

Judicial review of administrative decisions: 37 shades of grey in administrative decision-making

APSACC 2017, Sydney 16 November 2017

Chris Wheeler, Deputy NSW Ombudsman

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 included:

- working for local and state government agencies in Victoria and NSW
- as a lawyer in private practice giving advice primarily to local councils
- as a public official reviewing the exercise of discretionary powers by public officials as an Ombudsman investigator and later Local Government Inspector, and for many years as Deputy Ombudsman. In these 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 and decisions as Deputy Ombudsman have also been the subject of several judicial review applications to the NSW Supreme Court¹. I am happy to say all have been unsuccessful, so far!

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 will be talking today about judicial review of administrative action from the perspective of an administrative decision-maker². This presentation is an updated and somewhat expanded version of a presentation I originally gave to the 2016 AIAL National Conference in Brisbane.

The broadening scope of judicial review

Over several decades the courts in Australia have significantly broadened the scope of judicial review of administrative action from a narrow focus on good process to what is effectively a review of the merits of such action. This 'jurisdiction creep' has reached the extent that most aspects of the exercise of statutory discretionary powers can, in one way or another, be brought within the scope of such review.

The current broad interpretation of the scope of judicial review of administrative action has exacerbated 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*: Administrative law is not black and white, but various shades of grey. As the application of most 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 those who make the rules and those obliged to comply with them. 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 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 resources³. 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.

- *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. For example, 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, e.g. *Briginshaw, Browne v Dunn, Jones v Dunkel*]*”.

Presumably the role of judicial review of administrative action is to protect the rule of law. However, in practice:

- The vast majority of administrative actions do not result in judicial review. Most people who have a problem with an administrative decision in practice seek redress through an Ombudsman, an administrative tribunal or some other complaint or review process. Only an infinitesimally small fraction of the massive number of discretionary decisions made by NSW public officials, for example, under more than 1,000 Acts of Parliament, 600 statutory instruments and 300 plus planning instruments ever result in judicial review.
- The administrative actions that are reviewed by the courts are selected by applicants, not those courts, and generally only by applicants with access to the funds necessary to cover expensive legal representation; or people who are upset or determined enough to either self-litigate or bear the expense no matter the personal cost in their quest for vindication or compensation. 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*”.⁴ 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*”.⁵

- Relatively few of the 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 therefore 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. 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.
- While not denying the constitutional role of the courts in maintaining the rule of law, the practice of judicial oversight of administrative action through the review of individual cases can, in my view, be validly described as ad hoc, largely random and reactive.

If the role of the courts is intended to include pro-active guidance for administrative decision-makers, given the uncertainty, variability, complexity and incomprehensibility issues I referred to, I argue that judicial review as currently practised by the courts is not 'fit for purpose' in relation to such a role.

The scope of judicial review

Judicial review is primarily concerned with legal issues such as jurisdiction, not the merits. Phrases commonly used by the courts to describe the scope of judicial review include '*error of law*', '*jurisdictional error*', '*legally unreasonable*', and '*denial of procedural fairness*' or '*practical injustice*'. The grounds on which intervention in administrative decision-making has been justified by the courts are commonly referred to using such terms as identifying the wrong issue, asking the wrong question, ignoring relevant information, relying on irrelevant material, 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, my paper identifies and summarises 37 potential grounds. Well 38 actually, but I will get to that later.

As I mentioned earlier, administrative law is not black and white. In practice there is a significant grey area in each of these grounds, hence the reference in the title to this paper to the "*shades of grey*" in administrative decision-making.

These grounds, some of which overlap to a degree, are based on cases, many of which are set out in the copy of this presentation, with a more extensive list in a more detailed version of my 2016 AIAL presentation that can be downloaded at:

https://www.ombo.nsw.gov.au/data/assets/pdf_file/0003/49935/Judicial-review-of-Administrative-Action-An-administrative-decision-makers-perspective-FULL-VERSION-August-2016.pdf

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:

1. are based on a mistaken assertion or denial of the existence of jurisdiction,
2. are based on a misapprehension or disregard of the nature or limits of the decision-makers functions or powers,
3. are wholly or partly outside the general area of the decision-makers jurisdiction⁶,
4. are based on a mistaken belief that circumstances exist which authorise the making of the decision (commonly referred to as a "*jurisdictional fact*").

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 a decision-maker who⁷:

5. identified a wrong issue, asked the wrong question, failed to address the question posed⁸,
6. applied a wrong principle of law⁹,
7. ignored relevant material or relied on irrelevant material in a way that affected the exercise of power¹⁰,
8. breached a mandatory statutory procedure or obligation¹¹ (such as provisions imposing procedural fairness obligations¹², mandatory time limits, obligations to consult prior to decisions being made, or requiring the giving of reasons for a decision to be valid¹³), or
9. was not authorised to make the decision (e.g. due to the lack of a necessary delegation).

Practical injustice¹⁴: This would include decisions made or actions taken that impact, or are likely to impact, upon the rights or interests¹⁵ of a person or entity likely to be adversely affected by the decision or action where:

10. 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),
11. 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 (a limb of the "*hearing rule*")¹⁶,
12. 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)¹⁷,
13. 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 person¹⁸ (the "*bias rule*"¹⁹), or
14. 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 proceed²⁰.

Fettered discretion: Decisions that:

15. were made under the instruction of another person or entity where the decision-maker feels bound to comply²¹,
16. 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 consent²²),

17. were made under an unauthorised delegation of a discretionary power²³,
18. involve the inflexible application of a policy without regard to the merits of the particular situation²⁴, or
19. 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 applied²⁵.

Unreasonable procedure/deficient reasoning: Decisions that:

20. give disproportionate/excessive weight to some factor of little importance, or any weight to an irrelevant factor or a factor of no importance²⁶,
21. give no consideration to a relevant factor the decision-maker is bound to consider, or inadequate weight to a factor of great importance²⁷ (including a failure to deal with or make a finding on *“a substantial clearly articulated argument relying upon established facts”*²⁸, *“ignoring relevant material [which] affects the tribunal’s exercise or purported exercise of power”*²⁹),
22. are not based on a rational consideration of the evidence³⁰ 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”*³¹),
23. are based on reasoning that is illogical or irrational³², particularly where *“no rational or logical decision-maker could arrive [at the decision] on the same evidence”*³³ or *“there was ... no evidence upon which the [decision-maker] could reach the conclusion”*³⁴, or lack *“a basis in findings or inferences of facts supported on logical grounds”*³⁵),
24. lack an evident and intelligible justification³⁶ (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”*³⁷),
25. are based on a mistake in respect of evidence or on a misunderstanding or misconstruing of a claim advanced by the applicant³⁸, or
26. are contrary to the overwhelming weight of the available evidence³⁹.

Unreasonable outcome: Decisions that:

27. 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”*⁴⁰), or
28. are an obviously disproportionate response⁴¹, i.e. lacking proportionality (while there is some debate on the topic, this would include *“taking a sledgehammer to crack a nut”*⁴², where a penalty imposed is far greater than is warranted in the circumstances).

Insufficient evidence: Decisions that:

29. are based on **no** probative evidence at all⁴³,
30. 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 evidence⁴⁴ (e.g. *“a decision which lacks an evident and intelligible justification”*⁴⁵, *“decisions... so devoid of any plausible justification that no reasonable body of persons could have reached them”*⁴⁶, or where there is no evidence to support a finding that is a critical step in reaching the ultimate conclusion⁴⁷),
31. 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”*⁴⁸ (i.e. the

reasons do not adequately justify the result reached, and the court inferring from a lack of good reasons that none exist⁴⁹),

- 32. are based on evidence that does not meet the applicable standard of proof⁵⁰,
- 33. 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)⁵¹.

Uncertainty:

- 34. 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 certain⁵² (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).

Unfair treatment:

- 35. 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 persons⁵³.

Unauthorised purpose:

- 36. Decisions that are made for a purpose other than that for which the discretion exists⁵⁴ (e.g. the use of powers for an ulterior purpose, such as financial advantage⁵⁵).

Bad faith:

- 37. 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 power⁵⁶.

After deciding on the title for this paper referring to '37 shades of grey', I discovered a 38th: 'delay'! A 2017 judgement in the Federal Court *BIX15*⁵⁷ refers to the 2005 High Court judgment in *NAIS*⁵⁸, in which it was held by the majority that an AAT decision was affected by jurisdictional error because of delay. Admittedly not every delay will cause unfairness resulting in jurisdictional error, which creates another grey area for administrative decision-makers.

In its decision in *Minister for Immigration & Citizenship v Li and Anor* four years ago the High Court adopted (or 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 decision in *Wednesbury*. In *Li* the High Court effectively increased the jurisdiction of Australian courts to review the substance of administrative decisions.

It has been noted in several influential cases over the years⁵⁹ 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*⁶⁰

I think the problem for judges is well expressed in a comment 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].

Despite the often repeated claim by the courts that the law does not concern itself with the merits of administrative action⁶¹, as the list of grounds 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.

In practice the courts commonly review these aspects administrative decision-making by categorising what they are doing as reviewing points of law. This is achieved by breaking down the process into its component parts.

Fact finding

In relation to fact finding, 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*⁶², the area of "free discretion" of the decision-maker to make such assessments "... resides within the bounds of legal reasonableness"⁶³. 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,
- to look for relevant information,
- to find relevant information due to inadequate inquiries,
- to understand or appropriately interpret available information,
- to properly assess the relevance or importance of available information, or
- to properly explain the basis for a decision.

Error/failure/mistake	Examples of potential grounds for judicial intervention include
Failing to ask the right question or address the question posed	<ul style="list-style-type: none"> • Error of law by failing to ask the right question or asking the wrong question, or failing to address the question raised.
Failing to look for relevant information or failing to find relevant information due to inadequate inquiries	<ul style="list-style-type: none"> • No probative evidence that proves or helps to prove key facts. • Lack of probative evidence to the extent that the decision has no basis on the available evidence. • Failure to make adequate inquiries, etc.
Failing to understand or to appropriately interpret the available information	<ul style="list-style-type: none"> • Deficient reasoning due to a failure to rationally consider probative evidence or decisions that do not logically flow from the facts. • Mistake in respect of key evidence or error of fact due to misunderstanding or misconstruing a claim raised. • 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, or an obviously disproportionate response, etc.
Failing to properly assess the relevance or importance of the available information	<ul style="list-style-type: none"> • Attention given to extraneous circumstances such as factors of little or no relevance. • 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. • Contrary to the overwhelming weight of available evidence. • Evidence not meeting the applicable standard of proof, etc.

Failing to properly explain the basis for a decision	<ul style="list-style-type: none"> • No justification evident on the ‘record’, • Not disclosing any material by reference to which a rational decision-maker could have evaluated certain evidence, etc. • Lacking evident and intelligible justification.
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As highlighted in the previous slides, 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 UK Professor Mark Elliot, Reader in Public Law at the University of Cambridge, 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”⁶⁴.

I found an even more colourful description of the distinction in a blog post by Alison Young, a Fellow of Hartford 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*⁶⁵ ‘get out of jail free’ card...”⁶⁶.

Findings of 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*”⁶⁷. However, if such a finding was, for example, not based on any evidence (i.e. “any evident or intelligible justification”⁶⁸) or there was a failure to rationally consider the available evidence⁶⁹, then various grounds for judicial intervention could well be held to be available.

In my view it is all about categorisation! If a judge doesn’t like a finding on credibility, he or she can break the assessment process into its component parts and, ‘bob’s your uncle’, it’s all about legal reasonableness! Could one be forgiven for thinking that the effect of this approach is that a finding on credibility is ‘the function of the primary decision-maker’, but only if the judge thinks it was the right decision?

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 error⁷⁰. 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 error⁷¹, and could lead a court to infer that the decision-maker “*had no good reason*”⁷². 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 fairness⁷³.

Impact of the attitude of judges

I think there is ample evidence to show that 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).

The ‘attitude’ of judges might be influenced by their personal values or philosophy, or their reaction to the circumstances of the particular case. 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 to the proceedings, and
- possible unconscious influences⁷⁴, which might be categorised as confirmation bias, correspondence bias or fundamental attribution error, selective perception, selective exposure, etc.

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.

Impact on administrative decision-makers

Another factor that doesn’t appear to have received any attention by the courts or administrative law commentators is the negative impact on administrative decision-makers of jurisdiction creep. Having a court decide a public official’s decision was ‘unlawful’ implies they were either incompetent or lacking in integrity. This is a far worse outcome in terms of their reputation and credibility 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. That merely implies a difference of opinion.

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, 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.

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*”!

A few final thoughts:

- 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.
- 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. In my opinion Judges need to give careful thought to how the tension between the ‘*accessibility*’ and ‘*reliability*’ of the law⁷⁵ can be addressed to meet the needs of non-lawyer administrative decision-makers by using everyday language, while at the same time ensuring the law is still reliable by using precise technical language where this is essential.
- Public officials need to be particularly careful to ensure all aspects of their actions and decisions are not only lawful, but can be clearly shown to be fair and reasonable in the circumstances. I think a more practical, approach open to administrative decision-makers would be that instead of focusing on the minutia of administrative law, administrative decision-makers’ would be better off focusing more on the standards or qualities of administrative conduct that underpin the various grounds the courts have identified as justifying judicial intervention. In my view these standards or qualities can be categorised as aspects of fairness, reasonableness and competence in public administration.
- 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.

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* [30035/94, 3 July 1995, unreported], “K” v NSW Ombudsman & Anor [2000] NSWSC 771, *Ombudsman v Koopman & Anor* [2003] NSWCA 277.

² This talk is an updated version of a paper I delivered to the 2016 AIAL National Administrative Law Conference in Brisbane, subsequently published in AIAL Forum No 87. A much more detailed paper on the topic can be found on the NSW Ombudsman website by clicking on News and Publications, then Speeches, then my name.

³ 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).

⁴ Martin W. “Forewarned and four-armed: Administrative law values and the fourth arm of government” (2014) 88 ALJ 106, a6 109.

⁵ Martin W, “Bridging the Gap”, Address to the National Access to Justice and Pro Bono Conference, 12 August 2006

⁶ 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*, 4th 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

⁷ 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.

⁸ *Craig v South Australia, Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at 351 [82].

⁹ *Chapman v Taylor* [2004] NSWCA 456 at [33]. Per Hodgson LA (Beasley and Tobias JJA agreeing)

¹⁰ *Craig v South Australia, Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [19].

¹¹ 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 per *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; at 20 and *SZRRD v Minister for Immigration and Border Protection* [2015] FCA 577 at 14-17.

¹² See the views of Basten J. in *Italiano v Carbone & Ors* [2005] NSWCA 177 at 106 and Einstein J at 170

¹³ *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.

¹⁴ *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 195 ALR 502.

¹⁵ 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].

¹⁶ See most recently *Hunter’s Hill Council v Minister for Local Government* [2017] NSWCA 188.

¹⁷ An example of such a decision is the Queensland Supreme Court decision in *Vega v Vega v Hoyle* [2015] QSC 111. In this regard see also *Lohse v Arthur (No. 3)* [2009] FCA 1118 at [47], *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517 at [157] and [159], and *BRFO38 v The Republic of Nauru* [2017] HCA 44 at [65].

¹⁸ 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”, 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 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].

¹⁹ Bias is an element of the “bad faith” ground of judicial review as well as being a rule of procedural fairness.

²⁰ 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 Beeliar 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).

²¹ 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.

²² *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116; *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450

²³ *Barnard v National Dock Labour Board* [1953] 1 All ER 1113.

²⁴ 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 at [52] quoting Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277 at 287 [17].

²⁵ 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

²⁶ *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..

²⁷ *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].

²⁸ *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26 at [24], quoted in *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45 at [32]. [40].

²⁹ *Buchwald v Minister for Immigration and Border Protection* [2016] FCA 101 at [72], *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 at [82] per McHugh, Gummow and Hayne JJ.

³⁰ See for example the views of Finkelstein J in *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413, and *MZAGW & Ors v Minister For Immigration & Anor* [2015] FCCA 2857 at 26, 28, 30-32.

³¹ *Duncan v ICAC, McGuigan v ICAC, Kinghorn v ICAC, Cascade Coal v ICAC* [2014] NSWSC 1018 at 35 (2)

³² Per views expressed by the majority in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 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”, at [287].

³³ 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. 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].

³⁴ *ATI15 v Minister for Immigration & Anor* [2016] FCCA 8 at [60].

³⁵ *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], *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [130]-[131], *Sing V minister for Immigration & Anor* [2016] FCCA 257 at [12].

³⁶ 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].

³⁷ 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

³⁸ 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], *Sing V Minister for Immigration & Anor* [2016] FCCA 257 at [12].

³⁹ *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [23] & [24]

⁴⁰ *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.

⁴¹ *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 74; (2013) 249 CLR 332. See also *McCloy v New South Wales* (2015) 357 CLR 178 at [3] & [79].

⁴²For example French CJ in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 30.

⁴³ 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 at 35 (3), *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 355-6SZNKV v *Minister for Immigration and Citizenship* [2010] FCA 56 at [36]-[38], *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].

⁴⁴ 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].

⁴⁵ *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 76; (2013) 249 CLR 332.

⁴⁶ *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821

⁴⁷ *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], *SZIRU v Minister for Immigration and Citizenship* [2009] FCA 315; (2009) 108 ALD 515 at [53]-[54].

⁴⁸ 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.

⁴⁹ See for example *WAEF 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], citing *Sherlock v Lloyd* [2010] VSCA 122; (2010) 27 VR 434 at [74].

⁵⁰ 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 even where they are not obliged to comply with the “rule” in *Briginshaw* because they are not bound by the rules of evidence (at 115). In *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41 at [127], Leeming JA remarked that what was said in *Briginshaw* “reflects a more general approach to fact finding”, which was applicable by analogy to administrative tribunals (in that case, the NSW Civil and Administrative Tribunal).

⁵¹ *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, and *AZAFM v Minister for Immigration & Anor* [2015] FCCA 2831 at [17]-[18].

⁵² *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.

⁵³ *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at 5

⁵⁴ 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). The inference of improper purpose could be drawn if the evidence cannot be reconciled with the proper exercise of the power, per *Golden v Vlandys* [2015] NSWSC 1709, referring to *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 672.

⁵⁵ *Municipal Council of Sydney v Campbell* [1925] AC 338.

⁵⁶ *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35; (2007) 232 CLR 189.

⁵⁷ *BIX15 v Minister For Immigration and Border Protection* [2017] FCA 1116 at [31]-[43].

⁵⁸ *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 and *SZKJV v Minister for Immigration and Citizenship* (2011) 120 ALD 52; [2011] FCA 80

⁵⁹ 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 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.

⁶⁰ *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360

⁶¹ For example see the judgement of Brennan J in *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564, and more recently in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11 at

[12] (“the task for the Court is not to assess what it thinks is reasonable and thereby conclude . . . that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful”).

⁶² *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 66; (2013) 249 CLR 332.

⁶³ 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”.

⁶⁴ 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>)

⁶⁵ 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.

⁶⁶ A. L. Young, ‘Fact/Law – a Flawed Distinction?’, U.K. Const. L. Blog (21st May 2013) (<http://ukconstitutionallaw.org/2013/05/21/alison-l-young-factlaw-a-flawed-distinction/>)

⁶⁷ *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407 at [67], *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534 at [20].

⁶⁸ *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at 76; (2013) 249 CLR 332.

⁶⁹ *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].

⁷⁰ 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].

⁷¹ *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].

⁷² *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]

⁷³ See for example *Nichols v Singleton Council* (No 2) [2011] NSWSC 1517

⁷⁴ 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 make fascinating reading (Danziger, S., Levav, J., & Avnaim-Pesso, L., *Extraneous factors in judicial decisions*, PNAS April 26, 2011, vol 108, no. 17, at 6889-6892, referred to by Daniel Kahneman in his book ‘*Thinking, Fast and Slow*’, at 43-44).

⁷⁵ Fuller, L. *The Morality of Law* (1964), New Haven CT: Yale University Press