Recent NSW Administrative Law Decisions

A paper delivered by Mark Robinson SC to the
NSW State Legal Conference held in Sydney on 27 March 2013

I am asked to speak to you today on recent NSW administrative law decisions. I will speak on decisions:

- In the Court of Appeal and the Supreme Court of NSW
- Proposed Reform of Judicial Review in NSW
- Proposed Reform of Judicial Review in Australia
- Reform of the NSW Tribunal System - NUCAT

NSW Decisions

In *Navazi v New South Wales Land and Housing Corporation* [2013] NSWSC 138 (Rothman J) the Court considered the validity of a decision of a public housing corporation to cancel a housing subsidy pursuant to section 57 of the *Housing Act 2001* (NSW). The plaintiff was a disabled man living in the corporation's subsidised rental property that suited his particular disabilities. He was on a disability pension. He became the registered proprietor of a property for his sister in Iran who was proposing to come to Australia. The corporation determined that this action disentitled him to a rent subsidy and cancelled it. The corporation sent him general notices that it was "*undertaking an investigation related to your tenancy*" and several possible breaches of the Act.

It then made the cancellation decision.

By dint of section 57 of the Act, the corporation may only vary or cancel any rental rebate "*after conducting an investigation under section 58*". Section 58 of the Act provided for a specific investigation to be undertaken, namely "*an investigation to determine the weekly income of: (a) a person who is an applicant for, or a recipient of, a rental rebate under this Part, and (b) any other resident of the house in which that person resides.*"

The broad and criminal investigation the corporation had conducted did not fall within this narrow band (although it was empowered to investigate these matters) - paras: [55] to [86]

and [97]-[98].

The section 58 investigation was held to constitute a "*jurisdictional fact*" which must first occur in order to enliven the corporation's power to cancel a rent subsidy. The corporation's decision was quashed.

The Motor Accidents Authority of NSW (MAA) - the Medical Assessors Review Panel

The conduct of a medical assessors review panel's "review" of a medical assessment is governed by section 63 of the *Motor Accidents Compensation Act 1999* (NSW). The nature of the review is described as a *de novo* review as to all matters with which MAA medical assessment are concerned (section 63(3A) and *McKee v Allianz Australia Insurance Ltd* (2008) 71 NSWLR 609; [2008] NSWCA 163 (Allsop P, Giles and Basten JJA)).

A new certificate is issued which "*revokes*" the former certificate (section 63(4)).

Section 61 is said to apply to any new certificate (section 63(6)). Plainly, review panel assessments are "*medical assessments*" within the meaning of Part 3.4 of the Act.

There are review panel guidelines published by the MAA, applicable by reason of sections 44(1)(d) and 65(1) of the Act. The main such guidelines are contained in the MAA's "*Medical Assessment Guidelines*". It is delegated legislation.

Review panel practices and procedures are provided for in Chapter 16 (Reviews of medical assessments) especially at clauses 16.21 to 16.26. Most of them are machinery provisions. It is not provided for specifically in the Act, but the review panel must have power to determine for itself its own procedures apart from what is provided for in the Act and the guidelines.

The MAA has published three practice notes relating to review panels. They are published pursuant to 65(2) of the Act in order to "*promote accurate and consistent (reviews of) medical assessments*".

Judicial review challenges to review panel decisions are a growth industry at the moment in

NSW.

Plaintiffs are usually the MAA claimant (motor accident victim), seeking to set aside a whole person impairment (WPI) assessment of 10% or under. Such an assessment means that general damages are not recoverable in the MAA or in a court. Occasionally, insurers are the plaintiffs, seeking to set aside assessments of 11% or over – see for example; *Currie v Motor Accidents Authority (NSW)(NRMA)* [2013] NSWSC 83 (Adams J); *Nelkovska v Motor Accidents Authority of New South Wales* [2012] NSWSC 819 (AsJ Harrison); *Owen v Motor Accidents Authority (NSW)*(2012) 61 MVR 245; [2012] NSWSC 650 (SG Campbell J); *Allianz v Motor Accidents Authority of NSW* (2011) 57 MVR 319; [2011] NSWSC 102 (Hidden J); *Bratic v Motor Accidents Authority of NSW* (2010) 57 MVR 122; [2010] NSWSC 1244 (Fullerton J); *Sanhueza v AAMI Limited* (2010) 56 MVR 34; [2010] NSWSC 774 (Smart AJ); and, *Graovac v Motor Accidents Authority* (2010) 56 MVR 212; [2010] NSWSC 938 (Harrison AsJ)

In *Currie v Motor Accidents Authority (NSW)(NRMA)* [2013] NSWSC 83 (Adams J) there was an application by a claimant to quash an unfavourable review panel decision. It was fought on two main grounds, causation and denial of procedural fairness. The claimant's first ground lost and the second ground was successful and the assessment was set aside.

The plaintiff was injured on 21 February 2007. There were two cars were racing along a road when the driver of one of those cars lost control and the vehicle struck a truck travelling along on the road causing that driver to lose control. The truck rolled, finishing upside down. The plaintiff rushed to the aid of the driver, whose legs were trapped inside the cabin. One leg was partly amputated. The plaintiff tried to lift the cabin dashboard up in order to free the driver, as he was afraid the vehicle would explode. Police and paramedics soon arrived. The driver was placed in a helicopter but he died on the way to the hospital. The plaintiff said that, when he tried to lift the dashboard, he experienced a sudden onset of pain in his lower back and, after he got home his back became progressively more painful after a couple of hours. He took some Panadol but did not go to see a doctor until three months after the accident. He saw a GP, Dr Gibbins, on 21 May 2007 and he told her that about a month ago, he was pushing a car when sudden severe pain was felt down his back and he now has persistent low back pain

radiating down his right leg to his knee and pain in his hip. Justice Adams records it differently in [2] of the decision.

The review panel's reasons on causation, were that:

> "There was no contemporaneous evidence that Mr Currie had sustained any injury to his lower back on 21 February 2007. And …
> The Panel concluded that the duration of three months between the alleged accident and the first report to a medical attendant of symptoms in the back and legs does not indicate a causal nexus between the two events.
> The Panel concluded that none of the claimed injuries were caused by an alleged motor vehicle accident on 21 February 2007."

The panel also expressly took into account the claimant's statements and his submissions (unlike the review panel in *Owen v Motor Accidents Authority (NSW)*(2012) 61 MVR 245; [2012] NSWSC 650 (SG Campbell J) - the Court set aside that decision because the review panel had only considered the contemporaneous medical evidence and not the claimant's evidence on causation).

The plaintiff's case on causation was that the panel had failed to apply the correct test for determining the causation of injury since it had failed to "*verify that the motor accident could have caused or contributed to the impairment*". In other words, it was what the panel failed to state that was considered bad, not what it actually said.

The Court said (at [13]):

> "[I]t seems to me that the guidelines, applied with common-sense to the facts giving rise to the issue in the review, will not lead to error although they are couched in terms which differ somewhat both from the common law and s 50 of the *Civil Liability Act 2002*. The Panel indeed did conclude that the plaintiff's injury was not caused or contributed to by the accident. It may be that its reasoning was faulty in relying upon the absence of contemporaneous medical evidence, but that does not suggest that it did not undertake the statutory task, rather that its error (if any) was one of fact."

Review of fact finding is generally impermissible in judicial review.

On the natural justice/procedural fairness ground, the plaintiff's case was that the plaintiff

was not re-examined by the review panel and he should have been re-examined so that the panel could have put to him certain matters that needed to be put.

In the panel's reasons it made two (important) factual findings. It said:

> "The Panel was of the opinion that had Mr Currie sustained any significant injury to the lumbar region of his back his pain would have been of such severity that he would have sought medical attention." And

> "It is assumed that an ambulance would have been called to the scene of the accident on 21 February 2007, from the description obtained by Assessor Truskett, to attend occupants of the vehicles involved in the accident. Had Mr Currie had any significant symptom he then had the opportunity to report it."

There was no ambulance report tendered before the review panel and, although the insurer's detailed submissions squarely raised the issue of causation and the absence of contemporaneous evidence, the panel relied on the above reasoning. The plaintiff had said nothing about the ambulance officers at all in his evidence and submissions.

The Court relied on the often quoted passage in *Commissioner for ACT Revenue v Alphaone* Pty Ltd (1994) 49 FCR 576 at 590 – 592 on procedural fairness, that:

> "The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material ...
> The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material."

The Court held (at [22]) that the ambulance issue was an "*important element of the Panel's reasoning*" and that (at [21]) the panel "*assumed that the plaintiff had an opportunity to report a significant symptom in his back to the ambulance officers. A moment's reflection would have shown that there were obvious reasons why he might not have …*"
The panel did not first put all this to the claimant and he was thereby denied procedural fairness, a jurisdictional error.

The review panel decision was set aside.

MAA Proper Officer Decisions

Proper officers are persons designated by the MAA to make "*gateway*" decisions on section 62 (referral of matter for further medical assessment) and section 63(3) (referral of a matter to a review panel for a review of a medical assessment).

Both of these decisions have proven highly contentious for claimants and for insurers. There are many cases – see, for example: *Rodger v De Gelder* (2011) 80 NSWLR 594; 58 MVR 23; [2011] NSWCA 97 (Beazley, McColl and Macfarlan JJA) a challenge to a section 62 further proper officer decision; *QBE Insurance (Australia) Ltd v Henderson* [2012] NSWSC 1607 (Rein J) – insurer challenge to a proper officer "*further*" decision; *Lewis v Motor Accidents Authority of NSW* (2012) 60 MVR 185; [2012] NSWSC 56 (Adams J)- claimant's challenge to a proper officer decision under section 63 to refuse to refer a matter to a review panel.

In *QBE Insurance (Australia) Ltd v Henderson* [2012] NSWSC 1607 (Rein J), the Court was asked by an insurer to set aside a proper officer's decision to refuse an application for a medical assessment to go for a further assessment – section 62. The medical assessor had found 16% WPI on psychiatric grounds caused by the motor vehicle accident. The insurer had then lodged further material which was said to "*plainly*" constitute "*additional relevant information*", the statutory threshold (in addition to the fact that the new material must be "*such as to be capable of having a material effect on the outcome of the previous assessment*" (s62(1A)).

The additional information was contained in a new psychiatrist's report which was from an examination that occurred <u>after</u> the medical assessment report and stated of his injuries, *inter alia*:

> "They are not consistent with the accident. I believe he has recovered from his initial condition and he now suffers from a condition that is unrelated to the accident"

The proper officer dealt with the whole application in two substantive paragraphs which relevantly stated:

> "Whilst [the psychiatrist] comes to a different conclusion in his most recent report, this is not "*additional relevant information*" as it is an issue that has previously been canvassed and considered by the Assessor"

The Court held that the new material was in fact "*additional relevant information*" (at [35]), set the decision aside and said that the proper office is "*to now proceed to consider whether the information is of a character that is capable of having a material effect on the conclusion that the claimant suffers from PTSD as a result of the motor vehicle accident.*"

In addition to setting aside the decision, the Court made a declaration that "*the plaintiff's application made pursuant to s 62 contained "additional relevant information about the injury" within the meaning of that expression in s 62(1)(a).*"

CARS Assessors or Claims Assessors

Under the MAC Act, there is no "*appeal*" or review of claims assessors decisions provided.

A "*claims assessor*" is a person who, in the opinion of the MAA is "*suitably qualified*" and who may be a member of the MAA staff and who is "*appointed*" as a claims assessor by the MAA pursuant to section 99 of the Act. A claims assessor is empowered to assess claims under Part 4.4 (claims assessment and resolution) (ss 88 to 121) and also in accordance with Chapter 5 (award of damages) (ss 122 to 156).

The Principal Claims Assessor is appointed by the Minister and must be an Australian lawyer. Section 105 provides that a claims assessor is, in the exercise of his or her functions, "*subject to the general control and direction of the Principal Claims Assessor*". But the PCA is not empowered to overrule or interfere with any decision of a claims assessor "*that affects the interests of the parties to an assessment in respect of any such assessment*" (s 105(3)).

There are two main types of judicial review challenges here. Challenges to the assessment of damages (ss 94 & 95) and challenges to a decision to grant the parties exemption from having to go to a claims assessment at all (and to thereby be permitted to go straight to a court).

Exemption can be "*mandatory*" (section 92(1)(a)) or "*discretionary*" (section 92(1)(b)). Extensive guidelines are set out in the Claims Assessment Guidelines.

There are many judicial review cases in regard to each of these decisions.

In *Allianz Australia Insurance Ltd v Tarabay* [2013] NSWSC 141 (Rothman J), a claims assessor made a decision to refuse the insurer's exemption application. The Supreme Court set it aside. It was a case where the insurer made numerous claims that the claimant had made a "*false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident giving rise to the claim*" Claims Assessment Guidelines, clause 14.16.11.

The Court considered the claims were so serious that they should have been styled "*fraud*" claims. The claims were well documented and the claimant did not have a satisfactory explanation for them.

The claims were in short (at [12] to [17]) the claimant, a mechanic, had (or participated in) lodging:

- A false PAYG payment for $52,832 in support of past economic loss from a truck repair company;
- He said he had been employed by a smash repair company for 8 months, but his tax return showed no earnings there at all;
- He lied on his resume about how long he had worked there;
- He said he worked for Ultratune and he told his solicitors he never worked for Ultratune. Ultratune then sent a letter saying he did work for Ultratune at Fairfield but a virus ate their computer. Co-incidentally, the sole secretary/director/shareholder of Ultratune at Fairfield was the claimant's brother.

The claims assessor accepted in her reasons that there were some "*inconsistencies*" in the claimant's evidence but that all these difficulties could be overcome by giving the insurer a

bit more time at the final assessment hearing to cross-examine the claimant.

Strangely, she said at the end of her reasons:

> "Therefore having looked at all of the issues and the replies thereto I am not satisfied that the Claimant or any other person has made a statement knowing that it is false and misleading in a material particular in relation to all of the headings pursuant to s 117 of the Act."

The Court held that this was not the issue before the assessor. It said (at [62]):

> "The "*issue*" that was before the Assessor was whether an exemption should be granted. The question that has been answered is whether Allianz has proved fraud. That is not the question that was before the Assessor."

He said (at [66] and [67]):

> "[It] was an interlocutory proceeding in which the task of Allianz was not to prove the fraud alleged but to satisfy the Assessor, on the basis of an allegation, reasonably put, of fraud so that the matter was not one that should be heard in a CARS assessment.
>
> The Assessor asked herself the wrong question and answered it. In doing so she has reached a concluded view as to the substance of the matter alleged, without having heard the parties in full on the issue. In so doing, the Assessor has issued a decision vitiated by jurisdictional error and error of law on the face of the record: *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82]."

The Court also made some useful comments on the differences between a court and a claims assessor when it comes to hearings (or assessment conferences) relating to misleading documents or fraud. The Court said (at [56]) it accepted the opinion expressed by the claims assessor in her decision that often issues associated with inconsistencies in periods of employment are resolved in a CARS assessment as are inconsistencies in documents and statements. Often they are resolved in the proceedings by examination by the insurance company that is permitted by the assessor. The Court said "*This however is slightly different*". At [57] to [58], the Court said:

> "57 The allegation by Allianz is an allegation of fraud in relation to the reliance upon a document that is said to be a forgery (if not two such documents). The Assessor has no power to subpoena or require the attendance of any person. The Assessor has no power to require an answer to any question. The most that the Assessor is able to do, in dealing with an issue of that kind, is take into account a failure to answer a question in determining an assessment.
>
> 58 There is a significant difference between inconsistent evidence of earnings and evidence of potential forgery. The only conclusive means of determining the forgery, and its source, is by compelling production, compelling answers under oath, and cross-examination of Mr Tarabay and third parties. That course is impossible in an assessment."

The Court set the decision aside and referred the matter to a different claims assessor (because the insurer alleged apprehended bias in the case as well, which was not found by the Court).

As to claims assessments of damages for motor vehicle injuries, usually, the claimant's choice is to accept it (within 21 days) or not accept it (s 95(2)).

If the award is accepted, the insurer's task is to simply write a cheque and deliver it, or seek to challenge the legality of the CARS decision in the Administrative Law list of the Common Law Division of the Supreme Court of NSW.

I will speak in the remainder of the paper about two recent judicial review challenges to awards of damages by claims assessors:

1 *Allianz Australia Insurance Ltd v Kerr* (2012) 60 MVR 194; [2012] NSWCA 13 (McColl, Basten and Macfarlan JJA)(16 February 2012) – s 126 buffers, reasons, and

2 *Allianz Australia Insurance Ltd v Sprod* (2011) 59 MVR 250; [2012] NSWCA 281 – s 126 economic loss (Campbell, Barrett JJA and Sackville AJA).

***Allianz Australia Insurance Ltd v Kerr* (2012) 60 MVR 194**

This was an appeal from a decision of Justice Hislop. It concerned the legal validity of a motor accidents claims assessor's award of future economic loss by way of a "*buffer*". The amount of the buffer awarded to the claimant was $200,000 plus $22,000 for superannuation.

The Court of Appeal delivered an important judgment in relation to a number of areas, in particular:

- the evidence needed to be adduced in judicial review cases;
- the award of buffers in motor accidents cases; and
- adequacy of reasons as a ground of judicial review.

Evidence Needed to establish Jurisdictional Error or Error of Law on the Face of the Record

In *Allianz v Kerr*, the NSW Court of Appeal (Basten JA and Macfarlan JA agreeing) discussed the evidence that was required to establish jurisdictional error or error of law on the face of the record in judicial review proceedings. The court described two administrative law principles of "*restraint*" in this regard (at [15]):

> The first is the "*clear distinction*" still drawn under the general law between "*want of jurisdiction and the manner of its exercise*": *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; 59 CLR 369 at 389 (Dixon J), recently cited with approval in *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; 237 CLR 146 at [5]. The second principle is that, whilst jurisdictional error may be established by any admissible evidence relevant for that purpose, a quashing order based on the broader concept of error of law must identify the relevant error as appearing "*on the face of the record*".

In order to prove the ground of judicial review of error of law on the face of the record, the "record" has been held to be very narrow, limited to the instrument or page that actually records the decision or orders – see, *Craig v State of South Australia* [1995] HCA 58; 184 CLR 163. That decision was in part overturned in NSW by amendments to section 69 of the *Supreme Court Act 1970*(NSW). It now provides that "*the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination*": s 69(4). The court

of appeal stated (at [17]) that:

> "Given the procedural history outlined above, it is significant that the amendment did not refer to written evidence (such as affidavits and documentary material), nor did it refer to the transcript, whether of evidence or submissions."

Accordingly, it was considered that (at [18]):

> "[I]t was appropriate for the reviewing court to consider not only the certificate given by the claims assessor, but also his statement of reasons. It was less clear, however, whether the court might properly accept as evidence and scrutinise the reports of medical and other experts and the submissions made by the parties before the assessor. In the present case, such material was admitted by the primary judge, apparently without objection. Nevertheless, if the limits of this Court's jurisdiction preclude it taking such material into account for a particular purpose, it should not do so."

The Court of Appeal said (at [18]) that, for the purposes of evidence, these considerations require an applicant:

> "… to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record. As explained by Tate JA in *Easwaralingam v Director of Public Prosecutions (Vic)* [2010] VSCA 353; 208 A Crim R 122 at [25], a case apparently not involving an allegation of jurisdictional error:
>
> > "[A]n application for certiorari is not the same as a general appeal for error of law, most importantly, because it falls to be determined on the basis of different material. An application for certiorari does not invite a scouring of all the evidence before the inferior court to determine whether the proper inferences were drawn from it or whether an item of evidence was overlooked."

In summary, the Court said (at [62]):

> "… the range of challenges on a judicial review application is limited to errors of law on the face of the record and jurisdictional error. In the case of the latter, the kind of error is more limited, but the scope of inquiry is broader. In principle, in order to go beyond the face of the record, it would be necessary to identify a jurisdictional error."

Economic Loss and Buffers

In *Allianz v Kerr*, the claims assessor's buffer of more than $200,000 was upheld as being lawful. The award was challenged primarily because the reasons of the claims assessor did not comply with or conform to what was required pursuant to section 126 of the Act in that, the determination is necessary to make a decision as required by that provision were not present. The Court did not agree.

Alternatively, it was contended that the claims assessor did not provide adequate reasons for his decision. The Court did not agree.

This occurred in the context of an increasing number of damages determinations of claims assessors of substantial sums determined by way of buffers (*Kerr* at [5]).

Justice Basten wrote primary decision with which the two other judges largely agreed.

Section 126 of the Act provides:

> "126 **Future economic loss—claimant's prospects and adjustments**
>
> (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
>
> (2) When a court determines the amount of any such award of damages it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events concerned might have occurred but for the injury.
>
> (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."

Justice McColl considered that it was appropriate for a claims assessor to award a buffer when the impact of the injury upon the economic benefit from exercising earning incapacity after injury is "*difficult to determine*" (at [6]). Also, (citing Mason P in *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [2]) a buffer is appropriate where there is "*a*

smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort-related injury, at some distant time in the future."

She said (at [7]) the award of a buffer is:

- "difficult to assess" and
- "necessarily impressionistic"

She held that s 126 of the Act was (at [8]):

- intended (by Parliament) to promote intellectual rigour;
- in assessing damages, on occasion "*an element of impression must be involved*".

Most importantly (since it is largely supported by Justice Macfarlan in his judgment) McColl J said at [9]:

> "The foregoing should not be seen as a licence to award buffers indiscriminately. Where the evidence enables a more certain determination of the difference between the economic benefits the plaintiff derived from exercising earning capacity before injury and the economic benefit derived from exercising that capacity after injury, recourse should not ordinarily be had to the award of damages for future economic loss by way of a buffer. Each case must turn on its own facts."

Justice Macfarlan made remarks concerning the buffer for future economic loss awarded by the claims assessor. He held (at [67]) a buffer may be awarded "*to compensate an injured person for the possibility that he or she may suffer economic loss in the future as a result of a loss of capacity to earn income*". He cited the principle cited by McColl JA above from Mason P about a buffer being appropriate where there is "*a smallish risk*" of relevant loss "*at some distant time in the future*".

Mcfarlan JA held that (at [70]) if the claims assessor had calculated a buffer figure by "*allowing a notional sum for each year of the remainder of the claimant's working life, he should have referred to that reasoning process in his reasons*."

His Honour also said (at [71]):

> "*In other cases it may be able to be inferred (from the size of the award or other factors) that a process of reasoning, rather than simple intuition, led to the determination of the size of a buffer*."

He said the outcomes of those cases would be different, namely, the awards would be struck down by the Court as unlawful.

He also said (at [72]):

> "…awards in respect of future economic loss should wherever possible result from evidence-based calculations or estimates that are exposed in the decision-maker's reasons. The award of a buffer that is not supported by an explanation of how and why the amount was arrived at should remain a last resort where no alternative is available."

In the reasons for assessment, under the heading "*Future Economic Loss*" there was only the following findings and reasoning:

> ""In my view she has satisfied me that but for the accident she would have had continual work, albeit that from time to time she would have needed to change jobs and have had time off work. Thus she has satisfied s 126 of the Act. She is entitled to some amount for future economic loss but I accept accept the insurer's submission that it should be by way of a buffer rather than a concise calculation, given the claimant's concession of pre-existing psychological issues, her pre-existing work history and her current capacity for work. An amount of $20,000.00 as submitted by the insurer is clearly inappropriate. I believe the sum of $200,000.00 is the appropriate sum. Again I have allowed a further $22,000.00 on the basis of future superannuation loss."

On the appeal decision, Justice Basten's judgment set out the history of the common law use of buffers (at [24] to [29]) and then discussed the Court's consideration of section 126 of the Act (at [30]).

He set out the primary assumptions that would constitute the minimum content of section 126 (at [31]) and held that "*most*" of those factors were discussed by the claims assessor below (at [32]). His Honour did <u>not</u> find those findings or factors were contained under the claims assessor's heading "*future economic loss*". His Honour found those factors throughout the entire reasons for decision including from the statement of issues and in the background notations and in the summary of medical evidence (see at [33]). His Honour held that all

these things need to be read together in order to determine whether or not section 126 was complied with.

On the appeal, it was held the buffer was appropriately explained within the terms of the Act.

Adequacy of Reasons as a Ground of Judicial Review

In *Allianz v Kerr*, the Court of Appeal considered the adequacy of the reasons of the claims assessor. The claims assessor was assessing damages in a personal injury claim that was binding, should the claimant have accepted it. The Court held that as the Act (s 94(5)) only required the provision of "*a brief statement*" of reasons, that there was a lesser obligation on the claims assessor than that imposed on the courts (*Kerr* at [53]). The Court also suggested that there was nothing in the language of the Act that imposed a requirement on a claims assessor to make a finding on every question of fact which is regarded by the court, on judicial review of the decision, as being material - (*Kerr* at [54]-[55]).

As discussed above, the decision in that case concerned a "*buffer*" sum for future economic loss. It was held that when a decision involves an evaluation, or a judgment or is there in inherent imprecision in arriving at it, the court considers it was not to be expected that a decision-maker would be able, at any rate satisfactorily to the litigants or to one of the litigants, to indicate in detail the grounds which have led him to the conclusion (citing High Court authority).

The Court of Appeal set out the following passage on reasons (at [58]) from *Saville v Health Care Complaints Commission* [2006] NSWCA 298 (per Basten JA, Handley and Tobias JJA agreeing):

> "The purpose underlying the obligation to give reasons is in part the discipline of rationality, being the antithesis of arbitrariness, which follows from the exercise of justifying a conclusion, together with the transparency of decision-making, which permits the parties and the public to understand the result reached. However, this purpose must be given practical effect in particular circumstances."

Further, the Court in *Kerr's case* held (at [59]) that when a claims assessor determines a

buffer amount, he or she need not explain why some particular amount was chosen as opposed to another. Significantly, the Court also held (at [60]) that an assessor "*was not required to give reasons for findings he did not make, [and] he was not required to give reasons for issues he did not determine*."

Allianz Australia Insurance Ltd v Sprod **(2012) 61 MVR 547; [2012] NSWCA 281**

In this case, Justice Barrett JJA published the decision and Campbell JJA and Sackville AJA agreed. It concerned a motor accident's claims assessor's reasons for decision where he set out his reasoning for awarding future economic loss to the claimant in the amount of $134,300.00.

The claims assessor's entire reasoning for awarding future economic loss to the claimant was as follows:

> "**40. Future economic loss.** The Claimant is concerned about the possibility of losing his job. He explained that he is the only light duties worker in the area of the factory where he works. He is concerned that a pallet system will be introduced at work. This will leave very little for him to do and, I infer, increase his chances of losing his job. The Claimant explained to me in answer to Ms Allan's questions that fork lift driving is not a full time job. Workers driving forklifts have to do physical tasks as well.
> 41. I am satisfied that there is a chance of the Claimant losing his present job, despite his benevolent employer and that he will then be at a disadvantage on the open labour market. His lifting restriction will make it difficult to obtain a manual job, which is all he has ever done.
> 42. Bearing in mind the Claimant's present high earnings I am satisfied that it is appropriate to allow $250.00 net per week for future economic loss. The calculation is $250.00 x 632 (18.3 years) x .85 = $134,300.00.
> 43. Future superannuation at 11% is $14,773.00."

There was also an odd issue not fully resolved at [36] of the reasons where the claims assessor said:

> "His earnings went up by approximately $4,500 net in the year prior to his motor accident and then down by $1,500 in the year of the accident. They went up slightly the next year. In the most recent financial year the Claimant's net income has jumped by about $16,000 to approximately $1,000 net per week."

These very odd movements were not the subject of firm findings by the claims assessor.

In the Supreme Court, the insurer argued that there were a number of significant problems with these paragraphs. The assessor had failed to set out any real explanation or provide any real reasoning for his decision here. More importantly, he failed to make any attempt to comply with the necessary requirements of awarding damages for this head of damage pursuant to section 126 of the MAC Act. Under section 126 of the MAC Act, a claims assessor is bound to disclose certain assumptions about the claimant's most likely future circumstances but for the injury and is required to make adjustments to any amount of damages for future economic loss by reference to a "*percentage possibility*" that future events might occur.

The Court of Appeal agreed. It disagreed with the trial judge that the award of damages could have constituted a buffer and it was therefore no error that it was not properly explained. The Court said that this was not a buffer case. It said (at [25]) "*There was, in this case, resort to a precise figure of $250 net per week and a calculation by reference to that figure, based on a stated number of years of expected working life.*"

Justice Barrett explained succinctly the duties in section 126 of the Act (at [26] and [27]):

> "26 The underlying principle is that the plaintiff should have a sum by way of damages for the difference between earning capacity as it would have been in the absence of the injury and the earning capacity as it is following the injury. Both elements involve uncertainty and conjecture and, therefore, require that assumptions be made, albeit assumptions shaped by the available evidence. The assumptions cover, among other things, remaining expectancy of working life, the impact of the injury on that expectation, the extent to which the ability to function will be curtailed and the earnings that work according to the reduced ability will produce, together with assumptions regarding discounted present value and investment returns and as to vicissitudes or adverse contingencies. Because of s 126(1), ***an assessor has a duty to form an opinion*** that the assumptions to be applied in relation to such matters going to future earning capacity "*accord with the claimant's most likely future circumstances but for the injury*".
>
> 27 ***The duty*** under s 126(1) to be satisfied that the adopted assumptions accord with the most likely future circumstances but for the injury ***is supplemented by the*** s 126(3) ***duty to articulate the assumption*** on which the award is based. This, as has been said in this Court more than once, is to ensure transparency and, at the same time, to inject an element of rigor or method that may be overlooked or simply abandoned if the statutory system did not insist on the identification and articulation of the assumptions employed." (my emphasis)

It was held that the claims assessor had failed to "*engage with and perform the tasks prescribed by s 126*" (at [37]). Once the claims assessor engaged upon a process of calculation, the section 126 duties became apparent and he was obliged to state his assumptions as set out in the Act. Some of the matters identified by the Court that were wrongfully omitted here were:

- There was no statement by the assessor of the assumptions underlying the figure of $250 net per week as lost earnings for the balance of the working life (at [34]);
- Why did assessor assume that earnings at the higher level $1,000 net per week would be likely to be maintained for the balance of his working life? - Particularly when the assessor expressed an inability to understand how the increase had come about (see [36])?
- There was no explicit explanation of why a residual working life of 18.3 years was chosen or, what assumption was made in that respect; and,
- There was no reference to the assumption that gave rise to the allowance of 15% for vicissitudes (can be brief) (at [33]).

The Court made some final and helpful remarks made in order to assist claims assessors in the exercise of their future decisions. It said (at [42]), in summary:

1. Assessors do not have to prepare elaborate statements of reasons and explanations of assumptions.
2. They must work on the basis of facts.
3. However, an important element of the statutory scheme is the deployment of the expertise and experience of assessors as specialists. They are not meant to act as if they were judges. Their task is only to assess the amount that "*a court would be likely to award*" as damages. The function is no more than to estimate and to predict likelihood.
4. There is a clear place for informed intuition and speculation.
5. The purpose of s 126 is to produce ***a reasonable degree of transparency*** as to assumptions and the reasons for them so that those interested in the assessment may have an insight into the way in which the task of assessment was performed.
6. The section recognises that assumptions are necessary and appropriate. It does not seek to define aspects that may or may not properly be made the subject of assumptions about future earning capacity.
7. Its aim is merely to ensure that an insight can be obtained into the ***content*** of the assumptions and the ***reasons*** for their adoption. (my emphasis)

The No-Evidence Ground of Judicial Review

In *L&B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15 (McColl; Basten; Whealy JJA) the Court of Appeal provided a salient lesson as to the now commonly relied on ground of judicial review known as "*no evidence*". The rule is that administrative decisions which are based upon findings of fact must be founded upon logically probative evidence and not mere suspicion. The leading decision is *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 4 ALD 139; 44 FLR 41 at 62–68 per Deane J (with Evatt J agreeing). The position that findings of fact must be supported by logically probative evidence is again developed in Deane J's judgment in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 21 ALD 1 at 367 (CLR) (compare the decision of Mason CJ at 356).

In *L&B Linings*, where an employer sought judicial review against a decision by a workers compensation insurer setting a premium for a particular year, Justice Basten (with McColl and Whealy JJA agreeing) said (at [34]):

> "34 Four points of caution should be made. ***First***, this passage (Mason J in *Bond* at 356) indicates that the "*no evidence*" ground of judicial review depends not on the reasoning of the decision-maker, but on a comparison between the material available to the decision-maker and the conclusion reached. ***Secondly***, care must be taken with the term "no evidence", as an administrative decision-maker is usually entitled to take into account material which would not count as "evidence" in a judicial context. In what is essentially an inquisitorial inquiry, that material is not necessarily limited to the material placed before the decision-maker by the applicant for review. ***Thirdly***, it is important to bear in mind that the decision-maker may be entitled to seek support for a particular inference from the absence of material supportive of a contrary view. ***Fourthly***, where an evaluative judgment is to be formed on the basis of conflicting indicators, it will be difficult if not impossible to establish a "no evidence" ground of review." (my emphasis)

In addition, the Court held (at [35]) that one must be comprehensive in multiple or difficult decision to prove no evidence exists. In that case, there were, in effect, at least 47 separate assessments made by the Authority, being one in respect of each contractor. In order to establish that there was "*no evidence*" to support the findings of the Authority, "*it was necessary to demonstrate an absence of such evidence in respect of each individual about*

whom a finding was made. The appellant did not assay that task".

Proposed Reform of Judicial Review in NSW

In NSW, judicial review of administrative action is available only at common law (which is accessed via section 69 of the *Supreme Court Act 1970* (NSW)).

Some other Australian jurisdictions have established a statutory right to judicial review that effectively constitutes an entire code (of reasons, standing, grounds of judicial review and relief).

The most recognised of these statutes is the Commonwealth's *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**). [1] It is essentially a codification of the common law judicial review that stripped away most of its historical complexities. It was drawn up after Parliament received the Report of the Kerr Committee in 1971. The Kerr Committee, established on the recommendation of the then Solicitor-General, Sir Anthony Mason, presented an entirely new structure for administrative law in Australia [2].

The ADJR Act celebrated its 30th anniversary in 2010. It commenced operation on 1 October 1980. Sir Anthony Mason presented a paper in 2010 to the Australian Institute of Administrative Law[3] explaining his views as to the success of the "New Administrative Law" as it came to be known (together with the Commonwealth Administrative Appeals Tribunal, the Ombudsman and Freedom of Information legislation).

The success of the ADJR Act (and the adoption of very similar legislation in Queensland, Tasmania and the ACT) raises the question as to whether NSW should establish a similar

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1 Sir Anthony Mason "*Delivering Administrative Justice: Looking Back With Pride, Moving Forward With Concern*" (2010) 64 AIAL Forum 4; see also Sir Anthony Mason's 2001 paper "*Administrative Law reform: The vision and the reality*" Geoffrey Lindell, ed, The Mason Papers, Federation Press, 2007 at page 167.

2 The Kerr Committee and the related Bland and Ellicott Committee Reports are each reproduced in The Making of Commonwealth Administrative Law compiled by Robin Creyke and John McMillan in 1996 and published by the Centre for International and Public Law, Law Faculty Australian National University

3 Sir Anthony Mason "*Delivering Administrative Justice: Looking Back with Pride, Moving Forward with Concern*" (2010) 64 AIAL Forum 4. See also, Sir Anthony Mason's 2001 paper "*Administrative Law reform: The vision and the reality*" in Geoffrey Lindell, ed, The Mason Papers, Federation press, 2007 at page 167.

statutory right to judicial review.

In March 2011, the NSW Attorney General released a discussion paper on this topic titled "Reform of Judicial Review in NSW".

The discussion paper analysed the current operation of judicial review in NSW and reforms in other jurisdictions, with particular focus on the ADJR Act [in this regard the discussion paper also serves as an excellent research paper for busy practitioners]. It asked whether there is a need for reform of judicial review in NSW and, if so, what are the key issues that should be addressed in any reform measures. Specifically, the discussion paper asked:

* whether a statutory judicial review jurisdiction should be established,
* whether any such statutory jurisdiction should be modelled on the ADJR Act, or
* whether there are alternative options for the reform of common law judicial review in NSW.

The discussion paper also considered how to establish a statutory right to obtain a statement of reasons for decisions that might be subject to judicial review.

Apart from drawing attention to the availability of the grounds of judicial review and bringing into one place both the grounds and all of the available remedies in this area, I consider the major success of the ADJR Act to be that reasons are now provided in almost every Commonwealth decision. If they are not provided, they can be sought in almost every case by reason of section 13 of the ADJR Act. In New South Wales, public sector decision-makers and Ministers still do not provide reasons in a range of circumstances where they are not compelled to do so. The common law does not require a statement of reasons to be provided in the ordinary case (*Public Service Board (NSW) v Osmond* (1986) 159 CLR 656).

Note that 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* also provides for a party asking the Court for a statement of reasons at directions hearings of administrative law matters. However, this remedy can only be deployed

in litigation matters pursuant to section 69 of the *Supreme Court Act 1970* (NSW). It would be convenient to have reasons prior to any such litigation.

Accordingly, the Attorney's discussion of proposed reforms involving statement of reasons and a judicial review act are well worth considering.

Proposed Reform of Judicial Review in Australia

At the federal level, judicial review is governed by the law relating to constitutional writs pursuant to section 75(v) of the Australian *Constitution* and the common law accessed via section 38B of the *Judiciary Act 1903* (Cth). As well, the ADJR Act codifies the common law but does so in such a way that judicial review has become technical and constrained at times.

The Commonwealth Administrative Review Council (**ARC**) has very recently examined in detail the various aspects of the federal judicial review system in Australia. In its Report No 50, titled "*Federal Judicial Review in Australia*", the council makes recommendations for better integration of the review mechanisms and access to judicial review in federal courts.

After examining the current systems, the council concluded two key matters, namely:

- It is undesirable that there is a different ambit for '*constitutional review*' under the *Constitution* and the *Judiciary Act* and '*statutory judicial review*' under the *ADJR Act.*
- The *ADJR Act* continues to play an important role by improving the accessibility of judicial review, as a clear statement of the Parliament's commitment to be legally accountable for its decisions and by guiding administrative decision makers.

The council accepted the strong support expressed to its inquiry for the continuation of the ADJR Act that flowed from:

- a list of available judicial review grounds;

- flexible remedies, all of which are available where a ground of review is established;
- the right to request a written statement of reasons; and
- clear standing rules to initiate judicial review proceedings.

It ultimately recommended adoption of a model that would see the scope of the ADJR Act expanded to encompass the jurisdiction of the High Court under s 75(v) of the *Constitution*.

It said (at page 11):

> "The Council recommends altering the scope of the ADJR Act, without, however, altering the current ambit of judicial review. The Council would more closely align the two current generalist judicial review jurisdictions, encouraging consistency between constitutional and statutory judicial review. The Council considers that the two review mechanisms should be equally accessible. "

The Reform of the NSW Tribunal System

There is a range of tribunals operating now in New South Wales. Some have counted about 70.

The larger or more commonly known tribunals include the Consumer, Trader and Tenancy Tribunal (CTTT), Administrative Decisions Tribunal of NSW (ADT) and the Industrial Relations Commission (IRC).

On 22 March 2012, the NSW Parliament's Legislative Council's Standing Committee on Law and Justice handed down Report No 49 titled "*Inquiry into opportunities to consolidate tribunals in NSW*".

The Committee's task was to look into ways and means of external merits review tribunal consolidation in NSW, bearing in mind there are many and varied tribunals in NSW and a number of approaches could be taken to reducing them.

The current system was described as "*complex and bewildering*".

The Committee received submissions and conducted public hearings and it investigated some interstate tribunals, such as the Victorian Civil and Administrative Tribunal (VCAT).

Other Australian jurisdictions including Victoria, Western Australia, the Australian Capital Territory and Queensland all have 'super' tribunals (also called "one-stop shops").

Ultimately, the Committee determined that that the NSW Government should pursue the establishment of a new tribunal that consolidates existing tribunals where appropriate and where promotes access to justice. However, as the task of actually determining what tribunal should go into what body was is immense, highly technical and it involved multiple complexities, the Committee determined that an expert panel should be put together consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders. The Panel would pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, and prepare a detailed plan for implementation, including which tribunals should be consolidated.

The Committee also examined the Consumer, Trader and Tenancy Tribunal of NSW (CTTT) and determined that it should stay separate from the proposed consolidation and that an internal appeal process should be established within it.

All of these tribunals would be up for consideration for consolidation or amalgamation into a new consolidated tribunal, according to the Committee.

On 26 October 2012, the NSW Attorney General released a 7 page document titled "*Government Response to the Standing Committee on Law and Justice Inquiry into Opportunities to consolidate tribunals in NSW*".

He said 23 of the State's tribunals will be integrated into a new overarching tribunal that will provide a "*simple, quick and effective process for resolving disputes, supervising occupations and reviewing executive action*".

He said the NSW Civil and Administrative Tribunal (NCAT) will be a one-stop shop for almost all state tribunals, ranging from relatively small bodies such as the Chinese Medicine Tribunal to the Consumer, Trader and Tenancy Tribunal.

The Industrial Relations Commission is not one of the bodies slated to be consolidated.

The NCAT will be divided into five specialist divisions:

1 Consumer,
2 Administrative and Equal Opportunity,
3 Occupational and Regulatory,
4 Guardianship,
5 Victims.

He said "*The NSW model will be structured to preserve existing specialties rather than taking a one size fits all approach*."

The President of the tribunal will be a Supreme Court judge to "*ensure its independence*" and there will be Deputy Presidents appointed to each of the 5 divisions.

A steering committee has been established to ensure NCAT starts operating in NSW by January 2014.

Some of the existing tribunals to be included in the proposed NCAT are:

Administrative Decisions Tribunal
Consumer, Trader and Tenancy Tribunal
Medical Tribunal
Victims Compensation Tribunal
Guardianship Tribunal
The Aboriginal and Torres Strait Islander Health Practice Tribunal
Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunal
Charity Referees
Chinese Medicine Tribunal
Chiropractors Tribunal
Dental Tribunal
Local Government Pecuniary Interest and Disciplinary Tribunal
Local Land Boards

Medical Radiation Practice Tribunal
Nursing and Midwifery Tribunal
Occupational Therapy Tribunal
Optometry Tribunal
Osteopathy Tribunal
Pharmacy Tribunal
Physiotherapy Tribunal
Podiatry Tribunal
Psychology Tribunal
Vocational Training Appeal Panel

On 22 November 2012, the NSW Attorney-General, Greg Smith introduced the *Civil and Administrative Tribunal Bill 2012* (NSW) into the NSW Legislative Assembly. The Bill (now an Act assented to on 4 March 2013) establishes the basic framework of the new super-tribunal.

Provisions relating to jurisdiction and how the tribunal will operate will be devised this year. The new Act is the first stage of what will be several stages of legislative reform in 2013. It will involve building and consolidating the new NCAT.

A **Reference Group** has been established of key stakeholders to provide input on behalf of the affected tribunals, tribunal users and relevant peak bodies. The Reference Group is being consulted on legislation and other issues arising during the project. They will also play an important role in engaging with the broader stakeholder group and providing feedback and information to the Steering Committee and project team. The Reference Group is chaired by Linda Pearson, Commissioner of the Land and Environment Court.

The **NCAT Project team** is a multi-disciplinary team of senior and experienced NSW public servants who will draw the further draft Bills together. The Reference Group reports to this team.

Finally, both groups report to the **Steering Committee**, chaired by Laurie Glanfield, Director General of the Department of Attorney General and Justice. That Committee has five members who are senior heads of NSW Departments. They will have final say on the form of the draft Bills.

Basic questions are being thrashed about now, such as who can appeal, who hears the appeal, should there be an internal appeal panel? What rights are there to seek judicial review to the Supreme Court? Can an applicant have a lawyer? In all cases? What about costs?

Thank you