provides that the fact a matter is a 'relevant consideration' triggers the requirement for it to be disclosed under the obligations of the hearing rule. Where information 'should be put aside from consideration by the decision-maker as not credible, not relevant, or of little or no significance to the decision to be made' even if it may be adverse to the interests of the affected person,[208] there is no requirement for it to be considered and there should be no requirement for it to be disclosed in accordance with the hearing rule. Similarly, the fact that a decision-maker is under an obligation to consider a matter implies that the affected party should have a right to make submissions in regards to that matter.

IV SIMPLIFYING JUDICIAL REVIEW

A *Practical Problems*

The statutory conferral of a very wide discretion to make decisions can cause significant problems if the decision is brought under judicial review. The obligations arising from the procedural fairness and relevant considerations grounds of review require decision-makers to ensure their decision-making process is sound in several ways.

Even though a decision-maker may not be under an obligation to consider a matter or decides not to accord sufficient weight to some particular piece of information, they could, theoretically, be under an obligation to disclose it. Following the

[208] *VEAL* (2005) 225 CLR 88, [17].

established approach for relevant considerations, a decision-maker has significant freedom to determine what weight should be conferred to relevant considerations.[209] However, it was held in *VEAL*[210] that even though a decision-maker had determined that a matter was not sufficiently credible or significant and was not included in the reasons for the decision, the material had to be disclosed because of possible 'subconscious effect'.[211] The High Court have held that what is 'credible, relevant and significant' is

> … not to be understood as depending upon whatever characterisation of the information may later have chosen to apply to the information when expressing reasons for the decision that has been reached. … It follows that the Tribunal's statement, that it gave no weight in reaching its decision to the letter or its contents, does not demonstrate that there was no obligation to reveal the information to the appellant and to give him an opportunity to respond to it...[212]

Courts do not make determinations on validity based on what the decision-maker asserts was part of the decision-making process but rather on the effect of the process, as viewed from the outside. Even though the High Court has accepted that it is not the reviewing court's role to 'determine the appropriate weight to be given to matters which are required to be taken into account in exercising the statutory power',[213] a decision may, theoretically, be invalidated for failure to disclose a relevant consideration which the decision-maker did not consider to be 'salient facts which give shape and substance to the matter'.[214]

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[209] Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363, 375 (Deane J).
[210] *VEAL* (2005) 225 CLR 88, 96.
[211] *VEAL* (2005) 225 CLR 88, 97 referring to *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).
[212] *VEAL* (2005) 225 CLR 88, 96. Similarly, in *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1, 15 (Sheppard J) it was noted that the mere use of phrases such as 'has been read', 'has been made aware of and 'have been noted' do not prima face amount to the proper consideration of a matter.
[213] *Peko* (1986) 162 CLR 24, 41 (Mason J).
[214] *Peko* (1986) 162 CLR 24, 61 (Brennan J).

The courts have found that practicality is an important factor in examining the validity of an administrative decision.[215] However, convoluted judicial review processes which provides for different tests, requirements and limitations for two different grounds of review which have inherently-linked practical applications, is not entirely practical. Even though 'flexibility' is often billed as one of the positive aspects of the rules of procedural fairness the examination of judicial review cases, the previous chapters show the confusion surrounding decision-makers' obligations and the judiciary's role in determining the validity of administrative decisions.

B *A Simple Approach*

To aid in the practical application of a decision-maker's obligation to disclose, the relevant consideration test should simply and easily be transferred across to the requirements of the hearing rule. Rather than having one test for the hearing rule and another for relevant considerations, a simple requirement on a decision-maker to disclose all relevant considerations so that the affected person has the opportunity to respond to them would eliminate confusion and result in better decision-making; doing so supports the 'good government' values behind the rationales for judicial review.

The simple test should provide that where a decision-maker determines that a matter is relevant, meaning that it must be considered, it must be disclosed and, conversely, where a decision-maker considers that a matter is not relevant and is not considered, it does not need to be disclosed. Where it is the decision-maker's

[215] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14; Peko (1986) 162 CLR 24, 30 (Mason J).

prerogative to determine the relevance of a decision, it seems incorrect for a court to retrospectively find that a decision-maker ought to disclose information which the decision-maker did not consider, and was not bound to consider, in making the decision.

V JUSTIFICATION FOR THE AMALGAMATING THE TWO TESTS

Using the 'relevant considerations' test to determine decision-makers' obligations under the hearing rule is appropriate because it is practical and continues to be consistent with case law related to the two issues. Applying this simpler test is practical because it avoids the need to examine complex issues which may only be specific to certain factual scenarios. If the test focused only on relevance, there would be no need to consider issues of whether the decision-maker had corporate or actual knowledge or which of those two types of knowledge was applicable in determining whether procedural fairness was accorded.

Problems regarding whether the information 'could' have influenced the decision,[216] can also be avoided. Logically, if the information which 'could' have influenced the decision was relevant, they should have been considered and, regardless of the weight assigned to that information,[217] it should have been disclosed. Had that information not been relevant but was before the decision-maker without being disclosed the relevancy test would provide that no disclosure is necessary. If that non-relevant information had in fact been considered, the

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[216] *Johns v Release on Licence Board* (1987) 9 NSWLR 103, 116. This statement was approved by the High Court in *VEAL* (2005) 225 CLR 88, 96.

[217] Justice Mason held that the 'preferred ground' on which 'a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance or, or has give excessive weight to a relevant factor of no great importance' is *Wednesbury* unreasonableness: *Peko* (1986) 162 CLR 24, 41 (Mason J).

'irrelevant considerations' ground would come into operation and it is not necessarily a procedural fairness issue as procedural fairness only requires 'relevant, credible and significant' material to be disclosed.

A further justification of this approach is based on the rationale behind administrative law – the principle of supporting 'good government' and encouraging the making of 'better' decisions. The approach proposed here provides that all 'relevant, credible and significant' material that ought to be considered should also be disclosed. This process is the best way to allow affected parties to respond to the specific considerations that will form the basis of the Minister's decision. Allowing affected parties that opportunity arguably promotes 'good government' by ensuring that justice is seen to be done and that Ministers are making fully informed decisions.

Furthermore, this approach may stream-line the administrative law process in relation to disclosure of information. This is particularly evidenced in situations where a Minister fails to apply the relevant considerations test and in turn fails to disclose all 'relevant, credible and significant' material. Under the current approach there may be some argument as to whether there are two grounds of action: a failure to make relevant considerations and a failure to apply the hearing rule. However, under the new approach, because disclosure is a subsidiary of the relevant considerations process, the two failures of the Minister may be appropriately considered as the same mistake. This would avoid the necessity to make (and judges to hear) time-consuming submissions about the hearing rule when, truly, only a misinterpretation of the relevant considerations test has occurred.

This new approach does not necessarily override the current legal principles related to the issues of procedural fairness and relevant considerations. As previously noted, the issue of relevancy is a core element of decision-makers' obligations to disclose under the rules of procedural fairness, and the link between an obligation to consider submissions and the hearing rule was highlighted in *Peko*.[218] The simplified test was essentially applied in relation to the letter that was not considered by the Minister in that case: the letter was relevant and should have been considered, and the failure to consider the letter also amounted to a breach of procedural fairness in the sense that the affected party should have had the opportunity to present its case to the Minister before the decision affecting them was made.[219]

Applying the approach to the Cazaly litigation, it is arguable that as the SoPs matters were not relevant to the decision[220] (or were not significantly 'salient facts which give shape and substance to the matter'[221]) and there was no obligation to consider them, there was also no obligation to disclose them.

VI CONCLUDING COMMENTS

The arguments in this chapter may appear to be somewhat unnecessary. If a case before a court dealt with a situation in which relevant material was not considered and not disclosed, the disputed decision would no doubt be quashed on one ground or the other (if not both). However, what this chapter has tried to show is that there is a link between the review ground of relevant considerations and the

[218] (1986) 162 CLR 24, 45-46 (Mason J).
[219] *Peko* (1986) 162 CLR 24, 45-46 (Mason J).
[220] *Cazaly* [2007] WASCA 175, [298].
[221] *Peko* (1986) 162 CLR 24, 61 (Brennan J).

obligation to disclose under procedural fairness and that this link may be useful in assisting decision-makers and courts to clarify the requirements of decision-makers' obligations in complicated situations. In the particular situation of material being on departmental files which was not actually considered by a decision-maker it may be simpler for the determination of whether the material ought to be disclosed or not to turn on relevance rather than whether there was 'constructive knowledge' or a 'significant risk' of prejudice.

A practical problem of this approach is whether 'significant practical difficulties'[222] may arise from an obligation to disclose *all* 'relevant' material regardless of whether it materially affected the outcome of the decision.[223] In this circumstance, there may be no risk of prejudice in the practical outcome of the case, but there is nevertheless a flawed decision if relevant matters were not considered and the applicant may have 'lost [the] opportunity of advancing [their] case'.[224] The solution here may be that the integration of the two tests may provide a better process for determining what is relevant[225] for the relevant considerations ground. Given the courts' acceptance that decision-makers with wide discretionary powers have considerable room to decide on the weight accorded to matters before them,[226] applying the 'significant' aspect of the disclosure test to the relevant considerations ground may assist with balancing decision-makers' obligation to consider their discretion to accord the appropriate

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[222] *Cazaly* [2007] WASCA 175, [330].

[223] *See Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applications 134/2002* (2003) 211 CLR 44 and *McLachlan v Australian Securities & Investments Commission* (1999) 85 FCR 286 (no breach of procedural fairness in failure to disclose material on file which was not actually considered).

[224] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14.

[225] Wheeler, above n 171, 21.

[226] *Peko* (1986) 162 CLR 24, 41 (Mason J) (His Honour held that 'unreasonableness' is the more appropriate ground of review).

weight to the relevant considerations. Integrating the two tests would make it easier for both decision-makers and the judiciary to identify obligations and make determinations on validity for both the hearing rule and the relevant considerations ground.

CONCLUSION

I THE BASIS FOR THIS THESIS

This thesis examined some legal principles surrounding the judicial review of discretionary ministerial decision-making. The two main areas of focus were the obligations of the hearing rule in circumstances where a minister is statutorily incorporated as a 'corporation sole' and the interaction between the hearing rule and the obligation to consider relevant considerations. An underlying principle has been the ideas of 'good government', which include certainty, credibility, accountability, openness, fairness and participation in administrative decision-making.[227]

A *The Problem*

A clear understanding of the requirements and rationale of the procedural fairness rules will assist in determining the application of the rules in the many situations where there are currently no binding or persuasive precedents. As discussed in Chapter One, a multitude of rules and exceptions may be applicable in a determination of whether procedural fairness has been accorded depending on the 'circumstances of the particular case'.[228] 'Flexibility' in the requirements of procedural fairness allows the rules to be applied in numerous situations.[229] However, it is contrary to the rationale behind 'good government' to allow uncertainty about a decision-maker's obligations to lead to controversy, delay, litigation and, ultimately, major disruptions to the operation of the economy.

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[227] Elliot, above n 19, 292.
[228] *Kioa* v *West* (1985) 159 CLR 550, 585 (Mason J).
[229] See *Kioa v West* (1985) 159 CLR 550, 614 (Brennan J).

Following two years of legal conflict, reams of appeal books and written submissions,[230] three days of hearings and a 143-page Court of Appeal judgment against which Special Leave to Appeal in the High Court is being sought, the procedural fairness issue in the Cazaly litigation can certainly be seen as a complex legal question. Justice of Appeal Buss gave eight reasons as to why the issue of corporate knowledge was not relevant in determining whether procedural fairness had been accorded by a decision-maker who had not considered nor had knowledge of material referred to in submissions.[231] Had there been a simpler approach to delineating decision-makers' procedural fairness obligations, the confusion and expensive litigation following the appeal against the Minister's decision could have been avoided.

B *The Aim*

The basic aim of this thesis was therefore to identify the proper application of the rules of procedural fairness before a particular issue reaches a decision-maker in order to avoid the practical issues which arise when the courts examine the legality of a decision that is later challenged. Clarifying decision-makers obligations for procedures and processes ensures 'certainty and predictability'[232] and may prevent the problems arising out of contested administrative decisions. To clarify these requirements, this thesis has attempted to find a new way of looking at the obligation to disclose adverse information so that the affected person has the opportunity to present their case.

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[230] *Cazaly* [2007] WASCA 175, [9] (Pullin JA).
[231] *Cazaly* [2007] WASCA 175, [328]-[336] (Buss JA).
[232] Aronson, Dyer and Groves, above n 1, 471 referring to Brennan, above n 3, 28.

II THE ISSUES AND OBSERVATIONS

A *Corporate Knowledge in Ministerial Decision-Making*

This thesis has found that were a ministerial office is statutorily incorporated as a 'corporation sole', the issue of corporate knowledge is relevant in identifying ministerial decision-making obligations. Where the 'decision-maker'[233] who is the 'repository of the power'[234] stipulated by the Act is a corporate entity, 'relevant, credible and significant[235]' material within the knowledge of that entity, not just within the knowledge of the natural person occupying that ministerial office,[236] must be disclosed to the affected person. This approach is consistent with the principle that the knowledge of the department is attributable to the responsible minister. Where decision-making processes can be started with one natural person occupying a ministerial office and concluded with another natural person occupying that office,[237] ensuring the continuity of information within administrative agencies even when 'Ministers' may change from time to time is of practical importance.

However, the knowledge of the natural person acting as Minister is relevant in circumstances where the statute provides that powers granted to a Minister may be exercised according to the 'belief or state of mind of the Minister in relation to a

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[233] *VEAL* (2005) 225 CLR 88, [19].
[234] *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J).
[235] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).
[236] The authorities which provide that unless the 'adverse information' was considered by the decision-maker, there is no obligation to disclose material which may be on departmental files, for example, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants 134/2002* (2003) 211 CLR 441, 458-460; *McLachlan v Australian Securities & Investments Commission* (1999) 85 FCR 286, may be distinguished on the basis that they do not deal with ministerial decision-makers.
[237] See, for example, *Cazaly* [2007] WASCA 175, [46]; *Peko* (1986) 162 CLR 24, 35.

matter'.[238] In circumstances where such statutory arrangements do not exist and 'relevant, credible and significant'[239] may be within departmental files but was not considered by the decision-maker, there may be issues concerning both the hearing rule and relevant considerations. If the material was indeed 'relevant, credible and significant', was the decision-maker obliged to consider it and was the decision-maker therefore obliged to disclose it even though they did not consider it?

B *The Hearing Rule and Relevant Considerations*

This thesis suggested that there is an inherent theoretical link between the terminology and obligations of the hearing rule and the relevant considerations ground. Chapter Three of this thesis noted that where a decision-maker has a very wide discretion, it may be difficult to identify all the relevant considerations to a matter from the express provisions of the statute or 'by implication from the subject-matter, scope and purpose of the Act'.[240] While a decision-maker may either reject or accept evidence depending upon its persuasiveness, they cannot ignore that information altogether if it is a relevant consideration.[241] It would therefore amount to a breach of the 'relevant considerations ground' for a decision-maker to not consider 'relevant, credible and significant' material in

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[238] See, for example, *Mining Act 1978* (WA) s 12(2), cited in *Cazaly* [2007] WASCA 175, [331] (Buss JA).

[239] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

[240] *Peko* (1986) 162 CLR 24, 39-40 (Mason J).

[241] *Barrier Reef Broadcasting Pty Ltd v Australian Broadcasting Tribunal* (1992) 27 ALD 730, 737 (Wilcox J); *Riverina Broadcasters (Holdings) Pty Ltd v Australian Broadcasting Tribunal* (1992) 28 ALD 813, 818 (decision-maker ignored tendered evidence of depreciation charges claimed by a disappointed applicant for a commercial radio license when this evidence was relevant to the issue of commercial viability).

departmental files and amount to a denial of procedural fairness for the decision-maker to deny the affected person the opportunity to advance their case.[242]

There is confusion about the requirements of the hearing rule and it is often difficult to determine what a 'relevant consideration' is where decision-makers have wide discretionary powers. While courts are not to 'determine the appropriate weight to be given to matters which are required to be taken into account in exercising the statutory power',[243] a decision may, theoretically, be invalidated for failure to disclose a relevant consideration which the decision-maker did not consider to be 'salient facts which give shape and substance to the matter'.[244]

III THE SUGGESTED SOLUTION

This thesis has suggested that incorporating the two tests for both the hearing rule and the relevant considerations ground may be a solution to some of the practical problems arising from the grounds of review. Requiring the disclosure of all relevant material under the hearing rule eliminates discussion of issues regarding knowledge and using the 'significant' aspect of the hearing rule test and assists in identifying relevant considerations.[245]

The complexity of problems that can arise out of administrative decision-making may in a sense be justified by the fact that Ministers must often make decisions

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[242] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14.
[243] *Peko* (1986) 162 CLR 24, 41 (Mason J).
[244] *Peko* (1986) 162 CLR 24, 61 (Brennan J).
[245] This approach is consistent with the current approach outlined by Mason and Brennan JJ in *Peko* (1986) 162 CLR 24, 41 (Mason J) 61 (Brennan J) as well as Sackville J's clarification that the limiting factor requires a determination of whether the applicant was denied the 'possibility' of a positive outcome: *Lu* (2004) 141 FCR 346, [64] (Sackville J).

that need to weigh up competing interests and multifaceted expectations.[246] However, the existence of separate grounds of review for inherently interlinked concepts further complicates the identification of decision-makers' obligations. Integrating the requirements of the hearing rule, the process of considering submissions and responses from the affected parties, allows decision-makers to have access to a wider range of relevant material upon which to base their decision[247] and make better decisions. In turn, better decisions promote 'public confidence in the decision-making process and the correctness of decisions',[248] and support the values of 'good government.'

[246] Chris Wheeler, 'The Public Interest: We Know its Important, but do we Know what it Means' (2006) 48 *AIAL Forum* 12, 14.
[247] Aronson, Dyer and Groves, above n 1, 376.
[248] Creyke and McMillan, above n 25, 516.

APPENDIX

CASE NOTE: *RE MINISTER FOR RESOURCES; EX PARTE CAZALY IRON PTY LTD* [2007] WASCA 175

A Facts

This case concerns an application for judicial review arising out of a fight to secure mining rights over an area of land in Western Australia's Pilbara region which includes the 'Shovelanna' iron ore deposit. Cazaly Iron Pty Ltd ('Cazaly') lodged an application for writ of certiorari and declaratory relief in the Supreme Court of Western Australia against the Minister for Resources ('Minister'). The second respondents to the application were members of a joint venture ('RRJV') managed by Rio Tinto, which had held an expired exploration licence ('Expired Licence') over the Shovelanna deposit which had been granted under the *Mining Act 1978* (WA) ('the *Mining Act*'). RRJV had held the Expired Licence since 27 August 1989.

The RRJV was entitled to apply for renewals of the exploration licence under s 61 of the *Mining Act* and between 27 August 1989 and 26 August 2005, RRJV had applied for and was granted those exemptions. RRJV prepaid the rental for the contemplated renewal term to the Department of Industry and Resources ('the Department') and dispatched the application for renewal by courier on 19 August 2005. However, the application package was not received by the Mining Registrar at Marble Bar by close of business on 26 August 2005. Consequently, the licence held by RRJV expired at midnight on that date and the land subject to the expired licence became vacant Crown land. On 29 August 2005, Cazaly

lodged and application for exploration licence over subject land in accordance with s 58 of the *Mining Act*.

B *Appeals to the Minister*

On hearing of Cazaly's application for an exploration licence, Rio Tinto wrote to the Hon Alan Carpenter, who as Minister for State Development was responsible for the administration of the *Mining Act*, foreshadowing request for Cazaly's application to be terminated by an exercise discretion granted by s 111A of the *Mining Act*. RRJV applied for mining leases over the Shovelanna deposit; Cazaly lodged objections to RRJV's applications on the basis that Cazaly's application for an exploration licence was first in time and had priority under s 105A of the *Mining Act*. Two subsequent applications made by third parties for exploration licences over Shovelanna. Rio Tinto then made a formal request for the Minister to terminate the applicant's application pursuant to s 111A(1) of the *Mining Act*. Section 111A reads as follows:

111A. Minister may terminate or summarily refuse certain applications

(1) The Minister may —

(a) by notice served on the mining registrar or the warden, as the case requires, terminate an application for a mining tenement before the mining registrar or the warden has determined, or made a recommendation in respect of, the application; or

(b) refuse an application for a mining tenement,

if in respect of the whole or any part of the land to which the application relates —

(c) the Minister is satisfied on reasonable grounds in the public interest that —

(i) the land should not be disturbed; or

(ii) the application should not be granted;

…

(4) The powers conferred by subsection (1) are in addition to any other powers of the Minister under this Act.

Cazaly and the RRJV parties provided submissions and counter-submissions to the Minister in relation to his exercise of discretion under s 111A. The Department also submitted ministerial briefings. During this process, Cabinet changes resulted in the Hon John Bowler MLA ('Minister Bowler') becoming responsible for the administration of the *Mining Act*. Minister Bowler decided to exercise his power under s 111A(1)(c) of the *Mining Act* and terminated Cazaly's application for an exploration licence.

The statement of reasons for this decision was presented in a media statement dated 27 April 2006. The Minister's reasons included WA iron ore policy provided to the Minister by the Department of Industry and Resources, the public interest in promoting investment in WA and principles of fairness. The iron ore policy was said to promote the security of long-term tenure for iron ore resources to ensure the feasibility of the necessary extensive capital infrastructure investments for iron ore mining. The Minister also decided that it was in Western Australia's public interest to promoted investment in the resources industry by ensuring security of ownership and the avoidance of consequences which are disproportionate to minor oversights. Consistency and fairness in the circumstances amounted to the Minister declaring that had the roles of RRJV and Cazaly had been reversed, the decision would have been made in the favour of Cazaly.

C *Application for Judicial Review*

Cazaly applied to the Supreme Court of Western Australia for judicial review of the Minister's decision to terminate their application for the exploration licence. In its application for prerogative and declaratory relief, Cazaly submitted that:

- under s 111A(1)(c)(ii) of the *Mining Act*, the Minister should only have had regard to the application itself and not private interests of third parties;
- the iron ore policy was inconsistent with the *Mining Act* and the Minister is prohibited from taking it into account;
- there were no reasonable grounds for the Minister to be satisfied termination of application in public interest; and
- the procedure adopted by respondent in exercise of discretion under s 111A(1)(c)(ii) was unfair, the decision was unreasonable in the *Wednesbury* sense, and the Minister failed to accord procedural fairness.

D *Issues for the Court of Appeal*

The issues to be determined by the Court were:

- Whether a competing application for mining tenement is a relevant public interest consideration;
- Whether circumstances surrounding RRJV's renewal application as relevant to exercise of discretionary power under s 111A(1)(c)(ii);
- Whether the Minister's decision was based on protection of private interests;
- Whether matters of policy and principle governing the exploration of mineral deposits in WA were relevant considerations;
- Whether the iron ore policy consistent with Act;
- Whether the Minister's exercise of decision was fettered by the State's iron ore policy;
- Whether the maxim *expressio unius est exclusio* should be applied to the scope of s 111A(1)(c) of the *Mining Act* by reference to s 111A(1)(d);
- Whether decision based on reasonable grounds in public interest; and

- Whether the applicant was denied procedural fairness.

E *The Court of Appeal's Decision*

The substantive application was heard by Buss, Wheeler and Pullin JJA in the Court of Appeal in March 2007. The Court of Appeal's decision was handed down on 28 August 2007. The Court of Appeal unanimously agreed that the appeal should be dismissed. The Court of Appeal held:

- Competing applications for mining tenement by third parties could reasonably give rise to public interest consideration when viewed objectively;
- The Minister was entitled to take circumstances surrounding RRJV's failure to renew expired licence into consideration as that consideration was relevant to the exercise of the Minister's discretionary power;
- The Minister's decision was not based on protection of private interests as reflected in 'fairness' and 'consistency of outcome' considerations in the statement of reasons;
- This Minister was entitled to take matters of policy and principle governing exploration of mineral deposits in WA into account.
- The WA iron ore policy was consistent with Act and the Minister was not prohibited by the *Mining Act* from taking policy and its objectives into consideration;
- This Minister did not regard decision as being fettered by WA iron ore policy; rather the Minister gave proper, genuine and realistic consideration to merits of application;

- The *expressio unius est exclusio* maxim did not apply to determine the scope of s 111A(1)(c) by reference to s 111A(1)(d) as each was separate and distinct provision without conflict;
- The Minister did not reach a decision which so unreasonable that it may be described as being made in bad faith or so absurd that no sensible person would dream it within powers of the Minister;
- Cazaly was in possession of sufficient information to be able to understand substance of competing parties' submissions and content of policies and procedures the Minister took into account in reaching his decision.

Cazaly has applied for Special Leave to Appeal the Court of Appeal's decision in the High Court of Australia. At the time of writing, the High Court is yet to determine the application.

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