

**Judicial review of
illegality and irrationality
of administrative decisions
in Australia**

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SCOPE AND PURPOSE OF JUDICIAL REVIEW

The fundamental purpose of judicial review is to ensure that powers are exercised for the purpose for which they were conferred and in the manner in which they were intended to be exercised.¹

In *Attorney-General (NSW) v Quin*², Brennan J stated:

“The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. In *Victoria v The Commonwealth and Hayden*³, Gibbs J said that the duty of the courts extends to pronouncing on the validity of executive action when challenged on the ground that it exceeds constitutional power, but the duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law. The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall J in *Marbury v Madison*⁴:

“It is, emphatically, the province and duty of the judicial department to say what the law is”

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise”.⁵

The distinction drawn by Brennan J between judicial review and merits review is a fundamental principle of Australian administrative law.⁶

Brennan J’s formulation that judicial review is directed to “enforcing the law which determines the limits and governs the exercise” of power is a widely accepted

¹ J J Spigelman, “The integrity branch of government” (2004) 78 ALJ 724 at 730.

² (1990) 170 CLR 1 at 35-36.

³ (1975) 134 CLR 338 at 380.

⁴ (1803) 1 Cranch 137 at 177; 5 US 87 at 111.

⁵ See further *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 186 CLR 259 at 272; *Abebe v Commonwealth* (1999) 197 CLR 510 at [195]; *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 152 [43]–153; and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 348 [73].

⁶ J J Spigelman, “The integrity branch of government” (2004) 78 ALJ 724 at 730; M Gleeson, “Judicial Legitimacy” (2000) 20 *Australian Bar Review* 4 at 11.

statement of the dichotomy between legality and the merits.⁷ The law can be statutes or the common law.

The dichotomy between legality and the merits “does not involve a bright line test. The boundary is porous and ill defined”.⁸ Yet, the legitimacy of judicial review depends on courts policing that boundary, ensuring that judicial interference with administrative decisions and conduct only occurs in respect of the legality and not the merits of such decisions and conduct.

This paper assays the task of surveying the boundaries of legality.

A THREEFOLD CLASSIFICATION OF JUDICIAL REVIEW GROUNDS

In *Council of Civil Service Unions v Minister for the Civil Service*⁹ (also known as the GCHQ case), Lord Diplock perhaps bravely classified all of the grounds upon which administrative action is subject to control by judicial review under three heads: illegality, irrationality and procedural impropriety.

By illegality, Lord Diplock meant that “the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.”¹⁰

By irrationality, Lord Diplock meant “what can be now succinctly referred to as ‘*Wednesbury* unreasonableness’ (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).”¹¹ This includes a bundle of grounds, subsequently referred to as the “*Wednesbury* principles”, of disregard of relevant considerations, consideration of irrelevant considerations and manifest unreasonableness.¹² Lack of proportionality has been included, at least in Australia, under the heading of irrationality.

By procedural impropriety, Lord Diplock included failure to observe basic rules of natural justice and failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.¹³

Lord Roskill commended the threefold division and nomenclature of Lord Diplock.¹⁴ It has been followed in subsequent cases.¹⁵

⁷ J J Spigelman, “The integrity branch of government” (2004) 78 ALJ 724 at 732.

⁸ J J Spigelman, “The integrity branch of government” (2004) 78 ALJ 724 at 732.

⁹ [1985] AC 374 at 410.

¹⁰ [1985] AC 374 at 410.

¹¹ [1985] AC 374 at 410.

¹² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 233-234

¹³ [1985] AC 374 at 411.

¹⁴ [1985] AC 374 at 414, 415.

¹⁵ *Wheeler v Leicester City Council* [1985] AC 1054 at 1078; *R v Secretary of State for the Environment; ex parte Nottinghamshire County Council* [1986] AC 240 at 249; *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696 at 750; *R v Secretary of State for the Home Department; ex parte Al-Mehdawi* [1990] 1 AC 876 at 894; *R v Secretary of State for the Home Department; ex parte Launder* [1997] 1 WLR 839 at 856; *Credit Suisse v Allerdale Borough Council* [1997] QB 306 at 352; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 453 [89] and see 451 [81].

For the purposes of this paper, I will follow this threefold classification. I will address the first two divisions, illegality and irrationality (including proportionality), and summarise the main grounds of judicial review in Australia that fall within these divisions.

Before doing this, I will explain two fundamental distinctions revealed by the threefold classification.

SUBSTANCE AND PROCEDURE

The threefold classification reveals two fundamental distinctions: the first between substance and procedure and the second between hard-edged questions and soft questions.

The first distinction is between substance (illegality and irrationality) and procedure (procedural impropriety). It is a distinction between “the conclusion upon which a public body has seized and the process by which that conclusion has been reached”.¹⁶ This distinction underpins Lord Diplock’s classification because it explains why he separated procedural impropriety from illegality and irrationality.

Procedural impropriety accords with a truly supervisory jurisdiction of the court because the court does not interfere with the substance or merits of a decision, only the decision-making process. The courts in common law countries apply court-set standards of natural justice or procedural fairness as well as procedural provisions contained in statutory instruments under which the administrative decision-maker exercises power. It is for this reason courts in Australia have limited the scope of a legitimate expectation, denial of which can properly found judicial review, to an expectation as to the procedure that the administrative decision-maker would follow in exercising discretionary power, and not to an expectation as to the substantive result of the exercise of the power.¹⁷

Grounds of judicial review which relate to substance do not have the inherent, self-evident comfort of relating only to the procedure of the decision-making process. Yet, in order not to exceed the legitimate, supervisory jurisdiction of the court, the court has had to formulate the grounds in a way which builds in a merit avoidance mechanism.

Hence, in relation to the *Wednesbury* unreasonableness ground, the courts have insisted that the decision must be so unreasonable that no reasonable decision-maker could have made it. The decision must not merely be unsound, or wrong, it must be perverse. By building into the ground of review this margin of appreciation, the court retains the legitimacy of judicial review.

¹⁶ M Fordham, “Surveying the Grounds: Key Themes in Judicial Intervention” in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons*, Blackstone Press, 1997, p. 188.

¹⁷ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 27 [81]- 28 [83], 35 [111], 46 [143] and 48 [148].

SOFT AND HARD EDGED QUESTIONS

The second fundamental distinction involved in Lord Diplock's classification is between "hard-edged"¹⁸ questions and ordinary or soft questions. Hard-edged questions are involved in judicial review on grounds falling within the divisions of illegality and procedural impropriety but soft questions are involved in review on the irrationality grounds.

Hard-edged questions are where "there is no room for legitimate disagreement".¹⁹ The court substitutes its conclusion for that of the administrative decision-maker. A classic example of a hard-edged question is that of jurisdictional fact. A jurisdictional fact is a "criterion, satisfaction of which enlivens that power of the decision-maker to exercise a discretion".²⁰

An administrative decision-maker cannot give itself jurisdiction by a wrong finding of jurisdictional fact. Either the fact exists objectively or it does not; either the decision-maker has jurisdiction or it does not. If the decision-maker reaches the wrong conclusion of fact, the court can and must intervene.²¹ Moreover, the reviewing court can consider material beyond that before the decision-maker to determine whether the fact objectively exists.²²

It is because of this hard edged nature of the question that Australian (and more recently English law) have rejected any doctrine of deference to the administrative decision maker.²³

Questions of legality are also hard-edged. If an administrative decision-maker applies the wrong law or misdirects itself as to the law, the decision-maker has acted illegally and, subject to questions of materiality and discretion, the court can and should intervene. As Forbes J said in *R v Central Arbitration Committee, ex parte BTP Tioxide*²⁴:

"A tribunal either misdirects itself in law or not according to whether it has got the law right or wrong, and that depends on what the law is and not what a lay tribunal might reasonably think it was. In this field, there are no marks for trying hard but getting the answer wrong".

Soft questions, by contrast, do involve matters of fact-finding, weighing of factors and the exercise of discretion by the administrative decision-maker. These arise in review of administrative decisions on the irrationality grounds. Again, lest the court exceed its supervisory jurisdiction, judicial restraint is required. The court does not

¹⁸ *R v Monopolies and Mergers Commission; ex parte South Yorkshire Transport Ltd* [1993] 1 All ER 289 at 298; [1993] 1 WLR 23 at 32.

¹⁹ *R v Monopolies and Mergers Commission; ex parte South Yorkshire Transport Ltd* [1993] 1 All ER 289 at 298; [1993] 1 WLR 23 at 32.

²⁰ *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 148.

²¹ *R v Monopolies and Mergers Commission; ex parte South Yorkshire Transport Ltd* [1993] 1 All ER 289 at 298; [1993] 1 WLR 23 at 32; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288 at 295 [9].

²² *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 63 [36] - 64 [37], [40].

²³ *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at [39]-[50]; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288 at 296 [16]; *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 at 997 [75], [76] and J J Spigelman, "Jurisdictional Integrity", 2nd lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, 5 August 2004, p 10.

²⁴ [1981] ICR 843 at 856.

intervene on the basis of imposing or substituting its own conclusion for that of the public body, whether that be that a different finding of fact should have been made, or different weight attributed to factors or a different judgment or discretion exercised. It remains for the administrative decision-maker, in whom the legislature has reposed the power, to decide such questions. The court exercises a secondary, supervisory function. The court does not intervene on the basis of whether the decision-maker's conclusion is right or correct; more is required to warrant judicial intervention. Moreover, the reviewing court restricts itself to material that was before the decision-maker. In these ways, judicial review retains, for questions of substance, its truly supervisory character.²⁵

ILLEGALITY

A fundamental tenet of administrative law is that "all public power has its limits".²⁶ Judicial review is concerned to ensure that the repository of public power correctly understands and acts in accordance with the limits placed upon the grant of that power. If the repository fails to do either, it is the proper province of the judiciary to declare and enforce compliance with the legal limits.

Administrative action, whether a decision or conduct, that exceeds the limits is termed *ultra vires* or beyond the statutory power. Administrative action can be *ultra vires* in either a narrow sense or a broad sense.

The head of review of illegality encompasses the grounds of *ultra vires* in the narrow sense. An administrative decision will be *ultra vires* in the narrow sense if the decision-maker has no substantive power under the empowering statute to make the decision or has failed to conform to a procedure in the statute.²⁷

Administrative action that is *ultra vires* in the broad sense involves an abuse of power. Many types of abuse of power have been developed at common law. Many of them were summarised by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.²⁸ For this reason, they are sometimes referred to as the "*Wednesbury* principles". These grounds of review fall within the division or head of review of irrationality. They will be dealt with later in the paper.

An administrative decision-maker may have no substantive power, and hence any decision will be *ultra vires* in the narrow sense, where:

- (a) the person who purported to make the decision did not have the jurisdiction to make the decision (the wrong decision-maker);²⁹

²⁵ M Fordham, "Surveying the Grounds: Key Themes' in Judicial Intervention" in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons*, Blackstone Press, 1997, p 190.

²⁶ M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, 3rd ed, Law Book Co, 2004, p 85. As Kirby P said in *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491 at 508, "Unreviewable administrative action is a contradiction in terms, at least in the case of the exercise of statutory powers".

²⁷ M Allars, *Introduction to Australian Administrative Law*, Butterworths, 1990, p 165 [5.10].

²⁸ [1948] 1 KB 223.

²⁹ s 5(1)(c) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), *Chambers v Maclean Shire Council* (2003) 126 LGERA 7 (the Council that purported to grant consent to a development application was not the relevant consent authority) as explained in *Currey v Sutherland Shire Council* (2003) 129 LGERA 223 at 231

- (b) the decision was not authorised by the statute in pursuance of which it was purported to be made (the decision is expressly or impliedly forbidden);³⁰
- (c) the decision involves an error of law, such as the decision-maker misdirecting itself in law as to the scope or content of its statutory provisions;³¹ and
- (d) the decision is made conditional upon the satisfaction of a criterion (whether of fact or law) but the criterion is not in fact satisfied.

I will elaborate on the fourth of these limits on statutory power.

Conditions precedent to power

A decision-maker might have no substantive power because the statute prescribes a condition precedent that must be, but has not been, satisfied in order to enliven the power. The condition precedent usually relates to a factual requirement. However, the condition precedent can be expressed in subjective or objective terms.

Subjective condition precedent

A subjective factual requirement is satisfied whenever the repository of power so determines it to be satisfied. The fact which the statute requires is not the fact in itself or the court's finding of it, but the decision-maker's opinion, satisfaction or belief that such a fact exists.

The subjective condition precedent is the type of factual requirement most commonly employed in statutes. Such a condition precedent requires the decision-maker to consider the facts and to form the requisite opinion, satisfaction or belief that such facts exist. Failure to do so will entitle the court to review the decision-maker's decision as being ultra vires. The decision-maker's purported decision is without power because the condition precedent to enliven the power has not been satisfied.³²

If the decision-maker considers the facts and forms the requisite opinion, satisfaction or belief that such facts exist, judicial review is still possible although it is more circumscribed. Certainly, the factual correctness of the opinion is not

[34]; *R v Tea Tree Gully City; Ex parte Indoor Cricket Arenas (Aust) Pty Ltd* (1984) 37 SASR 167 (new council committee did not inherit delegation to old council committee after restructure); *GPT Re Limited v Wollongong City Council* [2006] NSWLEC 303 (9 June 2006) (delegate's decision to grant development consent ultra vires as delegation invalid); *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 578 [97], 593 [197]-[198] (participation in the adjudication by non-judicial members of a tribunal in contravention of the statute was the exercise of power by persons with no authority to do so).

³⁰ s 5(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 378 and *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 670.

³¹ s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act*; *Parramatta City Council v Hale* (1980) 47 LGRA 319 at 335 and *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 268 at 290 [47].

³² Examples in a planning and environmental context are: *Clifford v Wyong Shire Council* (1996) 89 LGERA 240 at 251; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 at 374; *Franklins Limited v Penrith City Council* [1999] NSWCA 134 (13 May 1999) at [18], [23], [26]; *Manly Council v Hortis* (2001) 113 LGERA 321 at 332, 334; *Schroders Australian Property Management Ltd v Shoalhaven City Council* (1999) 110 LGERA 130 affirmed on appeal [2001] NSWCA 74 (20 April 2001).

reviewable; the reviewing court cannot substitute the opinion it would have formed for the opinion of the administrative decision-maker.³³ The limited review permitted by the court was summarised by Gibbs J in *Buck v Bavone*:³⁴

“Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.”³⁵

The opinion of the decision-maker that a particular exercise of power falls within the terms of the statutory condition precedent cannot be decisive of the validity of the decision. As Latham CJ stated in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*:³⁶

“Thus, where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power”.³⁷

The circumstances in which a reviewing court may examine the factual foundation of the opinion of the decision-maker are limited. A distinction needs to be drawn “between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to [the decision-maker] and on the other hand the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the

³³ *Foley v Padley* (1984) 154 CLR 349 at 352-353, 370, 375.

³⁴ (1976) 135 CLR 110 at 118-119.

³⁵ See also *The King v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 117; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57; *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194 at 197; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-276; *Australian Heritage Commission v Mt Isa Mines Ltd* (1997) 187 CLR 293 at 303.

³⁶ (1944) 69 CLR 407 at 430

³⁷ See also *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119.

existence of the power depends”.³⁸

In respect of the latter, a reviewing court may properly interfere. In respect of the former, however, the traditional review has been that provided there is some evidence, even if inadequate, to support the opinion as to the factual requirement, a court will not interfere.³⁹ Of course, even there, the inadequacy of the factual material may support an inference that the decision-maker “is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to [the decision-maker] is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact”.⁴⁰

More recently, reviewing courts have indicated a preparedness to interfere. In a decision “where the satisfaction of the decision-maker was based on findings or interferences of fact which were not supported by some probative material or logical grounds”.⁴¹

Objective conditions precedent

An objective condition precedent is commonly referred to as a jurisdictional fact.⁴² The High Court in *Corporation of the City of Enfield v Development Assessment Commission*⁴³ defined the term as follows:

“The term ‘jurisdictional fact’ (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion”.

The term is applied not only to facts, but also to a mixture of fact and opinion, and to a pure opinion.⁴⁴

A jurisdictional fact must exist in truth before the decision-maker can validly act; the existence of the jurisdictional fact enlivens the power of the decision-maker. For this reason, a reviewing court can, and indeed should in discharge of its supervisory role, determine finally the existence of the jurisdictional fact at the relevant time of the exercise by the decision-maker of the statutory power. The court’s decision necessarily prevails in the event of a difference between the court’s opinion and that

³⁸ *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119.

³⁹ *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356.

⁴⁰ *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120 and *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20* (2003) 77 ALJR 1165 at 1172 [36].

⁴¹ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657 [145] and *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165 at 1172 [36], [37]. See further the discussion below on manifest illogicality.

⁴² Strictly the term “jurisdictional fact” is more appropriate where the precondition is to the jurisdiction of an inferior court or tribunal rather than the power (*vires*) of an administrative decision-maker under a statute. However, the term has now acquired such currency and is applied so frequently to both situations, that it is acceptable to use the term generally.

⁴³ (2000) 199 CLR 135 at 148 [28].

⁴⁴ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130]; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288 at 298 [25].

of the decision-maker.⁴⁵

The determination of whether a condition precedent to a statutory power is a jurisdictional fact involves a process of statutory interpretation.⁴⁶ The court construes the statutory formulation which contains a factual reference “so as to determine the meaning of the words chosen by Parliament, having regard to the context of that statutory formulation and the purpose or object underlying the legislation”.⁴⁷

Two tests are critical in that process of statutory interpretation: a test of objectivity (Did the legislature intend that the fact referred to must exist in fact?) and a test of essentiality (Did the legislature intend that the absence or presence of the fact would invalidate action under the statute?).⁴⁸

The process of determining whether a formulation which contains a factual reference meets the tests of objectivity and essentiality requires consideration of a multiplicity of factors. There inevitably will be indicators for and against a conclusion of jurisdictional fact. Good illustrations of the analytical process required are to be found in the New South Wales Court of Appeal’s decisions in *Timbarra Protection Coalition v Ross Mining NL*⁴⁹ and *Woolworths Ltd v Pallas Newco Pty Ltd*.⁵⁰

If on a proper construction of the statute, the formulation is characterised as a jurisdictional fact, the court must determine for itself whether the fact in truth exists. The court does this on the basis of the evidence before the court and not on the evidence before the decision-maker.⁵¹

The burden of establishing the facts which would show an absence of jurisdiction or power always rests on the person challenging the administrative action.⁵²

In determining whether the facts in truth exist, the court will not defer to the fact finding of the administrative decision-maker. Courts in Australia have rejected any idea of judicial deference. In *Corporation of the City of Enfield v Development Assessment Commission*,⁵³ the High Court rejected the suggestion that courts

⁴⁵ *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 64 [40]; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 147 [24] and 151 [38]; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288 at 308 [88], 313 [105]; M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, 3rd ed, Law Book Co, 2004, p. 228.

⁴⁶ *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 63-64 [37]; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288 at 294 [6].

⁴⁷ *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 64 [39].

⁴⁸ *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 64 [37], [38].

⁴⁹ (1999) 46 NSWLR 55 at 63 [37] - 73 [94].

⁵⁰ (2004) 136 LGERA 288 at 299 [30] – 308 [86]. See also J J Spigelman, “Jurisdiction and Integrity”, The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004, pp 7-10.

⁵¹ *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 61-62 [23]-[24], 76 [121]; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 147 [24], 151 [38]; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288 at 308 [88] and 313 [105].

⁵² *R v Foster; ex parte Commonwealth Life (Amalgamated) Assurance Ltd* (1952) 85 CLR 138 at 153, 155; *The Queen v Alley; ex parte NSW Plumbers and Gasfitters Employees’ Union* (1981) 153 CLR 376 at 382 and 395; *The Queen v Cohen; ex parte Attorney General (Queensland)* (1981) 157 CLR 331 at 338; *R v Marshall; ex parte Baranor Nominees Pty Ltd* [1986] VR 19 at 32-33; *Eatts v Dawson* (1990) 21 FCR 166 at 171 and *Re State Public Services Federation; ex parte Attorney-General (Western Australia)* (1993) 178 CLR 249 at 303.

⁵³ (2000) 199 CLR 135.

should defer to administrative fact finding, and the further suggestion, stemming from the United States⁵⁴, that courts should defer to administrative interpretation of ambiguous legislation.⁵⁵ A reviewing court must “determine independently for itself” whether the jurisdictional fact existed.⁵⁶

Hence, the High Court held in that case that it was for the primary judge of the reviewing court to determine the jurisdictional fact as to whether the decision-maker had jurisdiction on the evidence before the judge, and the intermediate appellate court had erred in holding that the judge should defer “in grey areas of uncertainty to the practical judgment” of the administrative decision-maker.⁵⁷

The High Court rejected the *Chevron* doctrine from the United States law for three main reasons. First, *Chevron* was concerned with competing interpretations of a statutory provision, not with jurisdictional fact finding at the administrative and judicial levels.⁵⁸

Secondly, application of the *Chevron* doctrine may have the undesirable consequence of encouraging administrative decision-makers “to adopt one of several competing reasonable interpretations of the statute in question, so as to fit the facts to a desired result”. The decision-maker “might be tempted to mould the facts and to express findings about them so as to establish jurisdiction and thus to insulate that finding of jurisdiction from judicial examination”.⁵⁹

Thirdly, the *Chevron* doctrine is inconsistent with the “essential characteristic of the judicature...that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers”.⁶⁰

In England, Lord Hoffman in *R (ProLife Alliance) v British Broadcasting Corporation*⁶¹ similarly rejected the language of deference:

“[75] My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

[76] This means that the courts themselves often have to decide the limits of

⁵⁴ The *Chevron* doctrine, named after *Chevron USA Inc v Natural Resources Defence Council Inc* (1984) 467 US 837 at 842-844.

⁵⁵ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 151 [39] – 156 [50].

⁵⁶ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 155 [48].

⁵⁷ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 151 [38].

⁵⁸ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 151 [40].

⁵⁹ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 152 [42].

⁶⁰ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43]. See further M Allars, “*Chevron* in Australia: duplicitous rejection?” (2002) *Administrative Law Review* 569 at 583-585 and P Cane, “The making of Australian administrative law” (2003) 24 *Australian Bar Review* 114 at 119.

⁶¹ [2003] 2 All ER 977 at 997 [75]-[76].

their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in art 6 of the convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law”.

Spigelman CJ, speaking extracurially, has added:

“Where intervention by a court is designed to ensure the institutional integrity of the decision-making process, it should be clear that "deference" is entirely inappropriate. That does not mean that a court will not give considerable weight to the conclusions on fact and usage, including jurisdictional facts, of primary decision-makers. This will, however, depend on the statutory scheme under consideration. To do more would be to abdicate the judicial function. To do less would be to blur the legality/merits distinction which, whatever the difficulties of its application, remains a rigorously policed boundary in Australian administrative law”.⁶²

IRRATIONALITY

The head of review of irrationality includes the types of abuse of power collectively referred to as the *Wednesbury* principles. These include where an administrative decision-maker fails to consider a relevant matter, takes into account an irrelevant matter, acts unreasonably by making a manifestly unreasonable decision or acts in a manifestly illogical manner, acts in bad faith or for an improper purpose, or fails to exercise its discretion such as by fettering or acting under dictation.

Administrative decisions involving these types of abuse of power are ultra vires in the broad sense. Review on these grounds of broad ultra vires offer courts greater scope than does narrow ultra vires for an examination of the circumstances of the decision making process. For this reason, this is the area that courts are most at risk of trespassing into the merits of administrative decisions by substituting their decisions for those of the decision-maker.⁶³ Accordingly, judicial restraint is

⁶² J J Spigelman, “Jurisdiction and Integrity”, The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004, p 11.

⁶³ M Allars, *Introduction to Australian Administrative Law*, Butterworths, 1990, p 165 [5.10].

required when reviewing administrative decisions on these grounds.

Relevant/irrelevant considerations grounds

A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account.

These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute.⁶⁴

In between the categories of considerations which the decision-maker is bound to consider (relevant considerations) and bound to disregard (irrelevant considerations) sits a third category of matters which a decision-maker may have regard if in the decision-maker's judgment and discretion it thinks it right to do so.⁶⁵

Care must be taken not to expand the relevant/irrelevant considerations grounds of review to permit review of the merits.⁶⁶ The merits of an administrative decision are for the repository of a relevant power and, subject to political control, for the repository alone.⁶⁷

An applicant dissatisfied with the merit assessment and outcome of an exercise of discretionary power by an administrative decision-maker, may seek to disguise a challenge on those merits in terms of recognised grounds of judicial review, such as the relevant/irrelevant considerations ground. Courts should see through the disguise. Courts must avoid the temptation to express a conclusion in terms of a recognised ground of review while in truth making a decision on the merits.⁶⁸

For this reason, concerns have been expressed about elevating the requirement to consider relevant matters to a requirement to give "proper, genuine and realistic consideration to the merits of the case".⁶⁹ This formulation "trembles on the verge of merits review".⁷⁰ To prevent the ground trespassing into the merits, judicial restraint is required.

A Full Court of the Federal Court has rejected the formulation of "proper, genuine and realistic consideration" for judicial review of Commonwealth administrative

⁶⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 and 55; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228.

⁶⁵ *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363 at 375; *K R Whelpton & Associates (Aust) Pty Ltd v Attorney-General (Cth)* (1987) 72 ALR 679 at 689; *R v Somerset County Council; ex parte Fewings* [1995] 1 WLR 1037 at 1049-1050 per Simon Brown LJ dissenting but not on this point.

⁶⁶ *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 40; *Bruce v Cole* (1998) 45 NSWLR 163 at 184, 186; *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 385.

⁶⁷ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36-38.

⁶⁸ *Bruce v Cole* (1998) 45 NSWLR 163 at 184.

⁶⁹ See *Khan v Minister for Immigration, Local Government and Ethnic Affairs*, (1987) 14 ALD 291 at 292

⁷⁰ J J Spigelman, "The integrity branch of government" (2004) 78 ALJ 724 at 735.

decisions as running counter to the statutory scheme for judicial review.⁷¹ The formulation does this by creating “a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [administrative] decision can be scrutinised”.⁷² This is illegitimate. Similarly, courts exercising common law supervisory jurisdiction have cautioned against too ready an employment of the test, lest this category of judicial review be “elided into a review on the merits or an appeal on the facts”.⁷³

A reviewing court will not transgress if it limits judicial review on this ground to where there has been an actual failure or a constructive failure to consider a relevant matter. A constructive failure occurs where “the ostensible determination is not a real performance of the relevant duty”.⁷⁴ The mere advertence to a relevant consideration, but subsequent disregarding of it, amounts to a constructive failure to consider the relevant consideration.⁷⁵

Conversely, the irrelevant consideration ground is not established where an irrelevant matter is first considered, but then rejected. As Burchett J said in *Australian Conservation Foundation v Forestry Commission*⁷⁶:

“It is true that a decision-maker may not take account of an irrelevant consideration; but I think he may pick up a red herring, turn it over and examine it, and then put it down, so long as he does not allow it to affect his decision”.⁷⁷

It is not for a party affected by a decision, or a reviewing court, to make an exhaustive list of all the matters which a decision maker might conceivably regard as relevant then attack the decision on the ground that a particular one of them was not specifically taken into account.⁷⁸

The considerations that are, or are not relevant, are to be identified “primarily, perhaps even entirely”, by reference to the statute reposing the power on the decision-maker rather than the particular facts of the case that the decision-maker is called on to consider.⁷⁹ The level of particularity with which a matter is identified in the statute may be significant where the failure complained of is not a failure to consider a certain subject matter, but a failure to make some inquiry about facts said to be relevant to that subject matter. For the applicant to succeed, the statute

⁷¹ Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁷² *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 442 [65].

⁷³ *Bruce v Cole* (1998) 45 NSWLR 163 at 186; *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 601 [62]; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 268 at 297 [74], [75], 298 [79].

⁷⁴ *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; *Hale v Parramatta City Council v Hale* (1982) 47 LGRA 319 at 335; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 443-444.

⁷⁵ *Elias v Federal Commissioner of Taxation* (2002) 123 FCR 499 at 512; (2002) 50 ATR 253 at 265; *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 185, 201

⁷⁶ (1988) 19 FCR 127 at 135; 79 ALR 685 at 693

⁷⁷ See also *McPhee v Minister for Immigration & Ethnic Affairs* (1988) 16 ALD 77 at 80.

⁷⁸ *Elliott v Southwark London Borough Council* [1976] 1 WLR 499 at 570. *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375; *Akpan v Minister for Immigration and Ethnic Affairs* (1982) 58 FLR 47 at 51-52; *Noble v Cowra Shire Council* (2001) 114 LGERA 440 at 445 [16].

⁷⁹ *Minister for Immigration and Multicultural Affairs v Yusuf* (2000) 206 CLR 323 at 347-348 [73] and see also *Abebe v Commonwealth* (1999) 197 CLR 510 at 579 [195].

must expressly or impliedly oblige the decision-maker to inquiry and consider the subject matter at the level of particularity involved in the applicant's submission.⁸⁰

The relevant/irrelevant considerations grounds are "concerned essentially with whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts".⁸¹

An applicant who undertakes to establish that an administrative decision-maker improperly exercised power ought not be permitted under colour of doing so to enter upon an examination of the correctness of the decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or the regularity or irregularity of the manner in which the decision-maker has proceeded. The correctness or incorrectness of the conclusion reached by the decision-maker is entirely beside the question.⁸²

Proper consideration of a relevant matter does not demand factual correctness. It is wrong to equate relevancy with factual correctness and irrelevancy with factual incorrectness.⁸³ A wrong assessment of the considerations the decision-maker takes into account is not a reviewable error of law.⁸⁴

The weight to be accorded to a relevant matter is a question of fact left to the decision-maker. No error of law occurs by misattribution of weight between relevant matters.⁸⁵

Not every consideration that a decision-maker is bound to take into account, but fails to take into account, or is bound to disregard but takes into account, will justify judicial intervention to set aside the decision and ordering the discretion be re-exercised according to law. A factor might be so insignificant that the failure to consider it, or the consideration of it, could not materially have affected the decision.⁸⁶

Unreasonableness

In *R v North and East Devon Health Authority; Ex parte Coughlan*,⁸⁷ Lord Woolf stated:

⁸⁰ *Foster v Minister for Customs* (2000) 200 CLR 442 at 452 [23].

⁸¹ *Minister for Immigration and Multicultural Affairs v Yusuf* (2000) 206 CLR 323 at 348 [74].

⁸² *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1993) 50 CLR 228 at 242; *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1 at 4-5.

⁸³ *Akpan v Minister for Immigration and Ethnic Affairs* (1982) 58 FLR 47 at 50.

⁸⁴ *Brunetto v Collector of Customs* (1984) 4 FCR 92 at 97-98.

⁸⁵ *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363 at 375; *Akpan v Minister for Immigration and Ethnic Affairs* (1982) 58 FLR 47 at 51-52; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 41; *Coles v Woollahra Municipal Council* (1986) 59 LGRA 133 at 140; *Randwick Municipal Council v Manousaki* (1988) 66 LGRA 330 at 335; *Australian Postal Corporation v Botany Municipal Council* (1989) 69 LGRA 86 at 93; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657; [1995] 1 WLR 759 at 764; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 321; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 159 at 291-292; *Xu v Minister for Immigration and Multicultural Affairs* (1999) 95 FCR 425 at 436; *Abebe v Commonwealth* (1999) 197 CLR 510 at 580 [197] and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627 [44].

⁸⁶ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

⁸⁷ [2001] QB 213 at 244

“Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic (though this can often be equally well allocated to the intrusion of an irrelevant factor)”.

The first face is that of manifest unreasonableness in the result of the decision. The second face is that of manifest illogicality in arriving at the result of the decision. The first face is well established in Australia; the second face only recently so.

Manifest unreasonableness in result

If the result of a decision is so unreasonable that no reasonable decision-maker could have made it, a reviewing court can interfere. However, because this comes closest to trespassing into the forbidden field of the merits of the decision, courts have been careful to circumscribe the ground.

The legislature has reposed the discretionary power in the administrative decision-maker to choose among courses of action upon which reasonable minds may differ. In *Puhlhofer v Hillingdon London Borough Council*⁸⁸, Lord Brighton said:

“Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely”.

The courts must not usurp the discretion of the decision-maker whom the legislature appointed to make the decision.⁸⁹

The threshold or perversity required before a court can find that a decision is manifestly unreasonable is high.⁹⁰ It is not for those seeking to quash administrative decisions to challenge the soundness of the decision. Whether it is sound or not is not a question for decision by the reviewing court.⁹¹ Moreover, manifest unreasonableness does not depend on the court’s own subjective notions of unreasonableness. What a court may consider unreasonable is a very different thing from the requirement for “something overwhelming” such that the decision is one that no reasonable body could have come to.⁹²

In reviewing a decision on the grounds of manifest unreasonableness, the court can only have regard to the material that was before the administrative decision-maker

⁸⁸ [1986] AC 484 at 518.

⁸⁹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37; *Botany Municipal Council v Minister for Transport* (1996) 90 LGERA 81 at 96-97; *Bruce v Cole* (1998) 45 NSWLR 163 at 184-185 and *The First Secretary of State v Hammersmatch Properties Ltd* [2005] EWCA Civ 1360 at [33], [36], [40].

⁹⁰ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41-42; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 42-43; *Friends of Hinchinbrook Society v Minister for Environment* (1997) 93 LGERA 249 at 277-278; *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 188, *R v Secretary State for the Home Department; Ex parte Hindley* [1998] QB 751 at 777; *The First Secretary of State v Hammersmatch Properties Ltd* [2005] EWCA Civ 1360 at [32].

⁹¹ *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 323; *Rea v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696 at 757-758, 765

⁹² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

at the time it made its decision. This is why the expression “manifest unreasonableness” is sometimes used. The unreasonableness of the decision must be manifest having regard to its terms and the material upon which it was based.⁹³

Cases in which courts have found manifest unreasonableness in result are rare. One example is where *all* the evidence points in one direction, and a decision-maker, for no given or identifiable reason, decides the other way.⁹⁴ Another example is where a power is exercised discriminatively without justification, such as where benefit or detriment is distributed unequally amongst members of a class who are equally deserving. Lord Russell CJ in *Kruse v Johnson*⁹⁵ described by-laws to be unreasonable in this sense if “they were found to be partial and unequal in their operation as between different classes”.

Other examples where a court had found a decision to be manifestly unreasonable include *Rosemount Estates Pty Ltd v Cleland*,⁹⁶ *Ziade v Randwick City Council*⁹⁷ and *Davies v Ku-ring-gai Municipal Council*.⁹⁸

Manifest illogicality

At common law, an illogical inference of fact does not in itself constitute an error of law. In *Australian Broadcasting Tribunal v Bond*⁹⁹ Mason CJ held:

“So long as there is *some* basis for an inference - in other words, the particular inference is reasonable open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place”.¹⁰⁰

However, that conclusion must depend on the statutory context. The statute reposing the discretionary power on the decision-maker may suggest that the common law principle does not apply. That was the conclusion in *Bruce v Cole*.¹⁰¹ The statutory opinion required to be formed in that case in order to remove a judge from judicial office related to a process in which “proved incapacity” was required to be established. That statutory context required a logical process of reasoning to draw an inference.

In *Hill v Green*¹⁰² Spigelman CJ stated:

“In my opinion, where a statute or regulation makes provision for an administrative decision in terminology which does not confer an unfettered discretion on the decision-maker, the courts should approach the

⁹³ *ULV Pty Ltd v Scott* (1990) 19 NSWLR 190 at 204.

⁹⁴ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 400, 433 cited as an example by Kirby J in *Re Minister for Immigration and Ethnic Affairs; ex parte applicant S20/2002* (2003) 77 ALJR 1165 at 1186 [129].

⁹⁵ [1898] 2 QB 91 at 99.

⁹⁶ (1995) 86 LGERA 1 at 27, 30.

⁹⁷ (2001) 51 NSWLR 342 at 375 [155].

⁹⁸ (2003) 58 NSWLR 535 at 547 [129].

⁹⁹ (1990) 170 CLR 321 at 356

¹⁰⁰ See also *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at 420 [20]-422 [26]. In contract, see per Deane J in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367.

¹⁰¹ (1998) 45 NSWLR 163 at 189G.

¹⁰² (1999) 48 NSWLR 161 at 174-175 [72].

construction of the statute or regulation with a presumption that the parliament or the author of the regulation intended the decision-maker to reach a decision by a process of logical reasoning and a contrary interpretation would require clear and unambiguous words”.

Finkelstein J in *Gamaethige v Minister for Immigration and Multicultural Affairs*¹⁰³ added:

“On this approach, a decision that is logically flawed, in the sense that the process of reasoning (inductive or deductive) is not logical, whether in the course of finding primary facts or in the process of inferring secondary facts, will be reviewable for error of law”.

In *Minister for Immigration and Multicultural Affairs v Eshetu*,¹⁰⁴ Gummow J addressed a case where the issue whether a statutory power was enlivened turned upon the further question of whether the requisite satisfaction of the decision-maker was arrived at reasonably. Gummow J held judicial review would be permitted “in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds”.¹⁰⁵

In *Minister for Immigration and Multicultural Affairs; ex parte applicant S20/2002*,¹⁰⁶ the appellant relied upon this formulation of the unreasonableness ground.¹⁰⁷ McHugh and Gummow JJ were prepared to accept that formulation.¹⁰⁸

Kirby J agreed with Spigelman CJ’s dicta in *Hill v Green*¹⁰⁹ that, absent a clear contrary intention, there is a presumption that the decision-maker should reach a decision by a process of logical reasoning.¹¹⁰ Kirby J stressed that review on this ground is reserved for seriously defective reasoning:

“A conclusion that a process of reasoning is perverse, or illogical, or irrational, ordinarily would not, and in any case should not, be based upon mere disagreement with the outcome reached by the administrator. The disagreement of a judge with the merits or conclusions of the decision reviewed is, at least in theory, immaterial. Rather, attributes such as ‘perverse’, or ‘illogical’ or ‘irrational’ must be properly linked to the applicable statutory and decision-making context in order to be informative about the nature of the error identified”.¹¹¹

The ground of manifest illogicality continues to be recognised¹¹² but may prove difficult to establish.¹¹³

¹⁰³ (2001) 109 FCR 424 at 432 [28].

¹⁰⁴ (1999) 197 CLR 611.

¹⁰⁵ (1999) 197 CLR 611 at 656-657 [145].

¹⁰⁶ (2003) 77 ALJR 1165.

¹⁰⁷ (2003) 77 ALJR 1165 at 1171 [34].

¹⁰⁸ (2003) 77 ALJR 1165 at 1172 [37].

¹⁰⁹ (1999) 48 NSWLR 161 at 174-175 [72].

¹¹⁰ (2003) 77 ALJR 1165 at 1186 [127].

¹¹¹ (2003) 77 ALJR 1165 at 1186 [128]. See also Kirby J’s earlier decision in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151.

¹¹² *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 (22 December 2003) at [57]-[66]; *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 78 ALJR 992 at 998 [38]; *Woolworths Ltd v Pallas*

An earlier illustration of unreasonableness in the manner of decision-making can be found in cases “where it is obvious that material is readily available which is centrally relevant to the decision to be made”. In such cases, for a decision-maker to proceed “to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it”.¹¹⁴

These cases may now be better characterised as review for manifest illogicality rather than manifest unreasonableness.¹¹⁵

The occasion and scope of judicial review of the unreasonable manner of making an administrative decision for failure to obtain information is even more limited than judicial review of the unreasonable result of a decision.¹¹⁶

The general rule is that there is no obligation on an administrative decision maker to make inquiries.¹¹⁷ The circumstances in which a court will find an exception to this general rule are “strictly limited”.¹¹⁸ The exception to the general rule that the decision-maker is not obliged to obtain further information is only triggered where it is “obvious” to the decision maker at the time of making the decision that there is further information which is “centrally relevant” and “readily available”.¹¹⁹

In order for the decision-maker to be able to conclude that it is “obvious” that there exists further material and that such material is “centrally relevant” and “readily available”, there must be something in the material that is before the decision-maker to alert the decision-maker to such further material. For example, the material might show an obscurity or omission which needs to be resolved in order for the decision-maker to be in a position to exercise the power properly.¹²⁰

Newco Ltd (2004) 136 LGERA 288 at 308 [92]; *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* (2005) 138 LGERA 11 at 45 [29]; *Walter Construction Group v Fair Trading Administration Corporation* [2005] NSWCA 65 (14 March 2005) at [76]; *Carcione Nominees Pty Ltd v Western Australian Planning Commission* (2005) 30 WAR 97 at [98]-[99]; *Hedderman v Murray* [2005] NSWSC 262 (30 March 2005), [20].

¹¹³ *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 (22 December 2003) at [59]; *Carcione Nominees Pty Ltd v Western Australian Planning Commission* (2005) 30 WAR 97 at [99] and see also *Re Minister for Immigration and Ethnic Affairs; ex parte applicant S20/2002* (2003) 77 ALJR 1165 at 1168 [9], [12]-1169.

¹¹⁴ *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549 at 563; (1985) 6 FCR 155 at 169-170; See also *Luu v Renevier* (1989) 91 ALR 39; *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455.

¹¹⁵ M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, 3rd ed, LawBook Co, 2004, p 267.

¹¹⁶ *Botany Municipal Council v Minister for Transport* (1986) 90 LGERA 81 at 96.

¹¹⁷ *Videto v Minister for Immigration and Ethnic Affairs* (1985) 69 ALR 342 at 353; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 391.

¹¹⁸ *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549 at 563; (1985) 6 FCR 155 at 169-170.

¹¹⁹ *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549 at 563; (1985) 6 FCR 155 at 170; *Hospital Action Group v Hastings Municipal Council* (1993) 80 LGERA 190 at 197; *Schroders Australia Property Management Ltd v Shoalhaven City Council* [2001] NSWCA 74 (20 April 2001), [101], [102].

¹²⁰ *Videto v Minister for Immigration and Ethnic Affairs* (1985) 69 ALR 342 at 353.

Lack of proportionality

Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*¹²¹ foreshadowed that the principle of proportionality might emerge as an independent head of judicial review.

Jowell and Lester explain that the principle of proportionality requires “a reasonable relation between a decision, its objectives and the circumstances of the case. It requires the pursuit of legitimate ends by means that are not oppressively excessive. It looks, therefore, to the substance of decisions rather than the way they are reached, but it also requires the decision-maker not manifestly to ignore significant alternatives or interests”.¹²²

In *Regina (Daly) v Secretary of State for the Home Department*¹²³, Lord Steyn noted that the intensity of review under the proportionality approach is greater than under the traditional grounds of review. The principle of proportionality “may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions”. The proportionality test also “may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations”.¹²⁴

In *R v Shaylor*¹²⁵ Lord Hope of Craighead summarised three matters which should be considered in determining whether an interference with a fundamental right is proportionate. The first is whether the objective sought to be achieved is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit the right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible.¹²⁶

Expressed in these ways, the principle of proportionality can be seen to be “more susceptible of permitting a court to trammel upon the merits of a decision than *Wednesbury* unreasonableness”.¹²⁷ Perhaps for this reason, courts in Australia have been reluctant to adopt proportionality as a separate ground of judicial review of administrative decisions.¹²⁸

Nevertheless, proportionality can be used as an indicator of unreasonableness in the *Wednesbury* sense.¹²⁹

¹²¹ [1985] AC 374 at 410.

¹²² J Jowell and A Lester, “Proportionality: Neither Novel Nor Dangerous” in J L Jowell and D Oliver (eds), *New Directions in Judicial Review*, Stevens and Son, London, 1988, p 51 at p 57.

¹²³ [2001] 2 AC 532.

¹²⁴ [2001] 2 AC 532 at 547.

¹²⁵ [2003] 1 AC 247.

¹²⁶ [2003] 1 AC 247 at 281 [61].

¹²⁷ *Bruce v Cole* (1998) 45 NSWLR 163 at 185.

¹²⁸ *State of New South Wales v Macquarie Bank Ltd* (1991) 30 NSWLR 307 at 321-325; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 575-578; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 37-38, 45, 81-82; *Bruce v Cole* (1998) 45 NSWLR 163 at 185; A Mason, “The tension between legislative supremacy and judicial review” (2003) 77 ALJ 803 at 809; J J Spigelman, “The integrity branch of government” (2004) 78 ALJ 724 at 734.

¹²⁹ *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* (1990) 96 ALR 153 at 168; A Mason, “Judicial Review: The Contribution of Sir Gerard Brennan” in R Creyke and P Keyzer (eds), *The Brennan Legacy, Blowing the winds of legal orthodoxy*, Federation Press, 2002, p 54; A Mason, “The tension between legislative supremacy and judicial review” (2003) 77 ALJ 803 at 809; M Allars, *Introduction to Australian Administrative Law*, Butterworths 1990, p 190 [5.57].

The principle also may be useful in the constitutional context for review in relation to purposive powers and for review of subordinate legislation.¹³⁰

Bad faith

An administrative decision will be invalid if it is made by the decision-maker in bad faith. In *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs*,¹³¹ a Full Court of the Federal Court stated:

“Bad faith in this context implies a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker”.

The bad faith must be actual; “there is no such thing as deemed or constructive bad faith”.¹³² A decision-maker cannot “blunder into bad faith”.¹³³

Although the ways in which bad faith can occur are “infinite”, nevertheless some factors are crucial. One is the presence or absence of honesty. Another is a purpose to achieve some end which is not an end for which the statutory power was conferred.¹³⁴

Improper purpose

Judicial review on the ground that the discretionary power was exercised for an improper purpose is easier than for bad faith.

An improper purpose is simply a purpose other than the purpose or purposes for which a discretionary power is conferred¹³⁵. Ascertaining the purpose or purposes for which a power is conferred involve a process of statutory interpretation. The statute reposing the power may expressly state the purpose for which the power may be exercised.¹³⁶ Alternatively, the purposes may be inferred from the subject matter, scope and purpose of the statute. Either way, the statute is the starting point.

Whether a decision-maker exercises its power for an improper purpose is a question of fact.¹³⁷ The person challenging a decision on this ground must prove that the decision-maker exercised the power for the improper purpose.¹³⁸

A reviewing court will look to the real purpose of the decision, and will not be dissuaded by a decision-maker attempting “to give an appearance of rectitude to

¹³⁰ *Leask v Commonwealth* (1997) 187 CLR 579 at 593-595, 600, 612-615, 624; *South Australian v Tanner* (1989) 166 CLR 161 at 165, 178; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 37-38, 45-46, 81-84; *Bruce v Cole* (1998) 45 NSWLR 163 at 185; P Bayne, “Reasonableness, Proportionality and Delegated Legislation” (1993) 67 ALJ 448.

¹³¹ [2002] FCAFC 397 at [19].

¹³² *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431 at [7]-[8]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 558 [18].

¹³³ *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 210 at 219 [24].

¹³⁴ *SBAP v Refugee Review Tribunal* [2002] FCA 590 at [49].

¹³⁵ *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491 at 508.

¹³⁶ This was the situation in *Municipal Council of Sydney v Campbell* [1925] AC 338.

¹³⁷ *Municipal Council of Sydney v Campbell* [1925] AC 338 at 343.

¹³⁸ *Municipal Council of Sydney v Campbell* [1925] AC 338 at 343.

actions which in fact lacked it".¹³⁹ Indeed, deliberate concealment of the purpose for which the power has been exercised may provide evidence of acting for an improper purpose.¹⁴⁰

If it appears that the actuating purpose of a decision is outside the scope of the purpose of the statute, that will vitiate the supposed exercise of the discretion. However, often the purpose of the statute is expressed broadly. This results in considerable scope for a decision-maker who is exercising the discretionary power and considering the general purpose of the statute to give effect to his or her view of the merits of the case.¹⁴¹ As Spigelman CJ notes:

“There is, in this approach, no focus on the reasonableness or quality of the ultimate decision. The context of the decision will, of course, be a material part of the process of identifying an actuating purpose. The comparison to be made, however, is with the purpose permitted by the legislation, not with a standard of what a reasonable decision-maker might have done. The language of actuating purpose is the language of integrity. It does not cross to the merits of the case”.¹⁴²

Difficulties arise when there are multiple purposes for which a statutory power is exercised, some proper and some improper. The test in Australia is that there will be an abuse of power if the purpose of the decision-maker is an improper one and “a substantial one” in the sense that no attempt would have been made to exercise the power if it had not been for that purpose.¹⁴³

Failure to exercise discretion

If an administrative decision-maker is entrusted with a discretionary power or duty expressly or impliedly for a public purpose, the decision-maker cannot divest itself of that power or duty.¹⁴⁴ There are several ways in which a decision-maker may fail to exercise a discretionary power or fail to perform a duty.

A decision-maker must not delegate the exercise of discretionary power or performance of a duty to another decision-maker unless there is express or implied power to delegate. A decision-maker must not allow another decision-maker to dictate how the discretionary power should be exercised. Finally, the decision-maker must not fetter the future exercise of the discretionary power by inflexibility applying a rule or policy without regard to the individual merits of the case or by entering a binding undertaking.

I will elaborate briefly on these aspects of the broad ultra vires concept.

¹³⁹ *Donovan v City of Sale* [1979] VR 461 at 474.

¹⁴⁰ *Flanagan v Commissioner of Australian Federal Police* (1996) 60 FCR 149 at 203.

¹⁴¹ *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165 at 1178 [69].

¹⁴² J J Spigelman, “The integrity branch of government” (2004) 78 ALJ 724 at 735.

¹⁴³ *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106; *Haines v Annwrack Pty Ltd* (1980) 39 LGRA 404 at 413; *Samrein Pty Ltd v Metropolitan Water, Sewerage and Drainage Board* (1982) 56 ALJR 678 at 679; 41 ALR 467 at 468-469; *Nettheim (on behalf of Actors Equity of Australia) v Minister for Planning and Local Government* (1988) 16 ALD 796; *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491 at 509, 521; *Yates v Penola District Councillor* (1997) 68 SASR 64 at 79.

¹⁴⁴ *Birkdale District Electric Supply Co v Southport Corporation* [1926] AC 353 at 364.

Improper delegation

A decision-maker invested with a statutory power is required to exercise it personally, and cannot delegate it to another person. This is a common law, rule of construction. It gives way to an express or implied legislative intent to permit delegation.¹⁴⁵

Where there is power to delegate, it may be constrained. An indivisible power cannot be partially delegated, such as by the delegator purporting to delegate one way in which the power may be exercised but not other ways.¹⁴⁶ A power may not be delegated to an outside body unconstrained by the considerations binding the delegator.¹⁴⁷

Dictation or undue influence

Where a discretionary power is vested in a decision-maker personally, the decision-maker must turn his or her mind to the exercise, and cannot act at the discretion or behest of another person.¹⁴⁸ A repository of a personal discretionary power will act invalidly if he or she makes a decision without exercising his or her own independent discretion but instead merely carries out instructions given by his or her superiors.¹⁴⁹

Fettering of discretion

An administrative decision-maker does not act illegally in adopting policies to guide or structure the exercise of discretionary powers. Indeed, courts have observed that it is desirable to do so.¹⁵⁰

However, a decision-maker will act improperly if it exercises a discretionary power in accordance with a rule or policy inflexibly without regard to the merits of the particular case.¹⁵¹

Uncertainty

An exercise of power in such a way that the result of the exercise of power is uncertain may also be an abuse of power. Some doubt has been expressed as to

¹⁴⁵ *Bayly v Sydney Municipal Council* (1927) 28 SR (NSW) 149 at 153-154; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 37-38.

¹⁴⁶ *Singh v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 90 ALR 397 at 402, *Singh v Castello*, unreported, Federal Court of Australia, Spender J, 16 July 1990 at [32]-[37], *GPT Re Limited v Wollongong City Council* [2006] NSWLEC 303 (9 June 2006), [45]-[50].

¹⁴⁷ *Conroy v Shire of Springvale & Noble Park* [1959] VR 737 at 753, *Taylor v Tweed Shire Council* (1975) 34 LGRA 154 at 161.

¹⁴⁸ *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 429.

¹⁴⁹ *Nashua Australia Pty Ltd v Channon* (1981) 36 ALR 285 at 230-231; *Srokowski v Minister for Immigration and Ethnic Affairs* (1988) 15 ALD 775 at 776.

¹⁵⁰ *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 625 and 631; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589-591; (1979) 46 FLR 409 at 419-421; *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 at 636, 640-641; *R v Eastleigh Borough Council; ex parte Betts* [1983] 2 AC 613 at 627-628; *Sawyer v Secretary to Department of Primary Industry* (1988) 15 ALD 742; *Stuart v Chief of the Army* (1999) 94 FCR 445 at 454-455; *Re Romato; Ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286.

¹⁵¹ *R v Port of London Authority; Ex parte Kynoch Ltd* [1919] 1 KB 176 at 184; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 625; *Green v Daniels* (1977) 51 ALJR 463 at 466; *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 503-504; *Surinakova v Minister for Immigration and Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 98.

the availability of uncertainty as a ground of review at common law.¹⁵² It is available as a statutory ground of review for administrative decisions under commonwealth law.¹⁵³

The issue is one of construction of the particular statute bestowing the power and the application of that statute to the circumstances of the case.¹⁵⁴ The statutory grant of power may inherently require certainty.¹⁵⁵

One way in which uncertainty has been said to arise is if an administrative decision approving some action, such as the carrying out of development, leaves open the possibility that the action may be altered in a significant or fundamental respect. For instance, a grant of development consent may be subject to a condition that has the effect of significantly altering the development in respect of which the consent is made or leaving open the possibility that development carried out in accordance with the consent and the condition will be significantly different from the development for which application was made.¹⁵⁶

Such a decision is an improper exercise of the power to grant consent. This is not because uncertainty is intrinsically a vice, but because such an exercise of power is outside that intended and permitted by the statute. The exercise of a statutory power to grant consent to a development must result in a consent under the statute and furthermore a consent to the application made under the statute. The ancillary power to impose conditions on a consent cannot be exercised in such a way as to have the consequence that the exercise of the power fails to answer the description of a consent or a consent to the application made.¹⁵⁷ A consent with a condition that leaves open the possibility that the development could be significantly different is not a consent to the application made.¹⁵⁸

Questions of degree are involved.¹⁵⁹ Retention of flexibility or delegation of supervision of some stage of a development may be desirable and in accordance with the statutory scheme.¹⁶⁰

The statute may expressly permit an exercise of power to grant consent subject to conditions which leave certain aspects to be carried out to the satisfaction of the consent authority or some other person specified by the consent authority¹⁶¹ or

¹⁵² *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 195; *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381 at 381-382; *Genkem Pty Ltd v Environment Protection Authority* (1994) 35 NSWLR 33 at 42 and 49; *Qiu v Minister for Immigration and Ethnic Affairs* (1994) 55 FCR 439 at 447; *Winn v Director General of National Parks and Wildlife* (2001) 130 LGERA 508 at 514 [12]; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 395 [427].

¹⁵³ s 5(2)(h) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

¹⁵⁴ *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at 514 [12].

¹⁵⁵ *Mixnam's Properties Ltd v Chertsey Urban District Council* [1963] 3 WLR 38 at 53-54; *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59 at 70, 71; *Transport Action Group Against Motorways v Roads and Traffic Authority* (1999) 46 NSWLR 598 at 628 [112].

¹⁵⁶ *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734.

¹⁵⁷ *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at 514 [13], [14].

¹⁵⁸ *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 and *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at 514 [16].

¹⁵⁹ *Transport Action Group Against Motorways v Roads and Traffic Authority* (1999) 46 NSWLR 598 at 629 [117].

¹⁶⁰ *Scott v Wollongong City Council* (1992) 75 LGERA 112 at 118 and *Transport Action Group Against Motorways v Roads and Traffic Authority* (1999) 46 NSWLR 598 at 629 [117]-630 [122].

¹⁶¹ See s 80A(2) of the *Environmental Planning and Assessment Act 1979* (NSW).

which identify express outcomes or objectives which the development or a specified aspect of it must achieve and clear criteria against which achievement of the outcome or objective must be assessed.¹⁶²

A condition will only be invalid if it falls outside the class of conditions which the statute either expressly or impliedly permits.¹⁶³ Where a condition does fall outside what the statute permits, the purported consent is not a consent at all.

¹⁶² See s 80A(4) of the *Environmental Planning and Assessment Act 1979* (NSW).

¹⁶³ *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2005) 141 LGERA 376 at 412 [89]; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 293 [57]; *GPT Re Limited v Wollongong City Council* [2006] NSWLEC 303 (9 June 2006), [90].