Judicial review of administrative decisions: a guide for personal injury lawyers

By Ben Zipser

In a number of jurisdictions in Australia, personal injury lawyers may be confronted by applications to courts for judicial review of administrative decisions.

Such applications may occur:

- at the Commonwealth level, in respect of appeals on a question of law to the Federal Court from decisions of the Administrative Appeals Tribunal in relation to compensation claims under the *Safety Rehabilitation and Compensation Act* 1988 (Cth);
- in Victoria, in respect of appeals on a question of law to the Supreme Court from decisions of the Victorian Civil and Administrative Tribunal in relation to compensations claims under the *Transport Accident Act* 1986 (Vic), as well as applications for judicial review of decisions of medical panels under the *Accident Compensation Act* 1985 (Vic);
- in Western Australia, in respect of appeals on a question of law to a compensation magistrate's court from decisions of review officers under the *Workers' Compensation and Rehabilitation Act* 1981 (WA);
- in Tasmania, in respect of appeals on a point of law to the Supreme Court from decisions of the Workers Rehabilitation and Compensation Tribunal under the *Workers' Rehabilitation and Compensation Act* 1988 (Tas); and
- in New South Wales, in respect of appeals on a point of law to the Court of Appeal from decisions of the Compensation Court under the *Compensation Court Act* 1984 (NSW) (recently repealed).

In each case, the applicant for judicial review is entitled to relief only if there is an error of law in the administrative decision. The circumstances in which an administrative decision contains an error of law are limited. This paper explains the principal circumstances under the following headings:

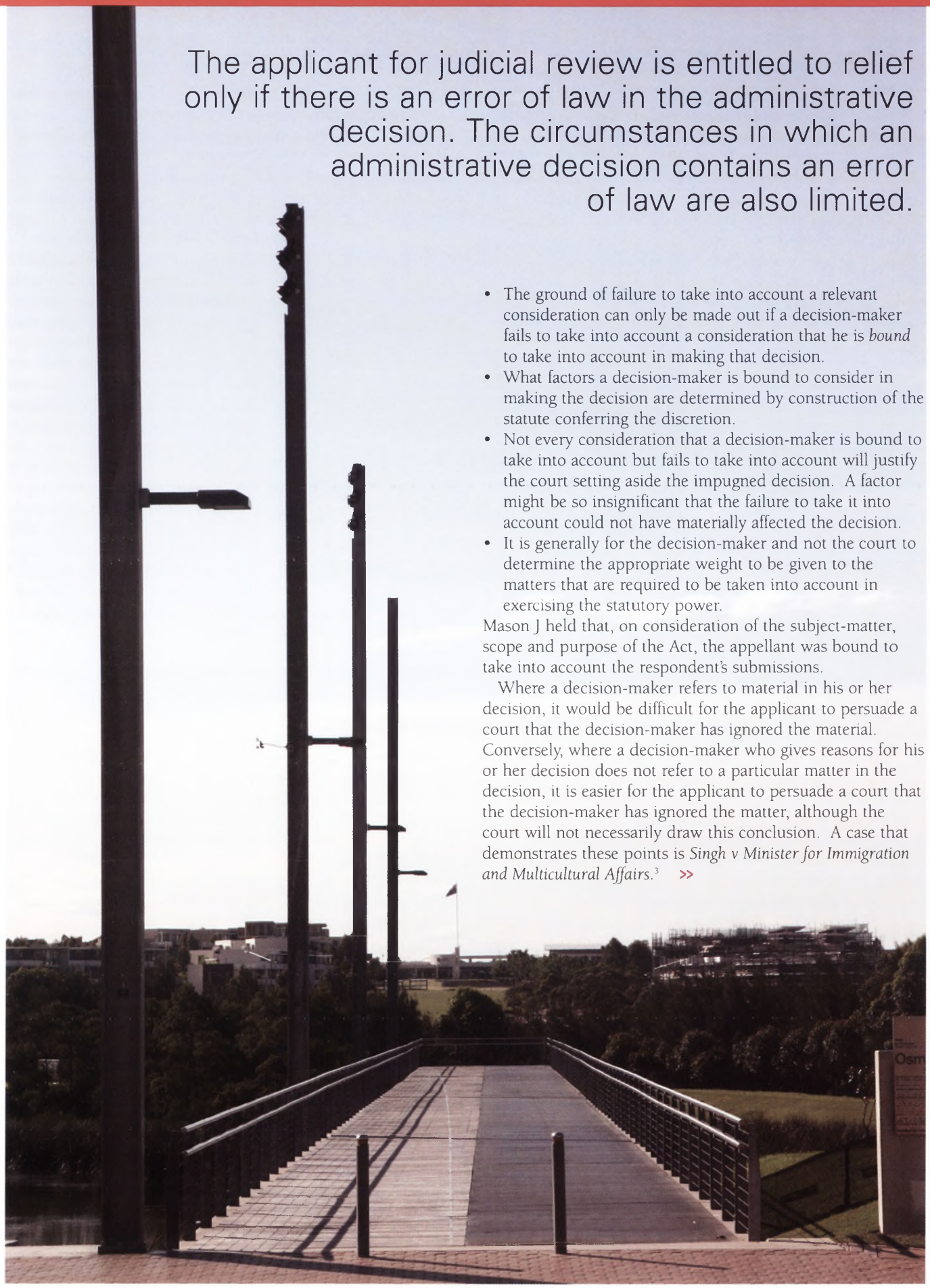
- ignoring relevant material;
- wrong findings of fact;
- errors in statutory construction;
- applying the wrong test or asking the wrong question;
- unreasonable decisions; and
- denial of procedural fairness.

IGNORING RELEVANT MATERIAL

An error of law occurs where a decision-maker under a statute ignores material he or she was required to consider. A leading case is *Minister for Aboriginal Affairs v Peko-Wallsend Limited*.[1] The appellant made a decision under s11 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) concerning an Aboriginal land claim. The decision adversely affected the respondent's interests. The appellant, in making the decision, did not take into account written submissions provided by the respondent to the appellant's office prior to the decision being made. The High Court considered whether the appellant was bound to have regard to the respondent's submissions, so that his failure to do so amounted to a reviewable error. Mason J, with whom Gibbs CJ and Dawson J agreed, stated the following principles:[2]

- The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action.

The applicant for judicial review is entitled to relief only if there is an error of law in the administrative decision. The circumstances in which an administrative decision contains an error of law are also limited.



- The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration that he is *bound* to take into account in making that decision.
- What factors a decision-maker is bound to consider in making the decision are determined by construction of the statute conferring the discretion.
- Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.
- It is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters that are required to be taken into account in exercising the statutory power.

Mason J held that, on consideration of the subject-matter, scope and purpose of the Act, the appellant was bound to take into account the respondent's submissions.

Where a decision-maker refers to material in his or her decision, it would be difficult for the applicant to persuade a court that the decision-maker has ignored the material. Conversely, where a decision-maker who gives reasons for his or her decision does not refer to a particular matter in the decision, it is easier for the applicant to persuade a court that the decision-maker has ignored the matter, although the court will not necessarily draw this conclusion. A case that demonstrates these points is *Singh v Minister for Immigration and Multicultural Affairs*.[3] >>

WRONG FINDINGS OF FACT

Where a decision-maker under a statute makes a finding of fact and the applicant wants to challenge the finding on a judicial review application to the courts, the challenge will succeed only if the finding of fact involved an error of law.

An error of law arises where a decision-maker makes a finding or draws an inference and there is *no evidence* to support the finding or inference: see *Australian Broadcasting Tribunal v Bond*;[4] and *Bruce v Cole*.[5]

However, if 'there is some basis for an inference ... 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': *Australian Broadcasting Tribunal v Bond*.[6]

Where a decision-maker makes a finding or draws an inference and the finding or inference is based on perverse or illogical reasoning, the law is not entirely clear as to whether there is an error of law. As stated above, in *Australian Broadcasting Tribunal v Bond* Mason J stated that there is no error of law in drawing an inference 'even if that inference appears to have been drawn as a result of illogical reasoning'.[7] Similarly, in *Azzopardi v Tasman UEB Industries Ltd*,[8] Glass and Samuels JJA held that a factual conclusion which was perverse, illogical or marred by patent error did not involve an error of law. However:

- In *Hill v Green*, Spigelman CJ stated, after noting that the principle in *Australian Broadcasting Tribunal v Bond* was limited to applications for judicial review under the common law, that '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 construction of the statute or regulation with a presumption that the parliament or author of the regulation intended the decision-maker to reach a decision by a process of logical reasoning'. In such a case, 'an inference or fact ... that is not based on logical reasoning' is not a finding within the meaning of the statute.[9]
- In *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*, Gummow and Hayne JJ, in considering whether there was jurisdictional error in a determination of the Refugee Review Tribunal under the *Migration Act* 1958 (Cth), stated that there would be jurisdictional error if the determination was 'not based on findings or inferences of fact supported by logical grounds'.[10]
- In *Bruce v Cole*, Spigelman CJ stated that 'acting without probative evidence is the equivalent of no evidence' and 'at common law a decision-maker who acts without probative evidence ... does not make a valid decision'.[11] Hence, where a decision-maker makes a finding or draws an inference and there is no *probative* evidence to support the finding or inference, this involves an error of law.

Subject to the points raised above, 'there is no error of law in simply making a wrong finding of fact': *Australian Broadcasting Tribunal v Bond*;[12] and *Bruce v Cole*.[13]

A personal injuries case in which the above issues were considered was *Ambulance Service of New South Wales v Daniel*.[14] The trial judge in the Compensation Court found that the respondent's employment with the appellant was 'employment to the nature of which his injury was due' within s17 of the *Workers' Compensation Act* 1987 (NSW). The appellant's appeal to the Court of Appeal was limited to questions of law. The appellant contended that there was no evidence on which the above finding of fact could be made, giving rise to an error of law. The Court of Appeal, after reviewing the authorities and the evidence before the trial judge, rejected the submission, stating that it was 'not satisfied there was not evidence on which the finding made by the trial judge could properly have been made'.

> One situation involving an error of law, which overlaps with errors in statutory construction, arises where a decision-maker under a statute applies the wrong test or asks the wrong question.

ERRORS IN STATUTORY CONSTRUCTION

Where a decision-maker construes a word or phrase in a statute, or applies the facts as found to a construction of the statute, and the applicant wants to challenge the finding on a judicial review application to the courts, an issue is whether the decision involves an error of law or an error of fact. In *Collector of Customs v Agfa-Gevaert Ltd*,[15] the High Court stated the following propositions:

- The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.
- The ordinary meaning of a word or its non-legal technical meaning is a question of fact.
- The meaning of a technical legal term is a question of law.
- The effect or construction of a term whose meaning or interpretation is established is a question of law.
- The question whether the facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law. A qualification to this proposition is that when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or not is one of fact.

The above propositions have been considered and applied in many cases, including personal injuries cases. For example, in *Vetter v Lake Macquarie City Council*,[16] the appellant, who travelled between home and work by car, had adopted the practice of calling on her grandmother on one day each fortnight after leaving work and before travelling home. After such a visit she was involved in an accident while driving

home. In order for the appellant to be entitled to compensation under the *Workers' Compensation Act* 1987 (NSW), it was necessary that the accident occurred during a 'periodic journey between the worker's place of abode and place of employment'. The primary judge in the Compensation Court of New South Wales found that the accident occurred during such a journey.

Section 32(1) of the *Compensation Court Act* 1984 (NSW) conferred on a party to any proceedings a right of appeal to the Court of Appeal on a 'point of law'. The respondent appealed to the Court of Appeal against this finding. The Court of Appeal allowed the appeal. On the appellant's appeal to the High Court, the High Court considered, first, whether the finding of the primary judge involved a point of law. If it did not, the Court of Appeal and High Court had no power to intervene in the primary judge's decision. The High Court held that the finding of the primary judge did involve a point of law and that 'the primary judge made no error of law in deciding that the appellant was undertaking a ... periodic journey between her place of employment and place of abode'.[17] On this basis, the High Court restored the decision of the primary judge.

See also:

- *Woolfe v Tasmania,*[18] which involved an appeal on a point of law from a decision of the Workers' Rehabilitation and Compensation Tribunal to the Supreme Court;
- *State Trustees Ltd v Transport Accident Commission,*[19] where Bongiorno J in the Supreme Court of Victoria held that the Victorian Civil and Administrative Tribunal erred in law in construing the term 'confinement' in Chapter 2 of the *Guide to the Evaluation of Permanent Impairment* published by the American Medical Association; and
- *Transport Accident Commission v Lees,*[20] where the Victorian Civil and Administrative Tribunal found that the defendant was injured as a result of a transport accident within the meaning of s3(1) of the *Transport Accident Act* 1986 (Vic) and, on an appeal to the Supreme Court limited to questions of law, the issue was whether the Tribunal erred in law in making this finding.

APPLYING THE WRONG TEST OR ASKING THE WRONG QUESTION

Another situation involving an error of law, which overlaps with errors in statutory construction, arises where a decision-maker under a statute applies the wrong test or asks the wrong question. Thus, in *Minister for Immigration and Multicultural Affairs v Yusuf*[21] McHugh, Gummow and Hayne JJ stated that 'identifying a wrong issue, asking a wrong question ... in a way that affects the exercise of power is to make an error of law'.

Whether a decision-maker has applied the wrong test or asked the wrong question in a particular case obviously >>

depends upon the statute under consideration. Two examples in personal injuries matters illustrate the point.

- In *Ambulance Service of NSW v Daniel*,[22] the trial judge in the Compensation Court held that the respondent's employment was 'employment to the nature of which his injury was due' within s17 of the *Workers' Compensation Act* 1987 (NSW). On an appeal limited to questions of law, the Court of Appeal rejected the appellant's contention that the trial judge had applied the wrong test in making this finding.
- In contrast, in *Wiegand v Comcare*[23] the Administrative Appeals Tribunal held that the applicant's ailment was not 'contributed to in a material degree by the employee's employment' within the meaning of this term in s4 of the *Safety Rehabilitation and Compensation Act* 1988 (Cth). On an appeal to the Federal Court limited to questions of law, the Federal Court held that the Tribunal applied the wrong test in making this finding. On this basis, the Federal Court set aside the Tribunal's decision and remitted the matter to the Tribunal to be decided according to law.

UNREASONABLE DECISIONS

Where a decision involving the exercise of a discretion is manifestly unreasonable, this involves an error of law. As Fitzgerald JA explained in *Hill v Green*,[24] 'a discretionary administrative decision which was not reasonably open to the decision-maker involves an error of law'. This ground of review is sometimes referred to as 'Wednesbury' unreasonableness, after *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[25] In *Hill v Green*, Fitzgerald JA, after reviewing the authorities, added:

> *'The "Wednesbury" principle has elements of imprecision and circularity and can call for value judgements which are sometimes semantically disguised ... The "Wednesbury" principle is settled law and, provided that proper judicial restraint is exercised, its application does not hinder legitimate administrative decision-making but protects those affected from the misuse of administrative power.'*[26]

Cases in which administrative decisions have been set aside on the grounds of Wednesbury unreasonableness are limited. However, one of them, *Norton v Comcare*,[27] is a personal injuries case. The Administrative Appeals Tribunal deemed the applicant able to earn full income in suitable employment, a finding that disentitled him to receive weekly payments of compensation under s19 of the *Safety Rehabilitation and Compensation Act* 1988 (Cth). On the applicant's appeal to the Federal Court, limited to questions of law, Drummond J concluded that the Tribunal 'made [its] decision in a manner so devoid of plausible justification that it is flawed for Wednesbury unreasonableness'.[28]

DENIAL OF PROCEDURAL FAIRNESS

Two key questions arise where a decision-maker denies an applicant procedural fairness and the applicant wants to seek relief on a judicial review application to the courts:

- whether a denial of procedural fairness involves an error of law; and
- if so, the circumstances that give rise to a denial of procedural fairness.

In relation to the first question, the preponderance of authority is that a denial of procedural fairness involves an error of law. The point was recently considered by the Full Court of the Federal Court in *Clements v Independent Indigenous Advisory Committee*.[29] As a result of an administrative error by the Administrative Appeals Tribunal, the applicant was denied procedural fairness. Pursuant to s44 of the *Administrative Appeals Tribunal Act* 1975 (Cth), appeals from the Tribunal to the Federal Court are limited to questions of law. The matter came before a Full Court of the Federal Court, which considered whether a denial of procedural fairness involves a question of law. A majority of the Full Court held that it did. Gray ACJ and North J, after reviewing the authorities, stated that the Court 'should accept the principle that a denial of procedural fairness is an error of law'.[30] However, Gyles J in dissent stated that 'a breach of the rules of natural justice, or a failure to follow necessary statutory procedures, which does not appear on the face of those documents but which requires findings to be made on the basis of evidence outside those documents, cannot properly be described as an appeal on a question of law within s44 of the Act'.[31]

In relation to the second question, in *WACO v Minister for Immigration and Multicultural and Indigenous Affairs*,[32] the Full Court of the Federal Court explained:

> *'In the broadest sense procedural fairness requires that an*

administrative tribunal is bound to hear a person affected by its decision before exercising its powers. Underlying it is the entitlement of the person to know the case sought to be made against him or her and to be given the opportunity of replying to it … Whether procedural fairness must be afforded and the content of it will, where the decision made arises in a statutory framework, depend upon the legislation pursuant to which the decision is to be made and all the circumstances of the case.'

In *Re Refugee Review Tribunal; ex parte Aala,*[33] McHugh J (with whom Kirby J agreed[34]) stated:

'One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding.'

In recent years there have been a large number of decisions of the Federal Court and High Court, reviewing decisions made under the *Migration Act* 1958 (Cth), which have explored the boundaries of the obligations of procedural fairness in administrative decision-making.

Two examples of personal injuries cases involving a denial of procedural fairness are as follows:

- In *Di Girolami v Garentone Pty Ltd*[35] a medical panel made a decision under the *Accident Compensation Act* 1985 (Vic) that the applicant worker's lack of current work capacity was 'unlikely to continue indefinitely'. The applicant applied to the Supreme Court for judicial review of the medical panel's decision. The Supreme Court found that, in the circumstances of the case, the medical panel did not accord the applicant procedural fairness. Specifically, the medical panel had relied in its decision on some information obtained from the applicant but, when it had obtained the information, the Panel had not told the applicant the purpose or significance of the information it was obtaining. This approach by the panel contravened the 'rule of natural justice which requires a person, particularly an unrepresented one, to be aware and comprehending of the nature of questions put to him or her and the consequences any answer may bring'.[36]
- In *Calleja v Franet Pty Ltd*[37] a medical panel, while accepting that the applicant had an adjustment disorder, found that the disorder was attributable to menopause, rather than to the worker's employment, and hence was not compensable. The Supreme Court held that the applicant had been denied procedural fairness because the panel had failed to give her a chance to meet its proposition that the adjustment disorder was attributable to menopause.

CONCLUSION

The principles of judicial review permit courts to control the unlawful exercise of power by administrative decision-makers. The circumstances in which an administrative decision contains an error of law are, however, limited. ■

Notes: **1** (1986) 162 CLR 24. **2** At 39-41. **3** [2001] FCA 389 at [60]-[73]. **4** (1990) 170 CLR 321 at 355-6. **5** (1998) 45 NSWLR 163 at 188. **6** At 356. **7** Ibid. **8** (1985) 4 NSWLR 139 at 155-7. **9** (1999) 48 NSWLR 161 at 174-5. **10** (2004) 207 ALR 12, at 38. **11** (1998) 45 NSWLR 163 at 188-9. **12** At 356. **13** At 187. **14** [2000] NSWCA 116. **15** (1996) 186 CLR 389 at 395. **16** (2001) 202 CLR 439. **17** At 453. **18** (2001) 10 Tas R 205. **19** (2002) 6 VR 359. **20** [2002] VSC 397. **21** (2001) 206 CLR 323 at [82]. **22** [2000] NSWCA 116. **23** (2002) 72 ALD 795. **24** (1999) 44 NSWLR 161 at [239]. **25** [1948] 1 KB 223. **26** At [241]. **27** [2000] FCA 1068. **28** At [51]. **29** (2003) 37 AAR 309. **30** At [8]. **31** At [67]. **32** (2003) 77 ALD 1 at [43]. **33** (2000) 204 CLR 82 at [101]. **34** At [128]. **35** [2001] VSC 57. **36** Ibid, at [22]. **37** [1999] VSC 202.

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