

PART 8 ADMINISTRATIVE ERROR SECTION 25(1)

Refer: *Ombudsman Act 1972* (Ombudsman Act)

SECTION 25(1) DEFINITIONS

Section 25 of the Ombudsman Act lists the following types of administrative error that may, in the Ombudsman's opinion, apply to an agency's actions. The list of examples under each type of error is intended as a guide only.

1. CONTRARY TO LAW – SECTION 25(1)(a)

An action or decision appears to be contrary to the law. This type of administrative error may fall short of criminal conduct. It may include:

- failure to comply with legal obligations (eg contractual, statutory, common law, court order)
- the law has not been correctly interpreted
- the law has not been correctly applied
- correct legal procedures or requirements have not been followed
- a decision or action has been taken and the decision-maker had no power to make the decision or do the act.

2. UNREASONABLE – SECTION 25(1)(b)

The term 'unreasonable' in the Ombudsman Act bears its popular or dictionary meaning. Accordingly, the issue is whether, viewed objectively, particular conduct or acts were not based on reason or good sense, or displayed poor judgement in the circumstances. This is a broad concept of unreasonableness and is to be contrasted with the doctrine of unreasonableness that can be a ground for judicial review of administrative action¹.

Examples of an unreasonable action or decision:

- unjustifiable delay in making decisions or taking actions
- decisions or actions are inconsistent with adopted guidelines or policy and that inconsistency is not adequately explained
- the action taken is not proportional to the issue being addressed (i.e. an excessive use of authority)
- an inadequate response to a reasonable request.

However, a qualification to this approach is where the decision or act complained about is pursuant to the exercise of statutory discretion or is otherwise eligible for judicial review². In that case, the narrower and more demanding administrative law test of unreasonableness should be used. This requires the administrative act to be so unreasonable that no reasonable authority could have acted in that way. In this context, an

¹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1KB 223.

² Bearing in mind that section 13(3) of the Ombudsman Act may apply to prevent the Ombudsman from investigating such a complaint.

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unreasonable decision is one that when looked at objectively, does not fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law³.

Examples of decisions to which this concept of unreasonableness may be applied:

- a refusal to withdraw an expiation notice pursuant to the *Expiation of Offences Act 1996*
- a decision to impose certain conditions on a licence
- a decision to seek recovery of a debt due
- a refusal to take enforcement action for a breach of the *Dog and Cat Management Act 1995*.

3. UNJUST – SECTION 25(1)(b)

Examples of an unjust action or decision include:

- abuse of power eg use of power for unauthorised purpose
- delay with serious consequences
- arbitrary decisions or actions
- decisions or actions are not justified by any evidence
- decisions or actions are partial, unfair or inequitable
- unconscionable decisions or actions
- denial of procedural fairness. Including inadequate:
 - notice of proposed action, decision or hearing
 - advice as to rights eg rights of appeal
 - reasons for decisions or actions
 - consultation
 - opportunity to be heard
- unfair or inequitable application of law so that the burden or the benefit does not reach all those to whom it is intended to apply.

4. OPPRESSIVE – SECTION 25(1)(b)

Oppressive conduct implies that the action goes beyond merely being unreasonable or unjust and is of greater concern. Examples include:

- means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
- abuse of power
- intimidation
- harassment
- punitive, harsh, cruel or offensive decision or action
- imposition of unreasonable preconditions to the provision of a legal entitlement.

³ *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

5. IMPROPERLY DISCRIMINATORY – SECTION 25(1)(b)

Examples of improperly discriminatory actions or decisions include:

- inconsistent application of policies or practices
- inconsistent application of laws when there is no reasonable, justifiable or appropriate reason to do so
- failure to make a distinction which is authorised or required by law
- failure to perform duties impartially and equitably.

6. WAS IN ACCORDANCE WITH A RULE OF LAW OR A PROVISION OF AN ENACTMENT OR A PRACTICE THAT IS OR MAY BE UNREASONABLE, UNJUST, OPPRESSIVE OR IMPROPERLY DISCRIMINATORY – SECTION 25(1)(c)

This category requires the Ombudsman to focus on the legislation, policy or practice on which the action is based. Examples include:

- where the legislation, policy or practice contains a heavy-handed approach to decision making in which the rights of the person subject to the decision are ignored without any justification.
- where the application of the law does, or will, produce a result that is unreasonable, unjust or oppressive.
- Where the law does not reflect the intent of Parliament.

7. WAS DONE IN THE EXERCISE OF A POWER OR DISCRETION AND WAS SO DONE FOR AN IMPROPER PURPOSE OR ON IRRELEVANT GROUNDS OR ON THE TAKING INTO ACCOUNT OF IRRELEVANT CONSIDERATIONS – section 25(1)(d)

This category requires the Ombudsman to look at how the decision was made. The type of decision or action must be looked at, as well as the manner in which it was made. Section 25(1)(d) is not concerned with the merits of the decision. It could be a good outcome but it was arrived at in bad faith or improper purpose.

It is necessary firstly to be able to identify the power or discretion being exercised. For example, a power to grant a Liquor Licence under the *Liquor Licensing Act*.

Having established the discretion or power, the manner in which the decision or action was taken is looked at to see if any of the following occurred:

Examples of **Improper purpose**:

- decision has been motivated by favouritism or personal objectives
- relevant considerations have not been adequately taken into account
- irrelevant considerations have been taken into account
- genuine, proper or realistic consideration has not been given to a matter
- decisions or actions for a purpose other than that for which the power was conferred ie the intent of a law, policy or procedure is ignored in order to achieve a particular outcome

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- decisions or actions motivated by favouritism or personal animosity
- bias or apprehended bias
- negligence or the absence of proper care and attention
- refusal of an otherwise valid claim based on minor procedural defects
- improper exercise of a delegated power:
 - acting under the direction or at the behest of another (ie acting under 'dictation')
 - decision or action not authorised by delegation
- misuse of public property, official services or facilities
- misuse of confidential information to obtain improper advantage
- bad faith (Definition of bad faith – 'the lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker').⁴

Irrelevant grounds / considerations:

- failing to adequately take into account a relevant consideration
- taking into account irrelevant considerations
- policy applied without having regard to the merits of the particular case
- actions influenced by irrelevant remarks or other inappropriate information recorded on files.

8. WAS DONE IN THE EXERCISE OF A POWER OR DISCRETION AND THE REASONS FOR THE ACT WERE NOT BUT SHOULD HAVE BEEN GIVEN – SECTION 25(1)(e)

This category applies to situations:

- in which there is a statutory obligation to provide reasons
- in which there is an obligation under principles of administrative law to provide reasons.

In assessing the adequacy of reasons the following considerations should be taken into consideration:

- the reasons should directly address the complainant's concerns
- assertions should be supported by sources and evidence if appropriate
- statements of law should be supported by authority (statute or case)
- the reasons should be clear and easily understood
- all relevant criteria on which the decision is based should be stated.

⁴ SCAS v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 397 at 19.

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9. WAS BASED WHOLLY OR IN PART ON A MISTAKE OF LAW OR FACT – SECTION 25(1)(f)

This section covers decisions or actions based on information that is factually in error or that has been misinterpreted. It also covers decisions and actions where the decision-maker acted on the basis of a misinterpretation of the legal position.

Mistake of Law:

- incorrect interpretation of the law
- incorrect application of the law
- ignorance of the law
- failure to rectify identified mistakes, errors or oversights

NOTE: a mistake of law can be distinguished from acting contrary to the law as the former is an attempt to follow the law but is based on a mistake eg a decision-maker does something because he or she thinks, in error, the law either permits it or requires it.

Mistake of fact:

- decisions or actions are based on information that is factually in error or misinterpreted
- important facts are omitted from reports or deliberations, or ignored
- failure to properly investigate
- failure to read file or other documentation correctly.

10. WAS WRONG – SECTION 25(1)(g)

The decision or action may offend one or all of the other criteria or it may not offend any. But nonetheless it is wrong. It includes those situations in which:

- the decision is contrary to the weight of the evidence
- it is unclear what the decision is
- the decision is unfair or inequitable
- the agency does not live up to commitments
- the agency fails to respond to reasonable requests
- the decision or action causes undue hardship or loss
- the agency fails to meet acceptable or industry standards for public administration, good judgement, integrity and the like
- the agency fails to give accurate, frank, impartial, complete and/or timely advice
- the agency knowingly sends members of the public on a futile enquiry.

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