Administrative law and response to emergencies

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Emergency management has given rise to gratifyingly little litigation, and when it has, the litigation has been largely confined to the areas of negligence and employment law. This experience might suggest that emergency managers can get along reasonably well without a thorough knowledge of the principles and practices of Administrative Law. Up to a point, this is probably true. But, I shall argue, Administrative Law has implications for emergency management and if it is not taken into account, managers may occasionally find themselves in considerable legal trouble.

Emergency management involves the exercise of public power, and this is normally regulated by at least two bodies of law. One of these bodies of law consists of the legislation which relates specifically to the activity in question. In the emergency area, this legislation is typically to be found in state disaster or emergency service legislation, and sometimes in legislation which regulates the structures of particular emergency services. The second involves a more general body of law which applies to administrative activities in general. This more general body of law—Administrative Law—constitutes the background against which all legislation must be read. It fills the gaps left by such legislation, and qualifies and supplements the powers and duties prescribed by the specific legislation. One branch of administrative law concerns the procedures whereby the merits of administrative decisions can be reviewed. This branch need not concern us here. Merits review plays little role in emergency decisions. The other major branch of administrative law is concerned with the legality of administrative acts, and with the consequences of administrative irregularities. This paper is concerned with the implications this latter branch of the law. In the heat of an emergency, administrative law is unlikely to be uppermost in most people's minds. However, I shall argue, administrative law is by no means irrelevant to reactions to emergencies. It bears on the institutional arrangements for emergency management. And insofar as it is not taken into account, emergency managers may find themselves in considerable legal trouble.

The core content of administrative law can be stated relatively simply. Administrative powers can be exercised only by those on whom they are conferred. Those on whom powers are conferred may exercise only those powers which actually have been conferred on them. Where procedures are prescribed, these procedures must be followed. Exceeding one's powers or failure to follow prescribed procedures will normally mean that one's acts lack legal authority.

Stated baldly, these propositions seem relatively obvious. What is less obvious is whether powers have been conferred in particular situations; what those powers actually are; what procedures must be followed in particular situations, and what is to happen if powers are exceeded or prescribed procedures not followed. To those of you who are familiar with emergency legislation, the answer may seem obvious enough. In most Australian jurisdictions, emergency legislation can be tracked down relatively easily. On the whole it appears to be clearly expressed, and if you have read it or if you read it, you will note that it addresses questions of who may do what, and according to what procedures. Why then, is it necessary to have some understanding of administrative law?

The answer is threefold. First, a close reading of most emergency legislation indicates that there are issues which it does not address. Second, administrative law imposes limits on administrative powers over and above those which might appear from a literal reading of the legislation. Third, while legislation tends to provide a reasonable guide to questions relating to powers and prescribed procedures, it tends not to address the question: but what happens when powers are exceeded or prescribed procedures are not followed? These omissions are not accidental. Those who draft legislation will do so knowing that these apparent gaps can be filled by the general principles of administrative law. It is therefore unnecessary to spell out these principles in particular pieces of legislation. Indeed, it might be positively undesirable. It would tend to make legislation much longer and more complex than is currently the case. It might well create problems—as for instance, where a court had to consider whether provisions specifically incorporating some administrative law principles was to be taken as impliedly excluding the operation of others. There are also symbolic reasons. Legislation which embodied the general principles of administrative law would need to make specific provision for extremely rare contingencies: the exercise of a draconian power for personal rather than public purposes; arbitrarily exercising powers in order to assist some groups rather than others; refusals to listen to what someone had to say because one had already made up one's mind. The inclusion of such provisions might well be the occasion for resentment, being taken as implying that those at whom the legislation is directed are the kinds of people who need to be told that this is unacceptable behaviour.

Reading the legislation is therefore not enough. To understand powers, procedures and consequences of administrative irregularities, it is necessary to resort to the general principles of administrative law. I shall demonstrate this by reference to the following questions. Who has power? What are the limits to power? What procedures apply in relation to the exercise of powers? And, what happens when powers are exceeded, or procedures not complied with?

1. Who may exercise powers?

Emergency legislation necessarily confers important powers. These are conferred on the incumbents of specified positions and in general, the importance of the power is related to the importance of the repository of the power. An obvious problem with conferring powers on a particular person is that the person might not be in a position to exercise those powers when occasion arises. If, for example, the Minister is killed or injured as a result of a major disaster, he or she will not be in a position to exercise powers in relation to the management of the emergency. For this reason, legislation makes provision for delegation of powers. Emergency legislation includes clear provisions relating to the procedures for delegating powers. However, there are some questions which are not always addressed in emergency legislation. These include questions such as:

- What is the position in relation to a delegation of power when the person who delegated the power has left office? Do all the delegations cease to have effect?
- Can a repository of the power to delegate withdraw a delegation of power?
- Can power be delegated to the incumbent of a particular role, or only to a named person?
- Can a person to whom power is delegated in turn delegate that power to yet another person?
- If power is delegated to the incumbent of a particular office, what happens if the office is re-defined?
- If there is no express power to delegate, are there circumstances where a power to delegate might be implied?

It is tempting to suggest that there are common sense answers. It makes sense to assume that delegations, once made, continue even when the person making them ceases to hold office. The alternative would be administrative chaos. It would mean, for instance, that in the aftermath of a disaster, the Minister's delegations could cease to have effect at the very time when it was essential that there be someone in a position to exercise powers. It would also seem obvious that the power to delegate implies a power to revoke delegations. It would be convenient, especially in the context of emergency management, that delegations be to role incumbents rather than to named people. If the only specified repository of the power is someone who is likely to be far too busy to be able to exercise the power in every circumstance requiring its exercise, it makes sense to assume that there is an implied power to delegate. As we shall see, common sense is not a bad guide to administrative law. However, it should be noted that the common sense and the law do not always coincide. Historically, for instance, the death of the monarch terminated many appointments, notwithstanding that it might have made institutional sense to maintain those appointments—especially given the potential for chaos during an interregnum.

General statutes relating to the interpretation of legislation throw some light on these issues. First, in most jurisdictions, these provide that a delegation survives the departure from office of the delegator. Second, delegations can be revoked. Third, power can be delegated to the incumbent of a named office. The position where the definition of the office changes so that it no longer corresponds precisely with the office to which power was originally delegated is not clear. In several jurisdictions, there are statutory provisions to the effect that delegated powers may not be further delegated. Finally, a power to delegate may be implied even if there is no express provision for it. First, while there is a presumption that acts are valid only if done by the statutory repository of a power, this presumption is rebuttable. If the legislation would be unworkable in the absence of delegation, a power to delegate will be implied. Second, even in the absence of a power to delegate, courts may imply a power to act through an agent. In contrast to delegates, agents act in the name of their principal rather than in their own name, but otherwise they are almost indistinguishable from delegates (and are sometimes described as such). A *delegate* may be found to have the power to act through agents even when there is an express statutory prohibition on sub-delegation. The power to act through agents is more likely to be inferred where the discretion to be exercised by the agent is limited, where the agent does not make important decisions, and where the agent is a person of appropriate standing.

2. The extent of powers

The most fundamental principle of administrative law is that people can exercise such legal powers as are conferred on them by law, and only those powers. If an administrator seeks to justify an administrative act, the administrator must be able to point to legal authority for that act. In a limited number of situations, administrators exercise common law powers. Typically, however, administrators' powers are statutory. Numerous powers are conferred by emergency legislation. These range from quasi-legislative powers such as the power to develop disaster plans to largely executive powers such as the power to enter land, take, damage or destroy land, close streets, and order people off land. What is impressive about many of these powers is that they provide authority for acts which involve considerable interference with proprietary and other interests and which, but for the empowering legislation, would be illegal. However, while legislation confers powers, it also restricts them. It defines what people may do, and in so doing it permits behaviour, but only if the behaviour falls within the permitted class of behaviours. Moreover, it may limit powers in other ways. It may set out conditions precedent to the exercise of those powers. It may state that a power is to be exercised only for a particular purpose. Emergency legislation provides numerous such examples.

The moral for those involved in emergency control is clear: they must know what the relevant legislation permits them to do, and in what circumstances, and for what purposes. This might seem to be a relatively simple exercise, involving no more than an hour or so spent poring over the legislation. However, a literal reading of the legislation may be misleading. Legislation may be ambiguous. Moreover, even if it appears not to be, it may nonetheless need to be interpreted in the light of a number of implied limitations on the which administrative law imposes. Some of these limitations are relatively commonsense limitations. Others may be less so.

Consider, for example, the following issues.

- The existence of a power will normally be dependent on the existence of a particular set of facts. What is the position where the administrator honestly, but mistakenly believes the facts to exist?
- A police officer is considering whether to order the evacuation of a family. The family does not want to go. The officer believes that the family could well be in danger, but makes the decision to order evacuation partly because of concern that, if left behind, members of the family might engage in looting.
- An administrator is faced with an ambiguous provision in a statute, and decides to act on the basis of a plausible interpretation of the legislation. A court subsequently rules that the interpretation was incorrect.

The first point to be noted is that courts will interpret emergency legislation, taking into account two major considerations. One is that it should be interpreted in a manner consistent with its underlying rationale, namely that the emergency personnel responsible for reacting to emergencies should be able to do so effectively. This means that where ambiguities exist, the legislation should not be interpreted in a manner which would mean that those responsible for reacting to emergencies could be penalised for making mistakes which were reasonable in all the circumstances. The other is that in the event of ambiguity, draconian powers are to be given a restrictive interpretation. In an emergency context, the former consideration will generally trump the latter one. However, even in time of emergency, courts will not always allow the control of the emergency to take precedence over all other considerations. Whatever the emergency might demand, an ultimate limit is placed by the requirement that there must be some basis for the exercise of a given power. For another, even assuming ambiguous law, commonsense alone would suggest that competing interests must be balanced. Powers will be more likely to be interpreted in favour of an administrator acting in the heat of an emergency than in favour of an administrator who has plenty of time to plan a particular course of action. Powers will be

interpreted more broadly when their exercise can be seen as linked to the control of an emergency than when their link to emergency control is more tenuous. Consistent with this is the case law dealing with administrators' powers in time of war. In general, administrators enjoy considerable freedom of action. Statutes tend to be construed in favour of the state rather than the individual, even where the individual's interests are of a kind that would normally receive considerable judicial recognition. However, even in wartime, powers are not unlimited. Administrators must act within statutory limits.

Second, powers will normally be regarded as having been conferred conditionally. These conditions sometimes flow from the legislation; sometimes they are implied. While their rationale is clear, they will not always be apparent to those who simply take legislation at face value. Space does not permit a thorough analysis of these conditions. However, I shall discuss some of the more important conditions. These include the following: (1) Where a pre-requisite for action is a person's opinion, that opinion must be an opinion reasonably open to the person and based on a reasonable gathering of information or on reasonable reliance on information provided by others. (2) Where an administrator has a discretion, that discretion may be exercised only after the administrator has taken account of all legally relevant considerations; (3) powers may be used only for the purposes for which they have been conferred, and decisions may not be based on legally irrelevant considerations; (4) even where the law is ambiguous, administrators may act only on the basis of the interpretation which courts ultimately find to be the correct one; (5) administrative behaviour must not be unreasonable.

2.1 Opinions

Emergency legislation frequently conditions the exercise of powers on administrators' opinions. Formulae vary. Some powers are made dependent on the person being satisfied that it is necessary or convenient to take that course of action. Some are based on a person's being satisfied that there are reasonable grounds for taking action. Some powers are dependent on the person believing on reasonable grounds. In yet other situations, the exercise of a power appears to be conditioned on the actual existence of a particular set of facts. Taken literally, such provisions might suggest that some powers could be exercised on the basis of an opinion, notwithstanding that the opinion was unreasonable; some only on the basis of a reasonable opinion, and others only if the relevant facts actually existed, regardless of their having been reasonably believed to exist. In fact courts seem to come close to implying that the precise formulation of the requirement makes little difference to the criteria for the determination of whether conditions precedent to the exercise of a power have been met.

At one extreme one finds *Liversidge v Anderson* [1942] AC 206. There the English House of Lords (by majority) held that even when a power was conditioned on the decision-maker's having a reasonable belief, it was the decision-maker's view of the reasonableness of the act that counted. This decision was much criticised, and is no longer good law. Its contemporary significance is sociological rather than legal. It demonstrates courts' tolerance for decision-makers in time of emergency.

In contrast, in *George v Rockett* (1990) 170 CLR 104, the Australian High Court has considered a power whose exercise was conditional upon it appearing to the decision-maker that there were reasonable grounds for forming a particular view. Taken literally, a requirement of this nature might suggest that all that was needed was that the decision-maker consider that there were reasonable grounds for holding a belief. However, the Court considered that this formula imported a requirement that there actually be reasonable grounds for the belief. This seems to suggest that Australian courts will require that a belief which is a condition precedent to the exercise of a power be a reasonable one, regardless of whether the legislation actually specifies this as a requirement.

Given this, it follows that where an administrator forms an honest, but unreasonable opinion, this will not be sufficient to justify action based on that opinion, even where a statute appears to permit action, once the administrator has formed the relevant opinion. In practice, however, little is likely to turn on these differences. Even if decision-makers were entitled to act on the basis of unreasonable opinions, the unreasonableness of the opinion might cast doubts on whether the decision-maker actually formed it, and on whether the decision-maker had taken appropriate matters into account in forming it. Moreover, results similar to the kind of results achieved in the two cases could normally be achieved by recognising that what is unreasonable in normal circumstances may be reasonable in time of emergency or war.

The law also deals with the question of what is to happen when the exercise of a power is apparently conditioned on actual existence of a particular state of affairs. Recognising the problems that could arise if facts apparently supporting a bona fide exercise of power were later to turn out not to exist, courts are reluctant to assume that legislation is to be interpreted on the basis that it is actual facts rather than reasonable beliefs about facts which matter. Moreover, courts are reluctant to inquire into the substantive—as distinct from the legal—merits of administrators' decisions. Inquiring into the actual existence of factual preconditions for the exercise of a power will involve a form of factual merits review. If it is clear that this is what the legislation requires, courts will conduct such a review, but if the legislation can be interpreted so that what counts is the administrator's reasonable beliefs, courts will opt for such an interpretation. Moreover, just as courts will doubt whether an administrator really believed that a particular set of facts existed, if it would not have been reasonable for an administrator to have so found, so will they be inclined to find that facts did exist if there is also evidence consistent with the administrator's belief in their existence having been reasonable.

One thing is clear, however. Where powers are delegated, problems might potentially arise from the fact that the exercise of powers is conditioned on the opinion on the person with the power to delegate. It would obviously defeat the purposes of delegation if the delegate had to ascertain someone else's opinion before acting, and legislation in all jurisdictions makes it clear that where power is delegated and conditioned on the formation of an opinion, the relevant opinion is the opinion of the delegate.

2.2 Purposes

Powers are sometimes expressly conferred for specified purposes. In such cases, the power may be exercised only for those purposes and not for other purposes. Moreover, even if powers are not expressly conferred for a particular purpose, they will be construed on the basis that they may be exercised only for certain purposes. Sometimes, too, legislation makes it clear that power is not to be exercised for certain purposes. For example, in most jurisdictions, emergency legislation provides that it does not authorise measures for the ending of a strike or lock-out, or for putting down a riot. However, even in the absence of such provisions, some purposes will be treated as improper purposes. An exercise of a power for an 'improper purpose' means that the administrator has acted beyond powers.

The proper purposes requirement can be treated as one which flows from a commonsense interpretation of the statute. It is also a well established principle of administrative law. The most obvious examples of improper purposes are uses of public powers to

achieve private goals. Police officers exceed their powers if they exercise their powers to rid themselves of unpleasant neighbours or because they have been bribed to exercise them in a particular way.

Nor may public powers be used to achieve public purposes other than those for whose achievement they have been provided. Even if administrators believe that the achievement of a particular goal is in the public interest, they may use their statutory powers for the achievement of that purpose only if the power has been conferred in order to enable that purpose to be achieved.

In practice, the proper purposes requirement can be difficult to apply. While legislation sometimes makes it clear that a power is to be exercised only for a particular specified purpose, or not for some other purpose, it is often silent on this question. Proper and improper purposes must be inferred from the general nature of the legislation, and this may require delving into the case law to see how courts have handled problems arising under analogous legislation.

A successful attack on the exercise of power on the improper purposes ground requires that no attempt would have been made to exercise the power but for the improper purpose. Thus a decision intended to achieve multiple purposes—some proper, some improper—may be nonetheless be a legal one, depending on the role played by the improper purpose in the exercise of the power. In practice, too, proof of improper purpose is likely to be difficult. It is probably no accident that most reported improper purpose cases are cases where the administrator acted in good faith, and therefore saw no reason to eliminate the evidence of what was ultimately found to be an improper purpose. The answer to the hypothetical question in relation to the evacuation of the family therefore appears to be that the decision would be flawed if it would not have been made but for the officer's desire to get revenge for prior challenges to the officer's authority. (Public powers are not bestowed to enable the pursuit of private vendettas.) If, however, the decision would have been the same, quite apart from the satisfaction it gave to the officer, the exercise of the power would be valid.

2.3 Relevant and irrelevant considerations

Powers are often conferred on the basis that they will be exercised only after particular considerations have been taken into account. In such cases, failure to take the considerations into account means that the administrator has erred. In jurisdictions which require the declarer of a state of emergency to be satisfied that the disaster is such that appropriate counter-disaster measures are beyond the capacity of, say, a disaster district co-ordinator, failure to consider this issue would mean that the exercise of discretion had miscarried. In some cases, however, it may be more difficult to determine whether a particular matter is a relevant consideration, in the sense that it must be taken into account. Two things are clear. One is that there are some matters which must be taken into account, notwithstanding that there is no express requirement to this effect. The other is that administrators are not required to take account of matters simply because it might appear that a wise administrator would have considered those matters. The obverse of the duty to take account of relevant considerations is the obligation not to take account of legally irrelevant considerations.

In determining whether matters are relevant or irrelevant, the courts look to the legislation. Sometimes, legislation adverts specifically to such matters. More usually, there will be grey areas, and relevant considerations must be inferred from the general scheme, subject matter and purposes of the legislation. Where legislation confers broad discretions, the considerations which the decision-maker must or must not take into account will be confined to those which can be implied from the statute. Courts may also have regard to legislation other than the legislation which specifically confers the power.

The fact that a matter must be taken into account means only that the administrator must give the matter some weight. If a court concludes that the administrator gave a matter far too little weight, it may find that the administrator erred, but the error will not be the failure to take account of the consideration. The duty to take account of a relevant consideration arises only if the administrator is at least constructively aware of the consideration. An administrator is constructively aware of a matter when the matter has been brought before the administrator's staff with a view to its being communicated to the administrator.

It is not always fatal to a decision that a relevant consideration has not been taken into account, or that an irrelevant consideration has been. 'A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.' If that is so, the decision can stand.

Examples of express prohibitions on particular considerations being taken into account are rare. However, the express provisions which exist in several states in relation to strikes and riots suggest that taking into account the effect of a proposed measure on strikes or riots would amount to taking an irrelevant consideration into account.

The 'relevant considerations' requirements overlap somewhat with the 'proper purpose' requirement. However, the fact that a purpose is a proper purpose does not mean that it must be taken into account. More surprising, perhaps, is the fact that the impropriety of a purpose may not necessarily mean taking account of the degree to which a proposed course of action will contribute to that purpose and means that the decision maker is taking account of a legally irrelevant consideration.

2.4 Errors of law

Where the exercise of a power involves interpreting the law, administrators have almost no freedom of manoeuvre. While judges recognise that law can be ambiguous, they also proceed on the basis that in any dispute, there is only one correct interpretation of the law—the one handed down by the final court to consider the matter. Administrators who act on the basis of what turns out to be an 'incorrect' interpretation of the law will normally be treated as having exceeded their powers even if their 'incorrect' interpretation was one that was reasonably open to them. This principle is subject to one exception: if the error is immaterial, it will not affect the validity of the administrator's behaviour. In a sense this is unfair, since it could expose the administrator to civil actions for damage arising out of the 'illegal' act. In practice, the effects of such hardship are mitigated by the willingness of governments to indemnify officials who make honest mistakes. In addition, in three jurisdictions there exist provisions which appear to protect administrators from civil suits in cases where they act in good faith and are acting 'for the purposes' of the Act.

The requirement that administrators interpret the law correctly obviously overlaps closely with the requirement that they act on the basis of relevant but not irrelevant considerations. If the law is incorrectly interpreted, it is likely that the decision-maker will either have failed to take account of all relevant considerations, or that there will have been some account taken of irrelevant considerations. However, there may be cases where account has been taken of a matter, but where the implications of the consideration have not been properly considered. If this is so, the behaviour might not fall foul of the 'considerations' requirements, but would fall foul of the 'no error of law' requirement.

2.5 Reasonableness

Subject to the above considerations, administrators in the emergency area enjoy very

broad discretions. The mere fact that a discretion has been exercised in a manner which does not appeal to a court does not mean that the administrator will be treated as having acted in excess of powers. The mere fact that the administrator has made findings of fact which have subsequently been shown to be wrong does not mean that the decision is 'wrong' in a legal sense. However, administrative behaviour can be attacked on the grounds that it is such that no reasonable administrator acting according to law could have acted as the administrator in question did. This criterion can be satisfied only if either of two conditions is satisfied. One is that the administrator acted unreasonably; the other is that the administrator did not in fact act according to law. Traditionally, one of the functions of the 'unreasonableness' ground was to enable attacks on suspect decisions where there was probably an error, but where there was no direct evidence of any particular kind of error. With the advent of freedom of information legislation, and statutory rights to reasons for decisions, this consideration is less important than was once the case. However, the unreasonableness ground still has a residual role to play. It covers cases where account has been taken of relevant considerations, but where an administrator has attached quite unreasonable weight to some considerations; where an administrator was not obliged to take account of a particular consideration (it not being actually known to the administrator), but where it would have been easy for the administrator to have made the inquiries in question and where it was clear that such inquiries would yield relevant information; to cases where the decision is a clearly irrational one; and to cases where, while there was some evidence to support a finding of fact, the finding was not reasonably supported by the evidence.

The 'reasonableness' requirement is not easily defined. However, one thing is clear: behaviour does not become unreasonable only because a court thinks discretion should have been exercised differently. It becomes unreasonable only if the court considers that the exercise of discretion was not reasonably open to the decision-maker. The vagueness of the reasonableness standard means that different judges are likely to apply it differently. That said, it is rare for administrative law applications to succeed solely on the unreasonableness ground.

3 Procedure

Emergency legislation includes a small number of procedural provisions, notably in relation to the procedures for declaring states of emergency or disaster. Some legislation requires consultation before making certain decisions. On the whole, however, the legislation does not prescribe procedures, except—in a rather rudimentary way—in relation to the procedures to be followed by some of the committees it establishes, and—in some jurisdictions—in relation to the commandeering of, and the entry on to, property. An intelligent reader of such acts might well conclude that these exhausted the procedural obligations of those exercising powers under the legislation. The reader would be wrong, although not badly so. Running parallel to statutory rules are what were once known as the common law rules of natural justice, and what are currently known as the procedural fairness requirements. Broadly, these rules relate to the kind of consultations that must take place between a decision-maker and a person who is likely to be affected by the decision, and to the degree to which the decision-maker must be and appear to be a disinterested party.

Where an administrative decision affects a particular person's interests, and where it requires findings of fact by the decision-maker in relation to the person affected, the decision-maker must afford procedural fairness to the person affected. This involves at least two requirements. The first is that the decision-maker give the person affected a chance to make submissions in relation to the decision. The second is that the decision-maker be someone who is and appears to be disinterested. The practical implication of these requirements varies according to context, and is the subject of a vast body of case law. Underlying this case law is what appears to be a form of cost-benefit analysis, involving a weighing up of the interests of the public and the interests of the person affected, coupled with assessments of the degree to which the benefits of particular forms of consultation outweigh their costs. In weighing up competing considerations, courts attach considerable value to the interests of the individual, and to assume that both the general public and the person affected share a common interest in procedures which maximise the likelihood of informed administrative decision-making. However, private interests do not always trump public interests. The balancing exercise affects both whether a person will be found to be entitled to some form of procedural fairness, and the scope of that entitlement, should there be some entitlement.

Some decisions made under emergency legislation are not subject to the procedural fairness requirements. Decisions having general application (such as decisions about the content of a disaster plan or decisions to close streets to traffic) are not made by reference to the particular circumstances of those who might be affected by the decision. There is therefore no common law requirement that such people be consulted. Other decisions may give rise to a right to procedural fairness. Emergency powers include powers to make decisions which affect particular people, and to interfere with important interests. These include the power to commandeer property, and to exclude and remove people from particular areas. Counting against the existence of a right to procedural fairness in relation to these decisions is the fact that these decisions are such that matters personal to, or uniquely likely to be known by, those adversely affected by the decision will rarely be of much relevance to the decision that ought to be made. However, one cannot rule out the possibility that a decision might be capable of being affected by information about matters about which an affected person would be in a particularly good position to provide relevant information. A person required to assist in tasks to save life or property may know that his own health will be imperiled if he gives such assistance. A householder may know that how floods are likely to affect her house, and this could be relevant to the question of whether she should be evacuated. However, the logic of the cost-benefit analysis is that what may be appropriate for decisions in relation to refugee applications will not be appropriate in relation to emergency decision-making where there may be little time available for administrators to consult affected parties before taking decisions which affect their interests. In a case like this, courts will recognise that it may be more important that an official spend limited time evacuating as many people as possible than that the time be used consulting people as to whether evacuation is appropriate in their case. In the hypothetical case above, the demands of procedural fairness may well be satisfied by the official's listening to her story as he starts bundling her out of the house.

4 The effects of failure to comply with the law

Consider the following four scenarios:

- A member of a State Emergency Service destroys a shed in the course of reacting to an emergency. An authorised member has the authority to do this. Unfortunately, the member in question was not authorised.
- The Governor in Council declares a state of emergency in relation to a disaster district. No-one has actually advised the Governor in Council that the measures necessary to deal with the disaster are

beyond the resources of the disaster district co-ordinator. A finding to this effect is a condition precedent to the exercise of the power in question.

- The Governor in Council is obliged to appoint a member of a central control group to be chair of the group. Members of the Executive Council are pre-occupied with a forthcoming election. No such appointment is made.
- The executive officer of the central control group tries to ensure that actions instructions pursuant to decisions of the central control group are transmitted to and carried out by bodies to whom they are directed, but is not always successful.

Regulatory legislation rarely makes much provision for what is to happen in the event of an administrator exceeding powers, failing to follow correct procedures, or failing to perform some statutory duty. In exceptional circumstances, breach of a relevant duty will render the offender liable to a criminal sanction. In some cases, irregularities can render an administrator liable to civil sanctions. However, some errors have no such implications. For instance, there may be no criminal or immediate civil liability if the responsible officer fails to prepare a disaster plan or fails to make an appointment to a committee. In these circumstances, people may need to resort to administrative law for a remedy.

The law relating to administrative law remedies can be complex. First, there are some circumstances where legislation appears to deprive people of the right to seek legal redress. Second, there are limits on who may seek redress in response to administrative irregularities. Third, the kinds of remedies available depend on the nature of the irregularity.

4.1 Ouster clauses

Legislation in several jurisdictions contains provisions which, at first sight, seem to limit the right of people to seek judicial review of administrative decisions. Legislation in two jurisdictions precludes proceedings where specified officials have acted 'in the execution or intended execution of this Act or in accordance with any delegation under this Act or in compliance or intended compliance with any direction given or purported to be given under this Act in respect of anything done or omitted to be done in good faith and for the purposes of this Act.' This provision seems to envisage that there may be cases where administrators may exceed their legal powers without being legally accountable for having done so. Provisions of this nature are read narrowly. If, for example, the act was in accordance not with a delegation, but only with a purported delegation, it would not be protected. Moreover, the act must be both in good faith and for the purposes of the legislation. Acts which are the result of an honest mistake as to the purposes of the Act are therefore not be covered by the exemption. The wording of such legislation does, however, seem to envisage that there may be some cases where it is envisaged that there will be no right of legal redress, notwithstanding that officials have exceeded their powers.

An alternative formula is to make decisions final and conclusive. To a layperson, such a provision might seem to preclude judicial review of the decision in question. In fact they do no such thing. They are treated as final only in the sense that once the decision has been made—and assuming it to have been made legally—the decision-maker cannot reconsider the matter. If the decision is legally flawed, however, its legality can be reviewed by a court.

A Northern Territory provision states that: 'The exercise of a power or the performance of a function under this section by a person is conclusive evidence of his or her authority to do so, and no person shall be concerned to inquire whether the occasion requiring the person to do so had arisen or has ceased.' This provision might also appear to make review difficult. However, the requirement that the power be exercised 'under this section' means that a court can inquire into whether that condition has been satisfied, and only if the condition has been satisfied, can the 'conclusive evidence' clause come into operation.

Otherwise, emergency legislation appears to contain no provisions which could be taken as attempts to oust the jurisdiction of courts to review the legality of decisions made under the legislation. It might be possible to design such clauses. However, the hostility of courts to attempts to oust their jurisdiction is such that virtually all such attempts have been interpreted in a manner which has meant that they have failed.

4.2 Standing

A more serious obstacle to a person seeking review of emergency decisions is the 'standing' requirement. The mere fact that someone wants to challenge a decision does not mean that courts will allow them to do so. Courts require that a person have a particular interest in the decision at issue. A resident of a particular area, for instance, could not challenge a decision to allocate resources in a particular way, even if the decision was legally flawed: their interest would be largely indistinguishable from the interests of everyone else in the area. A local government, on the other hand, might be able to assert a special interest insofar as its resources could be materially affected by such a decision. The rules which determine who may sue and who may not are known as the standing rules. They are complex, and their enforcement involves a considerable element of judicial discretion. They are, arguably, administered with rather less consistency than most rules. This has implications both for administrators and citizens. Administrators should never assume that they will be able to rely on the standing rules to shield them from responsibility for illegality—even where their decisions have general rather than particular effects. Citizens should think twice before seeking to challenge decisions which have general effect. If, for instance, a citizen is upset by the content of a disaster plan, the citizen would be unwise to challenge its legality in the courts. The wise course of action would be to mobilise a body representing the collective interests of those affected—a council or an established interest group. This both makes legal—as well as economic and political sense.

4.3 Remedies

In general when administrators exceed their powers, their decisions are legal nullities, and their acts enjoy none of the protection they would have enjoyed had they fallen within the administrator's powers. Insofar as they fail to follow prescribed procedures, their decisions are nullities except in relation to minor procedural breaches. However, the effect of these rules is complicated by the existence of circumstances in which courts will refuse to make orders in favour of those who are disadvantaged by administrative irregularities. Where administrators fail to comply with their legal obligations, they can be ordered to do so.

4.3.1 Where the administrator has exceeded powers

If people purport to exercise powers which they do not possess, these purported exercises of power are, as far as the law is concerned, of no legal effect. The act has no legal status. If it appears to create duties, those duties are illusory. A person may disregard the duty with immunity. Conversely, if the act would render the administrator liable to legal sanctions in the absence of its having legal justification, the administrator will be liable to these sanctions. These conclusions follow inexorably from the concept of power. This proposition is subject to a gloss. Irrelevant excesses of power do not invalidate decisions. If, for example, a decision would have been the same if the administrator had not acted in excess of power, the decision will continue to be a valid one.

4.3.2 Failure to follow prescribed procedures

The position with respect to procedural matters is somewhat more complicated. If full compliance with procedures is a condition precedent to the validity of an administrative act, it follows that failure to comply with those conditions means that the act has no special legal status, a condition precedent to its enjoying that status not having been satisfied. The fact that the failure to comply did not affect the decision is immaterial.

However, not all procedures are such that compliance with them is a condition precedent to the validity of subsequent acts. Administrative law recognises that there are some circumstances where it is reasonable to assume that the legislature would not have intended failure to comply with a particular procedural requirement to be fatal to the validity of subsequent official action. Determining whether this is so in any given case can be difficult. While legislation sometimes makes this clear, legislation is usually silent. Moreover, while we can assume that the prescription of procedures means that the legislature intended them to be followed, it does not necessarily mean that the legislature also intended that the penalty for failure to follow them would be to strip subsequent acts of what would otherwise have been their legal status. Broadly the following considerations are relevant:

- Failure to comply with the procedural fairness requirements will normally be fatal to the validity of a subsequent decision.
- The greater the importance of the power, the greater the likelihood that compliance with the procedural requirements will be treated as a condition precedent to the validity of the decision.
- The weaker the adverse effect of a failure to fulfil a procedural requirement on the likely quality of the decision, the greater the likelihood that the failure to comply with the requirement will not be fatal to the validity of the decision.

4.3.3 Failure to perform duties

Most administrative law cases involve complaints that decision-makers have exceeded their powers. It is rare to find complaints that administrators have failed to exercise their powers. There is in fact nothing to stop a person making such a complaint. The application will be for an order that the administrator perform the relevant duty.

Emergency legislation abounds in requirements that particular officials do certain things. The language in which these requirements are expressed varies, sometimes involving the mandatory 'shall', sometimes imperative passives, and sometimes the word 'must'.

Where an administrator has failed to perform a duty, parties with standing can apply for an order that the administrator perform the duty in question. However, courts will not lightly make such orders. First, it is necessary to establish the existence of the duty. Second, it is necessary to establish breach of the duty. Even when an obligation has not been performed, this will not necessarily be taken as amounting to a breach. Failure to perform is to be distinguished from refusal to perform, and only if the latter is established, will courts grant an order to perform. Third, many duties are duties to exercise a discretion. If administrators are ordered to exercise a discretion, the order will amount to no more than that. Courts cannot order that discretions be exercised in particular ways (although they can of course order that they be exercised in accordance with law - or with the law as set out in a judgment).

Most administrative law cases involve complaints that decision-makers have exceeded their powers. It is rare to find complaints that administrators have failed to exercise their powers.

4.4 Discretionary remedies

The fact that a decision is a legal nullity does not mean that it will formally be recognised as such by the law. Formal recognition requires an authoritative pronouncement from a court, and there are several circumstances in which such pronouncements will not be forthcoming. First, and most obviously, there will be no pronouncement unless someone applies to a court for such a pronouncement. There will be many cases where administrative irregularities go unnoticed by the legal system. Second, there will be cases where courts will hear a case but exercise their discretion to refuse to make an authoritative order. Such exercises of discretion are rare, but they are sometimes made in cases where there has been undue delay in prosecuting the action, and where third parties would be disadvantaged if the court made an order declaring the offending decision to be void.

5 The practical irrelevance of administrative law

While it is important to note the ways in which administrative law can bear on the administration of emergency legislation, it is also important to keep this in perspective. For while administrative law may be relevant, it is rarely mobilised. There are several reasons for this. The first is that there is normally little to be gained from doing so, even if there may well have been an administrative irregularity. Administrative law's response to a finding that there has been an irregularity is normally to declare the relevant decision a nullity. However, by the time the court makes this order, the decision in question will long since have ceased to operate. The flood waters will since have subsided, and the broccoli will be flourishing in the newly-laid silt. The only circumstance in which there will be anything to be gained by a successful challenge to a decision will be where its invalidity means that it ceases to be capable of acting as a defence to a civil action. However, even then, litigation may be a hazardous enterprise. The person aggrieved by the administrator's actions must be able to point to some harm suffered as a result of the administrator's unlawful action. The mere fact that the administrator has acted unlawfully does not of itself give rise to a civil cause of action. A second possibility is that administrative irregularities take place without anyone being aware of them. People may exercise powers, blissfully unaware of the fact that they have never been authorised in writing to do so. Procedural fairness may be denied by exhausted police officers ignorant of the finer points of this technical area of law. The third possible explanation is that those exercising power under emergency legislation normally comply both with the legislation and with the superadded administrative law requirements. There are two reasons why this might be so. Disaster law is an area of law where courts will be somewhat less demanding than usual. Legislation encourages allowing broad powers to administrators. The common sense assumptions and cost-benefit analyses which underlie administrative law decisions indicate that administrators need the power to act quickly. This, however, is not the only consideration. The other explanation must lie in the behaviour of those who exercise the powers. Abuses of emergency powers are evidently not common, and failure to comply with the standards of administrative law are evidently rare. While most of those who are responsible for handling emergencies are probably not administrative law experts, they probably share a sufficient commitment to values which also happen to be administrative law values to ensure that this does not matter too much.