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Question 1

82/100

Advise Kristen:
Markers comments in bold

Potential Breaches of Directors Duties:
Each director owes a fiduciary duty to the company both under Cl and statute. (s181)
In this case, Gav, Wax and Jason are all potentially liable for breach of these duties.

Duty to Exercise Care, Diligence and Skill:
This duty can arise out of Cl fiduciary principles and s180 of Corps Act. Daniels v AWA provides
a fiduciary duty of care which is complemented in statute, s 180(1). This duty requires directors
to exercise reasonable care in the performance of their office. Wheeler adds to this requirement
establishing an obligation to remain continually involved in company affairs. [√]

Kristen may argue Gav and Waz have breached this duty in failing to meet the modern standard
of care required of directors. Daniels v AWA. (BJR ?) The failure to adequately monitor and
control the blocks expansion and expose losses on property acquisitions in Sydney and
Melbourne would arguably fail to satisfy the objective e test that requires a director to exercise
care and diligence expected of a reasonable person in the same circumstances with the same
responsibilities. S 180(1) [√]

Jason may also be held in breach of this duty for failing to take reasonable steps to guide and
monitor management of the company. Daniels and Friedrich impose a high obligation on
directors to stay abreast of company affairs and specifically its financial capacity. [√]

Thus, Jason is unable to blindly rely on the advice of Gaz and Waz. While delegation is
permitted, s 198D(1), Jason is still required to take a diligent interest in the company.(State
Tobacco). Clearly Jason’s reliance becomes unreasonable when he becomes aware of the
financial troubles of the company and fails to inquire further, instead taking an acquiescent
approach to the company. “Whatever you reckon guys…”

Therefore, as Jason cannot delegate ultimate responsibility for the company (Wheeler), Jason
could also be found in breach of this duty. [√√]

Defence: Business Judgement Rule, s 180(3)
Gav and Waz may argue that they acted under the belief that they were acting in the company’s best interests. This belief must be honest and reasonable, such that it is a belief that a reasonable person in their position would hold. This rule is framed as a presumption in favor of the director to allow opportunity for risk taking by directors. However the onus is on Gav and Waz to prove that the judgement was in good faith, for a proper purpose, they were properly informed and based on a rational belief that it is in the company’s best interests. S180(2). [✓]

This defence is likely to fail as there exists evidence that they were not properly informed, despite Kristen’s attempts to warn them of potential dangers. Gav and Waz also arguably gained personal interest in the arrangement with ‘Fees’ and hence this was not a rationally held belief.

Clearly this ground of defence would fail for Jason as he was not involved in the decisions of the company to argue that he was acting in the best interests of ‘Block.’ [✓]

**Duty To Prevent Insolvent Trading: S 588g(1)(2)**

The directors could also be held liable for insolvent trading in relation to the ‘palazzo-style’ tiles that were ordered when the company was in financial difficulty. It must be established that this debt was incurred by the directors when the company was or would become insolvent, and there exist reasonable grounds to suspect insolvency, or a reasonable person should have been aware.

S 588G(1)(2)
Insolvency as defined under s 95a as an inability to meet debts when they become due and payable. [✓]

In this case, Gav and Wax were aware of the Block’s financial difficulties, yet entered into further debt of $50 000 causing the company to become further indebted and arguably insolvent. Based on the standard required in Friedrich, an ordinary director with this knowledge would have suspected that the company would become insolvent by virtue of entering into this debt. *Commonwealth Bank v Fredrich*

Jason could also be held liable as a director is unable to rely on lack of knowledge regarding financial matters to avoid financial liability. *Fredrich* This however would be harder to establish. [✓]

**Defences:**
Directors may argue that there were reasonable grounds to expect that when debt was incurred, the company was insolvent. S 588H(2). However, due to the meeting just prior to the debt being incurred at which the directors became aware of the company’s financial state, this defence is likely to fail. [✓]
Under s 588H(3): Jason may argue that he had reasonable grounds to believe that a reasonable person was providing information regarding the company’s insolvent, however this would be difficult to make out. [√]
Hence it is likely that the directors will be also liable under this ground.

**Duty Not To Appropriate Corporate Opportunities: S 182, 183**

A director is precluded from taking a business that belongs to accompany, where the company has not abandoned the opportunity.
In this case, Gac and Waz are receiving a 5% commission on loans entered into between their tenants and ‘Fees’. Hence based on the test in *Regal v Hastings* they have acquired this opportunity for commission by virtue of their position as directors of ‘Block’ and have profited in gaining a 5% commission. The company has not given consent to the directors, (*QLD Mines v Hudson*) nor has there been adequate disclosure. Hence Waz and Gaz are liable under this duty and the statutory provision, s 182 in which they have improperly used their position to gain advantage to the detriment of the company.

*(Conflict on interests s 191??)*

Kirsten could also argue the duty to act in good faith in the company’s interests, however this may be more difficult to prove as the directors could argue they were acting bona fide for the benefit for the company.
If Kristen is successful in proving a breach then Directors may be liable under s 1317D, civil penalty provision. [√]
QUESTION 1 B
In respect of Directors duties, the fiduciary relationship exists between the company and the director. Hence, consistent with the Internal Management Principle and Proper Plaintiff Rule the company must bring an action for breach of duties. *Foss v Harbottle.*

However, under s 236, Kristen and other members may bring an action that is derivative of the company’s right to do so. To establish these ground, must first satisfy the conditions under s 237(2) which outlines the grounds for granting leave to bring an action. [√]

Therefore Kristen would need to give:

c) notice to the company – 14 days written notice

a) establish that it is probable that the company will not bring the proceedings

b) Prove she is acting in good faith

d) is a serious question to be tried, and

e) is in the best interest of the company.

[√√]

**Conclusion:**
It is likely that these grounds will be established as Kristen in acting in the best interests of the company in avoiding a collapse of the company. Further, the company is unlikely to bring an action and it appears that she is acting in good faith. *(is it likely??)*
QUESTION 2

Advise Bob:

Greenmoney (G)
G wishes to invalidate Nickel’s (N) share reduction. To establish this, G must prove that the share reduction contravenes s 256B(1) which sets out 3 mandatory requirements of reduction. While share reduction of issued capital is a permitted exception to the capital maintenance rule, (Trevor v Whitworth), if N fails to comply with the requirements under s 256, the reduction can be declared invalid. [\sqrt{\text{ }}]

Requirements of Share Capital:

a. Shareholders Test:
   Must be fair and reasonable to company’s shareholders as a whole. G may argue that the cancellation of non-metal shareholders in consideration for 55cents per share was not fair or reasonable. This however will be likely to fail as this price was determined by an experts report. Assuming this report was independent and credible the price offered may be held to be fair. Nicron v Catto

b. Creditors Test:
   Reduction must not materially prejudice the company’s ability to repay creditors. In this case the court will look at whether Nickel has sufficient assets to represent the remaining capital, consistent with the capital maintenance rule. Trevor v Whitworth. Arguably, this share reduction was in the interests of the creditors.

c. Voting Test:
   Reduction must be approved by shareholders as set out in s 256C. As this is a selective reduction, a special resolution must be past at a general meeting, however there must be no votes cast in favor of anyone who will receive a reduction or an ordinary resolution agreed to at a general meeting. In this case there was a special resolution passed (defined in s 9; 75%). Non-metal group had 80% of the vote and there appears, based on the evidence, that the non-metal shareholders passed a resolution approving the reduction. Hence this voting requirement appears to have been established. [Winpor?]

Conclusion:
It appears unlikely that G will be able to challenged this share reduction.

Heavy:
To force Heavy to pay the debt to Nickel, Nickel must prove that there was a valid contract to
which Heavy is bound. Heavy has argued that their employee did not have authority to enter into
the contract and Nickel should have been aware of this. Nickel may argue it relied on the
grounds of apparent authority and s 129 assumptions, hence contract is valid. [$\sqrt{\ }$]

Authority to Contract:
The company has the legal capacity to enter a contract under s 124(1). Companies can
contract either directly via the corporate seal, s 123 or via authorized persons, s 127 or
alternatively, indirectly under actual or apparent/ostensible contract.

In this case Nickel can argue that the employee had apparent authority which can be
implied from the employee's conduct. The employee through use of the company
letterhead and forged signature of the managing director (who is authorized to contract on
behalf of the company under s 198A) constituted apparent authority, giving the
impression to Nickel that they had authority. Hely Hutchison.

Further, s 128(1) allows Nickel to make assumptions when dealing with a company.
The ground of apparent authority is codified under s 129(3) which allows a third party to
assume anyone held out by the company to be its agent has been duly appointed and has
the authority to contract. To rely on this assumption, 4 conditions must be established:
(Freeman v Lockyer) [$\sqrt{\ }$]

1. Must show that the company made a representation that the agent has authority to
   enter into a contract. In this case the letterhead would satisfy this condition.
2. Representation must be made by someone who has actual authority. The forged
   signature of the managing director would satisfy this condition based on s 198A
3. Clearly Nickel was induced to enter the contract by the company’s representation.
4. And, the company’s constitution did not deprive the company power to enter into the
   contract.

Therefore Nickel may argue that the contract is still enforceable as it may be implied/inferred
that the employee had apparent authority. To rely on this assumption, s 129(3), it must be
proven that the third party did not know or suspect that this assumption was incorrect. S 128(4)

In this case, despite the allegations of Heavy it appears that Nickel did not know or suspect that
the employee was not authorized to contract. Further, under s 128(3) Nickel can still rely on
the assumption under s 129 event though the employee acted fraudulently in forging the
signature. S 128(3).

Conclusion:
Nickel can enforce the contract with Heavy, thus requiring Heavy to repay debt of $5 million.

Amiable:
Amiable is seeking to exercise its rights under the floating charge and claim the sum of $6 million.

The floating charge created in August 2003, over the assets of Nickel allows a company freedom to deal with these assets without being concerned with the rights of the chargee while the company is still solvent. However once the company defaults on the loan, ‘crystallization’ occurs in which the floating charge converts into a fixed charge. The chargee, in this case Amiable, may then take action regarding the property covered by the charge.

However, Nickel was under voluntary administration from Jan 1 2004 till April 1 2004. Amiable purported to exercise its rights under the floating charge on 28 March 2004. While a company is under administration, as Nickel was, there is a freeze on actions and proceedings against the company and its property. Thus during this time period, the charger Amiable, cannot enforce the floating charge against the company. S 440 A-J. Instead Amiable must now wait for the company assets to be pooled and distributed in accordance with s 555 by the liquidator, Bob. However creditors will be paid ahead of shareholders.

Alternatively, Nickel may argue it is a voidable transaction under s588A-F. s588FA(1) defines an unfair preference as being whether the company and the creditors are parties to the transaction and the creditor receives more than they would have if the company was not wound up. Typically this occurs when an insolvent company repays a debt to a creditor prior to the commencement of winding up. Re Emanuel

The close relation of Rose, a director of Nickel to Amiable due to her substantial shareholding in the company my satisfy this condition as it is suggested that the price value of the security had eroded during 2003 and resulted in Amiable pressuring Nickel into ‘topping up’ security.

To establish either an unfair preference, s500FA or an un-commercial transaction, s588FB, it must have been entered into prior to the relations back day- the day when the court ordered winding up or when voluntary administration was entered into, which ever is earlier. S 588FE. In this case, voluntary administration was entered into on 1 Jan 2004, however the charge was not exercised until 28th March. This may raise potential problems. If s 588FE can be satisfied, Nickel can have the transaction declared voidable and the court may make orders under s 588FF.

Defenses under 588FG are likely to fail as clearly Amiable benefited from the transaction and it may be argued that Rose was not involved in good faith. A further argument may be that it is an invalid floating charge under s 588FJ as the floating charge which was created in August 2003 is within the period of 6 months before the relation back day of 1st April, but before winding up began. If Amiable is unable to prove that the company was still solvent the charge will be declared void. [√√]

Loyal
As an employee of Nickel, Loyal is entitled to compensation of $2 million from Nickel. As Nickel is being wound up, Loyal will receive compensation in accordance with the order of priority for the repayment of debts under s 556. Therefore, Loyal will only receive payment if there is sufficient funds once expenses for administration, employee’s wages and entitlements have been paid up. If there is remaining funds under s 556(1)(f), Loyal may receive compensation.

Loyal may attempt to recover compensation from the companies in the metal group. To establish this action, Loyal must prove that these companies were in an agency relationship and therefore liable for each others debts. Hence this is an exception to the doctrine of separate legal entity. *Salomon’s Case.* This exception is construed narrowly as this doctrine is considered as a fundamental principle in corporations law. *Salomon’s Case, Lees Farming.* In this case, it would be unlikely that Loyal could prove an agency relationship between Nickel and Metal group as there is not the requisite degree of control over the company. *Smith Stone and Knight.*

Therefore it is unlikely that Loyal will be able to pursue the metal company for compensation wed by Nickel. Further, many of the metal group companies are insolvent. Hence, even if one could imply and agency relationship, the priority criteria under s 555 would also need to be satisfied. [✓]
QUESTION 3(C):

Introduction:
The duty to act in good faith for the benefit of the company is a necessary obligation to protect shareholders interest over others who have an interest in the company. Duty to the nature of the structure of a company, the potential abuses of power by directors, the subordiance of shareholders to creditors in relation to payment of capital when a company is wound up and vulnerability of shareholders to oppressive conduct, such a duty is imperative.

Duty of Good Faith:
The duty to act in good faith ensures directors act in the best interest of the company as a whole. (s181). This duty exists both at common law and statute law. Shareholders under this duty are protected from directors exercising their powers for improper purposes and failing to act bona fide for the benefit of the company as a whole. While it may be argued that this duty unfairly protects shareholders at the expense of other interest in the company. This argument can clearly be rebutted due to the lack of standing of individual shareholders in pursuing an action for alleged breach. Percival v Wright. Shareholders are only able to pursue this action under the Statutory Derivative Action and therefore this duty is owed to the company as a whole rather than individual interests of shareholders.

Corporations Act:
Under the current structure of the Corporations Act 2001, it may be argued that the shareholder has significant rights and authority to participate in management and hence this duty is unnecessary. However, Directors are able to exercise wide discretionary powers that potentially undermine the interests of shareholders and thus this duty is necessary. Specifically under s198A, directors have exclusive power to manage the corporation. This is given a broad interpretation by the courts based on the doctrine of non-interference which recognizes the power of the directors to manage company affairs. Automatic Self-Cleansing Filter. Directors under this section have the power to appoint managing directors and chairmen of the board while shareholders can only prevent a person being a managing director by voting them off the board.S203F(1) Therefore directors have the power to appoint the most influential people within the company. Hence, while it appears that shareholders have substantial rights to indirectly control management of the company, there are a number of factors that reduce this control.

The lack of shareholder control was recognized by Berk and Means, who argued that due to shareholder apathy, directors have gained significant control over general meetings. As a result of this increased directors power, the duty to act in good faith is a necessary restriction
on directors to ensure shareholders interests are preserved. This duty is designed to prevent directors from acting within their own interests.

**Conclusion:**

The director’s role is to run the company in the best interests of the company, which is usually to the benefit of both current and future shareholders. While there exist significant tensions and complexities in enforcing such a duty due to the differing interests of creditors, directors and shareholders, this duty is imperative to ensure companies do not become a cloak for fraudulent activity. Salema. Ensuring a company is run in the best interest of the general body of shareholders ensures the company is regulated, controlled and directors towards achieving maximum profits and long term stability. The limitations on individual shareholders in bringing an action for breach of this duty (s236, s237), operates as a necessary control on individual shareholders complaints regarding company decisions that are not in their interests. [✓]
QUESTION 1:

Grounds of Review Available to Joe:

Under the ADJR Act, there are a number of grounds available to Joe:

1. **Validity of Ministers Directions:**
   
   Under s 5(2)(e), the Rule against Dictation, the exercise of discretionary power must not be at the behest of another person. Therefore challenging the decision of the board not to review his license involves determining the validity of the minister’s direction. Generally a minister’s decision which imposes on a decision maker, or in this case the board, about what decision to make can be deemed an improper exercise of power. S5(2)(e). This exists alongside the common law non-abdication and non-fettering principles which describe that a discretion cannot require additional criteria, limit the discretion exercised or tell the board the decision to make. *Green v Daniels* [N]

   It must be determined whether directions of the minister were intended to give guidance or effectively bind the board in its decision making. *Telstra v Kendall*. In *Smokers Case*, the minister could determine such guidelines for restricting the board’s discretion. However, a direction must not conflict with the board’s discretion, specifically in making a decision in favor of a person which would be authorized in the absence of the direction. *R v Port London*. In this case, the direction of the Minister in regards to imposing additional restriction on Zone Q and the requirement of only Australian employees does conflict with the discretion granted to the board under the act. Hence on these grounds, Joe may challenge the validity of the Ministers Direction and hence the decision of the board based on these directions.

Further grounds of Review:

Consideration of irrelevant factors:

Joe may argue that the Board considered irrelevant factors in exercising its power. S 5(2)(a). The considerations to be taken into account under s 2 of the act can be taken as inclusive rather than an exhaustive list of considerations, hence allowing the board to have regard to other relevant factors.
However, in this case the board arguably placed too much reliance on the minister’s directions, inflexibly applying the conditions and failed to have adequate regard to the individual merits of the case. *CCSU, Murphy Oils* [√]

**Consideration of Relevant Matters:**
Joe could also argue that the board failed to give adequate consideration to relevant factors thus giving rise to a ground of review under s 5(2)(b). The courts however will be conscious of engaging in merits review and will not review the weight placed on various considerations—however may argue this under the ground of reasonableness. The failure to take into account the relevant factors in s 2 of the Act including the interests of existing fishing operations and the economic viability of the industry may be argued to have materially affected the decision. *Peko.* Hence the board failed to take into account considerations that they were bound to take into account. This is based on considerations defined as ‘proper genuine and realistic consideration’ to all relevant matters. *Hindi v MIEA* Arguably, Joe’s evidence and the letter from Fishwatch were relevant considerations that should have been taken into account and potentially would therefore exposed the error regarding Area X. Hence Joe has a number of credible grounds to challenge the decision with a good chance of success. *(Tickner?)*

2. (a) **STANDING:**
For fishwatch to establish an action, the best option would be under the ADJR Act at FC. The difficulty however will be to establish standing as Fishwatch must prove they are a ‘person aggrieved’ under s 5. However the facts appear analogous to *Nth Coast Environmental Council* in which standing was granted as the organization that established it had adequate standing that was more than mere intellectual and emotional concerns. Fishwatch would arguably be capable of establishing sufficient proximity as the group is protecting endangered species in the area, has obvious connections with the subject matter and is organizing other applicants. Hence it is likely that Fishwatch would be able to establish standing.

Fishwatch must establish that the decision is made under an enactment and of an administrative character, (s3) – clearly this would be proven as the final decision was made under an Act.

b) **Breach of S4:**
The issue here will be to determine whether the legislation intended the breach of s4 to constitute invalidity. Once invalid, the decision is treated as if it no longer exists. Thus one must determine whether the statute envisaged that a breach lead to invalidity. *Project Blue Sky.*
Hence a decision may be unlawful but still be valid. In this case as international conventions are not binding unless domestically enacted and the consequences of invalidity would lead to severe inconveniences it may be argued that a breach of s4 did not constitute invalidity. (s16) However it must be recognized that there exists much judicial creativity in determining consequences for breach. [v]
QUESTION 3:

1. Inspector and minister: Are they bound to observe procedural fairness. (PF)
In determining when PF will apply the following conditions must be satisfied:
- Must be an administrative decision
- Decision must affect the rights, interests or legitimate expectation of an individual. Haoucher.
And courts will presume the legislature intended PF to apply unless expressly excluded. Kioa.
In this case clearly it is of an administrative decision. (Residual category: Applying general rules to specific circumstances) which affects individual rights. [√]

The main issue in this case is whether both the minister and the inspector are bound to observe procedural fairness. Hence it must be identified as to whether the decision made constitutes a final and operative decision which has undergone stages or whether there are discrete decisions made by different decision makers, each capable of attracting the obligation of procedural fairness. Twist v Randwick.
In this case it appears the former is most appropriate. The Inspector merely made a recommendation to the minister which the minister could then choose to accept or reject. Thus, in the initial stages of investigation there was no potential for the Inspectors findings to adversely affect an individual. Further, the minister could effectively make the decision against the recommendations of the minister and hence there was no need for procedural fairness in the initial stages as any error could be remedied by the minister. Marine Hull v Hurford.
Therefore assuming two decisions are part of the one process in which there is not procedural fairness owed by inspector as any breach can be remedies in the second stage as the minister is able to make an independent analysis and does not merely apply inspectors findings. [√√]

2. There is a common law presumption reflected in the ADJR Act under s 5(1)(a). As there is nothing in the Act to expressly limit the obligation to observe procedural fairness, if it can be established that someone’s rights, interests or legitimate expectation will be affected by the decision, then procedural fairness will be established. Jia, Kioa. It must be a procedural, not substantive obligation.
To determine if procedural fairness applies a multi-factual approach must be adopted, taking into account the individual circumstances of each case. FAI. [√]

Factors:

a. Rights and Interest Affected:
In this case the ministers decision clearly affected the interests of an individual, namely Liam which differs from the impact on wider members of the public. Kioa. Liam’s business has been directly affected by the decision, thus suggesting this element would be established. (?)

b. Legitimate Expectation:
Liam may argue he held an expectation of a procedural right, advantage or opportunity. This is a question of fact. In this case, based on the considerations in the Act. s 2(a),(b) Ian may argue that he expected the potential of closure of existing pools such as his would be an influencing factor, and if this was to change, he would be informed. FAI. Ian must establish that this legitimate expectation was reasonable, well founded and more than hope. Haoucher Also reliance and detriment. Lamb. This appears to be established on the facts. [√]

c. Nature of Power being Exercised:
Decisions legislative in nature which are likely to apply more generally to public are less likely to attract procedural fairness obligations. FAI Insurance. Thus if it can be established that this decision was a polycentric decision, Liam’s argument of procedural fairness would be significantly undermined. Liam could argue that although there were policy considerations and the consideration of the public interest under s2(a), the decision was still made a matters of individual merit, s2(b) and therefore procedural fairness is still required. Ridge v Baldwin, FAI

The impact and degree of adversity on the person is also an influencing factor. FAI. Assuming that there exists two parts to the same decision, there is no express right of appeal and based on the above analysis it appears that despite the policy considerations involved, there is sufficient impact on the individual interests. [√√]

Assuming
QUESTION 4:

1. **Validity of Regulations:**

To determine if regulations are valid, statutory authority must be established. It must first be noted that these regulations, as they are NSW subordinate legislation cannot be challenged under the ADJR Act as jurisdiction does not extend to NSW and the regulations are not of an administrative character. S 3(1) Hence validity of the regulations must be challenged under CL

The main issue in this instance is whether the regulations are authorized by the head statute, the **Buildings Act 1999. (‘the Act’)**

*McEldowney v Ford* established a broad 3 stage test which is used as a general guide to determine whether statutory authority can be established. Essentially, however it is a question of statutory interpretation. (this test has been applied in Australian cases *Bradbury* and *Turner*)

\[ \begin{align*}
\text{Test:} \\
\text{1. Must determine the scope, object and purpose of the authorizing act.} \\
\text{In this case, the authorizing act uses the terms ‘necessary and convenient’ (s3) to grant the power to promote the purpose of the act which appears to be the preservation of the existing colonial architecture in the Rocks Area. This purpose can be inferred from construction of the statute as a whole. S15(1)AA *Statutory Interpretation Act*. The terms ‘necessary and convenient’ are analogous to the power conferred in *Shannon v Scott* in which the power granted a broad guideline for regulations to be made under the Act. However such legislation was only to supplement not complement the Act. [√\ n]} \\
\text{2. Determine the scope, object and purpose of the regulations.} \\
\text{These regulations provide strict guidelines and impose pecuniary penalties (s1) which arguably narrow the type of activities/buildings permitted in the authorizing act. The regulations provide the additional criteria of only using sandstone, which is far narrower than the general provisions of the authorizing act.} \\
\text{3. Determine whether the regulations come within the scope, purpose and object of the authorizing act:} \\
\text{The regulations must not conflict with the purpose of the act which is to preserve and promote colonial architecture in the Rocks. These regulations however, narrow the field by imposing a pecuniary penalty, granting the Minister additional power than that conferred in the statute to cancel licenses, requiring only sandstone buildings and imposing the highest environmental standards.} \\
\text{In taking into account the nature of the decision maker, statutory power and the interests affected, (*McEldowney*), it appears the regulations are outside the scope of the act. The main act} \\
\end{align*}\]
gave the power to ‘regulate’ [x], not ‘prohibit’ [√] all other building material but sandstone.  
*(Shanahan v Scott)*.

As in *Swan Hill v Bradbury*, in looking at the subject matter of the act, it is clear that the act should not be construed to include prohibition. These regulations seek to widen the purpose of the authorizing act and hence may be challenge the validity of such regulations.

A further test under *State of SA v Tanner*, further strengthens this argument; the regulations must be ‘reasonably proportionate’ to the ends/purpose specified in the authorizing act. In this case the regulations go beyond what is reasonable proportionate to achieve the statutory purpose. *(as discussed above) (some)*

Hence these regulations may be declared invalid as they grant power and impose restrictions which supplement rather than complement the process of the authorizing act. *Shananan v Scott*

**Q2: Validity under Other Grounds:**
Ian also has further avenues available to challenge the decision of the Minister. As this is in NSW jurisdiction, one cannot rely on the ADJR Act, hence must establish common law grounds.

The main grounds of review available in this instance are:
- Ultra Vires; acting beyond power
- Unauthorised purpose
- Unreasonableness

First, it must be determined whether delegation by the minister to the secretary is valid. Under s 4 of the Act, the minister is given express power to delegate, thus it appears such delegation is valid under a formal instrument. However it may be argued that the Minister has breached the Common Law principles of non-fettering and non-abdication. There must be a genuine exercise of discretion. Hence a minister cannot entirely delegate all responsibility of decision making. *DSS v Alvero.*

This argument may be rebutted under the *Carltona* Principle of administrative necessity if it can be established that such delegation is justified due to the nature of the decision maker. Further, as this is a mechanical type decision rather than discretionary, such delegation may be permitted. *DSS v Alvaro.* [?]  
Hence, this is not a strong argument for challenging the decision.

**Unauthorised Purpose:**
Exercise of power must not be beyond the power granted for the purpose of the act. Hence may challenge the decision arguing that the secretary has acted for an ulterior purpose. Based on a question of fact, it may be argued that the prohibited use of sandstone is not covered in the statute and hence the power of decision making was exercised for an improper purpose. *Toohey*

**Unreasonableness:**
If a decision is so unreasonable that no reasonable person could have made it, then the court may intervene. *Wednesbury*. In this case, it may be argued that the secretary gave excessive weight to the consideration regarding sandstone and hence was an unreasonable conclusion. It must however be noted that this is a difficult ground to establish as the courts are hesitant to engage in merits review. *Khan v Minister*. Therefore, unless it can be established that the secretary’s decision was so unreasonable that no person could have exercised the power, this ground will not be established.

The strongest ground of review in this case appears to be either under the unreasonable ground, specifically for ‘making a decision that has an unnecessarily harsh effect’. *Wilcox*. \[\checkmark\]

In taking into account the relevant considerations in that his concrete building material appears as sandstone, Ian may argue that this invalidates the minister’s decisions. Further, these grounds are not mutually distinct and thus may be relied upon to support each other. However the invalidity of the decision will be difficult to establish.

Q3. Remedy:
Ian can apply to the NSW SC, however his best option would be to take action to the FC under s 39B of the Judiciary Act, which grants the FC the same jurisdiction as the HCA under s 75(v)

The most appropriate remedies would be to apply for a writ of certiorari to quash the decision, if an error on the face of the record can be established. *Craig v SA*. Ian may also apply for a writ of mandamus to have the decision remade according to law. Further, Ian may seek a declaration which provides an authoritative statement that the decision is invalid and can be used as further basis for having the decision reconsidered. \[\checkmark\]

4. Incomplete Statement of Reasons:
Under s 13 of the ADJR Act, there is a right to reasons. However, Ian is unable to rely on this as this act is under NSW jurisdiction and NSW is not included under the jurisdiction of the ADJR, nor does it have equivalent provisions. Hence, as there is no Common Law right to reasons, Ian cannot pursue this by arguing a legal error. Alternatively however, under the *Freedom on Information Legislation* (Cth), Ian may be able to obtain reasoning for the decision. Under this legislation, the reasoning must be sufficient to justify the boards findings and hence may give rise to potential legal error. (?)