

Administrative Law for Criminal Lawyers

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What is administrative law?

- Governs the activities of the executive/administrative agencies of government
- Developed to *regulate* the power of *executive bodies*
- Most administrative powers are exercised under a *statutory power* (or common law basis)
- Distinction between:
 - **Merits review** – focus on *merits* of the decision. The body conducting the review has the power to *remake* the decision below. Only available as a creature of statute
 - **Judicial review** – focus on the *legality* of the decision below. No power to remake the decision on its merits

Judicial review

- Judicial review involves review by a Court with the power (the prerogative) to supervise the conduct of the **executive** and **courts of inferior jurisdiction**
- Can give relief by way of **prerogative writs**
- Now replaced via statute by “**orders in the nature of**” the writ, e.g. s. 69 of the *Supreme Court Act 1970 (NSW)* or r. 56.01 *Supreme Court Rules (NT)*
- The main modern writs are:
 - **Habeas corpus** - bring the person to court
 - **Certiorari** – a direction to bring the record to the court to quash a decision
 - **Mandamus** – requiring something be done
 - **Prohibition** – prohibiting something being done
- Also equitable remedies:
 - **Injunction**
 - **Declaration**

Increasing prevalence of administrative law

- Increasing amount of State intervention
- Increasingly prescriptive regulatory frameworks for the exercise of administrative powers
- Change in practices in law enforcement and increasing use on tactical investigatory techniques
- Admin remedies, although ancient, are flexible and adaptable to modern demands
- Decision in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531

Types of error and remedies

- Is there a **legal error** by the decision-maker?
- Determine what **category** of the error. In particular, is it an:
 - *Error of law*
 - *Jurisdictional error*
- Consider whether there is a **remedy available** to correct the error. prerogative relief is *discretionary*. Discretionary factors include:
 - Existence of alternative statutory remedy, e.g. appeal
 - Unreasonable delay
 - Acquiescence or waiver
 - Bad faith
 - Futility
 - Undesirability of fragmentation of criminal proceedings

***Kirk* and privative clauses**

- *Kirk v Industrial Court of NSW* (2010) 239 CLR 531
- A criminal case at first instance in the Industrial Court of NSW
- Section 179 of the *Industrial Relations Act 1996 (NSW)* provided that a decision of the Industrial Court, however constituted, “is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal”.
- Held: Privative clauses such as s. 179 that oust review (or prescribe limits) on the exercise of judicial review would remove the supervisory powers of a State Supreme Courts as enshrined in Chapter III of the Constitution.
- Accordingly, to the extent that any statutory provision purports to limit the exercise of review on the basis of *jurisdictional error*, such provisions are *unconstitutional* and will be read down.
- Hence, there is always available, no matter what Parliament dictates, the possibility of judicial review for jurisdictional error
- For application re territory courts: *The Territories and Kirk v Industrial Relation Commission (NSW)*, Cameron Ford (2011) 2 NTLJ 28

Jurisdictional error

- Error that fundamentally affects the exercise of the jurisdiction by the decision maker
- Kirby J in *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR at 146 at 186 cited with approval a list from Aronson:
 1. A mistaken assertion or denial of the very **existence of jurisdiction**
 2. A misapprehension or disregard of the **nature or limits of the decision maker's functions or powers**
 3. Acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or **making the types of decisions or orders which are forbidden** under any circumstances
 4. Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or **fact** ... or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or objective existence of those things, rather than on the decision maker's subjective opinion
 5. Disregarding a **relevant consideration** which the Act required to be considered or paying regard to an **irrelevant consideration** which the Act required not to be considered, in circumstances where the Act's requirements constitute **preconditions** to the validity of the decision maker's act or decision
 6. Misconstruing the decision maker's Act ... in such a way as to **misconceive the nature** of the function being performed or the extent of the decision maker's powers
 7. Acting in **bad faith**
 8. A breach of **natural justice** [breach of obligation of procedural fairness].
- Controversial exclusion of the ground of illogicality or **unreasonableness** (*Wednesbury* unreasonableness), likely also a ground of jurisdictional error: *Minister for Immigration and Citizenship v SDMDS* (2010) 240 CLR 611; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332
- List approved by six judges in *Kirk*, but the Court made clear (at [70]-[73]) that the **categories of jurisdictional error are not closed**

Impact of administrative law on development of criminal law

- Examples include:
 - Developments in contemporary **statutory interpretation** for the construction of criminal and quasi criminal statutes:
 - Expanding overlap between “error” in administrative law and **pleading error in grounds of appeal**
 - As a basis to challenge **conditions precedent for criminal liability**
 - As a basis to challenge the **admissibility of evidence** pursuant to s. 138 of the *Uniform Evidence Acts*
 - Offering **alternative mechanisms for review** of decisions in place of appeals
 - Offering the possibility of **collateral attacks** on investigatory practices
 - As a mechanism to **enforce the provision of rights** and other procedural duties owed to persons during the criminal justice process, such as to suspects, detainees and prisoners

Types of administrative decisions that occur in the criminal justice context

- Decisions of **administrative bodies** (as conditions precedent for criminal liability or admissibility of evidence), e.g.:
 - Delegation of powers
 - Gazettal
 - Issue of notices/directions
- Decisions by **law enforcement officers**, e.g.:
 - Search warrants
 - Phone and listening device warrants
 - Controlled operations
 - Crime Commission proceedings
 - Forensic procedures
 - Search and seizure without warrant
 - Arrest and detention
 - Questioning

Types of administrative decisions continued

- Decisions by a **prosecutor**

- Most decisions by the prosecution **not reviewable**, e.g. the decision whether or not to prosecute : *Barton* (1980) 147 CLR 7; which charges to prefer: *Elias* (2013) 248 CLR 483; or whether to accept a plea to a lesser charge: *Maxwell* (1996) 184 CLR 501
- But conduct can be tortious or an abuse of process
- Defects in prosecutorial process
 - Signing of indictment
 - Delegation by Director etc.

- Decisions by a **Court**

- Review of decisions by judicial officers through prerogative relief
- Decisions by judicial officers as *persona designata* and acting in administrative capacity
- Decisions of registrars and court officials

- Decisions regarding the **enforcement of sentences**

- Conditions of imprisonment
- Decisions by corrections officers
- Parole decisions

Some practical examples

- Some successful judicial review challenges:
 - Review of **interlocutory decisions** of a magistrate (where appeal not available): *Munungurr v Gordon* (2011) 30 NTLR 45
 - Quashing magistrate's decision to refuse plea vacation application because of **breach of obligation to afford procedural fairness**: *Fuimaono v Director of Public Prosecutions* [2011] NSWSC 472
 - Quashing a **parole determination** and a direction to fulfil public duty in accordance with law: *Esho v Parole Board* [2006] NSWSC 345
 - Quashing a **warrant** and declaring it invalid: *Ballis v Randall* (2007) 71 NSWLR 282
 - See *Ousley* (1997) 192 CLR 69 as to the type of errors in warrants that can be challenged in the trial and those which need to be challenged by way of separate judicial review
 - Quashing a **decision to commit for trial**: *Leahy v Barnes* [2013] QSC 226
 - Challenging charges based on **invalidity of decisions made by Australian Crime Commission**: *Australian Crime Commission v LB*, (2009) 25 NTLR 30; *R v Debono* (2012) 268 FLR 261
 - By a **media organisation** challenging the decision to make a pseudonym order: *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131
 - A writ of **habeas corpus** for a person **held in a correctional centre** where order to be held in a **mental health facility**: *Louie v Governor, MRRC, Silverwater* (unreported, Hall J, NSWSC, 7.4.14)
 - A writ of **habeas corpus** where court had **no power to remand** on breach of a bond: *Yates v Commissioner of Corrective Services (NSW)* [2014] NSWSC 653
 - A declaration that a **bail condition was unlawful**: *Lawson v Dunlevy* [2012] NSWSC 48

Diagram 1: Analysis of lawful decision-making

The following decision making flowchart sets out a list of questions which could be asked by administrative decision makers. These questions assist a decision maker in the lawful 'flow' of power from legislation to decision. Without the proper flow of this power, the decision may be unlawful.

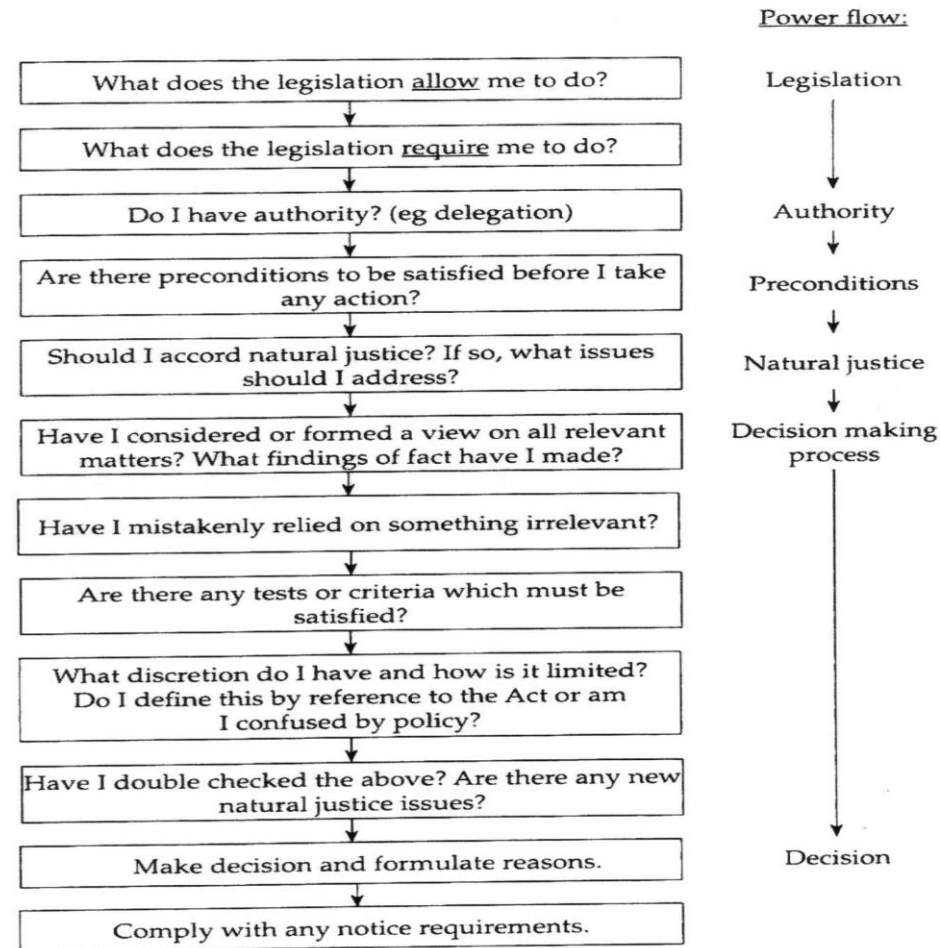


Diagram 2: Administrative law overview flowchart – Part 1
(Primary analysis of the decision)

Part 1 of the flowchart starts with categorising the decision or act which may be reviewable, exploring the source of power for it, and considering whether merits review is available.

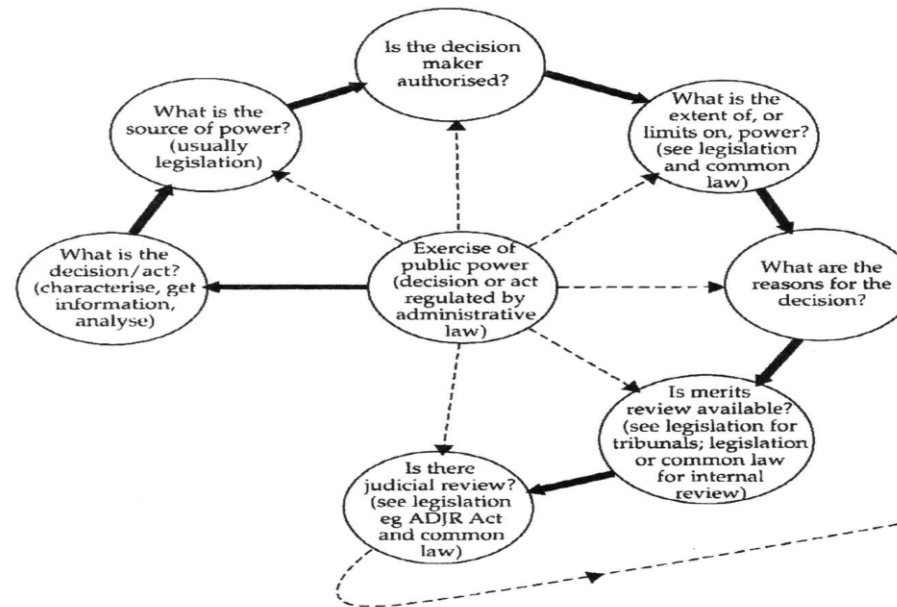


Diagram 5: Error of Law in Australian Administrative Law

