

# **Judicial Review of Administrative Action: An administrative decision-maker's perspective – Full version**

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# Introduction

I have been directly involved in the making of administrative decisions in the exercise of statutory discretionary powers for almost 40 years. This involvement has been both as a decision-maker in the first instance working for local and state government agencies in Victoria and NSW, and as Deputy Ombudsman (and previously as an Ombudsman investigator and Local Government Inspector) reviewing the exercise of discretionary powers by other public officials. In my review roles I have been involved in assessing the conduct and decisions of thousands of state and local government officials exercising powers under hundreds of statutes. Several of my investigations/decisions have also been the subject of judicial review in the NSW Supreme Court.<sup>1</sup>

While much has been written over the years about administrative law, it has invariably been written from the perspective of lawyers, not of the public officials bound to comply with that law. While I am legally trained, informed by my practical experience I attempt in this paper to look at judicial review of administrative action from an administrative decision-maker's perspective.

Administrative decision-makers are not free to exercise statutory discretionary powers in any way that they may wish. They must act within the limits of the statutory authority (or jurisdiction) that has been conferred on them. Where an administrative decision-maker acts outside his or her jurisdiction or does not provide procedural fairness to a person or entity adversely affected by the decision, that action can be challenged through judicial review proceedings. The role performed by the courts in the review of administrative action is said to be to protect the rule of law<sup>2</sup>. Judicial review proceedings focus on the 'legality' of administrative decisions or actions and determine whether the decision or action was free from "*jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and 'error of law on the face of the record'*"<sup>3</sup>. In a 2000 High Court decision<sup>4</sup>, Hayne J argued that there "*...is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction*"<sup>5</sup>. *... The former kind of error concerns departures from limits upon the exercise of power. The latter does not*".

While a court undertaking judicial review cannot substitute a correct and preferable decision for an unlawful administrative decision (i.e. review the decision on its merits), the court is able to:

- quash unlawful administrative action and expunge an unlawfully made administrative decision from the record,
- prohibit the decision-maker from taking any further administrative action in relation to a matter,
- require the decision-maker (or if necessary, a different decision-maker) to remake the administrative decision according to law,
- declare the correct legal position in relation to the administrative action, or
- where appropriate, issue an injunction to stop all further administrative action in relation to a matter.

Over time the courts in Australia have significantly broadened the scope of judicial review of administrative action from a narrow focus on good process to what more and more is in effect a review of the substance or merits of such action. From the perspective of an administrative decision-maker, this 'jurisdiction creep' has now reached the extent that few aspects of the exercise of statutory discretionary powers cannot, in one way or another, be brought within the scope of such review. The current position appears to be that where judges are minded to do so, for example if they perceive a serious problem with the merits or impact of an administrative action<sup>6</sup>, they are likely to be able to identify some procedural or evidentiary failure which can be categorised as falling within at least one of the recognised grounds of judicial review (37 potential grounds are listed under 11 categories in the Annexure to this paper).

Such a broad interpretation of the scope of judicial review of administrative action exacerbates problems for administrative decision-makers that have long been hallmarks of the current system. These problems include:

- *Uncertainty*: Various legal rules laid down by the courts and the scope of administrative action that can be subject to judicial review are constantly changing and evolving over time through judgments handed down in numerous decisions scattered randomly amongst many hundreds of administrative law cases heard each year in the wide range of Australian Federal, State and Territory courts.
- *Variability*: As the application of many of the administrative law principles varies depending on the individual circumstances of the case, administrative decision-makers often have little certainty as to how a court might apply those principles in practice.
- *Complexity*: As administrative law judgments are written by lawyers for lawyers, not for the vast majority of administrative decision-makers who are required to comply with them, there is a widening gap in understanding between the rule makers and those obliged to comply with them.
- *Incomprehensibility*: The courts articulate the relevant legal principles in highly technical language, often incomprehensible to the non-lawyers who make up the vast majority of administrative decision-makers.

Presumably the role of judicial review of administrative action is to protect the rule of law. Unfortunately, I would argue that in practice it is ad hoc, largely random (cases are selected by applicants not the courts) and reactive. Administrative law as interpreted by the courts is also very complex and written in highly technical language, so the majority of the administrative decision-makers who must apply it are unlikely to understand its technicalities. Even those administrative decision-makers who are legally trained can be expected to have difficulty keeping up with the scale and scope of administrative law decisions. Given the uncertainty, variability, complexity and incomprehensibility issues referred to above, I argue in this paper that judicial review by the courts does not achieve a proactive, systemic or comprehensive outcome in the performance of that role.

While it will not be simple or easy, the only workable alternative is to identify and implement effective practical strategies to stop, and then reverse the trend to ever increasing levels of technicality and difficulty. Such strategies would need to focus on both operational and oversight practices and procedures involving a radical re-think about ways to ensure that public officials obey the law, only act within their jurisdiction, and act reasonably in the circumstances of each case.

## Scope of judicial review: a creeping jurisdiction?

As recently as March 2016 a Federal Circuit Court judgment<sup>7</sup> described the scope of errors by the AAT that would constitute jurisdictional error in the following terms:

*“The Tribunal Decision is only liable to be set aside upon review if it involves jurisdictional error: ... Further, an error by the Tribunal, will only constitute jurisdictional error if the Tribunal:*

- a) identifies a wrong issue;*
- b) asks the wrong question;*
- c) ignores relevant material; or*
- d) relies on irrelevant material,*

*in such a way that the Tribunal’s exercise or purported exercise of power is thereby affected resulting in a decision exceeding or failing to exercise the authority or powers given under the relevant statute: Minister*

*for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 ... per McHugh, Gummow and Hayne JJ.*"

In practice there is a far wider range of grounds on which courts in Australia have identified as justifying judicial intervention to overturn administrative decisions or actions. While not purporting to be exhaustive, the **Annexure** to this paper summarises 37 such grounds (only two of which incorporate the four circumstances listed in the quote above).

Despite the often repeated claim by the courts that the law does not concern itself with the merits of administrative action<sup>8</sup>, as the list in the **Annexure** highlights, over time the Australian courts have significantly broadened the scope of the grounds for judicial review of administrative action. A relatively recent expansion was the High Court's decision in *Minister for Immigration & Citizenship v Li and Anor* [2013] HCA 18 (*Li*), in which the Court adopted (or at least clarified) a broader interpretation of what constitutes 'unreasonableness' in the legal sense (e.g. by linking unreasonableness to rationality and logicity), than the narrower 'traditional' view that had been in place since the 1948 *Wednesbury* decision. Highlighted by the decision in *Li*, it can be argued that this 'jurisdiction creep' has now reached the extent that there are few aspects of administrative decision-making (in the exercise of a statutory power) that could not, in one way or another, potentially be brought within the scope of judicial review.

To illustrate this point, two particular aspects of administrative action that the courts commonly state are the preserve of administrative decision-makers, but which in practice courts commonly review, are fact finding and the giving of weight to various factors and the making of findings as to credit/credibility.

## Fact finding and weighting

For the purpose of distinguishing between law and fact, questions of fact can include findings of 'primary facts' and the application of those facts to settled legal principles. The courts argue that in relation to fact finding and the giving of weight to various factors "... [t]here is no error of law simply in making a wrong finding of fact"<sup>9</sup>. Further, that "... it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power ... I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance"<sup>10</sup>.

While the courts consistently emphasise that fact finding is a matter for administrative decision-makers, they also make it clear that this is subject to the proviso that such assessments and weightings are reasonable in the circumstances. As the High Court said in *Li*<sup>11</sup>, the area of "free discretion" of the decision-maker to make such assessments "... resides within the bounds of legal reasonableness"<sup>12</sup>.

This issue about the distinction or dividing line between law and fact has been the subject of some interesting discussion in the UK context, particularly spurred on by a 2013 UK Supreme Court judgement<sup>13</sup> in which Lord Hope of Craighead expressed the view that a "pragmatic approach should be taken to the dividing line between law and fact". This reflected views expressed in earlier UK cases, for example a 2006 case in which it was argued that the division between law and fact was "not purely objective, but must take account of factors of 'expediency' or 'policy'"<sup>14</sup>. In a blog post referring to that 2013 UK decision, Professor Mark Elliot, Reader in Public Law at the University of Cambridge, argued that "...if the distinction between jurisdictional and non-jurisdictional errors of law is malleable, then that which distinguishes law from fact appears to be positively liquefied"<sup>15</sup>. An even more colourful description of the situation resulting from the 2013 case can be found in a blog post by Alison Young, a Fellow of Heartford College, University of Oxford, who suggested that if "... prizes were awarded to 'Distinctions in English law', then a good contender for the 'lifetime achievement' award would be the distinction between 'law' and 'fact'. Whilst adventurers have their Swiss Army knife, and the Dr has his sonic screwdriver, lawyers have the multi-purpose malleable

'law/fact' distinction which is just as capable of opening or closing avenues of review, or providing a *deus ex machina*<sup>16</sup> 'get out of jail free' card..."<sup>17</sup>. Referring to views expressed by Elliott, Young argued however "...that it is not the distinction that is liquefied, but its application".

In a recent case involving an unrepresented litigant that raised various grounds of appeal (some on questions of law and some on "other grounds"), the Appeal Panel of the NSW Civil and Administrative Tribunal explicitly adopted the "'pragmatic approach' to the 'dividing line between fact and law'" advocated in the 2013 UK Supreme Court judgment referred to above<sup>18</sup>. While I believe the majority of administrative decision-makers are likely to welcome, at least in principle, a 'pragmatic approach' being adopted by courts and tribunals, in practice such an approach is likely to lead to further jurisdiction creep.

Various failures or errors that can occur in the process of fact finding can be categorised as an 'error of law' if the cause of the mistake can be ascribed to at least one of a wide range of reasons. As highlighted in the example in the Table below, the position has now been reached where, in practice, the scope of the available grounds for judicial review of administrative action (in the exercise of a statutory power) is potentially so broad that it is difficult to identify any significant fact finding related error that could not potentially be identified as falling within at least one of them.

Typical fact finding related administrative errors that can occur at one stage or another in the course of an administrative process are failures to: ask the right question or address the question posed, to look for relevant information, find relevant information due to inadequate inquiries, understand or appropriately interpret available information, properly assess the relevance or importance of available information, or properly explain the basis for a decision. The Table below sets out the various grounds on which a court might potentially be able to overturn an administrative action/decision in relation to each of these fact finding related errors:

<b>Error/failure/mistake</b>	<b>Examples of <u>potential</u> grounds for judicial intervention include</b>
Failing to ask the right question or address the question posed	<ul style="list-style-type: none"> <li>• Error of law [see Annexure at 2) (a) &amp; (b)]</li> </ul>
Failing to look for relevant information or failing to find relevant information due to inadequate inquiries	<ul style="list-style-type: none"> <li>• No probative evidence that proves or helps to prove key facts [see Annexure at 7) (a)].</li> <li>• Lack of probative evidence to the extent that the decision has no basis on the available evidence [see Annexure at 7) (b)].</li> <li>• Failure to make adequate inquiries [see Annexure at 7) (e)], etc.</li> </ul>
Failing to understand or to appropriately interpret the available information	<ul style="list-style-type: none"> <li>• Deficient reasoning due to a failure to rationally consider probative evidence [see Annexure, at 5) (c)] or decisions that do not logically flow from the facts [see Annexure at 5) (d)-(g)], etc.</li> <li>• Mistake in respect of key evidence or error of fact due to misunderstanding or misconstruing a claim raised [see Annexure at 5) (f)].</li> <li>• Unreasonable outcomes due to <i>Wednesbury</i> unreasonableness (as expanded by the decision in <i>Li</i>), decisions not based on findings or inferences of fact supported by logical grounds [see Annexure at 6) (a)] , or an obviously disproportionate response [see Annexure at 6) (b)], etc.</li> </ul>

<p>Failing to properly assess the relevance or importance of the available information</p>	<ul style="list-style-type: none"> <li>• Attention given to extraneous circumstances such as factors of little or no relevance [see Annexure at 5) a)].</li> <li>• Failure to properly assess the weight of evidence, e.g. by failing to consider or give appropriate weight to relevant factors or giving disproportionate or excessive weight to some factor of little importance or any weight at all to an irrelevant factor or a factor of no importance [see Annexure at 5) (a)-(b)].</li> <li>• Contrary to the overwhelming weight of available evidence [see Annexure at 5) (g)].</li> <li>• Evidence not meeting the applicable standard of proof [see Annexure at 7) (d)], etc.</li> </ul>
<p>Failing to properly explain the basis for a decision</p>	<ul style="list-style-type: none"> <li>• No justification evident on the ‘record’, not disclosing any material by reference to which a rational decision-maker could have evaluated certain evidence, etc [see Annexure at 7) (c)].</li> <li>• Lacking evident and intelligible justification [see Annexure at 5) (e)].</li> </ul>

The above table highlights that a question as to whether an issue is within the scope of judicial review can in large measure come down to categorisation. How a judge categorises an issue can in practice be heavily influenced (either consciously or subconsciously) by a range of factors including the perceived importance of the principle at stake, the seriousness of the impact on the individual, and/or whether the issue raises serious concerns about propriety or fairness. From an administrative decision-maker’s perspective, and particularly given the time and resource constraints under which they operate, it could be argued that any attempt to make the process and outcome of a reasonably complex or contentious administrative action judicial review-proof would in practice impose an almost impossible burden on day-to-day decision-making.

## Findings as to credit/credibility

In relation to the making of findings as to credit/credibility, as McHugh J said in a 2000 High Court judgment, “...a finding on credibility ... is the function of the primary decision maker ‘par excellence’”<sup>19</sup>. However, if such a finding was, for example, not based on any evidence (i.e. “any evident or intelligible justification”<sup>20</sup>) or there was a failure to rationally consider the available evidence<sup>21</sup>, then various grounds for judicial intervention could well be held to be available<sup>22</sup>. More recent judgments have been at pains to point out that there are circumstances where findings as to credibility by administrative decision-makers may found jurisdictional error<sup>23</sup>. If a decision is based on the acceptance or rejection of the evidence of a particular party/witness, and that decision was based on an assessment as to whether a witness is to be believed or not, then the failure to give reasons for that finding may found jurisdictional error<sup>24</sup>, and could lead a court to infer that the decision-maker “had no good reason”<sup>25</sup>. Further, where a decision is detrimental to a person’s rights or interests and a significant basis for that decision was a finding about credibility, a failure to disclose to the person affected material on which such a finding was based may well be found to be a denial of procedural fairness<sup>26</sup>.

In my view it all comes down to categorisation. While the courts might not directly review a finding on credibility, they can, and on occasion clearly do, review the component parts of the process that lead up to such a finding from the perspective of legal reasonableness and find jurisdictional error. When this occurs, the court is not substituting its finding about the merits in place of the finding reached by the original decision-maker, just blocking the finding of that decision-maker.

## The current position

The current position now appears to be that where judges are minded to do so, for example if they perceive serious problems with the merits or outcome of an administrative action<sup>27</sup>, they are likely to be able to identify some procedural or evidentiary failure which can be categorised as falling within at least one of the recognised grounds of judicial review. The attitude of judges to the parties, the issues, the perceived fairness of the processes used and/or the outcomes of administrative action can have a significant bearing on how they categorise the issues arising in a case and apply relevant administrative law principles, as well as their approach to statutory interpretation (should they identify ambiguity in applicable legislation)<sup>28</sup>. In this context the ‘attitude’ of judges might be influenced by their personal values or philosophy, or their reaction to the circumstances of the particular case. See for example the comments by T Forest J in *K v Children’s Court of Victoria and Federal Agent Mathew Court* [2015] VSC 645 at [25]: “A reviewing court, when considering the reasonableness of an exercise of discretion, must assess the substantive decision, and arguably the decision maker’s reasoning process, in the context of the subject matter, scope and purpose of the legislation under which that discretion is conferred. **The temptation to verge into the merits is thus difficult to resist...**” [emphasis added].

It has been noted in several influential cases over the years<sup>29</sup> that where judges regard an administrative decision as unreasonable, this may give rise to an inference that some other kind of jurisdictional error has been made. As far back as 1949, in a High Court judgment Dixon J referred to the concept in the following terms:

*“If the result appears to be unreasonable on the supposition that [the administrative decision-maker] addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. **It is not necessary that** [the presiding officer] **should be sure of the precise particular in which** [the administrative decision-maker] **has gone wrong.** It is enough that [the presiding officer] can see that in some way [the administrative decision-maker] **must have failed in the discharge of his exact function according to law**”<sup>30</sup>.*

The recent cases involving the ICAC and Margaret Cunneen are good examples of how ‘attitude’ may well have impacted on the approach adopted by presiding officers to their interpretation of the relevant legislation, and therefore on the outcome of the cases that came before them for decision. Those cases involved decisions of the NSW Supreme Court, the NSW Court of Appeal, and the High Court<sup>31</sup>. Nine judges in all heard the arguments – three adopting a broader interpretation of the ICAC legislation in favour of the ICAC and six a narrower interpretation in favour of Cunneen. In my view a strong indication as to why the majority in the High Court adopted a narrower interpretation can be found on the first page of the majority judgment where the following views are expressed as to the implications of adopting a broader interpretation of the ICACs jurisdiction:

*“It would also enable the Independent Commission Against Corruption ... to exercise its **extraordinary coercive powers** (with consequent **abrogation of fundamental rights and privileges**) in areas ranging well beyond the ordinary understanding of corruption in public administration and the principal objects of the ICAC Act” [at 3] [emphasis added].*

The perspective of the judge at first instance, and then the minority judges on appeal, appears to have been quite different, for example the views expressed by Bathurst CJ in the NSW Court of Appeal:

*“The definition of corrupt conduct contained in s 8 of the Act, as Gleeson CJ pointed out in *Greiner v Independent Commission Against Corruption* at 129, is wide and in a number of respects unclear. In the same case Priestley JA described at 182 s 8 as intending to cast a very wide net. He stated that the unifying idea is that in the interest of honest and impartial exercise of official functions by public officials any conduct adversely affecting such exercise is prima facie to be regarded as corrupt. He said at 183 that the prime aim of s 8 was to bring a broad area of conduct, detrimental to the public interest, within the investigative reach of the Commission” [at 14].*

From my reading of the judgments of the judges who found against the ICAC, it appears to me that their views were strongly influenced by their clearly stated views about what they saw as the extraordinarily broad scope of its powers.

The approach of the courts to the interpretation of privative clauses is an even clearer example of how attitude appears to impact on the approach adopted by presiding officers to their interpretation of legislation. The traditional approach of the courts to attempts by the legislature to restrict their jurisdiction is to interpret such ‘ouster’ clauses very narrowly. To justify such a strict interpretation the courts presume that “*the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies*”.<sup>32</sup> The approach adopted by the High Court for more than 60 years has been described by Professor Mark Aronson<sup>33</sup> as “... a convoluted, interpretive approach to private clauses...” and “[A]s an exercise in interpretation, it was scarcely convincing...”.<sup>34</sup> In the same article Professor Aronson also referred to “...privative clauses and limitations clauses now being a waste of ink...”. The presumptions presiding officers are prepared to attribute to the intentions of the Parliament in order to effectively interpret privative provisions out of existence are hard to reconcile with the principle of statutory interpretation that every provision must be assumed to have some work to do/practical effect!<sup>35</sup>

Would it only be a cynic who might argue that the writers of “*The Castle*” got it right after all? If there is a will the judge is likely to be able to find a way, so maybe it really can come down to “*the vibe*”!

## **Is this a problem?**

There are at least three issues arising out of the nature and extent of this ‘jurisdiction creep’:

- 1) the policy issue as to whether such a broad interpretation of the scope of judicial review is in the public interest,
- 2) the practical issue about the implementation of the principles laid down by the courts, and
- 3) the compliance and/or constitutional issue about the proper role of the courts in ensuring compliance.

### ***The policy issue***

In relation to the policy issue about whether such a broad interpretation of the scope of judicial review is in the public interest, there are arguments for and against. For example, a broad interpretation of the jurisdiction of the courts to review administrative conduct can be considered to be in the public interest given the growth over time in the nature and extent of executive government powers, and their intrusion into the lives of citizens. Oversight of administrative decision-making by the courts can provide an important check or balance by ensuring that the exercise of statutory power by executive government is reasonable.

The positive aspect of such a check or balance is moderated by the practical limits on its application, i.e. it is only available to people or organisations that can afford the expense of expert legal representation, people who are upset and/or determined enough to either self-litigate or to bear the expense no matter the personal impact, or people who have access to free legal assistance. In relation to the expense issue, in 2014 Chief Justice Martin of the Western Australian Supreme Court noted that the “... opportunities for people aggrieved by government agencies to seek redress through the judicial branch of government are restricted by cost, complexity and the intimidating nature of legal proceedings” .<sup>36</sup> In an earlier 2006 article commenting on Australia’s legal system in general, Chief Justice Martin described it as “... the Rolls Royce of justice systems, but there is not much point of having a Rolls Royce in the garage if you can’t afford the fuel to drive it anywhere”.<sup>37</sup> The broadening scope of judicial review also places additional pressure on court resources.<sup>38</sup>

The positive aspect also needs to be balanced against the negative impact on administrative decision-makers (including members of merit review tribunals) of the expansion of the scope of judicial review into areas previously seen as exclusively related to the substance or merits of administrative action. From the perspective of an administrative decision-maker, having a court decide their original decision was 'unlawful' (which implies they were either incompetent or lacking in integrity) is a far worse outcome in terms of their reputation, credibility, etc, than having a court or tribunal look at the merits of the same decision and decide that there is a more correct and preferable decision (which merely implies a difference of opinion). Further, the outcome of a successful merits review application (where such a review is available) is generally largely the end of the matter for an administrative decision-maker, whereas the outcome of a successful judicial review is generally that the decision-maker and/or other public officials have to revisit the assessment and decision-making process.

### ***The practical issue***

A strong argument against broadening the scope of the grounds for judicial review of administrative action relates to the practical problems encountered by administrative decision-makers in implementing the principles laid down by the courts.

The growing complexity of administrative law has significant implications for the practical implementation of the principles that are intended to guide those obliged to comply with them. As mentioned in the introduction to this paper, in my view there are four primary causes of these practical problems:

1. *uncertainty* due to constantly changing legal principles,
2. *variability* depending on the specific circumstances of each case,
3. *complexity* of the law, and
4. *incomprehensibility* due to the use of highly technical language and reasoning that can be very difficult to understand.

#### **Looking at each of these causes in turn:**

1. In relation to *uncertainty*, the legal principles laid down by the courts are constantly changing and evolving over time through judgments handed down in numerous decisions scattered randomly amongst many hundreds of administrative law cases heard each year in the wide range of Australian Federal, State and Territory courts. As an example of the problem faced by administrative decision-makers wishing to keep up with changes to administrative law, in recent years many of the changes have come about through migration related cases heard in the Federal Court and Federal Circuit Court of Australia. A quick look at the Federal Court website indicates that as at mid-May, in 2016 that Court had handed down over 200 judgments with Minister for Immigration in the title, as well as a further 30 judgments categorised as relating to 'administrative law'. In 2016 the Court handed down over 500 judgments categorised as 'migration' and 80 as 'administrative law', and in 2014 over 350 categorised as 'migration' and 21 as 'administrative law'. To these figures needs to be added the various administrative law related judgments handed down each year by the Federal Circuit Court of Australia, eight State and Territory Supreme Courts, and of course the occasional High Court judgment.

Most administrative decision-makers do not have ready access to comprehensive (and comprehensible) legal advice from administrative law experts, or regular advice about important changes as they occur, including advice as to the application to and likely implications for the policies and procedures they operate under and the decisions they can be called on to make. In the circumstances it is unrealistic, if not unreasonable, to expect administrative decision-makers (whether legally qualified or not) to be in a position to comply with all legal principles laid down by the courts that are applicable at any point of time.

2. In relation to *variability*, the applicability of many legal rules/principles is said by the courts to in large measure depend on the particular circumstances of each case<sup>39</sup> (i.e. the courts are happy to customise the applicable legal rules/principles to address individual circumstances). However, the vast majority of administrative decisions do not result in judicial review proceedings in which the applicability of legal rules/principles to particular circumstances can be analysed, debated and determined in far greater detail than was possible in making the administrative decision the subject of those proceedings.

From the perspective of administrative decision-makers, the relatively few administrative decisions that are judicially reviewed do not provide clear guidance as to how discretionary powers should be exercised or how the courts are likely to react in any particular case.

A good example of this variability problem is the rules around the content and application of the duty of a decision-maker to disclose certain material to a person who is to be made the subject of adverse comment. This issue frequently gives rise to disputes about how much information must be given. The guidance provided by the Australian courts has varied over the years, with the clear trend being an expansion of the scope of the information and documentation that must be disclosed. In 1985 the High Court stated in *Kioa v West*<sup>40</sup> that the hearing rule required that “*in the ordinary case where no problem of confidentiality arises an opportunity should be given [to a person whose interests are likely to be affected] to deal with adverse material that is credible, relevant and significant to the decision to be made*”. The Court noted that a person in this position did not have to be given an opportunity to comment on “every adverse piece of information provided, irrespective of its credibility, relevance or significance” and warned against administrative decision-making becoming “clogged” by inquiries into allegations that are not relevant, credible or significant.<sup>41</sup> The Court also cautioned against a situation developing where inquiries were “*overjudicialise[d] by the application of the principles applied to adversarial litigation.*”<sup>42</sup>

However, in a 2009 decision, the Federal Court of Australia,<sup>43</sup> applying the High Court test set out in *Kioa v West*, concluded that if “*...adverse information that was credible, relevant and significant to the determination to be made by the decision-maker was placed before the decision-maker it would be unfair to deny a person ... an opportunity to deal with it where there was a real risk of prejudice, albeit subconscious, arising from the decision-maker's possession of the relevant information*” (emphasis added). The requirement that decision-makers reveal adverse information that might have “*subconsciously*” influenced their decision is particularly problematic in practice where, as is often the case, the decision-maker (in this case an investigator) is someone who is not independent of the organisation or the parties to an investigation or persons affected by the decision. Another example is a 2011 decision of the NSW Supreme Court<sup>44</sup> where it was held that a failure to provide the underlying factual material on which a draft report was based resulted in a denial of procedural fairness. This was on the basis that the investigator “*did not give the necessary disclosure of adverse information which his enquiries had revealed and on which his report rested*”.

The obligation to disclose information available to the decision-maker was considered last year in the Queensland Supreme Court. In a single judge decision the Court held that a breach of natural justice had occurred because the person the subject of investigation had not been given access to all the information and documents relied on by the investigators/decision-maker, including un-redacted copies of **all** witness statements (*Vega Vega v Hoyle* [2015] QSC 111). In that case the judge stated that in order for the applicant “*to accurately assess the weight of the information, the identity of a witness should have been provided*”, and that if the applicant “*was unaware of the author of a particular adverse comment, how was he to weigh the significance of the evidence let alone properly respond to it?*”. In support of this argument the judge also referred to the “*possibility that the investigators and reviewers might miss favourable aspects of the evidence or deliberately cherry pick unfavourable parts...*” [emphasis added], it being unexplained how this could be reconciled with the High Court's view that the obligation is to give a person an opportunity to respond to “*adverse material*”.

In a July 2016 decision, the High Court again considered the issue of procedural fairness, including the nature and content of the information that a decision-maker needs to disclose to a person who could be the subject of adverse comment. Rejecting the argument that the decision-maker was required to disclose “all that it knows”, in a seven member decision the Court reiterated that:

*“Ordinarily, there is no requirement that the person [whose interest is apt to be affected] be notified of information which is in the possession of, or accessible to, the [decision-maker] but which the [decision-maker] has chosen not to take into account at all in the conduct of the inquiry”<sup>45</sup>[emphasis added].*

The obligation is to afford a person ‘a reasonable opportunity to be heard’, which is ordinarily satisfied by putting a person on notice of ‘*the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the [decision-maker] might take into account as a reason for coming to a conclusion adverse to the person*’.

While this statement of the High Court helps to clarify the standard disclosure obligation on administrative decision-makers, the judgment allows for exceptional circumstances – which might include a situation such as that in the *Vega Vega* case where the court considered there were “*enormous consequences*” for the party affected that required a higher level of prior disclosure.

These cases highlight the fact judicial officers commonly interpret the content of the principles of procedural fairness in the light of a range of factors (including the seriousness of the potential impact on the applicant). They may also interpret the “*credible, relevant and significant*” principle in a manner that calls for disclosure of a nature that approaches, if not meets, what would be required in adversarial proceedings.

From the perspective of an investigator conducting an administrative investigation, a broadening of the scope of procedural fairness to require disclosure of un-redacted copies of all witness statements in certain circumstances is a problematic development. Should the approach adopted in the *Vega Vega* case become the accepted interpretation by the courts of the scope of the disclosure requirement of procedural fairness<sup>46</sup>, this would have a significant impact on the conduct of administrative investigations where the outcome could have significant detrimental impact on one or more individuals. This would be particularly problematic in the context of public interest disclosures where most, if not all, legislative schemes specifically provide that procedural fairness is an exception to confidentiality obligations. A requirement that an investigator provide the degree of disclosure called for in *Vega Vega* (i.e. to identify all persons from whom statements were obtained) could effectively ‘sterilise’ the confidentiality safeguards provided for whistleblowers in public interest disclosure legislation. Unfortunately administrative investigators will get no degree of certainty on this issue until the position likely to be adopted by other Australian courts becomes clearer, which may take years.

A balance therefore needs to be drawn between flexibility and certainty, between:

- crafting rules in a way that their application can vary to address the particular circumstances of each case (primarily applicable to the very small proportion of administrative decisions/investigations that in practice result in judicial reviews), and
  - providing clarity and certainty for both administrative decision-makers/investigators and the people affected by such decisions or investigations (in relation to the vast majority of administrative decisions/investigations that are not reviewed).
3. In relation to *complexity*, a fundamental issue inherent in the current approach of the courts to judicial review of administrative action is the widening gap in understanding between the rule makers and those obliged to comply with those rules. Administrative law judgments are written

by lawyers for lawyers<sup>47</sup>. The vast majority of judges are not pulled from the ranks of administrators and therefore have not had to routinely grapple with the same issues (and are unlikely to fully understand the operational realities) confronting administrative decision-makers. These can include needing to concurrently assess multiple cases, often on the basis of limited information (because of strict statutory time limits), subject to various performance goals/output measures, and in environments of ever decreasing resources<sup>48</sup>. This can be further complicated where such decisions are being made in highly contentious and politicised environments. On the other hand, when a judge hears a case, the parties and their legal representatives will usually have spent considerably more time researching the facts and putting together their arguments than was available to the original assessor and/or decision-maker. The arguments for and against will have been identified and debated before the judge in far more detail than the case that would have been available for consideration by the original assessor and/or decision-maker prior to the original decision being made. The judge will also usually spend a considerable period carefully crafting his or her judgment – probably much more time than would have been available to the original decision-maker. The majority of lawyers who practise in administrative law (whether as barristers or solicitors) are also unlikely to have an extensive, in-depth experience in the practicalities of day-to-day administrative decision-making.

4. In relation to *incomprehensibility*, what adds immeasurably to the practical problem is the standard practice of the courts to articulate the relevant legal rules/principles in highly technical language, largely incomprehensible to the non-lawyers who make up the vast majority of administrative decision-makers. While judgments now seldom include rules/principles of statutory interpretation expressed in Latin phrases, they commonly still include such technical terms as: “*jurisdictional error*”, “*non-jurisdictional error*”, “*jurisdictional fact*”, “*constructive failure to exercise jurisdiction*”, “*ultra vires*”, “*procedural ultra vires*”, “*extended ultra vires*”, “*procedural fairness*”, “*hearing rule*”, “*legitimate expectation*”, “*reasonable apprehension of bias*”, “*Wednesbury unreasonableness*”, “*legal unreasonableness*”, “*obiter dicta*” (or “*obiter*”), “*ratio decidendi*” (or “*ratio*”), “*otiose*”, “*ex parte*”, “*the face of the record*”, “*certiorari*”, “*certiorari for error of law on the face of the record*”, “*certiorari for jurisdictional error*”, “*mandamus*”, “*interlocutory decision*”, “*the rule in ...[add case name, e.g. *Briginshaw*, *Browne v Dunn*, *Jones v Dunkel*]*”.

Adding to this language problem is the range and in-exactitude of the terminology used to describe the criteria or threshold tests the courts use to assess the validity of administrative decisions and actions. For example criteria relating to:

- judgments: “*unreasonable*” (e.g. as in ‘*Wednesbury unreasonableness*’, ‘*legal unreasonableness*’, ‘*unreasonableness in a legal sense*’), “*reasonable*”,
- outcomes: “*patently unreasonable*”, “*capricious*”, “*arbitrary*”, “*disproportionate*”,
- logic: “*irrational*”, “*rational*” (“*rationality*”), “*illogical*”, “*logical*”,
- procedures: “*fairness*” (e.g. as in ‘*procedural fairness*’), “*fair*” (e.g. as in ‘*fair treatment*’), “*justice*” (e.g. as in ‘*natural justice*’), “*injustice*” (e.g. as in ‘*avoidance of practical injustice*’),
- perceptions/beliefs: “*unfair*”, “*fair*”, “*apprehension of bias*”, “*legitimate expectation*”,
- intentions: “*bad faith*”, “*good faith*”, “*unauthorised purpose*”, “*bias*”.

In my view a good example highlighting this comprehensibility issue can be found in a recent NSW Court of Appeal decision<sup>49</sup> in which Bathurst CJ drew attention to part of a judgment of the Full Court of the Federal Court of Australia<sup>50</sup>. The majority in that Federal Court judgment rejected a submission that had been put to them by one of the parties that the judgment in *Li* propounded two alternative tests for legal unreasonableness: firstly that on the facts the

result is unreasonable or plainly unjust; and secondly that the decision lacks an evident and intelligible justification. In the Court of Appeal judgment the Chief Justice quoted the following remarks from the Federal Court judgment:

*“This concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or a precise textual formulary... The submission [referred to above] reflected the dangers of overly emphasising the words of judicial decisions concerning the nature of abuse of power, and of unnecessary and inappropriate categorisation. The plurality’s discussion of unreasonableness at [63]-[76] in Li should be read as a whole – as a discussion of the sources and lineage of the concept: [64]-[65], of the limits of the concept of reasonableness given the supervisory role of the courts: [66], of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits: [67], of the various ways the concept has been described: [68]-[71], of the relationship between unreasonableness derived from specific error and unreasonableness from illogical or irrational reasoning: [72], of the place of proportionality or disproportion in the evaluation: [73]-[74]...”*

Whatever the purpose the Federal Court’s interpretation might be intended to achieve, with respect, such reasoning does little to assist administrative decision-makers to understand the legal obligations that apply to their work. From my reading of the judgment in *Li*, it clearly indicates that there could be jurisdictional error in either of the circumstances referred to in the submission to the Federal Court as ‘tests’. It is not immediately obvious why it would be unnecessary or inappropriate to refer to such ‘tests’ as separate grounds on which a court might intervene, and in practice, conceptualising in this way the basis on which a decision could be challenged helps administrative decision-makers to identify certain possible administrative pitfalls. Further, given that the words used in judicial decisions are the only basis on which such decisions can be interpreted and understood, an admonition not to “*overly emphasis[e] the words of judicial decisions ...*” is of little or no assistance to administrative decision-makers trying to understand those decisions.

Another example highlighting the comprehensibility issue is the rules that have been applied by the courts in relation to sufficiency of evidence. On the one hand there is the ‘no evidence’ rule of procedural fairness<sup>51</sup> and on the other hand a decision can be overturned on the basis of a lack of probative evidence<sup>52</sup>. It is not clear why the first is needed if it is in practice subsumed within the second!

Using NSW as an example, there are over 1,000 current Acts of Parliament, 600 statutory instruments and 300 plus planning instruments under which public officials make massive numbers of discretionary decisions every year. Only an infinitesimally small fraction of these decisions ever result in judicial review. Further, while relatively few of the numerous administrative review decisions handed down by the High Court, Federal Court and various State and Territory Supreme Courts have significant implications for administrative decision-making, it is unrealistic to expect the vast majority of administrative decision-makers to have the time or expertise to identify which ones do and what those implications might be for the performance of their roles. In my experience few agencies have, or have ready access to, the systems and/or expertise required to perform this role on behalf of their staff in a rigorous and timely fashion.

Administrative law is very technical and difficult and the majority of the administrative decision-makers who must apply it are unlikely to understand its technicalities. Given the huge numbers of public officials who exercise discretionary administrative decision-making powers, from a practical perspective the answer is clearly not to require that all such decision-makers be legally trained. Even those administrative decision-makers who are legally trained will have difficulty keeping up with the scale and scope of administrative law decisions.

While it will not be simple or easy, in my view the only workable alternative is to identify and implement effective practical strategies to stop, and then reverse the trend to ever increasing levels of technicality and difficulty. Such strategies would need to focus on both operational and oversight practices and procedures involving a radical re-think about ways to ensure that public officials obey the law, only act within their jurisdiction, and act reasonably in the circumstances of each case.

## ***The compliance role of the courts***

In relation to the role of the courts in ensuring compliance with administrative law principles, the High Court has said that the purpose of judicial review of administrative action is to ensure that public officials “*obey the law and neither exceed nor neglect any jurisdiction which the law confers on them*”<sup>53</sup>. In a later High Court case judicial review was described as “... *neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly*”<sup>54</sup>.

The vast majority of administrative actions do not result in judicial review, and those that do are selected by the applicants for review, not the courts. While not denying the constitutional role of the courts in maintaining the rule of law, as mentioned earlier in this paper, judicial oversight of administrative action through the review of individual cases is in practice an ad hoc, largely random and reactive approach to the performance of such a role. A more proactive, systemic and comprehensive outcome could only be achieved if the judicial reviews undertaken by the courts resulted in clear practical guidance that could assist public officials generally to exercise their discretionary powers appropriately. Given the uncertainty, variability, complexity and incomprehensibility issues referred to above, judicial review as currently practised by the courts is not ‘fit for purpose’ in relation to such a proactive guidance role.

Tribunals are in little better position to provide proactive guidance because their review of administrative action role is also in practice reactive and largely random as cases are selected by applicants not the tribunals. The scope of the jurisdiction of tribunals also varies from jurisdiction to jurisdiction.

Parliamentary ombudsmen do perform a proactive guidance role and have great discretion to select issues to review (including looking at systemic issues identified from individual complaints). However, they cannot provide a substitute for the judicial role because of other differences, for example:

- while the administrative review jurisdictions of courts and tribunals are primarily limited to the exercise of statutory powers, the jurisdiction of Parliamentary ombudsmen extend well beyond that to “*matters of administration*” generally (subject to certain exclusions),
- while “*errors within jurisdiction are beyond the scope of judicial scrutiny or intervention*”<sup>55</sup>, identifying and addressing such issues is a key part of the role of ombudsman,
- while courts and tribunals can make binding determinations, ombudsmen can only make suggestions and recommendations, and
- while all three are concerned about whether administrative action was legal, ombudsmen are less concerned with technical legality and more with whether such action was ‘reasonable’ in the circumstances<sup>56</sup>.

While the flexible approach of ombudsmen to the review of administrative action in my view has much to commend it, they are currently not mandated or resourced to perform such a comprehensive proactive administrative review/advice role. Looking at the NSW Ombudsman as an example, the funds made available by government for the Ombudsman Office to perform its administrative review role have been reduced in most years over the last two decades, during which time the numbers of complaints have increased significantly. This has resulted in the Office only having the resources to look in any detail into less than 50% of the thousands of complaints about public sector administrative decision-making received each year.

## Conclusions

The scope of the grounds on which courts can overturn the decisions and actions of public officials exercising statutory powers is broad, and continues to expand, and the rate at which the courts are adding new, or reinterpreting existing, administrative law rules appears to be growing. Further, while the courts argue that they are not reviewing the merits of decisions, by focussing their attention on the individual component parts of a decision-making process, if minded to do so they can effectively achieve the same outcome and categorise their role as reviewing points of law.

Presiding officers are human beings. While their training and experience incline them towards rational and objective assessments of the evidence and applicable law, it is not realistic to assume that they can completely ignore or be unmoved or uninfluenced by other factors. Conscious influences might include their views about the conduct of or impact on a party. Possible unconscious influences might be categorised as confirmation bias/belief bias, correspondence bias/fundamental attribution error, selective perception, selective exposure, etc<sup>57</sup>. When hearing a case, a presiding officer may well take the view that a public official exercising discretionary powers has made a decision or acted in a way the presiding officer perceives to be unfair, unreasonable or otherwise improper. In such circumstances, if minded to do so, the presiding officer may well be able to identify some aspect of the surrounding procedures, reasoning or conduct that can be categorised as falling within one or more of the numerous (and ever expanding) recognised grounds justifying a finding of jurisdictional error or breach of procedural fairness.

Judgments in the increasingly complex area of administrative law are written by lawyers for lawyers, yet the majority of public officials who exercise discretionary statutory powers are not lawyers. This approach has resulted in an ever widening gap in understanding between those who are effectively the rule-makers (i.e. the courts) and those obliged to comply with the rules (i.e. public officials). This is an issue that has serious implications for public administration generally. The growing complexity of administrative law has significant implications for the practical implementation of the principles that are intended to guide those obliged to comply with them. This issue has been described as the tension between the '*accessibility*' and '*reliability*' of the law<sup>58</sup>; between making law more accessible to the general public by using everyday language, and making the law more reliable by using precise technical language.

The common approach to the drafting and interpretation of administrative law principles is to specify that their application will depend on the particular circumstances of each individual matter. While this approach ensures a maximum degree of fairness in relation to the relatively small number of administrative decisions that result in judicial reviews, it provides limited practical guidance to administrative decision-makers generally. What administrative decision-makers need are principles drafted to have more consistent and certain application to administrative decision-making generally. The objective should be to ensure an imperfect, but reasonable, approach to fairness in all cases, to provide greater clarity and certainty for both administrative decision-makers and the people affected by the vast majority of administrative actions that do not result in judicial review.

## Suggestions

1. It would greatly assist the public officials who make administrative decisions in the exercise of statutory powers if, when drafting administrative law related judgments, the courts:
  - a. indicate in the catchwords or head-note whether the judgment expresses a precedent/guideline judgment/authoritative statement (or a departure from same), and
  - b. provide an explanation of the decision/principle that will be understandable to non-legally trained administrative decision-makers (i.e. in plain English using a minimum of technical terms).

2. The legal obligations on public officials who make discretionary decisions in the exercise of statutory powers have now been developed by the courts to a stage where consideration should be given by governments to their comprehensive, plain English codification in statutes applicable across each jurisdiction<sup>59</sup>. Each code should be supported by a detailed objects provision giving clear guidance as to the Parliaments intentions as to how the elements of the code are to be interpreted and applied by both administrative decision-makers and the courts. Such codes could set out obligations that apply generally, as well as variations necessary to address particular administrative decision-making circumstances<sup>60</sup>. Comprehensive plain English statutory codes could provide greater certainty for administrative decision-makers and the people or entities affected by their decisions as to the rights to be provided/procedures to be followed in particular circumstances. Statutory codes would also bring together the relevant rules in one place, which could be easily referred to by administrative decision-makers to identify what principles or rules apply at any point in time.
3. The courts need to find a more accurate way to explain the scope of the judicial review function than the standard claim that they do not review the merits of administrative decisions made in the exercise of statutory powers. Possibly more applicable descriptions might be that the role of the courts in reviewing the actions and decisions of public officials exercising statutory powers is to ensure they are carried out and made in accordance with certain presumptions about the intentions of Parliament, or that administrative decision-makers have exercised their powers in accordance with the conditions for the valid exercise of the relevant statutory powers<sup>61</sup>.
4. Public officials need to be particularly careful to ensure all aspects of their actions and decisions are not only lawful, but can be demonstrated to be fair and reasonable in the circumstances because, should presiding officers be minded to do so, there are numerous grounds on which they can justify overturning an administrative decision or action which they perceive to be unreasonable, unfair or otherwise inappropriate.
5. When defending legal actions seeking to overturn the actions and/or decisions of public officials, legal counsel should be alert to the reality that well-reasoned and otherwise compelling legal arguments alone may not be sufficient to ensure a favourable outcome should presiding officer(s) have concerns that the actions and/or decisions the subject of the proceedings were not fair and reasonable in the circumstances.

## Annexure:

### Grounds for judicial review of administrative action

While not purporting to be exhaustive, each of the grounds summarised below have been identified by courts in Australia as justifying judicial intervention (grouped into 11 broader categories). This analysis is only intended to provide a general guide as to the circumstances where a court could potentially decide to overturn an administrative decision.

#### *Authority to act*

- 1) **Outside jurisdiction:** This would include circumstances where decisions were made or actions taken without lawful authority, or did not comply with the applicable legal requirements<sup>62</sup>. For example decisions that:
  - a) are based on a mistaken assertion or denial of the existence of jurisdiction,
  - b) are based on a misapprehension or disregard of the nature or limits of the decision-maker's functions or powers,
  - c) are wholly or partly outside the general area of the decision-maker's jurisdiction<sup>63</sup>, or
  - d) are based on a mistaken belief that circumstances exist which authorise the making of the decision<sup>64</sup>(commonly referred to as a "*jurisdictional fact*"<sup>65</sup>, being a fact which is an essential precondition to the exercise of a power<sup>66</sup>).

#### *Application of the law*

- 2) **Incorrectly applying statutory requirements:** This refers to decisions that are based on a misinterpretation of the applicable legal requirements or an incorrect application of those legal requirements to the facts found by the decision-maker<sup>67</sup>. This would include where an administrative decision-maker:
  - a) identified a wrong issue, asked the wrong question, failed to address the question posed<sup>68</sup>,
  - b) applied a wrong principle of law<sup>69</sup>,
  - c) ignored relevant material or relied on irrelevant material in a way that affected the exercise of power<sup>70</sup> (i.e. "*conclusion ...affected by some mistake of law*"<sup>71</sup>),
  - d) breached a mandatory statutory procedure<sup>72</sup> or obligation<sup>73</sup> (such as provisions imposing procedural fairness obligations<sup>74</sup>, mandatory time limits, obligations to consult prior to decisions being made, or requiring the giving of reasons for a decision to be valid<sup>75</sup>), or
  - e) was not authorised to make the decision (e.g. due to the lack of a necessary delegation).

#### *Procedure to be followed*

- 3) **Practical injustice**<sup>76</sup>: This would include decisions made or actions taken that impact, or are likely to impact, upon the rights or interests<sup>77</sup> of a person or entity likely to be adversely affected by the decision or action<sup>78</sup> where:
  - a) the person was not given notice of the issues in sufficient detail and at an appropriate time to be able to respond meaningfully (the notice requirement of the 'hearing rule' of procedural fairness),
  - b) the person was not given an opportunity to respond to adverse material that is credible, relevant and significant to the decision to be made<sup>79</sup>, including proposed comment, conclusions or recommendations (another limb of the "*hearing rule*"<sup>80</sup>),
  - c) the person was not given access to all information and documents relied on by the decision-maker (that can include un-redacted copies of all witness statements)<sup>81</sup>,

- d) the person making the decision, undertaking an investigation or assessment, etc, denied the person or entity a fair hearing because he or she has not acted impartially in considering the matter (i.e. pre-judgment and closed mind), or there is a reasonable apprehension of bias on the part of that person<sup>82</sup> (the “*bias rule*” of procedural fairness<sup>83</sup>), or
- e) the person making the decision misled a person or entity as to its intention, or failed to adhere to a statement of intention given to a person or entity, as to the procedure to be followed, and this resulted in unfairness, for example because the person or entity did not have an opportunity to be heard in relation to how the process should proceed<sup>84</sup>.

### ***Discretion***

#### **4) Fettered discretion:** Decisions that:

- a) were made under the instruction of another person or entity (usually a superior) where the decision-maker feels bound to comply<sup>85</sup>,
- b) were made when acting on a ‘purported’ delegation which does not permit any discretion as to the decisions to be made (e.g. only having the discretion to determine an application by granting consent<sup>86</sup>),
- c) were made under an unauthorised delegation of a discretionary power<sup>87</sup>,
- d) involve the inflexible application of a policy without regard to the merits of the particular situation<sup>88</sup>, or
- e) improperly fetter the future exercise of statutory discretions, i.e a decision-maker with discretionary powers cannot bind him/her/itself as to the manner in which those discretionary powers will be exercised in future, whether through a contract, or a policy or guideline inflexibly applied<sup>89</sup>.

### ***Reasonableness of decision-making***

#### **5) Deficient reasoning:** Decisions that:

- a) give disproportionate/excessive weight to some factor of little importance, or any weight to an irrelevant factor or a factor of no importance<sup>90</sup>,
- b) give no consideration to a relevant factor the decision-maker is bound to consider, or inadequate weight to a factor of great importance<sup>91</sup> (including a failure to deal with or make a finding on “a substantial clearly articulated argument relying upon established facts”<sup>92</sup>, “ignoring relevant material [which] affects the tribunal’s exercise or purported exercise of power”<sup>93</sup>),
- c) are not based on a rational consideration of the evidence<sup>94</sup> or do not logically flow from the facts (i.e. are “not based on a process of logical reasoning from proven facts or proper inferences therefrom”<sup>95</sup>),
- d) are based on reasoning that is illogical or irrational<sup>96</sup>, particularly where “no rational or logical decision-maker could arrive [at the decision] on the same evidence”<sup>97</sup> or “there was ... no evidence upon which the [decision-maker] could reach the conclusion”<sup>98</sup>, or lack “a basis in findings or inferences of facts supported on logical grounds”<sup>99</sup>),
- e) lack an evident and intelligible justification<sup>100</sup> (e.g. decisions that are not based on “reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes of the power”<sup>101</sup>),
- f) are based on a mistake in respect of evidence or on a misunderstanding or misconstruing of a claim advanced by the applicant<sup>102</sup> or
- g) are contrary to the overwhelming weight of the available evidence<sup>103</sup>.

- 6) **Unreasonable outcome:** Decisions that:
- a) are patently unreasonable or illogical, i.e. so unreasonable that no reasonable decision-maker could have reached them, on their face are illogical or irrational, including arbitrary, capricious, vague or fanciful (an aspect of what is commonly referred to as “Wednesbury unreasonableness”<sup>104</sup>), or
  - b) are an obviously disproportionate response<sup>105</sup>, i.e. lacking proportionality (while there is some debate on the topic, this would include “taking a sledgehammer to crack a nut”<sup>106</sup>, where a penalty imposed is far greater than is warranted in the circumstances).

### ***Sufficiency of the evidence***

- 7) **Insufficient evidence:** Decisions that:
- a) are based on **no** probative evidence at all<sup>107</sup>,
  - b) are based on a lack of probative evidence to the extent that they have no basis or are unjustifiable on, or are unsupported by, the available evidence<sup>108</sup> (e.g. “a decision which lacks an evident and intelligible justification”<sup>109</sup>, “decisions... so devoid of any plausible justification that no reasonable body of persons could have reached them”<sup>110</sup>, or where there is no evidence to support a finding that is a critical step in reaching the ultimate conclusion<sup>111</sup>),
  - c) are not supported by reasons that “disclose any material by reference to which a rational decision-maker could have evaluated [certain evidence], no such material can be found in the record; and no other logical basis justifies the... finding”<sup>112</sup> (i.e. the reasons do not adequately justify the result reached, and the court inferring from a lack of good reasons that none exist<sup>113</sup>),
  - d) are based on evidence that does not meet the applicable standard of proof<sup>114</sup>, or
  - e) are based on insufficient evidence due to inadequate inquiries, including decisions where there has been a failure to make reasonable attempts to obtain certain material that is obviously readily available and centrally relevant to the decision to be made (admittedly in limited circumstances)<sup>115</sup>.

### ***Certainty***

- 8) **Uncertainty:** Decisions that are uncertain in circumstances where the provision conferring power to make the decision, or impose a condition, requires that the decision or condition be certain<sup>116</sup> (e.g. where the result of the exercise of a power to determine an application is uncertain due to a poorly drafted condition that must be complied with as a pre-condition of the consent).

### ***Conduct of the decision-maker***

- 9) **Unfair treatment:** A display of disrespect for an affected person or entity can demonstrate apprehended bias on the part of a decision-maker. The fair treatment, and apparent fair treatment, of persons the subject of the exercise of State power (as required by the rules of procedural fairness) obliges administrative decision-makers to recognise the dignity of such persons<sup>117</sup>.

### ***Motivation of the decision-maker***

- 10) **Unauthorised purpose:** Decisions that are made for a purpose other than that for which the discretion exists<sup>118</sup> (e.g. the use of powers to resume land for certain specified purposes, for an ulterior purpose such as financial advantage<sup>119</sup>).
- 11) **Bad faith:** Decisions that are made in bad faith, that is, made with intended dishonesty, or recklessly or capriciously for an improper or irrelevant purpose, or arbitrarily exceeding power<sup>120</sup>.

**NOTE:**

I have done my best to ensure that the material is as accurate as I can make it and current at the time of drafting, however I cannot guarantee that this is the case. If despite my best endeavours I have made some mistakes, which I accept is quite likely, in my view they would serve to demonstrate my point about the complexity of administrative law. If a legal issue arises in any particular case, consideration should be given to whether there is a need to seek specific legal advice.

## Endnotes

<sup>1</sup> See for example *Botany Council v The Ombudsman* [1995] NSWSC 38, *Botany Council v The Ombudsman* (1995) 37 NSWLR 357, *Ku-Ring-Gai Council v The Ombudsman* [30035/94, 3 July 1995, unreported], “K” v NSW Ombudsman & Anor [2000] NSWSC 771, *Ombudsman v Koopman & Anor* [2003] NSWCA 277.

<sup>2</sup> *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; (2003) 211 CLR 476 at [104] (per Gaudron, McHugh, Gummow, Kirby, Hayne JJ).

<sup>3</sup> *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175-176

<sup>4</sup> *Re Refugee Review Tribunal; ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 [163]. The passage was quoted with approval by the plurality in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at [66].

<sup>5</sup> Which may well be an issue within the jurisdiction of the Parliamentary Ombudsman of that jurisdiction

<sup>6</sup> Made under a statutory power

<sup>7</sup> *Farooq v Minister for Immigration & Anor* [2016] FCCA 376 at 10.

<sup>8</sup> For example see the judgement of Brennan J in *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564.

<sup>9</sup> Per Brennan J in *Waterford v The Commonwealth* [1987] HCA 25; (1987) 163 CLR 54 at 77

<sup>10</sup> Per Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 at 15(d)

<sup>11</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 66; (2013) 249 CLR 332.

<sup>12</sup> See also the view expressed by Brennan CJ in *Kruger & Ors v The Commonwealth* (“Stolen Generation Case”) [1997] HCA 27; (1997) 190 CLR 1 at 36: “... when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention”.

<sup>13</sup> *Jones (by Caldwell) v First Tier Tribunal (Respondent) and Criminal Injuries Compensation Authority (Appellant)* [2013] UKSC 19; 2 AC 48 at [16].

<sup>14</sup> Per Lord Hoffman in *Lawson v Serco* [2006] ICR 250, quoted in *Jones v First Tier Tribunal* at [46].

<sup>15</sup> M. Elliott, ‘Jurisdictional error and the law/fact distinction: *Jones (by Caldwell) v First-Tier Tribunal* [2013] UKSC 19’ ( <http://publiclawforeveryone.com/2013/04/17/jurisdictional-error-and-the-lawfact-distinction-jones>)

<sup>16</sup> This term is defined in Wikipedia as “an unexpected power or event saving a seemingly hopeless situation, especially as a contrived plot device in a play or novel”. Current usage of the term has “...the negative connotation of an utterly improbable, illogical or baseless plot twist that drastically alters the situation”, per the Urban Dictionary.

<sup>17</sup> A. L. Young, ‘Fact/Law – a Flawed Distinction?’, U.K. Const. L. Blog (21<sup>st</sup> May 2013)

(<http://ukconstitutionallaw.org/2013/05/21/alison-l-young-factlaw-a-flawed-distinction/>)

<sup>18</sup> *Wilson v Commissioner of Police, New South Wales Police Force* [2015] NSWCATAP 248 at 17

<sup>19</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407 at [67]. In this judgment McHugh J went on to state that a primary decision-maker does not need to give detailed reasons as to why a particular witness was not believed, noting that the decision-maker “...must give reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence”. See also *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534 at [20].

<sup>20</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 76; (2013) 249 CLR 332.

<sup>21</sup> *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413, *Pochi and Minister for Immigration and Ethnic Affairs* [1997] AATA 64; (1997) 2 ALD 33 at 41-42, *Minister of Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 4 ALD 139 at 155-156, *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 76, and *Sullivan v Civil Aviation Safety Authority* [2014] FCAF 93 at [97].

<sup>22</sup> See also: *Twynam Agricultural Group Pty Ltd v Williams* [2012] NSWCA 326 at [47], *SZSQY v Minister for Immigration and Border Protection* [2013] FCA 1288 at [16] and *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51.

<sup>23</sup> See for example: *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089 at [16] – [23], *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317, (2013) FCR 99 at 121, *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470 at [37], *WAGO v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 437 at [54], *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 at [31].

<sup>24</sup> *SZSRV v Minister for Immigration and Border Protection* [2014] FCA 220 at [23], *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089 at [16] – [23], and *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [23].

<sup>25</sup> *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22; (1953) 88CLR 100 and *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159CLR 656 at [7]

<sup>26</sup> See for example *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517

<sup>27</sup> Made under a statutory power

<sup>28</sup> See Endnote 68.

<sup>29</sup> See for example *House v King* (1936) 55 CLR 499 at 505; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Wilson v The State of Western Australia* [2010] WASCA 82 [2]; *Minister for*

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*Immigration and Citizenship v Li* [2013] HCA 18 at [85]; *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 at 115.

<sup>30</sup> *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360

<sup>31</sup> *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 157; *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

<sup>32</sup> Described as the “principle of legality”. See for example *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.* [1910] HCA 33; (1910) 11 C.L.R. 1. *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at 505 [72], *Nassir Bare v Independent Broad-Based Anti-Corruption Commission & Anor* [2015] VSCA 197 at 330-336.

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<sup>34</sup> M Aronson, ‘Statutory Interpretation or Judicial Disobedience?’ UK Const. L. Blog (1<sup>st</sup> June 2013) (available at <http://ukconstitutionallaw.org>).

<sup>35</sup> See for example *Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405 at 414, *Minister for Resources v Dover Fisheries Pty Ltd* [1993] FCA 366; (1993) 43 FCR 565 at 574 per Gummow J., *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355 at 382 [71].

<sup>36</sup> Martin W. “Forewarned and four-armed: Administrative law values and the fourth arm of government” (2014) 88 ALJ 106, a6 109.

<sup>37</sup> Martin W, “Bridging the Gap”, Address to the National Access to Justice and Pro Bono Conference, 12 August 2006

<sup>38</sup> Courts are concerned not only with justice between the parties, but also with the public interest in the proper and efficient use of public resources: *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [23]; (2009) 239 CLR 175 at 189.

<sup>39</sup> To refer to just a few of the multiple possible examples, see the comments of Brennan J in *Kioa v West* (1985) 159 CLR 550 at 611 & 612 and Mason J at 585, and McHugh in *Miah v Minister for Immigration and Multicultural Affairs* (2001) 206 CLR 57 at [129].

<sup>40</sup> See Brennan J in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 628-629 (emphasis added): “information that cannot be dismissed from further consideration by the decision-maker before making the decision” (*VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; (2005) 225 CLR 88 at [17]).

<sup>41</sup> Per Brennan J at 628.

<sup>42</sup> Per Brennan J at 629, quoting *Bushell v Environment Secretary* [1981] AC 75 at 97 per Lord Diplock.

<sup>43</sup> Per Graham J in *Lohse v Arthur (No. 3)* [2009] FCA 1118 at [47].

<sup>44</sup> Per Schmidt J in *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517 at [157] and [159]

<sup>45</sup> *Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI* [2016] HCA 29 at [83].

<sup>46</sup> Which might not become clear for several years!

<sup>47</sup> While there may well be other examples, a recent notable exception to this practice is the judgement of Mitchell J in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, at 94 to 116, in which he explains the meanings of ‘jurisdictional error’ and ‘jurisdictional fact’ in terms a reasonably intelligent non-lawyer could understand. Unfortunately, adopting such an approach is likely to increase the chances that a judgment will be overturned on appeal by a court which does not agree with the simplified definition (which supports my point that judgments are written by lawyers for lawyers).

<sup>48</sup> This issue is very well expressed in an article by Professor Dennis Pearce published in the *Public Law Review* (1991) 2, in which he noted that: “An agency thus finds itself torn by the demands of those who impose limits on resources in the name of efficiency and the demands of the law that require a more expensive procedure. The managerialist approach primarily measures efficiency by having regard to output whereas the judicial process looks more closely at individual outcomes. This difference in approach is at the heart of the tension that exists between the Executive and the Judiciary” (at p.180).

<sup>49</sup> *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [289].

<sup>50</sup> *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [10].

<sup>51</sup> See Endnote 106.

<sup>52</sup> See Endnote 107.

<sup>53</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193, endorsed by a later High Court in *Plaintiff s157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 (per Gaudron, McHugh, Gummow, Kirby, Hayne JJ).

<sup>54</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70 (per Brennan J).

<sup>55</sup> Per Martin W. “Forewarned and four-armed: Administrative law values and the fourth arm of government” (2014) 88 ALJ 106 at 116 [see also my response to this article in “Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia” (2014) 88 ALJ 740].

<sup>56</sup> In this regard, using the NSW Ombudsman as an example, the Ombudsman can find allegations to be substantiated where the conduct was in accordance with the law, but in the view of the Ombudsman “the law ... is unreasonable, unjust, oppressive or improperly discriminatory” (s.26 (1)(c) of the *Ombudsman Act 1974*). Such

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a finding can be relevant, for example, where the Ombudsman finds that problems have arisen as unintended consequences flowing from changes made to legislation over time.

<sup>57</sup> See for example: confirmation bias/belief bias: [https://en.wikipedia.org/wiki/Confirmation\\_bias](https://en.wikipedia.org/wiki/Confirmation_bias) ; correspondence bias/fundamental attribution error:

[https://en.wikipedia.org/wiki/Fundamental\\_attribution\\_error](https://en.wikipedia.org/wiki/Fundamental_attribution_error); selective perception:

[https://en.wikipedia.org/wiki/Selective\\_perception](https://en.wikipedia.org/wiki/Selective_perception); selective exposure theory:

[https://en.wikipedia.org/wiki/Selective\\_exposure\\_theory](https://en.wikipedia.org/wiki/Selective_exposure_theory) ; etc. In this regard the results of the study involving parole judges in Israel, reported some years ago in the Proceedings of the National Academy of Sciences, make fascinating reading (Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, "Extraneous Factors in Judicial Decisions", PNAS 108 (2011): 6889-92, referred to by Daniel Kahneman in his book *'Thinking Fast and Slow'* at pp. 43-44).

<sup>58</sup> Fuller, L. *The Morality of Law* (1964), New Haven CT: Yale University Press

<sup>59</sup> Examples of attempts at codification of the natural justice hearing rule requirements include Division 4, Part 7 of the *Migration Act 1958* (Cth), s.24 of the *Ombudsman Act 1974* (NSW), s.8 of the *Ombudsman Act 1976* (Cth), s.24 of the *National Vocational Education & Training Regulation Act 2011*.

<sup>60</sup> An option that could be considered might be to include certain rebuttable presumptions.

<sup>61</sup> Per views expressed by Mitchell J in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 at 104.

<sup>62</sup> Commonly referred to as the decision-maker acting "*ultra vires*". When considering whether administrative action was authorised under a statutory provision, should a judge decide that there is ambiguity in a key provision of that Act, this would provide considerable scope for the judge to give effect to what he or she considers to be the policy behind the Act (in my opinion the *Cunneen* cases referred to in Endnote 31 are a good example)

<sup>63</sup> In relation to the above three circumstances [in the Annexure at 1) (a)-(c)], see *Craig v South Australia* [1995] HCA 58 at 11 & 12; (1995) 184 CLR 163 at 177-179, *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at [71]-[73], M Aronson, B Dyer & M Groves, *Judicial Review of Administrative Action*, 4<sup>th</sup> ed., 2009, and Prof. Aronson, *Jurisdictional Error and Beyond*, in M. Groves (ed.) *Modern Administrative Law in Australia Concepts and Context*, Cambridge University Press, 2014

<sup>64</sup> Requiring a belief in the existence of facts that must be objectively satisfied to create or establish jurisdiction (e.g where a statute uses expressions such as 'where', 'when' or 'if' a certain state of affairs exists, or that the repository of the power is satisfied it exists). See also: *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* [2011] HCA 10; (2011) 177 ALR 473 at 481 [35], *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144, *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASC 217; (2011) 43 WAR 319 and *Delmere Holdings Pty Ltd v Green* [2015] WASC 148, in particular 95 & 110.

<sup>65</sup> Apparently a jurisdictional fact "...need not be a fact. It may be a complex of elements. The decision-maker's assessment or evaluation may be an element of the 'jurisdictional fact' or it may be the jurisdictional fact itself. For example, where a power is expressly conditioned on the formation of a state of mind by the decision-maker (such as an opinion, belief, state of satisfaction or suspicion) the existence of the state of mind itself will constitute a jurisdictional fact", per Mitchell J in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 at 108, who in turn referenced *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [28] and *Plaintiff M/70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at [57].

<sup>66</sup> In *Trives v Hornsby Shire Council* [2015] NSWCA 158 the NSW Court of Appeal said that: "To describe a fact as jurisdictional is to say its existence or otherwise may depend upon a finding, not by the repository of the power, but by a court with the function of reviewing the repository's decision". The Court went on to say: "Whether a fact is jurisdictional in this sense will be a question of statutory interpretation. As noted by Dixon J with respect to a matter going to the jurisdiction of a magistrate [in *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391]: ... if the legislature does make the jurisdiction of a court contingent upon the existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid".

<sup>67</sup> Commonly characterised by the courts as a "*constructive failure to exercise jurisdiction*". A decision will not involve an error of law unless, but for the error the decision would have been, or might have been, different: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 at 80; (1990) 170 CLR 321.

<sup>68</sup> *Craig v South Australia* [1995] HCA 58 at 11 & 12; (1995) 184 CLR 163 at 177-179, *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at 351 [82], *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 197 ALR 389; (2003) 77 ALJR 1088, *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [19].

<sup>69</sup> *Chapman v Taylor* [2004] NSWCA 456 at [33]. Per Hodgson LA (Beasley and Tobias JJA agreeing)

<sup>70</sup> *Craig v South Australia* [1995] HCA 58 at 14; (1995) 184 CLR 163 at 179, *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [19].

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<sup>71</sup> *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353 at 360, quoted in *Re Minister For Immigration and Multicultural Affairs v Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59.

<sup>72</sup> Sometimes referred to as “procedural ultra vires”, this issue is discussed in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 215 ALR 162. A breach of a mandatory procedure is described as a “failure to discharge ‘imperative duties’ or to observe ‘inviolable limitations or restraints’ upon the exercise of jurisdiction” in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32 at 29, quoting from *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 at 34; (2003) 211 CLR 476 at 506

<sup>73</sup> For example, where there is a statutory obligation to consider and determine an application, a failure to consider all claims expressly made, or misunderstanding or misinterpreting a claim leading to an error of fact, can constitute jurisdictional error. This can be because of a failure of procedural fairness or a failure to comply with statutory requirements: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at 20 and *SZRRD v Minister for Immigration and Border Protection* [2015] FCA 577 at 14-17. However, a failure to consider an element of a claim in an application (where this is a statutory obligation) can be apparently distinguishable from “an error of fact based on a misunderstanding of evidence or even overlooking an item in evidence in considering an applicant’s claims is not jurisdictional error so long as the error... does not mean the [Tribunal] has not considered the applicant’s claim”, per *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51 at [28], (2010) 115 ALD at 309.

<sup>74</sup> See the views of Basten J. in *Italiano v Carbone & Ors* [2005] NSWCA 177 at 106 and Einstein J at 170

<sup>75</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56 at 55; (2003) 216 CLR 212 at [55], *Drysdale v WorkCover WA* [2014] WASC 270 at 58 [see also Endnote 112].

<sup>76</sup> *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1; (2003) 195 ALR 502.

<sup>77</sup> A failure to afford procedural fairness may amount to an error of law: see for example *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCA 69 at [13]. This is not limited to decisions, recommendations or findings, but can apply where reports of coroners, royal commissions, investigative agencies, investigators looking into disciplinary issues and the like, that can “substantially impact on the economic or reputational interest of particular individuals”, per M Aronson and M Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013) at [2.460], quoted by Basten JA in *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [714].

<sup>78</sup> The view of the High Court on this issue has been clearly expressed in various cases, e.g: “...there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention”, per Mason J in *Kioa v West* [1985] HCA 81; 159 CLR 550; and “It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment”, per Mason C.J., Deane and McHugh JJ. in *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596 at p 598.

<sup>79</sup> See Endnotes 40-44.

<sup>80</sup> The “hearing” rule does not necessarily oblige a decision-maker to allow an oral hearing before a decision is made: *Re Minister for Immigration and Multicultural Affairs; Ex parte P T* [2001] HCA 20, (2001) 75 ALJR 808 at 813, *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2013] HCA 6; (2003) 214 CLR 1 at 12-13[34], 13[38], 34-35[105]-[106], 36[113]-[114], 38-39[122] & 45[140], *Applicant NAFH of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 140 at [33], *MZYUM v Minister for Immigration and Citizenship* [2013] FCA 51 at [73], and *Minister for Immigration and Border Protection v WZARH & Anor* [2015] HCA 40 at [33].

<sup>81</sup> An example of such a decision is the Queensland Supreme Court decision in *Vega v Hoyle* [2015] QSC 111. In this regard see also *Lohse v Arthur (No. 3)* [2009] FCA 1118 at [47] and *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517 at [157] and [159].

<sup>82</sup> In relation to bias, it has been held that a party to an administrative process is entitled to have a claim resolved by a decision-maker whose mind is open to persuasion - see for example *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17, (2001) 205 CLR 507 at [71], [75] and [78]. In relation to apprehended bias, it was suggested that in the case of administrative proceedings held in private the test could be formulated by reference to “a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias”, per Gleeson CJ, Gaudron & Gummow JJ in *Re Refugee Review Tribunal & Anor v Ex parte H & Anor* [2001] HCA 28 at 28; (2001) 179 ALR 425. In a later case the High Court took the view that a reasonable apprehension of bias can arise where “it might reasonably be apprehended that a person ... would have an interest which could affect [his/her] proper decision-making”, per the majority in *Isbester v Knox City Council* [2015] HCA 20 at [33]. This can include an “interest which would conflict with the objectivity required of a person deciding [the issue]”. This was an interest referred to by the majority in *Isbester* (quoting Isaacs J in *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243 at 259) as an “incompatibility” (at [34]). The Court went further noting that the application of

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the principle extended beyond just the decision-maker, referring to the High court decision in *Stollery v Greyhound Racing Control Board* [1972] HCA 53, (1972) 128 CLR 509 at 520, where Menzies J referred to the “... long line of authority which establishes that a tribunal decision will be invalidated if there is present some person who, in fairness, ought not to be there”, at [37]. The Court went on to note that in *Stollery* their honours held that “... the manager’s mere presence was sufficient to invalidate the decision, either because he was an influential person or because his presence might inhibit and affect the deliberations of others”, at [37]. If on appeal actual or apprehended bias are established the court will set aside the decision even if satisfied that the decision below was correct on the merits: see *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577 at 581 [2] & 611 [117], and *Antoun v R* [2006] HCA 2; (2006) 224 ALR 51 at 52 [2]-[3]. A comprehensive review of the relevant principles relating to reasonable apprehension of bias is set out in *AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236, and in relation to quasi-judicial officers in *McCloy v Latham* [2015] NSWSC 1879 at [39]-[55]. Requirements to establish bias were also considered in *Jia Legeng* at [69] and [127], *SZOTX v Minister for Immigration & Anor* [2011] FMCA 37 at [12], and *SZOPX v Minister for Immigration and Citizenship* [2011] FCA 552 at [9].

<sup>83</sup> Bias is an element of the “*bad faith*” ground of judicial review as well as being a rule of procedural fairness.

<sup>84</sup> This formulation previously also referred to “*legitimate expectation*”, however in 2012 the High Court expressed the view that the expression should be disregarded: *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31 at 65, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at 9[25], 12[35], 34[104]-[105], and more recently *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [73], *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [28]-[30]. In *Save Beelihar Wetlands (Inc) v Jacob* [2015] WASC 482 Martin CJ expressed the view that: “*It is now established that legitimate expectations can, at best, only give rise to procedural rights, as compared to substantive rights*” (at 145). See also *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125, *Re Ruddock; ex parte Applicant S154/2002* (2003) 201 ALR 437 at [28] & [58] and *MZAFS v Minister for Immigration and Border Protection* [2016] FCA 75 at [7]-[10].

<sup>85</sup> Commonly referred to as decisions “*made under dictation*”, see: *R v Stepney Corporation* (1902) 1 KB 317, *Simms Motor units Ltd v Minister of Labour and National Service* (1946) 2 ALL ER 201, cf. *Evans v Donaldson* [1909] HCA 46; (1909) 9 CLR 140 at p.189, *R v Anderson*; *Ex parte Ipec-Air Pty Ltd* (1965) 113 LR 177 and *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* [1977] HCA 71; (1977) 139 CLR 54.

<sup>86</sup> *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116; *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450

<sup>87</sup> *Barnard v National Dock Labour Board* [1953] 1 All ER 1113.

<sup>88</sup> See: *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, *Green v Daniels* (1977) 51 ALJR 463, *Drake v Minister for Immigration & Ethnic Affairs (No 1)* (1979) 24 ALR 577; (1979) 2 ALD 60 at 69-70, *Re Drake v Minister for Immigration & Ethnic Affairs (No 2)* (1979) 2 ALD 634, *Jackson v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 203, *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 at [52] quoting Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277 at 287 [17] who was in turn citing *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407 at 497.

<sup>89</sup> Commonly referred to as the “*no fetter principle*” and as an “*anticipatory fetter*”, see *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* [1977] HCA 71; 139 CLR 54, *Camberwell City Council v Camberwell Shopping Centre Pty Ltd* (1992) 76 LGRA 26, *Civil Aviation Safety Authority v Sydney Heli-Scenic Pty Limited* [2006] NSWCA 111

<sup>90</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 72; (2013) 249 CLR 332, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 41, 30 & 71..

<sup>91</sup> *Acquista Investments Pty Ltd & Anor v The Urban Renewal Authority & Ors* [2014] SASC 206 at 565-568, *SZUZE v Minister for Immigration & Anor* [2015] FCCA 1767 at [21]-[35], *AEO15 v Minister for Immigration & Anor* [2016] FCCA 97 at [42] [see also the cases referred to in Endnote 90].

<sup>92</sup> *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [24], quoted in *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45 at [32]. This is described as a failure to accord procedural fairness and a constructive failure to exercise jurisdiction. See also *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at [55] & [63], *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [113] – [115], *SZTEX v Minister for Immigration and Border Protection* [2014] FCA 1269 at [26], *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [64]-[65], *WZATA v Minister for Immigration & Anor* [2016] FCCA 305 at [40], *AAH15 v Minister for Immigration and Border Protection* [2016] FCA 104 at [48], .

<sup>93</sup> *Buchwald v Minister for Immigration and Border Protection* [2016] FCA 101 at [72], *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323, at [82] per McHugh, Gummow and Hayne JJ.

<sup>94</sup> See for example the views of Finkelstein J in *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413, *Pochi v Minister for Immigration and Ethnic Affairs* [1997] AATA 64; (1997) 2 ALD 33 at 41-42, *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 4 ALD 139 at 155-156, *City of Port*

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*Adelaide Enfield v Bingham* [2014] SASC 36 at 61, and *MZAGW & Ors v Minister For Immigration & Anor* [2015] FCCA 2857 at 26, 28, 30-32.

<sup>95</sup> *Duncan v ICAC, McGuigan v ICAC, Kinghorn v ICAC, Cascade Coal v ICAC* [2014] NSWSC 1018 at 35 (2)

<sup>96</sup> Per views expressed by the majority in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 364. Writing extra-judicially, Chief Justice French noted that “...the requirement that a power conferred by a statute be exercised rationally, is a requirement not met merely by the avoidance of absurdity”: French R., *Statutory Interpretation and Rationality in Administrative Law: National Lecture on Administrative Law 2015* (2015) 82 AIAL Forum, at p1. In *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, Bathurst CJ took the view that “...a decision on factual matters essential to the making of a finding by a decision-maker ..., can be reviewed on the basis that the reasoning which led to the decision was irrational or illogical irrespective of whether the same conclusion could be reached by a process of reasoning which did not suffer from the same defect”, at [287].

<sup>97</sup> Not every lapse in logic will give rise to jurisdictional error (*Minister for Immigration and Citizenship v SZMDS* [2010] 240 CLR 611 at [130]-[131]), for example “an error of fact based on a misunderstanding of evidence or even overlooking an item of evidence in considering an applicant’s claims is not jurisdictional error, so long as the error ... does not mean that the [Tribunal] has not considered the applicant’s claim”, which in the circumstances in question would be a breach of a statutory obligation, per *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303; [2010] FCAFC 51 at [27]-[28]. In *SZTJG v Minister for Immigration & Anor* [2015] FCCA 414 the Federal Circuit Court of Australia noted that: “... *Li and Sing*, ..., do not stand for [the] ... proposition ..., that unreasonableness, or for that matter ‘illogicality’ ..., in the context of fact finding, constitutes jurisdictional error”, at [83].

<sup>98</sup> *ATI15 v Minister for Immigration & Anor* [2016] FCCA 8 at [60].

<sup>99</sup> *Re Minister for Immigration and Multi-Cultural Affairs; ex parte Applicant s20/2002* [2003] HCA 30; (2003) 198 ALR 59 at [34], *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32 at [37]-[38], and *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262; [2000] NSWCA 29 at [86], *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [130]-[131].

<sup>100</sup> Per the majority in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 364-365 at [76], *DPP v Cartwright* [2015] VSCA 11 at [33]-[34].

<sup>101</sup> Per French CJ in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [25] quoting Prof Galligan in *Discretionary Powers: A Legal Study of Official discretion*, 1986, at 140

<sup>102</sup> Referred to by the Full Court of Federal Court of Australia as an “error of fact” that “can constitute jurisdictional error” in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [63]. See also *Australasian Meat Employees’ Union v Fair Work Australia* (2012) 203 FCR 389 at [92], *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [113] – [115], *SZUZE v Minister for Immigration & Anor* [2015] FCCA 1767 at [21]-[35], *SZUTM v Minister for Immigration & Anor* [2015] FCCA 1212, at 69, and *Singh v Minister for Immigration & Anor* [2016] FCCA 257 at [30]-[33].

<sup>103</sup> *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [23] & [24], but see also Endnote 97.

<sup>104</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See also *Minister for Immigration v Li* [2013] HCA 18 at [24 & [65]; (2013) 249 CLR 332, quoting *Sharp v Wakefield* [1891] AC 173 at 179 and *Kitto J in R v Anderson; Ex parte Ipec-Air Pty Ltd* [1965] HCA 27; (1965) 113 CLR 177 at 189: “It is a general principle of law, ... that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice...”. In *Minister for Immigration v Li* the majority also noted that: “The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably” (at par [63]), and “...*Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it” (at para [68])

<sup>105</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 74; (2013) 249 CLR 332.

<sup>106</sup> For example French CJ in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 30; (2013) 249 CLR 332.

<sup>107</sup> Commonly referred to as the “no-evidence rule” of procedural fairness, see: *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473, *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151, *Duncan v ICAC, McGuigan v ICAC, Kinghorn v ICAC, Cascade Coal v ICAC* [2014] NSWSC 1018 at 35 (3), *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 355-6, *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 4 ALD 139; 44 FLR 41 at 62-68, *VAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 350 at [18]-[19], *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32 at 91, *SZNVK v Minister for Immigration and Citizenship* [2010] FCA 56 at [36]-[38], *Maxwell v Minister for Immigration and Border Protection* [2016] FCA 47 at [54], *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45 at [69]-[70], *SZAPC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 995 at [57], *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [278].

<sup>108</sup> See for example the views of Menzies J in *Parramatta City Council v Pestell* [1972] HCA 59; (1972) 128 CLR 305 at 323, *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413, *SFGB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 231; (2003) 77 ALD 402 at [19]-[20] & [25], *Australian Pork Ltd v Director of Animal & Plant Quarantine* [2005] FCA 671 at 309 -310, *SZNV v Minister for Immigration and Citizenship* (2010) 118 ALD 232 at [38], *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; (2014) 254 CLR 28 at [46].

<sup>109</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 76; (2013) 249 CLR 332.

<sup>110</sup> *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821

<sup>111</sup> *SFGB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 231; (2003) 77 ALD 402 at [18]-[20], *Applicant A227 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 567 at [44], *SZJRU v Minister for Immigration and Citizenship* [2009] FCA 315; (2009) 108 ALD 515 at [53]-[54], *SZNV v Minister for Immigration and Citizenship* [2010] FCA 56 at [38].

<sup>112</sup> Per Kenny J in *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108 at 72 and Gibbs CJ in *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159 CLR 656 at [7], referring to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1; [1968] AC 997 [see also Endnote 75].

<sup>113</sup> See for example *WAE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184: 75 ALD 630 at [47] and *Minister for Immigration & Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431 at [49]-[50]. However, "... inadequate reasons provided at the discretion of the decision making body cannot impugn the validity of the decision itself", per Davies J in *Obeid v Independent Commission Against Corruption* [2015] NSWSC 1891 at 49. In this regard see also *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 at 25, and *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 183; 303 ALR 342 at [105]-[106].

<sup>114</sup> Administrative decision-makers are obliged to be reasonably satisfied as to the matters to be decided, which in the context of determining whether a fact does or does not exist is generally the civil standard, being the balance of probabilities. The appropriate degree of satisfaction is subject to the "need for caution to be exercised in applying the standard of proof when asked to make findings of a serious nature", per Sullivan v *Civil Aviation Safety Authority* [2014] FCAFC 93 at 99. In the Sullivan case this was referred to as the "rule of prudence" that should be applied by decision-makers who are not obliged to comply with the "rule" in *Briginshaw* because they are not bound by the rules of evidence (at 115).

<sup>115</sup> *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ARR 429; (2009) 83 ALJR 1123: "It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction". See also: *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170, *SZIAI v Minister for Immigration and Citizenship* [2008] FCA 1372, at [25]-[26], *Foxtel Management Pty Ltd v Australian Competition and Consumer Commission* [2000] FCA 589; 173 ALR 362 at 417, *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391 at 453 [189], n214, *Luu v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 369, *SZNBX v Minister for Immigration and Citizenship* (2009) 112 ALD 475 at [21], *SZNV v Minister for Immigration and Citizenship* [2010] FCA 56 at [34], *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [71], *AZAFM v Minister for Immigration & Anor* [2015] FCCA 2831 at 15, 17-18, *Buchwald v Minister for Immigration and Border Protection* [2016] FCA 101 at [76].

<sup>116</sup> *Television Corporation Ltd. V The Commonwealth of Australia* [1963] HCA 30; (1963) 109 CLR 59 at 71. While there "... is no general principle of administrative law that the exercise of a statutory power must, in order to be valid, be final or certain...", a condition "... will be invalid for lack of certainty or finality if it falls outside the class of conditions which the statute expressly or impliedly permits", per *Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services & Anor* [2015] NSWLEC 167 at 48. Note however that a decision will not be held to be invalid merely because it is ambiguous if that ambiguity is capable of resolution.

<sup>117</sup> *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at 5, *Kolan v Minister for Immigration & Anor* [2016] FCCA 341 at [31]-[40]

<sup>118</sup> Also referred to as "improper purpose", see: *R v Anderson; Ex parte Ipec-Air Pty Ltd* [1965] HCA 27 at 10; (1965) 113 CLR 177 (quoting *Water Conservation and Irrigation Commission v Browning* [1947] HCA 21; (1947) 74 CLR 492 at pp 496, 498, 499, 500, 504), *Thompson v Randwick Municipal Council* [1950] HCA 33; (1950) 81 CLR 87 at 105 - 106, *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491. The inference of improper purpose could be drawn if the evidence cannot be reconciled with the proper exercise of the power, per *Golden v V'landys* [2015] NSWSC 1709, referring to *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 672.

<sup>119</sup> *Municipal Council of Sydney v Campbell* [1925] AC 338.

<sup>120</sup> *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35; (2007) 232 CLR 189. The courts have held that: allegations of bad faith involving personal fault on the part of the decision-maker must not be lightly made and must be clearly alleged and proved; a finding that an administrative decision-maker had not acted in good faith will be rare and extreme; mere error or irrationality will not of itself demonstrate lack of good faith and illogical factual findings or procedural blunders will usually not be sufficient to base a finding of bad faith: See

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*SBBS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 361 at 42-48, *SCAS v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 397 at [19], and *Minister for Immigration & Multicultural & Indigenous Affairs v SBAN* [2002] FCAFC 431 at 7-10.