

**How to determine error in administrative decisions**  
**A cheat's guide**  
**Paper given to law firms 2014**

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**What is judicial review?**

Understanding judicial review requires you to understand two very simple concepts.

The first concept is usually referred to as the separation of powers doctrine.

The parliament makes laws conferring powers and duties upon government ministers, delegates, and other government decision-making bodies. The ministers, delegates, and other decision-makers make the decisions that the parliament empowers and requires them to make.

The courts make sure that the decision-makers make their decisions within the boundaries of the power that has been conferred upon them.

In other words, judicial review is the process by which the courts determine whether or not an administrative decision-maker has acted within the power conferred upon him or her by Parliament.

The second concept follows from the first, which is that the categories of jurisdictional error are simply ways of describing what a decision-maker has done when they have gone beyond the power conferred upon them by the statute (exceeded their jurisdiction), or when they have failed to exercise a power conferred upon them by the statute (failed to exercise their jurisdiction).

In *Kirk v IRC*<sup>1</sup>, the Court said;

*“It is neither necessary, nor possible, to attempt to mark out the metes and bounds of jurisdictional error”.*

The categories of error are not closed, because there could always be another way of describing what a statute requires or forbids and how that obligation or restriction has not been complied with.

Those are the two most fundamental conceptual building blocks of judicial review.

Now, what is a simple way of becoming more familiar with the categories of error, in other words, what is the language you want to become familiar with to accuse a decision-maker of having “gone wrong”?

### **What are the grounds of judicial review?**

#### ***ADJR Act and State equivalents.***

In Australia, the *Administrative Decisions (Judicial Review) Act 1977*, with its codified grounds of review, remains available as a means of review of most decisions at Commonwealth level (with similar schemes in several states<sup>2</sup>).

The *ADJR Act* was the product of the *Commonwealth Administrative Review Committee Report* of 1971<sup>3</sup>, “the Kerr Report” (yes, the very Sir John Kerr better popularly remembered for his performance as Governor General).

The grounds of review found in the *ADJR Act* reflect an attempt to simplify and reform the common law grounds of review as they were at that time.

I’ve attached a copy of section 5 of the *ADJR Act* to this paper. The grounds listed there remain broadly similar to the common law grounds of review, and represent the simplest short-cut to the categories of judicial review for you to consider.

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<sup>1</sup> *Kirk v IRC* (2010) 239 CLR 521

<sup>2</sup> Judicial Review Act 1991 (Qld), Judicial Review Act 2000 (Tas), Administrative Decisions (Judicial Review) Act 1989 (ACT).

<sup>3</sup> Commonwealth Administrative Review Committee Report, Parl Paper No 144 (1971)

## **Jurisdictional error.**

However, as Beech-Jones SC (as His Honour then was) has said, every galah in the administrative law pet-shop is now squawking jurisdictional error<sup>4</sup>, which is now an entrenched minimum standard of judicial review available at both Commonwealth and State level<sup>5</sup>.

In other words, if you can squawk “jurisdictional error”, you squawk the language of contemporary Australian judicial review.

I’ve listed below some of the ways in which an administrative decision-maker can be said to have gone beyond, or failed to exercise, their jurisdiction.

It is the categories I’ve listed, and the language they use, which you should use to construct your grounds of review, when you prepare a summons which relies on jurisdictional error.

In practice, it is not always easy to find the best way to express an error, and errors can often be equally well characterised in several different ways.

I’ve footnoted references to leading authorities or texts for you to refer to so that you can better understand what it is that is really meant by these allegations of error.

I’ve started with the widest and most abstract and difficult to understand errors. I’ve moved to those which are more specific, and easier to understand.

As a practical tip, the happiest hunting grounds are likely to be found in categories five to ten of the list.

### **List of grounds of common law grounds of review.**

(1) Mistakenly asserting or denying the very existence of jurisdiction<sup>6</sup>.

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<sup>4</sup> The Impact of External Administrative Law Review: The Role of the Courts, Beech-Jones SC, (2007) 57 AIAL Forum 70.

<sup>5</sup> *Kirk v IRC* (2010) 239 CLR 521

<sup>6</sup> See Mark Aronson’s list in *Jurisdictional Error without the Tears*, in Australian Administrative Law, Groves and Lee (eds) Cambridge University Press (2007) p330, at p335, which also includes my

(2) Misapprehending or disregarding the nature or limits of the decision-maker's functions or powers. For instance, the subject matter which a decision maker

(3) Misconstruing the relevant statute in such a way that the exercise of power is affected, leading the decision-maker to identify a wrong issue, or ask a wrong question<sup>7</sup>.

(4) Acting on a mistaken view about the existence of a particular fact, occurrence, or event, but only if the existence of that fact, occurrence, or event, is necessary for the valid exercise of the power (a "jurisdictional fact")<sup>8</sup>.

Whether a fact is "jurisdictional" is a question of statutory construction. The court won't usually accept that something is a jurisdictional fact if it leads to the court taking over the fact-finding function of the administrative decision-maker.

(5) Failing to take into account a matter that the Act implicitly or explicitly *requires* the decision-maker to take into account.

What the Act implicitly (as opposed to expressly) requires the decision-maker to take into account is determined with reference to the subject-matter, scope and purpose of the Act<sup>9</sup>.

(6) Taking into account a matter that that the Act explicitly or implicitly *does not permit* the decision-maker to take into account<sup>10</sup>. This too is a matter of statutory construction.

(7) Exercising a discretionary power in a way which can be characterised as legally unreasonable<sup>11</sup>. I will have a lot more to say about that in my talk today, when I analyse *Li's* case.

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second species of error. Aronson's list was referred to and accepted by the High Court in *Kirk, op.cit.* at [71].

<sup>7</sup> *Craig v South Australia* (1995) 184 CLR 162, at p179.

<sup>8</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 73 ALD 1, at [53] – [60], per McHugh and Gummow JJ.

<sup>9</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, per Mason J, at p39; per Brennan J, at p56.

<sup>10</sup> *Peko-Wallsend, op. cit.*, per Mason J, at p40.

<sup>11</sup> *Minister for Immigration and Citizenship v Xiujuan Li* [2013] HCA 18 (2013) 297 ALR 225, an important case I will discuss today; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

(8) Reaching a conclusion upon which the exercise of a power is dependent in a manner which is totally contrary to reason, illogical, or irrational<sup>12</sup>. Importantly, *Li*'s broader concept of "legal unreasonableness" may apply here as well.

(9) Acting in bad faith when making a decision, or making a decision affected by fraud. The bad faith of another, if it affects the exercise of power, might also invalidate a decision<sup>13</sup>.

(10) Failing to accord procedural fairness, either by acting in a manner giving rise to a reasonable apprehension of bias, or by failing to afford a party personally affected by a decision a reasonable opportunity to deal with adverse material where procedural fairness is required.

*Ex parte H* (2001) 179 ALR 425 outlines the now generally accepted test in administrative law for "apprehended bias", which is "Whether a fair-minded lay-person, properly informed about the nature of proceedings, the matters in issue, and the conduct said to give rise to an apprehension of bias" might apprehend bias (at [28]).

This is how you should particularise it.

Procedural fairness is now generally required<sup>14</sup>. Indeed, the Courts will now go to great lengths to avoid finding a parliamentary intention to exclude it<sup>15</sup>.

**Well I've found some egregious error.**

**What relief do I claim?**

Having identified error, you need to tell the Court what you want it to do about it. There are various statutory grounds of appeal, and many of them require you to identify an error of law, or a question of law (a dementedly complex area which we need not go into). However, you always (or nearly always) have the option of an appeal to the Supreme Court under section 69 of the Supreme Court Act, and I've attached the section to point you in the direction of how you might word your grounds.

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<sup>12</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32 (per Gleeson CJ at [38]); *SZMDS* per Crennan and Bell JJ, at [136].

<sup>13</sup> *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189

<sup>14</sup> *Teoh* (1995) 183 CLR 273; *Kioa v West* (2001) 206 CLR 57.

<sup>15</sup> *Saeed* (2010) 241 CLR 252 at [22] – [23].

Speaking generally, you would usually ask for an order in the nature of certiorari, quashing (or as we sometimes like to think, “squashing”) the decision, and you might ask for an order in the nature of mandamus, requiring the decision-maker to determine the matter “in accordance with these reasons and law”. You may need an injunction, and you may seek a declaration that what has been done is unlawful, though of course, a “squashing order” is a pretty clear message to the decision-maker that this is the case.

And of course, you will be after your costs, usually from the hapless Minister (and not, as a general rule, from a Tribunal, who will have quite properly stayed out of the arena, and filed a submitting appearance, save as to costs).

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## Attachment “A”.

*Administrative Decisions (Judicial Review) Act* (Cth), section 5.

### 5 Applications for review of decisions

- (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:
  - (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
  - (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
  - (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
  - (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
  - (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
  - (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
  - (g) that the decision was induced or affected by fraud;
  - (h) that there was no evidence or other material to justify the making of the decision;
  - (j) that the decision was otherwise contrary to law.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
  - (a) taking an irrelevant consideration into account in the exercise of a power;
  - (b) failing to take a relevant consideration into account in the exercise of a power;
  - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
  - (d) an exercise of a discretionary power in bad faith;
  - (e) an exercise of a personal discretionary power at the direction or behest of another person;
  - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
  - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
  - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
  - (j) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
  - (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no

evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.



**Attachment 'B'.**

**Supreme Court Act, section 69**

Proceedings in lieu of writs

(1) Where formerly:

(a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or

(b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

then, after the commencement of this Act:

(c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but

(d) shall not issue any such writ, and

(e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and

(f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to:

(a) the writ of habeas corpus ad subjiciendum,

(b) any writ of execution for the enforcement of a judgment or order of the Court, or

(c) any writ in aid of any such writ of execution.

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

By the way, don't worry about section 69(5); since *Kirk*, no such provision is likely to be effective.