

Administrative Law and Personal Injury Litigation in NSW

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In the late 1990s and in the early 2000s, the NSW Parliament enacted some significant legislation dealing with entirely new non-curial processes for compensating injured workers and persons injured in motor accidents. The relevant legislation is primarily contained in the *Workers Compensation Act 1987 (WCA 1987)*; the *Workplace Injury Management and Workers Compensation Act 1998 (WIM 1998)*; and, the *Motor Accidents Compensation Act 1999* (“**the MAC Act**”).

In both areas, the legislative reforms introduced measures to provide for the determination of personal injury claims and the resolution of associated medical disputes primarily through the use of administrative and statute-based procedures and measures intended to reduce the level of litigation or confine the circumstances in which court proceedings may be instigated in respect of a claim for personal injury damages.

By introducing mechanisms for the resolution of disputes in a non-curial fashion and by further modifying common law entitlements, the underlying rationale was said to be that the costs and inadequacies of the common law would be alleviated; that is to say, claims would more speedily be processed, disputes more readily resolved, and - by reducing the level of litigation and the involvement of legal practitioners and the need for multiple medical reports - costs would be significantly reduced.

In motor accidents, a large part of binding decision-making is now undertaken by (expert) statutory “non-curial” decision makers. Medical practitioners and other suitable qualified persons (appointed as “*medical assessors*”) make binding determinations of the extent of injury, and, in practice, a panel of experienced personal injury lawyers (appointed as “*claims and resolution service assessors*”) make determinations binding on the insurers as to damages (under the MAC Act). The same is the case in the workers compensation area where the NSW Compensation Court was abolished and entirely replaced by a statutory “*Commission*”.

Many other reviewable decisions are provided for in the legislation.

The purpose of this paper is to revisit how these controversial legislative reforms opened up new avenues of legal challenge through administrative law type appeals and by judicial review of administrative action in the Supreme and District Courts of NSW.

I say *revisit* because in March 2002, I delivered a paper on this topic with Ian Harvey to the Australian Plaintiff Lawyers Association NSW State Conference in Sydney¹. We then identified a number of specific areas where we anticipated the first rounds of judicial review challenges would eventuate. We identified the relevant provisions in a sort of “target list”. We opined that while it was true to say in New South Wales that a door was then closing on an important and significant area of legal work in the Compensation Court and in relation to motor accident personal injury litigation - a close examination of the new schemes from an administrative law perspective revealed that another door had well and truly opened. In 2005, I delivered an updated version of that paper to an Australian Insurance Law Association seminar discussing some of the early cases².

That paper also contains a brief description of the two statutory schemes, and the sets out the “target list” of available statutory or administrative decisions amenable to challenge or judicial review and an outline of the basic judicial review approaches to challenging the legality of such decisions.

I will not repeat my understanding of the schemes, the target list or the discussion of those early cases here.

This paper is intended to constitute an update of those papers and to present a brief refresher on the main principles of administrative law (for personal injury lawyers).

1 “*The Use of Administrative Law Remedies in Workers Compensation*” a paper by Mark Robinson and Ian Harvey presented to the Australian Plaintiff Lawyers Association NSW State Conference in Sydney on 15 March 2002.

2 “*Administrative Law in NSW Workers Compensation and Motor Accidents Compensation*” a paper by Mark Robinson to the Australian Insurance Law Association seminar held on 18 August 2005 in Sydney (published on the internet at <http://www.wentworthchambers.com.au/marobinson/publctns.htm>).

Administrative Law in NSW

The full range and scope of administrative law process and remedies should be first borne in mind. At its most broad context, administrative law in New South Wales relates to or concerns:

1. ***Judicial Review*** - the legality of administrative decisions, including those of Ministers, Governments and Tribunals that affect rights, interests or legitimate expectations of persons or entities (usually undertaken in the Supreme Court of NSW, Common Law Division, Administrative Law List - known as “judicial review” of administrative action). This is usually the option of last resort for an applicant, and it is undertaken when all other options for challenge are not available;
2. ***Merits Review*** - is the process of an external review of the merits of a statutory (administrative) decision by a person or entity independent of the original decision-maker, who comes to a new decision. Merits review involves making a decision "*de novo*" (meaning, literally, from the very beginning, anew). It has also been referred to as "*standing in the shoes of the decision-maker*" and concerns a “*remaking*” of the decision under review in order to come to the correct or preferable decision based on evidence now presented. The jurisdiction of the General Division of the Administrative Decisions Tribunal of NSW (“*ADT*”) is a leading example of an independent, external merits review body.
3. ***Internal Review*** - where there is provision (usually in the enabling Act, but not necessarily so) for a person superior in employment status to the original administrative decision-maker to re-make the subject decision (usually afresh).
4. ***Freedom of Information*** (itself subject to merits appeals in the ADT);
5. ***The Ombudsman*** - whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations;
6. ***The Independent Commission Against Corruption***;
7. ***The Privacy Commissioner***, and the ADT in administering the *Privacy and Personal Information Protection Act 1998* (NSW); and
8. ***Self-help*** remedies or processes that might be invoked by aggrieved persons or entities from time to time (be they personal, political, fair or unfair, lawful or not).

The primary tenets of administrative law should also be kept in mind. Overall, they are to

ensure that in the making of administrative decisions, there is :

- a. legality;
- b. fairness;
- c. participation;
- d. accountability;
- e. consistency;
- f. rationality;
- g. proportionality; and,
- f. impartiality.

The usual aim of a merits review process in a tribunal is to provide the review applicant with a correct or preferable administrative decision, while at the same time, improving quality and consistency in relation to the making of decisions of that kind. It is an aid to good public administration.

The primary aim of judicial review in the court is to ensure (and to some extent, enforce) legality, namely the legal correctness of administrative decisions. It seeks to prevent unlawful decisions standing on the public record.

Judicial Review of Administrative Action in NSW

The leading basic text in this area is 1,023 pages long - Aronson, Dyer and Groves, Judicial Review of Administrative Action, 4th ed, 2009 (Lawbook Co, Sydney). I will keep my discussion of this topic brief.

(a) Framework and Procedure

The jurisdiction of the superior courts by way of judicial review of administrative action is a jurisdiction that was developed by the courts in accordance with the common law or general law. As I said earlier, it involves a court assessing or examining a decision or purported decision of an executive or governmental body or a tribunal for legal error (and not on the merits of the particular case).

The relief granted (which is discretionary) may be to quash or set aside the decision, declare

the decision invalid or void and, in some cases, to remit the decision to the original or primary decision-maker for re-consideration according to law (sometimes with a direction that the matter be decided by a different decision-maker or differently constituted tribunal).

Judicial review in New South Wales lies largely within the realm of common law. The NSW Government has deliberately chosen *not* to enact a codification of the law here [such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("**ADJR Act**") or the *Judicial Review Act 1991* (Qld)]. The consequence is that, in so far as decisions of most public bodies and officials made or required to be made under statute are concerned, the avenue for judicial review is neither helped nor hindered by statutory considerations. The grounds for such review are still evolving through decisions of various courts and many of these grounds overlap.

Identifying the most appropriate ground or grounds of judicial review is the key to success in this area, providing you have sought the appropriate remedy and the discretionary factors to not work against you. The discretionary factors are that a remedy will not be granted if:

- a more convenient and satisfactory remedy exists;
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay, or,
- if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made³.

Ordinarily then, grounds of judicial review known as errors of law amounting to identification of the wrong question, ignoring relevant material, relying on irrelevant material or, at least, in some circumstances, making an erroneous finding or reaching a mistaken conclusion, leading to the exercise of an excess of power or authority, will give rise to the availability of relief against the decision of that administrative body for what has come to be known nowadays as a "jurisdictional" error of law. Moreover, as the High Court has indicated,⁴ the obligation to accord procedural fairness may well stem from the common law;

³ See the discussion of the discretion and the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 82 ALJR 1177; [2008] HCA 32 at [91]-[92] per Kirby J.

⁴ *Kioa v West* (1985) 159 CLR 550 at 576, 582-5, 632; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 574-5; cf *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 75 ALJR 52 at [38]-[41].

it is not something which is within the gift of statute law (albeit that legislation may affect its scope and content in a given circumstance)⁵. An obligation to accord procedural fairness will also arise where the legitimate expectations of a party are adversely affected by the exercise or proposed exercise of a particular power. It is essentially a matter of ensuring fair-play in action.

In NSW, it may be open to an aggrieved party under both personal injury schemes to seek relief by way of an application for judicial review in the Supreme Court of NSW— usually in the *Administrative Law List* of the Common Law Division of the Court.

To this end, practitioners need to be aware of the Supreme Court Practice Note CL 3 dated 6 July 2007 which explains the operation of the Administrative Law List and some of the provisions of the *Uniform Civil Procedure Rules 2005*.

The primary statutory provisions concerned with properly invoking (by way of summons) the Supreme Court’s judicial review jurisdiction are the following sections of the *Supreme Court Act 1970* (NSW):

- s69 – proceedings by summons in lieu of the prerogative writs;
- s65 – order to fulfill a public duty;
- s66 – injunction; and
- ss75 and 63 – declarations.

In the *Uniform Civil Procedure Rules 2005*, a practitioner must first check the list in Schedule 8 (Assignment of business in the Supreme Court). The MAC Act is listed there and any proceedings in the Supreme Court regarding any section of that Act are thereby assigned to be heard in the Administrative Law List of the Common Law Division. The WCA 1987 is also listed there and proceedings are assigned to the Common Law Division. However, by reason of rule 45.3, judicial review proceedings should all be assigned or transferred to the Administrative Law List. Other UCPRs that must be checked are rule 1.18(b)&(c) – assignment of business; Part 49 (internal appeals); Part 50 (external appeals); and Part 51

⁵ There remains some controversy as to the “*precise jurisprudential character of the process of statutory interpretation that is necessarily involved in determining whether a duty (to afford procedural fairness) exists*”:

(Court of Appeal).

Also take careful note of section 48 of the *Supreme Court Act 1970* (NSW) (Assignment to the Court of Appeal) in order to ascertain whether the person or entity you are considering challenging is a “*specified tribunal*” (especially if a judge is involved in the making of the impugned decision) and, if so, the judicial review proceedings must be commenced in the Court of Appeal direct.

Once proceeding are commenced, in the ordinary course, a directions hearing will be convened. At that hearing, orders are made for the orderly preparation of the matter for trial.

The principal concerns are then:

- Obtaining necessary transcripts and documents and affidavits for tender; and
- Obtaining an early hearing date.

Usually, all that is required in evidence is the tender of the documentary material that was before the original decision-maker. In some cases (depending on the ground of judicial review relied upon) more evidence than just the exhibits is required, such as a transcript of the hearing of the proceedings below. Oral evidence and cross examination is almost never required in judicial review matters. If evidence is put on that is voluminous and is not required, one can expect significant criticism from the bench and maybe an appropriate adverse costs order.

At the first return of the summons, under the Practice Direction, an application may be made seeking a direction that the person or body whose decision has been challenged furnish to the plaintiff a statement of reasons for the impugned decision. The statement must not only set out the decision-maker’s reasons for decision but must also include that person’s findings on material questions of fact, referring to the evidence or other material on which those findings were based, together with that person’s “*understanding of the applicable law and the*

see- *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* [2008] NSWCA 356 at [53]-[54] (Spigelman CJ, with Allsop P and Sackville AJA agreeing).

reasoning processes leading to the decision".

It can readily be seen that in a number of circumstances, an order of the Court requiring a decision-maker to provide his/her "*understanding of the applicable law and the reasoning processes leading to the decision*" might be an extremely useful forensic tool or weapon.

It might well flush out, for example, an egregious misunderstanding by an approved medical specialist ("AMS") of the Appeal Panel of the legal provisions he/she/it was required to apply or a misperception or lack of appreciation of the issues he/she/it was required to address in the provision of an otherwise "conclusive" medical assessment certificate (s 326 of WIM 1998).

Obtaining reasons by order of the Court might well be the only option available to aggrieved applicants in NSW, as, ordinarily, reasons are not required to be given by an executive decision-maker unless there are special circumstances - *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656. The general law requires that, in the ordinary case, where an administrative decision-maker exercises discretionary statutory power to make a decision, there is no common law duty to provide reasons for that decision. However, the High Court also held in *Osmond* that, on occasion, there were "*special circumstances*" either in the relevant Act or in the principles of natural justice such that the general rule did not apply and reasons were required to be provided (see, *Osmond* at 670.5 (per Gibbs CJ) and 676.7 per Deane J). This proviso was explained and applied in NSW in relation to a ruling that costs assessors must provide reasons for their decision (the Act was silent on the question) otherwise, the appeal rights given by the Act would be close to useless - see, *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729 at 734C to 735C (per Priestley JA, with Handley and Powell JJA agreeing), adopting in part Sperling J's decision in *Kennedy Miller Television Pty Limited v Lancken*, New South Wales Supreme Court, unreported, 1 August 1997 (BC9703385).

The importance of fully stated reasons as an essential legal requirement for a quasi-judicial tribunal (the NSW workers compensation medical Appeal Panel) was discussed in *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 where the NSW Court of

Appeal held that the Appeal Panel members in workers compensation had a duty to give full and proper reasons (at [24] per Handley JA with McColl JA agreeing) even though that was not expressly stated in the relevant legislation. The reasons were held to be inadequate and the Panel's decision was set aside. The Court indicated (at [106], per Basten JA with McColl JA agreeing) that the authorities that underpin *Osmond's* case might “*no longer be as definitive as they once were*”. In *Vegan*, the Court of Appeal further held that, as a matter of statutory construction and as a matter of principle the Appeal Panel was a quasi-judicial entity and it should be required to provide reasons for that reason alone.

(b) Jurisdictional Error and the Grounds of Judicial Review

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari, prohibition and mandamus and injunctions and declarations) are available under the *Supreme Court Act* 1970 (NSW) in the court's exercise of its supervisory jurisdiction over State statutory decision-makers and tribunals.

Establishing a ground of judicial review is all that is ordinarily required in order to move the Court for a remedy (which in judicial review, is discretionary in most cases – possibly except for denials of natural justice – see: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, at [80] (per McHugh, with Kirby J agreeing)).

The test of establishing a ground of judicial review is considerably more difficult in the face of an ouster or privative clause. In that case, a more serious error of law, a **jurisdictional error**, must be established by the Court in order to set aside the impugned decision.

Examples of jurisdictional errors of State tribunals and executive decision-makers include them:

- identifying a wrong issue;
- asking a wrong question;
- ignoring relevant material;
- relying on irrelevant material; or
- an incorrect interpretation and/or application to the facts of the applicable law,

in a way that affects the exercise of power (see: *Craig v State of South Australia*

(1995) 184 CLR 163 and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323).

Denials of natural justice or breaches of the rules of procedural fairness invariably result in a jurisdictional error - *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 508 [83]; *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82; and, *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* (2001) 206 CLR 57.

The traditional grounds of judicial review (in addition to denials of natural justice or breaches of procedural fairness – including bias and apprehended bias) in respect of tribunals and executive decision-makers include:

- 1 Errors of law (including identifying a wrong issue; making an erroneous finding; and reaching a mistaken conclusion).
- 2 improper purpose;
- 3 bad faith;
- 4 irrelevant/relevant considerations;
- 5 duty to inquire (in very limited circumstances);
- 6 acting under dictation;
- 7 unreasonableness;
- 8 proportionality (not presently available);
- 9 no evidence;
- 10 uncertainty;
- 11 inflexible application of a policy (without regard to the individual merits of the application);
- 12 manifest irrationality or illogicality;
- 13 failure to afford a “proper, genuine and realistic consideration of material; and.
- 14 failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker’s power.

I propose to discuss in this paper only a few of those grounds. There have been some recent developments in them and to some extent, they are related and they overlap. The administrative law tenets that these next grounds go to is to enforce rationality, consistency and legality in decision-making.

Irrationality and Illogicality

A comparatively recently identified ground of judicial review is that the administrative

decision was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds such that the decision-maker misconceived his or her purpose or function - *Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165⁶. The refugee applicant there lost the case, but the principle emerged from it. The ground would also apply to a decision or reasoning that is hopelessly confused and irrational. However, it is available only in relation to such errors that are in the extremely serious category. While the ground is now established in the High Court's "constitutional writ" jurisdiction, it also applies in the NSW Courts as part of the general law.

The concept of manifest illogicality or irrationality was considered by the NSW Court of Appeal in *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [57]-[66] (see also, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [92]).

Wednesbury Unreasonableness

The *Wednesbury* unreasonableness ground or judicial review is related to and can overlap with the ground of manifest or serious irrationality or illogicality. The ground is named after the celebrated UK Court of Appeal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 112 JP 55, 45 LGR (Eng) 635, [1947] 2 All ER 680, [1948] LJR 190, 63 TLR 623, 177 LT 641 (which was also unsuccessful for the original applicant, but the principle emerged). In classic terms, the ground is that an exercise of a power is said to be so unreasonable that no reasonable person could have so exercised the power (see also section 5(2)(g) of the ADJR Act and related cases).

It was most recently discussed in *East Melbourne Group Inc v Minister for Planning* [2008] VSCA 217 where leading authorities are gathered and the principles derived from many cases are set out⁷. The Victorian Court of Appeal held invalid the exercise of a planning Minister's statutory power to exempt a proposed development from the public notification process

⁶ See also the discussion of the *S20/2002* case and the ground of judicial review at Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed, 2009 (Lawbook Co, Sydney) at [5.65]-[5.75] and [4.410]-[4.420]

⁷ See also - Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed, 2009 (Lawbook Co, Sydney) at [6.175]-[6.220]

because her public reasons for her decision did not fit the actual facts relating to the development and it was held to be unreasonable. The Court considered (at [182]-[184] - per Ashley and Redlich JJA) that the following matters or situations *each* satisfy the *Wednesbury* test for unreasonableness – where the decision under challenge:

- is devoid of any plausible justification;
- is one that no reasonable person could have made;
- concerns the engagement by the decision-maker in an abuse of discretion;
- is manifestly unreasonable in that it simply defies comprehension;
- it must be obvious that the decision-maker consciously or unconsciously acted perversely;
- involves manifest illogicality in arriving at the decision (there being illogical findings, or inferences of fact unsupported by probative material or logical grounds);
- involves irrationality (which encompasses disregard of relevant considerations, giving regard to irrelevant considerations and manifest unreasonableness);
- is manifestly illogical;
- involves an absence of any foundation in fact for the fulfilment of the conditions upon which the existence of the power depends;
- involves a factual finding where all of the evidence points one way, and the opinion rests upon a contrary view;
- where the decision is not supported on logical grounds by the material adduced;
- where important parts of the reasons of the decision-maker were, upon consideration of the evidence, in error and could not be supported on any reasonable basis;
- if the facts disclose no basis for the decision, it will be invalidated without any distinction being drawn between errors of law and fact; or,
- where by the decision-maker's own criteria it can be seen that the factual result is perverse.

Improper Purpose

Improper purpose is also sometimes linked to *Wednesbury* unreasonableness - see for example, *East Melbourne Group Inc v Minister for Planning* [2008] VSCA 217 at [340]-[341] (per Ashley and Redlich JJA), where the Court stated:

“Where the Court is concerned with a statute which has conferred – as in this case – an apparently unconfined discretion upon the decision-maker, the factors which that person may take into account will be unconfined save to the extent that there may be implied from the subject matter, scope and purpose of the statute, some limitation on the factors to which regard may legitimately be had [*Minister for Aboriginal Affairs v*

Peko-Wallsend Ltd (1986) 162 CLR 24, 40 (Mason J), 56 (Brennan J)]. It is equally well established that an administrative act will be invalidated where its ‘initiating and abiding purpose’ is a foreign or ulterior one [*Flanagan v Commissioner of the Australian Federal Police*; *Robert Charles Howard v Commissioner of the Australian Federal Police*; *Bruno Grollo v Commissioner of the Australian Federal Police* (1996) 60 FCR 149 (Beaumont, Ryan and Lindgren JJ); *Samrein Pty. Ltd. v Metropolitan Water, Sewerage and Drainage Board* (1982) 41 ALR 467, 470 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ); *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423 (Brennan J); *Williams v Spautz* (1992) 174 CLR 509; *Ang v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 95, 101 (Wilcox J); *Mathews v Maddigan*, Full Federal Court, 6 November 1995, unreported; cf *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 673, 697; *Bienke v Minister for Primary Industries and Energy* (1994) 125 ALR 151, 171-2 (Gummow J)].”

The “Proper, Genuine and Realistic Consideration” Ground

Other grounds of judicial review or formulations of the same are adopted from time to time. Some of them fall in and out of favour with the Courts. One example is the ground styled in terms that the decision-maker failed to give the matter “*proper, genuine and realistic consideration*” to a relevant matter.

It first came to attention as a separate ground of judicial review in *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 ALD 291 (Gummow J). While it is arguably appropriate to rely on it as a proper and separate ground of judicial review, be aware it was soundly criticised in the Federal Court in *Minister for Immigration & Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 441-442 and in the NSW Court of Appeal in *Anderson v Director General of the Department of Environmental and Climate Change* [2008] NSWCA 337 at [51]-[60] (Tobias JA, with Spigelman CJ and Macfarlan JA agreeing).

The criticisms of the ground relate to its vague or imprecise nature and that it is often capable of being the platform for an impermissible merits-based attack under the guise of judicial review. Notwithstanding this, the ground has been accepted and applied in NSW a number of times and at Court of Appeal level. The arguments are set out in detail in *Anderson (ibid)*.

However, the same may be said of the *Wednesbury* unreasonableness ground and other grounds. The Court is always vigilant to keep the parties to the question of legality in judicial

review proceedings. Review on the merits is not permissible in such proceedings.

It would sometimes be preferable for a practitioner to attempt to recast any ground founded on the “*proper, genuine and realistic consideration*” ground into one or other of the grounds of judicial review so as to avoid this criticism.

Some Fundamental Questions in Personal Injury Law

In both workers compensation and in motor accidents, some fundamental questions are still being worked through by the courts – often by the process of decisions on judicial review and related appeals. I do not propose to provide a comprehensive list of them. However, some of the more interesting developments are worth comment.

In workers compensation, for example, the Court of Appeal has only recently worked out the meaning of the Delphic expression to “*review*” in relation to a medical Appeal Panel in a series of decisions.

In *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 the NSW Court of Appeal (at [15]) (per Handley JA – with McColl JA agreeing) described the nature of an ordinary Court appeal as being one in the strict sense, to a superior court, with the aim being to redress error of the court below. Of the workers compensation medical Appeal Panel provisions, Handley JA said (at [17]-[18]):

“Administrative appeals were unknown, or relatively unknown, in Australia and Britain in 1950, but are now common in both jurisdictions. Parliament by providing for such appeals must be taken to have intended that an appeal to a superior administrative body should be similar to an appeal to a superior court.

Since an appeal is a means of redressing or correcting an error of the primary decision maker a successful appeal should produce the correct decision, that is the decision the original decision maker should have made. It is therefore an inherent feature of the appellate process that the appellate decision maker exercises, within the limits of the right of appeal, the jurisdiction or power of the original decision maker.”

Basten JA (with McColl JA agreeing) considered (without deciding) (at [76] to [87]) and

[131] to [137] that the nature of the appeal to the workers compensation medical Appeal Panel was not entirely clear and that Parliament, in not spelling out the nature of the appeal plainly (or at all) gave rise to difficulties in other situations. He considered the primary judge was wrong in this respect and suggested that the proper approach may tentatively be that the powers of the Appeal Panel (at [137]) “may be limited to addressing, and if thought necessary, correcting, errors identified in the certificate granted by the approved medical specialist, as specified by the appellant.”

The issue was revisited in *Siddik v WorkCover Authority of NSW* (2008) 6 DDCR 228; [2008] NSWCA 116 (Mason P, Giles and McColl JJA) where the Court of Appeal reviewed the *Vegan* case and reconsidered the nature of a “review” to the workers compensation Appeal Panel found in section 328 of the WIM (1998) Act. The Court thoroughly reviewed the authorities in this area as to the meanings of “review” and “appeal” (at [59] to [69]) and concluded (at [100]) that an appeal by way of review was a flexible concept that may, depending on the circumstances, involve either a hearing *de novo* or a rehearing.

In the motor accidents world, in *McKee v Allianz Australia Insurance Ltd* (2008) 71 NSWLR 609; (2008) 50 MVR 379; [2008] NSWCA 163 (Allsop P, Giles and Basten JJA) the Court of Appeal considered the nature of an appeal in a legislative setting similar to that found in the *Vegan* and *Siddik* cases – that is the proposed “review” to an appeal panel of medical assessors in section 63 of the MAC Act. The majority of the Court held the word “review” constituted a “*de novo*” review and it extended to review of the whole of the initial medical assessment now under review. This conclusion was said to derived from the “*text and structure*” of the Act (eg, at [7] per Allsop P). In dissent on this issue, Basten JA said (at [64]):

“In some circumstances the term “review” may connote a fresh consideration of a matter, without the need to determine the existence of error, in contrast to the usual meaning of “appeal”. This reasoning appears to have been relied upon by McColl JA (with whom Mason P agreed) in *Siddik* at [70]-[90]. Nevertheless, her Honour accepted the comment of Burchett J in *Colpitts v Australian Telecommunications Commission* (1986) 9 FCR 52 at 63-64 that the word “review” may be said to have “a quite amorphous meaning”, the content of which must be derived from the particular statutory context, referring to remarks to that effect in *Tomko v Palasty (No. 2)* [2007] NSWCA 369 at [43] and adding the authority of *Brandy v Human Rights and Equal*

Opportunity Commission [1995] HCA 10; 183 CLR 245 at 261 (Mason CJ, Brennan and Toohey JJ): *Siddik* at [68]. Thus, although an appeal by way of review may sometimes invoke a fresh hearing by a body untrammelled by findings made at first instance and entitled to look at material not presented to the first instance tribunal, the term “review” nevertheless indicates that the issues will be limited to those addressed by the first decision: see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [30]”.

Just three months after that decision was handed down, an amending Act took effect (on 1 October 2008), the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act 2007* (NSW) and section 63(3A) of the MAC Act now provides plainly that the medical Appeal Panel decisions are to be de novo appeals on all issues.

Some Other Significant Decisions

In *Dar v State Transit Authority of NSW* (2007) 69 NSWLR 468, Bell J (at [71]) held that the Appeal Panel of the Workers Compensation Commission fell into jurisdictional error by failing to take into account the submission of the worker that he would like the Appeal Panel to conduct an oral hearing so that he could appear at that hearing together with his legal representatives. It was held that the Panel was bound to take the submission into account as it was relevant to the decision whether to determine the matter on the papers or after an oral hearing.

Actual Bias and Workers Compensation

In *South Western Sydney Area Health Service v Edmonds* (2007) 4 DDCR 421; [2007] NSWCA 16 the New South Wales Court of Appeal (Giles JA, Tobias JA, McColl JA) considered whether an arbitrator’s decision was tainted by actual bias against the background of section 354 of the WIM 1998 Act. The Court set out the relevant principles for executive decision-makers acting judicially as follows (at [97]- [98] per McColl JA with Giles and Tobias JJA agreeing):

- A party asserting actual bias on the part of a decision maker carries a heavy onus. The allegation must be distinctly made and clearly proved;

- A finding of actual bias should not be made lightly; cogent evidence is needed;
- A finding of bias is a grave matter;
- The applicant had to establish that the decision-maker was so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented; and,
- The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion.

Only in very rare circumstances do you need to rely solely on actual bias. The test for apprehended or ostensible bias is much easier to establish. In the case of administrative proceedings conducted in private (as the medical examinations in both schemes are undertaken) the appropriate apprehended bias rule may be stated in the following terms (from the High Court in *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982; [2001] HCA 28 at [28]):

“Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias.”

No Probative Evidence

In *South Western Sydney Area Health Service v Edmonds* (2007) 4 DDCR 421; [2007] NSWCA 16, the New South Wales Court of Appeal also considered whether a Workers Compensation Commission arbitrator’s decision was invalid for failure to be supported by the evidence, including expert medical evidence. The Court set aside the arbitrator’s decision. The Court said (at [127] to [129] per McColl JA with Giles and Tobias JJA agreeing):

“While the Commission may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matter before it permits (s 354(2)), r 70 of the *Workers Compensation Commission Rules 2003* provides that when informing itself on any matter, the Commission is to bear in mind the principles that evidence should be logical and probative, should be relevant to the fact in issue and the issues in dispute, that evidence “based on speculation or unsubstantiated assumption is unacceptable” and that “unqualified opinions are unacceptable”.

Rule 70 broadly reflects fundamental principles of the common law concerning admissibility of evidence. Indeed, in *Aluminium Louvres & Ceilings Pty Ltd v Zheng* [2004] NSWCCPD 26 (at [24]) Deputy President Fleming said:

“Where the rules of evidence do not apply, the conduct of proceedings will be a matter to be determined according to principles of fairness, taking into account the nature of the proceedings, the legislative requirements and the demands of the instant case. The Commission may have regard to evidence that would not be admissible in a court in accordance with the rules of evidence. Fairness must guide the weight to be given to this evidence.

Where the rules of evidence do not apply, in order to find error of law based on absence of evidence there must be an absence of material, whether strictly admissible according to the rules of evidence or not: *Smith & Anor v Collings Homes Pty Ltd* [2004] NSWCA 75 at [32] per Mason P (Handley JA and Campbell J agreeing).”

Other Cases

In the motor accidents area, in *Allianz Australia Insurance Limited v Motor Accidents Authority of NSW* (2006) 47 MVR 46; [2006] NSWSC 1096 (Sully J) (16 October 2006), the Court considered a determination of a claims assessor of the Claims and Resolution Service of the MAA (CARS) refusing a claim for exemption from assessment. The Court afforded the assessor a wide scope to make decisions, describing the CARS process as “non-curial” and uniquely and purely executive and therefore written reasons provided should not be scrutinised too closely by a Court in judicial review proceedings. The Court dismissed the challenge.

In *Allianz Australia Insurance Limited v Crazzi* (2006) 68 NSWLR 266 (Johnson J) the Supreme Court of NSW considered another challenge to a CARS assessment of damages for a motor vehicle accident. Three separate decisions were purportedly made in succession by the assessor. The first decision was a draft, mistakenly sent to the parties; the second decision omitted consideration of the question of interest which had not been argued but which was foreshadowed at the hearing, so the assessor held a further hearing many months later and then made a third decision. The final decision was held to be valid as the earlier decisions were infected with jurisdictional error. The Court applied and explained jurisdictional error and the effect of the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 in this regard. The Full Federal Court decision in *Jadwan Pty*

Limited v Secretary, Department of Health and Aged Care (2003) 145 FCR 1, which had also sought to explain the *Bhardwaj* decision, was distinguished by the Court.

See also, *Kelly v Motor Accidents Authority of New South Wales* (2006) 46 MVR 553; [2006] NSWSC 1444 (Rothman J); which was upheld by the Court of Appeal in *Insurance Australia Ltd t/as NRMA Insurance v Motor Accidents Authority of New South Wales* [2007] NSWCA 314 (Spigelman CJ, Beazley & Giles JJA). The Court dismissed a challenge to a decision of a claims assessor not to exempt a matter from claims assessment (thereby possibly binding the insurer to pay a determined amount of assessed monetary damages accepted by the plaintiff within 21 days after such determination).

In *Hayek v Trujillo* [2007] NSWCA 139 (18 June 2007) (Mason P, Ipp and McColl JJA), the Court of Appeal considered the late claims and the timing, exemption and litigation provisions of the MAC Act and the status of a “*special assessment*” certificate relating to the assessment of a dispute issued under s 96 of the Act.

District Court of NSW

Judicial review activity in the District Court of New South Wales is slowly on the increase after that Court gained administrative law style jurisdiction in 1999 (and commenced to determine applications in late 2003). The Act provides that the Court may determine procedural fairness disputes based on section 61(4) of the MAA Act. Under the Act, otherwise “conclusive” decisions of medical assessors may be “rejected” by the Court if there is found both procedural unfairness and “substantial injustice” to a party. There are many decisions in this area, concerning both the substantive issue (for example, *Towell v Schuetrumpe* (2006) 4 DCLR(NSW) 41; [2006] NSWDC 159 (Rein SC DCJ), *Nithiananthan v Davenport* (2006) 3 DCLR(NSW) 384; [2006] NSWDC 105 (Phegan DCJ) and *Mafra v Egan (No 1)* [2006] NSWDC 22 (Johnstone DCJ) and what happens once a medical assessment is rejected by the Court (usually, remittal, as in *Ragen v The Nominal Defendant (No 1)* [2007] NSWDC 84 and *Ragen v The Nominal Defendant (No 2)* [2007] NSWDC 85 (Johnstone DCJ) but cf: *Nithiananthan v Davenport* (2006) 3 DCLR(NSW) 384; [2006] NSWDC 105 (Phegan DCJ)).

The introduction of the District Court into this area brings new life and new judicial minds to some interesting and complex administrative law questions. Divergent and some creative approaches are emerging. Publication of some District Court decisions on the Lawlink web site has also assisted in lifting the quality and reasoning of many of the decisions.

Applications that are made for merely tactical advantages by parties in this area are usually readily transparent before the trial judges and are dispatched by the Court *before* the substantive personal injury hearing commences.

Conclusion

Understand the available grounds of judicial review and how they might interact and overlap. Plead the related grounds as well in the summons or points of claim.

Pick your best cases to seek judicial review. Because the supervisory jurisdiction here is discretionary, a good case on the facts is the best one to challenge if the intention is to seek to establish a particular proposition or a new principle.

Only on occasion will an individual matter require challenge based on notions of individual justice and manifest error.

Be prepared to pick the best and most egregious error in the decision and run with that one. Abandon the others (even if there are many). That way the Court will focus on the worst part of the decision and your challenge will not look like an impermissible merits appeal.

It is not every error that a superior court will be concerned with correcting. It will only be errors that go to the *validity* of the decision that will move the court to act (on whatever ground or basis).

It is a matter of (good) judgment.

Justice Mason, when he was President of the NSW Court of Appeal from time to time

reminded us of the words of Jordan CJ from a 1947 case and the way he put the judicial test when he was identifying the categories of error of law which vitiated a decision making process.

In that case he said: "... *there are mistakes and mistakes*" - *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR 416, 420 (NB: also cited by Spigelman CJ in *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at [152]).

Thank you.