

## JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: AN ADMINISTRATIVE DECISION-MAKER'S PERSPECTIVE

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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 New South Wales and as Deputy Ombudsman (and previously as an Ombudsman investigator and Local Government Inspector) reviewing the exercise of discretionary powers by 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. My investigations/decisions have also been the subject of several unsuccessful judicial review applications to the Supreme Court of New South Wales.<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.

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.

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 the rules they make.

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- **Incomprehensibility:** The courts articulate the relevant legal principles in highly technical language that is often 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', 'ultra vires', 'procedural ultra vires', 'extended ultra vires', 'legal unreasonableness', 'obiter dicta', 'ratio decidendi', 'otiose', 'ex parte', 'certiorari', 'certiorari for error of law on the face of the record', 'certiorari for jurisdictional error', 'mandamus', 'the rule in ... [add case name — for example, *Briginshaw*, *Browne v Dunn*, *Jones v Dunkel*]'.

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 (after all, cases are selected by applicants, not the courts) and reactive.

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 that judicial review by the courts does not achieve a proactive, systemic or comprehensive outcome in the performance of that role.

To help set the scene, in New South Wales there are over 1000 current Acts of Parliament, 600 statutory instruments and 300-plus planning instruments under which public officials make massive numbers of discretionary decisions. Only an infinitesimally small fraction of these decisions ever result in judicial review.<sup>2</sup> Further, while relatively few of the administrative review decisions that are 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.

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>3</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 scope of errors that could constitute jurisdictional error is commonly described in administrative law judgments using such terms as:

- identifying the wrong issue;
- asking the wrong question;
- ignoring relevant information;
- relying on irrelevant material; or
- denial of procedural fairness / natural justice, or practical injustice.

In practice, there is a far wider range of grounds which courts in Australia have identified as justifying judicial intervention to overturn administrative decisions or actions. While not purporting to be exhaustive, this article identifies and summarises 37 potential grounds, grouped under 11 categories:

- (1) authority to act;
- (2) application of the law;
- (3) procedure to be followed;
- (4) fettering discretion;
- (5) reasonableness, including deficient reasoning and unreasonable outcome;
- (6) sufficiency of evidence;
- (7) uncertainty;
- (8) conduct of the decision-maker (unfair treatment); and
- (9) motivation of the decision-maker, including unauthorised purpose and bad faith.

### 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 — 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>4</sup> or
  - (d) are based on a mistaken belief that circumstances exist which authorise the making of the decision (commonly referred to as a 'jurisdictional fact').

### 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>5</sup> This would include where an administrative decision-maker:
- (a) identified a wrong issue, asked the wrong question or failed to address the question posed;<sup>6</sup>
  - (b) applied a wrong principle of law;<sup>7</sup>
  - (c) ignored relevant material or relied on irrelevant material in a way that affected the exercise of power;<sup>8</sup>
  - (d) breached a mandatory statutory procedure or obligation<sup>9</sup> (such as provisions imposing procedural fairness obligations,<sup>10</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>11</sup>); or
  - (e) was not authorised to make the decision (for example, due to the lack of a necessary delegation).

### Procedure to be followed

- (3) **Practical injustice:**<sup>12</sup> This would include decisions made or actions taken that impact upon or are likely to impact upon the rights or interests<sup>13</sup> of a person or entity likely to be adversely affected by the decision or action 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, including proposed comment, conclusions or recommendations (another limb of the 'hearing rule');
- (c) the person was not given access to all information and documents relied on by the decision-maker (it has been held that in certain circumstances this can include un-redacted copies of all witness statements);<sup>14</sup>
- (d) the person making the decision, undertaking an investigation or assessment etcetera denied the person or entity a fair hearing because he or she has not acted impartially in considering the matter (that is, prejudgment and closed mind) or there is a reasonable apprehension of bias on the part of that person<sup>15</sup> (the 'bias rule' of procedural fairness<sup>16</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>17</sup>

### Discretion

**(4) Fettered discretion:** This includes decisions that:

- (a) were made under the instruction of another person or entity where the decision-maker feels bound to comply;<sup>18</sup>
- (b) were made when acting on a 'purported' delegation which does not permit any discretion as to the decisions to be made (for example, only having the discretion to determine an application by granting consent);<sup>19</sup>
- (c) were made under an unauthorised delegation of a discretionary power;<sup>20</sup>
- (d) involve the inflexible application of a policy without regard to the merits of the particular situation;<sup>21</sup> or
- (e) improperly fetter the future exercise of statutory discretions — that is, a decision-maker with discretionary powers cannot bind himself/herself/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>22</sup>

### Reasonableness of decision-making

**(5) Deficient reasoning:** This includes 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>23</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>24</sup> (including a failure to deal with or make a finding on 'a substantial clearly articulated argument relying upon established facts'<sup>25</sup>, 'ignoring relevant material [which] affects the tribunal's exercise or purported exercise of power');<sup>26</sup>
- (c) are not based on a rational consideration of the evidence<sup>27</sup> or do not logically flow from the facts (that is, they are 'not based on a process of logical reasoning from proven facts or proper inferences therefrom'<sup>28</sup>);
- (d) are based on reasoning that is illogical or irrational,<sup>29</sup> particularly where 'no rational or logical decision-maker could arrive [at the decision] on the same evidence'<sup>30</sup> or 'there was ... no evidence upon which the [decision-maker] could reach the conclusion'<sup>31</sup> or lack 'a basis in findings or inferences of facts supported on logical grounds';<sup>32</sup>

- (e) lack an evident and intelligible justification<sup>33</sup> (for example, 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>34</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>35</sup> or
- (g) are contrary to the overwhelming weight of the available evidence.<sup>36</sup>

**(6) Unreasonable outcome:** This includes decisions that:

- (a) are patently unreasonable or illogical — that is, 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>37</sup>); or
- (b) are an obviously disproportionate response<sup>38</sup> — that is, lacking proportionality (while there is some debate on the topic, this would include ‘taking a sledgehammer to crack a nut’,<sup>39</sup> where a penalty imposed is far greater than is warranted in the circumstances).

### Sufficiency of the evidence

**(7) Insufficient evidence:** This includes decisions that:

- (a) are based on no probative evidence at all;<sup>40</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>41</sup> (for example, ‘a decision which lacks an evident and intelligible justification’,<sup>42</sup> ‘decisions ... so devoid of any plausible justification that no reasonable body of persons could have reached them’<sup>43</sup> or where there is no evidence to support a finding that is a critical step in reaching the ultimate conclusion<sup>44</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>45</sup> (that is, the reasons do not adequately justify the result reached and the court inferring from a lack of good reasons that none exist);<sup>46</sup>
- (d) are based on evidence that does not meet the applicable standard of proof;<sup>47</sup>
- (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>48</sup>

### Certainty

**(8) Uncertainty:** This includes 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>49</sup> (for example, 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 precondition 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>50</sup>

### Motivation of the decision-maker

**(10) Unauthorised purpose:** This includes decisions that are made for a purpose other than that for which the discretion exists<sup>51</sup> (for example, the use of powers for an ulterior purpose, such as financial advantage<sup>52</sup>).

**(11) Bad faith:** This includes 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>53</sup>

A relatively recent expansion was the High Court's decision in *Minister for Immigration & Citizenship v Li*<sup>54</sup> (*Li*), in which the Court adopted (or clarified) a broader interpretation of what constitutes 'unreasonableness' in the legal sense (for example, by linking unreasonableness to rationality and logicity) than the narrower 'traditional' view that had been in place since the 1948 decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>55</sup> (*Wednesbury*). In *Li* the High Court reiterated and/or expanded the scope of reasonableness to include:

- considering an irrelevant factor or not considering a relevant factor;
- giving disproportionate weight to a factor of little importance or giving inadequate weight to a factor of great importance;
- lacking evident or intelligible justification; and
- lacking proportionality.

Despite the often-repeated claim by the courts that the law does not concern itself with the merits of administrative action,<sup>56</sup> as the list highlights, over time the Australian courts have significantly broadened the scope of the grounds for judicial review of administrative action.

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.

So what is left? In my view, in practice not a lot.

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

However, in practice the courts commonly review these aspects by categorising what they are doing as reviewing points of law. This is achieved by breaking down the process into its component parts.

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>57</sup> the area of 'free discretion' of the decision-maker to make such assessments 'resides within the bounds of legal reasonableness'.<sup>58</sup> 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.

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;
- 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.

<b>Error/failure/mistake</b>	<b>Examples of potential 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.</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.</li> <li>• Lack of probative evidence to the extent that the decision has no basis on the available evidence.</li> <li>• Failure to make adequate inquiries, etc.</li> </ul>
Failing to understand or appropriately to interpret the available information	<ul style="list-style-type: none"> <li>• Deficient reasoning due to a failure rationally to consider probative evidence or decisions that do not logically flow from the facts.</li> <li>• Mistake in respect of key evidence or error of fact due to misunderstanding or misconstruing a claim raised.</li> <li>• Unreasonable outcomes due to <i>Wednesbury</i> unreasonableness (as expanded by the decision in <i>LJ</i>), decisions not based on findings or inferences of fact supported by logical grounds, or an obviously disproportionate response, etc.</li> </ul>

<p>Failing properly to 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.</li> <li>• Failure to properly assess the weight of evidence, eg 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.</li> <li>• Contrary to the overwhelming weight of available evidence.</li> <li>• Evidence not meeting the applicable standard of proof, etc.</li> </ul>
<p>Failing properly to 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.</li> <li>• Lacking evident and intelligible justification.</li> </ul>

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.

I like the description of the law/fact distinction in an article by Professor Mark Elliott, Reader in Public Law at the University of Cambridge in the United Kingdom, who 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>59</sup>

I found an even more colourful description of the distinction in a blog post by Alison Young, a Fellow of Hertford College, University of Oxford, who suggested that:

[I]f 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>60</sup> 'get out of jail free' card ...<sup>61</sup>

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>62</sup> However, if such a finding was, for example, not based on any evidence (that is, 'any evident or intelligible justification'<sup>63</sup>) or there was a failure to rationally consider the available evidence<sup>64</sup> then various grounds for judicial intervention could well be held to be available.

In my view it is all about categorisation. If a judge does not like a finding on credibility, he or she can break the assessment process into its component parts and, 'Bob's your uncle', it is all about legal reasonableness.

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>65</sup> For example, 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>66</sup> and could lead a court to infer that the decision-maker 'had no good reason'.<sup>67</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>68</sup>

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 — 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).

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 Forest J in *K v Children's Court of Victoria and Federal Agent Mathew Court*.

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 ...*<sup>69</sup>

It has been noted in several influential cases over the years<sup>70</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:

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>71</sup>

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. For example:

- conscious influences might include their views about the conduct of or impact on a party; and
- possible unconscious influences<sup>72</sup> might be categorised as confirmation bias / belief bias, correspondence bias / fundamental attribution error, selective perception, selective exposure etcetera.

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.

Would it only be a cynic who might argue that the writers of the movie *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'.

In relation to the role of the courts to review administrative action:

- the vast majority of administrative actions do not result in judicial review;
- the administrative actions that are reviewed are selected by applicants, not the courts; and
- judicial oversight of administrative action through reviews of individual cases is therefore in practice ad hoc, largely random and reactive.

If the role of the courts is intended to include proactive guidance for administrative decision-makers, 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 role.

Another factor that does not appear to have received any attention from the courts or administrative law commentators is the negative impact on administrative decision-makers of jurisdiction creep. Having a court decide that a public official's decision was 'unlawful' (which implies they were either incompetent or lacking in integrity) is a far worse outcome in terms of their reputation, or credibility etcetera than having a court or tribunal look at the merits of the same decision and decide that there is a more correct or 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.

To attempt to address these issues, I make a series of 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 headnote whether the judgment expresses a precedent/guideline/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 (that is, in plain English using a minimum of technical terms).
- (2) The legal obligations on administrative decision-makers 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 in all jurisdictions<sup>73</sup> (with detailed

objects provisions giving clear guidance as to parliaments' intentions as to how they are to be interpreted and applied). Such comprehensive plain English statutory codes would bring together the relevant rules into one place, which could be easily referred to by administrative decision-makers to identify key changes over 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.
- (4) Public officials need to be particularly careful to ensure that all aspects of their actions and decisions are not only lawful but can also be clearly shown to be fair and reasonable in the circumstances.
- (5) When defending legal actions seeking to overturn administrative decisions, 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 in question were not fair and reasonable in the circumstances.

#### Endnotes

- 1 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* (Unreported, 30035/94, 3 July 1995); *K v NSW Ombudsman* [2000] NSWSC 771; *Ombudsman v Koopman* [2003] NSWCA 277.
- 2 Leaving aside immigration cases, in my experience most judicial review cases are brought by parties who have access to the considerable funds required to bring such proceedings, people prepared to risk all in the pursuit of a 'matter of principle', or self-litigators.
- 3 Lon Fuller, *The Morality of Law* (Yale University Press, New Haven CT, 1964).
- 4 See *Craig v South Australia* [1995] HCA 58 at [11], [12]; (1995) 184 CLR 163, 177–9; *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531, [71]–[73]; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 4th ed, 2009); and Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014).
- 5 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, 80; (1990) 170 CLR 321.
- 6 *Craig v South Australia, Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323, 351 [82].
- 7 *Chapman v Taylor* [2004] NSWCA 456, [33] (Hodgson LA; Beasley and Tobias JJA agreeing).
- 8 *Craig v South Australia, Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317, [19].
- 9 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: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263, [20]; *SZRRD v Minister for Immigration and Border Protection* [2015] FCA 577, 14–17.
- 10 See *Italiano v Carbone* [2005] NSWCA 177, [106] (Basten J) and [170] (Einstein J).
- 11 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56, 55; (2003) 216 CLR 212, [55]; *Drysdale v WorkCover WA* [2014] WASC 270, 58.
- 12 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 195 ALR 502.
- 13 A failure to afford procedural fairness may amount to an error of law: see, for example, *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAO 69, [13]. This is not limited to decisions, recommendations or findings but can apply to reports of coroners, royal commissions, investigative agencies and investigators looking into disciplinary issues and the like that can 'substantially impact on the economic or reputational interest of particular individuals': Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013), [2.460], quoted by Basten JA in *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, [714].
- 14 An example of such a decision is the Supreme Court of Queensland decision in *Vega v Hoyle* [2015] QSC 111. In this regard, see also *Lohse v Arthur (No 3)* [2009] FCA 1118, [47]; and *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517, [157], [159].
- 15 In a recent 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': the majority in *Isbester v Knox City Council* [2015] HCA 20, [33] (*Isbester*). 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, 259) as an 'incompatibility' ([34]). The Court went further, noting that the application of the principle extended beyond just the decision-maker and referring to the High Court decision in *Stollery v Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509, 520 (*Stollery*),

- 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": [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': [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, 581 [2], 611 [117]; and *Antoun v The Queen* [2006] HCA 2; (2006) 224 ALR 51, 52 [2]-[3].
- 16 Bias is an element of the 'bad faith' ground of judicial review as well as being a rule of procedural fairness.
- 17 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, 65; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1, 9 [25], 12 [35], 34 [104]-[105]; and, more recently, *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105, [73]; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, [28]-[30]. In *Save Beeliam 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': 145.
- 18 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, 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.
- 19 *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116; *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450.
- 20 *Barnard v National Dock Labour Board* [1953] 1 All ER 1113.
- 21 See *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610; *Green v Daniels* (1977) 51 ALJR 463; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50, [52], quoting Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277, 287 [17].
- 22 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.
- 23 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 72; (2013) 249 CLR 332; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 41, 30, 71.
- 24 *Acquista Investments Pty Ltd v The Urban Renewal Authority* [2014] SASC 206 at 565-8; *SZUZE v Minister for Immigration* [2015] FCCA 1767, [21]-[35]; *AE015 v Minister for Immigration* [2016] FCCA 97, [42].
- 25 *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26, [24], quoted in *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45, [32], [40].
- 26 *Buchwald v Minister for Immigration and Border Protection* [2016] FCA 101, [72]; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, [82] (McHugh, Gummow and Hayne JJ).
- 27 See, for example, the views of Finkelstein J in *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413; and *MZAGW v Minister For Immigration* [2015] FCCA 2857, [26], [28], [30]-[32].
- 28 *Duncan v ICAC, McGuigan v ICAC, Kinghorn v ICAC, Cascade Coal v ICAC* [2014] NSWSC 1018, 35(2).
- 29 Per views expressed by the majority in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 364. 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': [287].
- 30 Not every lapse in logic will give rise to jurisdictional error (*Minister for Immigration and Citizenship v SZMDS* [2010] 240 CLR 611, [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: *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303. In *SZTJG v Minister for Immigration* [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': [83].
- 31 *AT115 v Minister for Immigration* [2016] FCCA 8, [60].
- 32 *Re Minister for Immigration and Multi-Cultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59, [34]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, [37]-[38]; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611, [130]-[131].
- 33 Per the majority in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 364-5 [76]; *DPP v Cartwright* [2015] VSCA 11, [33]-[34].
- 34 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, [25] (French CJ) quoting Denis James Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 140.

- 35 Referred to by the Full Court of Federal Court of Australia as an 'error of fact' that 'can constitute jurisdictional error': *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, [63].
- 36 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611, [23], [24].
- 37 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See also *Minister for Immigration v Li* [2013] HCA 18, [24], [65]; (2013) 249 CLR 332.
- 38 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 74; (2013) 249 CLR 332.
- 39 For example, *ibid* 30 (French CJ).
- 40 Commonly referred to as the 'no-evidence rule' of procedural fairness: see *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473; *Duncan v ICAC, McGuigan v ICAC, Kinghorn v ICAC, Cascade Coal v ICAC* [2014] NSWSC 1018, 35(3); *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 355–6; *SZNV v Minister for Immigration and Citizenship* [2010] FCA 56, [36]–[38]; *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45, [69]–[70]; *SZAPC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 995, [57]; *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, [278].
- 41 See, for example, *Parramatta City Council v Pestell* [1972] HCA 59; (1972) 128 CLR 305, 323 (Menzies J); *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, [19]–[20], [25]; *Australian Pork Ltd v Director of Animal & Plant Quarantine* [2005] FCA 671, 309–310; *SZNV v Minister for Immigration and Citizenship* (2010) 118 ALD 232, [38]; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; (2014) 254 CLR 28, [46].
- 42 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 76; (2013) 249 CLR 332.
- 43 *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768, 821.
- 44 *SFGB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 231; (2003) 77 ALD 402, [18]–[20]; *Applicant A227 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 567, [44]; *SZJRU v Minister for Immigration and Citizenship* [2009] FCA 315; (2009) 108 ALD 515, [53]–[54].
- 45 *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108, 72 (Kenny J); *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159 CLR 656, [7] (Gibbs CJ), referring to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1.
- 46 See, for example, *WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184; 75 ALD 630, [47]; *Minister for Immigration & Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431, [49]–[50]. However, 'inadequate reasons provided at the discretion of the decision-making body cannot impugn the validity of the decision itself': *Obeid v Independent Commission Against Corruption* [2015] NSWSC 1891, 49 (Davies J).
- 47 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': *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93, 99 (*Sullivan*). In *Sullivan* 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* (*Briginshaw v Briginshaw* (1938) 60 CLR 336) because they are not bound by the rules of evidence: 115.
- 48 *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, 169–70.
- 49 *Television Corporation Ltd v Commonwealth* [1963] HCA 30; (1963) 109 CLR 59, 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': *Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services* [2015] NSWLEC 167, 48.
- 50 *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, 5.
- 51 Also referred to as 'improper purpose': see *R v Anderson; Ex parte Ipec-Air Pty Ltd* [1965] HCA 27, 10; (1965) 113 CLR 177 (quoting *Water Conservation and Irrigation Commission v Browning* [1947] HCA 21; (1947) 74 CLR 492, 496, 498, 499, 500, 504). The inference of improper purpose could be drawn if the evidence cannot be reconciled with the proper exercise of the power: *Golden v V'landys* [2015] NSWSC 1709, referring to *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 672.
- 52 *Municipal Council of Sydney v Campbell* [1925] AC 338.
- 53 *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35; (2007) 232 CLR 189.
- 54 [2013] HCA 18.
- 55 [1948] 1 KB 223.
- 56 For example, see the judgment of Brennan J in *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564.
- 57 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 66; (2013) 249 CLR 332.

- 58 See also the view expressed by Brennan CJ in *Kruger v Commonwealth* ('Stolen Generation Case') [1997] HCA 27; (1997) 190 CLR 1, 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'.
- 59 Mark Elliott, *Jurisdictional error and the law/fact distinction: Jones (by Caldwell) v First-Tier Tribunal* [2013] UKSC 19 (17 April 2013) Public Law for Everyone <<http://publiclawforeveryone.com/2013/04/17/jurisdictional-error-and-the-lawfact-distinction-jones>>.
- 60 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': *Urban Dictionary*.
- 61 Alison Young, 'Fact/Law — A Flawed Distinction?' on *UK Constitutional Law Association Blog* (21 May 2013) <<http://ukconstitutionallaw.org/2013/05/21/alison-l-young-factlaw-a-flawed-distinction/>>.
- 62 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407, [67]; *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534, [20].
- 63 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 76; (2013) 249 CLR 332.
- 64 *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, 41–2; *Minister of Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 4 ALD 139, 155–6; *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 76; and *Sullivan v Civil Aviation Safety Authority* [2014] FCAF 93, [97].
- 65 See, for example, *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089, [16]–[23]; *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) FCR 99, 121; *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470, [37]; *WAGO v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 437, [54]; *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253, [31].
- 66 *SZSRV v Minister for Immigration and Border Protection* [2014] FCA 220, [23]; *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089, [16]–[23]; and *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317, [23].
- 67 *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, [7].
- 68 See, for example, *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517.
- 69 [2015] VSC 645, [25] (emphasis added).
- 70 See, for example, *House v King* (1936) 55 CLR 499, 505; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360; *Wilson v State of Western Australia* [2010] WASCA 82, [2]; *Minister for Immigration and Citizenship v Li* [2013] HCA 18, [85]; *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, 115.
- 71 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360.
- 72 See, for example, confirmation bias / belief bias: correspondence bias / fundamental attribution error: selective perception; selective exposure theory; etc. In this regard, the results of the study involving eight parole judges in Israel, referred to by Daniel Kahneman, make fascinating reading: Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus and Giroux, 2011) 43–4.
- 73 Examples of attempts at codification of the natural justice hearing rule requirements include *Migration Act 1958* (Cth) div 4, pt 7; *Ombudsman Act 1974* (NSW) s 24; *Ombudsman Act 1976* (Cth) s 8; *National Vocational Education & Training Regulation Act 2011* (Cth) s 24.