Administrative Law in NSW Workers Compensation and Motor Accidents Compensation

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From about 6 years ago, the NSW Government came under (or, rather, placed itself under) considerable pressure to respond to community perceptions about the high cost of insurance premiums and the complexity and length of claims processes involved in compensating injured workers and persons injured in motor accidents.

The response saw the advent of new workers compensation laws and new motor vehicle accident compensation laws.

In both areas, the legislative reforms introduced measures to provide for the determination of claims and the resolution of associated medical disputes primarily through the use of administrative statute-based procedures and measures intended to reduce the level of litigation or remove it entirely.

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

The purpose of this paper is to identify how some areas of these legislative reforms in the workers compensation and motor accidents compensation (CTP) areas and the new dispute resolution mechanisms introduced by them open up new avenues of legal challenge through administrative law and judicial review of administrative action in the Supreme and District Courts.

A feature of legislative initiatives in schemes regulating motor accident compensation over the years and now in workers compensation reform has been the extension of measures designed to reduce and control the amount of damages payable for non-economic loss.

Another feature has been the determination of claims for permanent impairment compensation by accredited medical assessors whose assessments, in the event of a dispute, are intended to be binding. Legal practitioners now have to deal with a new approach to claims procedures that emphasize the avoidance of disputes, the early acceptance of liability and administrative processes designed to exclude or minimise relatively small claims and that provide limited avenues of formal review or appeal.

(a) Workers Compensation

Under the raft of legislative measures introduced in 2001 to give effect to the Government's reforms of the NSW WorkCover Scheme, the 'whole person' impairment approach with assessment under administrative guidelines, has been adopted for lump sum compensation for

permanent impairment (s 66), compensation for pain and suffering (s.67) and where access to common law damages is permitted.

Amendments to the *Workers Compensation Act 1987* (**WCA 1987**) (made primarily by the *Workers Compensation Legislation Amendment Act* 2001 No 61) provide that a worker who receives an injury that results in permanent impairment is entitled to receive from the worker's employer lump sum compensation for that permanent impairment as provided by s 66 WCA 1987. The amount of permanent impairment compensation is to be calculated under s 66 on a sliding scale as it was in force at the date the injury was received. (The maximum amount of compensation payable is $200,000 if the degree of permanent impairment is greater than 75%.) Permanent impairment compensation is ***in addition*** to any other compensation payable under the workers compensation legislation. For example, compensation for pain and suffering (not exceeding $50,000) is payable where the worker receives an injury that results in a degree of permanent impairment of 10% or more (s 67 WCA 1987). Pain and suffering compensation for permanent impairment arising from psychological injury is not payable unless the injury is a "primary psychological injury" (as defined) and the degree of permanent impairment arising from the injury is 15% or more (s 65A WCA 1987).

In determining compensation payable for non-economic loss, the degree of permanent impairment that results from an injury is to be assessed as provided for by s 65 WCA 1987 and Part 7 of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998* (**WIM 1998**). [By reason of s.2A WCA 1987, that Act is to be read as if it forms part of WIM 1998.] If there is a dispute about the degree of permanent impairment suffered by a worker, the Workers Compensation Commission may not award permanent impairment compensation unless an approved medical specialist has assessed the degree of that impairment (s.65(3) WCA 1987).

Certain kinds of compensation payable under WCA 1987 (or WIM 1998) may be commuted to a lump sum as provided by the legislation (eg weekly payments of compensation): see s 87E WCA 1987. However, the commutation entitlement is subject to a number of conditions (or "pre-conditions") as set out under s 87EA, including, the condition that the WorkCover Authority "is satisfied that, and certifies that it is satisfied that the injury has resulted in a degree of permanent impairment of the injured worker that is at least 15% (assessed as provided by Part 7 of Chapter 7 of the WIM 1998 Act)".

The Authority may refer a matter that is subject to a commutation application for assessment by a medical assessor as if it were referred for such assessment upon a dispute. The Authority may delegate any of the Authority's functions in this regard to an insurer: s 87EA(4). Under s 87F, subject to certain conditions, a liability may be commuted to a lump sum with the agreement of the worker whereupon that agreement (including an agreement ***purporting*** to be a commutation agreement) is not subject to review or challenge in proceedings before the Worker's Compensation Commission or a court.

In implementing the recommendations of the Sheahan Report dated 31 August 2001(resulting from the ***Commission of Inquiry Into Workers Compensation Common Law Matters***), the workers compensation scheme modified or curtailed the availability of common law damages where an employer was negligent or otherwise tortiously liable. It did this by imposing limits on the time during which a common law action for damages can be commenced and limiting

such actions to the recovery of particular heads of damage.

Section 151D WCA 1987 provides that a person to whom compensation is payable under the Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation more than 3 years after the date on which the injury was received, except with the leave of the court in which the proceedings are to be taken. However, time does not run for the purposes of section 151D until certain things have occurred or steps taken, including while a medical dispute exists as to whether the degree of permanent impairment of the injured worker is at least 15%, (or whether the degree of permanent impairment of the injured worker is fully ascertainable) and is the subject of a referral for assessment under Part 7 of Chapter 7 of WIM 1998.

Section 151G of the WCA 1987 provides that the only damages that may be awarded in an action by the worker[1] are damages for past economic loss due to loss of earnings and damages for future economic loss due to the deprivation or impairment of earning capacity. There is no entitlement to damages for pain and suffering. Moreover, no damages may be awarded unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least **15%** (s 151H). In assessing the degree of permanent impairment that results from a physical injury, no regard is to be had to any impairment or symptoms resulting from a psychiatric or psychological injury. The degree of permanent impairment that results from an injury is to be assessed by a medical assessor as provided for under Part 7 of Chapter 7 of WIM 1998.

(b) Motor Accidents Scheme

The *Motor Accidents Act 1988* sought to reduce and control the amount of damages payable for non-economic loss by providing for a deductible to be subtracted from non-economic loss damages and providing for a threshold level of severity of non-economic loss of 15%, below which no damages for such loss would be awarded. A "verbal threshold" also required an injured person's capacity to lead a normal life to have been significantly impaired for a period of 12 months. Other measures placed restrictions on the availability of damages for gratuitous domestic assistance and the availability of interest.

Under the *Motor Accidents Compensation Act 1999* ("**the MAC Act**"), the threshold was altered to provide for the objective medical assessment of impairment, again aimed at ensuring that general damages are paid only in the more serious cases. The requirement is for above 10% whole body permanent impairment.

A feature of the 1999 motor accidents scheme is that impairment is to be assessed by persons appointed under Part 3.4 of the MAC Act as medical assessors. A court may, at any stage in proceedings for an award of damages for non-economic loss, refer the matter for assessment of the degree of permanent impairment by a medical assessor (s.132, MAC Act). The assessment of the degree of permanent impairment is to be made in accordance with guidelines issued by the Motor Accidents Authority under the MAC Act ("the ***MAA Medical Guidelines***") or, if no such guidelines are in force, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition ("the

1 Section 151G does not apply to an award of damages in an action under the *Compensation to Relatives Act 1897*

American Guidelines"). The MAA may adopt the provisions of other guidelines (and, to date, as expected, it has largely based its guidelines on the American Guidelines to produce a set of comprehensive guidelines on the assessment of permanent impairment). In applying the MAA Medical Guidelines and assessing the degree of permanent impairment of a person injured in a motor accident, an assessor cannot have regard to any psychiatric or psychological injury or impairment (or symptom) unless the assessment is made "solely" with respect to the result of such an injury (s. 133(3), MAC Act).

The medical assessor to whom a medical dispute is referred must issue a medical certificate which is "***conclusive evidence***" as to:

(a) whether the injured person has sustained permanent impairment of more than 10%;

(b) whether any treatment already provided was reasonable and necessary; or

(c) whether an injury has stabilized.

However, a court may reject a certificate issued by a medical assessor (solely) on the grounds of a denial of procedural fairness to a party to the proceedings and if the court is satisfied that admission of the certificate would cause "substantial injustice" to that party (s 61(4), MAC Act).

In addition, the MAC Act introduced a semi-compulsory system of MAA-based claims resolution. The Claims Assessors of the MAA's unit known as the Claims Assessment and Resolution Service ("**CARS**") deal with referred disputes and conduct hearings.

Claims assessors are officers of the Motor Accidents Authority of NSW ("**the MAA**") who are "designated" (not appointed) as constituting claims assessors within the meaning of section 99 of the MAC Act. They are officers within CARS, which is itself a "unit" of the Authority established pursuant to s 98 of the MAC Act. Claims assessors have some limited civil protection in section 103 (1) of the Act and are subject to the general control and direction of the Principal Claims Assessor ("the PCA") in the exercise of their functions (s105(3)) but not in relation to the actual making of particular assessments (s105(2)).

Unless a dispute is exempted from the CARS resolution process by section 92 (whereupon Court proceedings will usually be commenced for a determination of liability and damages), most disputes will be determined by claims assessors.

Claims assessors have one primary duty - to assess claims referred to the MAA by the claimant or the insurer (s 90) and then, in turn, referred to the claims assessor by the Principal Claims Assessor pursuant to section 93.

The duty is expressed in an unusual fashion in section 94(1) of the MAC Act. A claims assessor is to "make an assessment" of the "issue of liability for the claim (unless the insurer has accepted liability), and the amount of damages for that liability". Also, in section 96, "*special assessments*", the requirement is simply that the referred dispute "is to be assessed". There is no guidance in the MAC Act as to how those assessments are to be made or as to what standard of proof ought to be applied, if any.

In any event, the nature of the power being exercised by the claims assessors is administrative, or executive power, which is amenable to judicial review in the Supreme Court of NSW.

Section 97 of the MAC Act is the regulation-making power and it provides, *inter alia*, for the making of regulations concerning the making of assessments. However, there are no such regulations at the moment (although, there are regulations regarding costs assessments).

By section 106 of the MAC Act, claims assessments under Part 4.4 of the Act (ss 88 to 106) are "subject to" the relevant provisions of MAA Claims Assessment Guidelines relating to those assessments. Provision for the making of such guidelines is found in section 69 which provides, *inter alia*, that the MAA may issue guidelines from time to time with respect to "procedures for the assessment of claims under Part 4.4 and associated matters".

Such guidelines for the procedures for assessing claims were promulgated in June 2002 and are styled "*Claims Assessment Guidelines*". They must be followed to the letter by claims assessors as if they were delegated legislation (see, in relation to the MAS Medical Guidelines, *NRMA Insurance Ltd v Motor Accidents Authority of NSW* [2004] NSWSC 567 at [10] - [14] & [26] - [28], Dunford J)). Having said that, paragraph 4 of the Explanatory Note to the Guidelines provides that:

> "These Guidelines are primarily intended to guide the officers of the MAA, members of the legal profession and the insurance industry. Easy to understand information directed towards claimants who wish to represent themselves will be available from the MAA."

Claims assessors are empowered under the Act to conduct "*assessment conferences*" - described widely in section 104 of the Act, as "*any conference or other proceeding held with or before a claims assessor*" - at which the parties attend.

They are also empowered to give a direction in writing to a party to require them to provide specified documents or information to the assessor (section 100). This is a kind of limited summons power. They are also empowered to give documents or information that was furnished to them pursuant to section 100 to the other party (section 101). There is an additional power to "summons" a party (and only a party) to attend an assessment conference (section 102).

Apart from powers to make decisions, or assessments, referred to above, these are all of the powers of the claims assessors under the MAC Act.

More guidance as to the powers of a claims assessor is derived from the Claims Assessment Guidelines. In particular, Chapter 9 of the MAC Act deals with the allocation of matters to assessors, Chapter 10 deals with assessment procedure, Chapter 11 deals with documentation and other supporting material, Chapter 12 deals with preliminary assessments and Chapter 13 deals with the assessment conferences.

Under the guidelines, the claims assessor notifies the parties of the way in which the assessment is to proceed and there is usually held an assessment conference where both

parties appear to give "evidence"(as it is referred to at guideline 13.4). Witnesses for the parties may appear and give evidence. However, only the claims assessor may question the witnesses and they cannot be compelled to answer (guideline 13.4). A party's legal representative or agent may question a witness only with leave of the claims assessor. In addition, there are limits to the number of medical expert reports that an assessor may take into account (guideline 13.9).

Once a CARS assessment has been made, section 95 of the MAC Act provides that any assessment on liability is not binding on any party. However, any assessment as to quantum of damages is binding on the insurer if it has accepted liability and the claimant accepts the amount of damages within 21 days.

From this brief overview of developments under the motor accidents scheme, it can readily be seen that the wholly administrative-based WorkCover scheme has adopted some of the features of the motor accidents scheme including a similar approach to the provision of binding medical assessments by approved medical assessors. In the latter respect, however, the WorkCover scheme has not expressly provided for the rejection of a medical assessment on any administrative law grounds.

Medical assessment under the WorkCover Scheme

The president of the Workers Compensation Commission appoints approved medical specialists ("**AMS**").

Medical disputes may be referred for assessment to an AMS by a court, the Commission or the Registrar either of their own motion or at the request of a disputing party (s 321 of WIM 1998). All disputed permanent impairment claims must be referred to an AMS who must make his/her assessment in accordance with WorkCover Guidelines issued for that purpose.

Pursuant to s 326 of WIM 1998, an opinion certified in a medical assessment certificate issued by an AMS is "***conclusively presumed to be correct***" in respect of:

(a) the degree of permanent impairment;

(b) whether any "proportion" (sic) of permanent impairment is due to a pre-existing injury, condition or abnormality;

(c) the nature and extent of hearing loss suffered by a worker; or

(d) whether the degree of permanent impairment is ascertainable.

Section 327 of WIM 1998 provides for limited appeal rights to a panel of two AMSs and an arbitrator, if:

(a) there is a deterioration of the worker's condition;
(b) new information is available which was not previously available;
(c) the assessment was made on the basis of incorrect criteria; or
(d) the assessment contains a demonstrable error.

The procedure for such appeals and the seminal role (the "Gatekeeper" role) of the WCC Registrar in relation to the availability of these appeal rights is discussed in more detail later in this paper.

Workers Compensation Commission's Jurisdiction

The jurisdiction of the Commission extends to all matters in dispute except, it seems, for questions as to the worker's condition (including prognosis, aetiology and treatment) and fitness for work. The Commission can be expected to refer all medical disputes arising in proceedings before it to an AMS. However, it is not at all clear from the legislation whether there is some residual power in the hands of the Commission to deal with some aspects of a medical dispute itself or whether only an AMS may determine all aspects of a medical dispute. The decision of the Commission is final and binding subject to the appellate processes, which involve the president, presidential members and (in some situations) the Court of Appeal (see s 350 of WIM 1998).

What is reasonably clear from the scheme of the legislation is that arbitrators are meant to be the main "tribunal" forum in this jurisdiction. An arbitrator must not make an award or determination until the arbitrator has used his/her "best endeavours" to resolve the dispute through conciliation (s 355 WIM 1998).

The genesis of many of the provisions pertaining to the claims procedures set out in Part 9 of WIM 1998 appears to be legislation for the settlement of industrial disputes. An arbitrator may, with leave of the President, refer a novel or complex question of law to the President for determination (s 351 WIM 1998).

The Commission (constituted by a Presidential member) may also "review" the decision of an arbitrator upon granting leave to an aggrieved party (s 352 WIM 1998), with no rights for the parties to adduce further evidence. The arbitrator's decision (even an interim or interlocutory decision) may be confirmed or may be revoked and a new decision made in its place. Alternatively, the matter may be remitted back to the Arbitrator concerned, or to another Arbitrator, for determination in accordance with any decision or directions of the Commission (s 352(7) WIIM 1998).

It is a live issue as to whether or not this kind of "review" is considered a true appeal de novo (that is by way of re-hearing) – If the Supreme Court decision regarding appeals to an Appeal Panel of AMS decisions is applied, the Commission's review or arbitrator decisions will likely be held to be a full de novo appeal - see, *Campbelltown City Council v Vegan* [2004] NSWSC 1129 at [77] to [80] (Wood CJ at CL).

As such, the Commission should conduct a merits review of the arbitrator's decision by "standing in his or her shoes" and making the decision afresh. The alternative construction would be that the Commission will conduct the "review" essentially on the basis of the material that was before the arbitrator and, confine his/her review to determining whether the first instance decision is affected by significant legal or factual error.

Judicial Review of Administrative Action in NSW

(a) Framework and Procedure

The jurisdiction of the superior courts by way of judicial review of administrative action is a jurisdiction that has been developed by the courts in accordance with the common law or general law.

Judicial review of administrative decisions 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 set aside the decision, declare the decision invalid or void or, in some cases, 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 consequence is that, in so far as decisions of most public bodies and officials made or required to be made under statute are concerned, there are a large number of grounds upon which applications for judicial review may be made. These grounds are still evolving and many of them overlap.

And so, 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 jurisdictional error of law. Moreover, as the High Court has indicated,[2] the obligation to accord procedural fairness may well stem from the common law; 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). 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.

Later sections of this paper identify some areas of the modern Workcover/Workers Compensation Commission scheme where administrative decisions might be amenable to judicial review. Similarly, the decisions made by the MAA and its medical assessors and medical Review Panels and CARS assessors will also be considered in the context of possible judicial review.

In NSW, it may be open to an aggrieved party under both schemes to seek relief by way of an application for judicial review in the Supreme Court – usually in the ***Administrative Law List*** of the Common Law Division of the Court. To this end, practitioners need to be aware of Practice Note 119 dated 2 May 2001 which explains the operation of the Administrative Law List (ALL) and the provisions of Part 14D of the Supreme Court Rules. It should be noted

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

that this Practice Direction (and the rules governing the conduct of the Administrative Law List) will be substantially revised shortly.

In invoking the common law jurisdiction of the Court to seek administrative law relief in relation to decisions made under the Workcover scheme, proceedings appropriate for the Administrative Law List should be commenced in that list by way of summons.

In the ordinary course, a directions hearing will be convened. At that hearing, an interlocutory 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 reasoning processes leading to the decision". It can be readily 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" may be an extremely useful forensic tool or weapon.

It might well flush out, for example, an egregious misunderstanding by an AMS or the (section 327 WIM 1998) 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.

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 agreeeing), 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).

In *Campbelltown City Council v Vegan* [2004] NSWSC 1129 (at [94] to [100])(Wood CJ at CL), the Supreme Court held that the Workers Compensation Commission's medical Appeal Panel was <u>not</u> required to set out reasons for its decisions on review assessments made pursuant to section 328 of the WIM 1998 Act (notwithstanding it did in fact set out brief reasons for its determination on the review in that case).

(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] HCA 24, 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 (considered below).

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 - *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;
12 manifest irrationality or illogicality; and

13 failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker's power.

Irrationality and Illogicality

A recently emerging 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 1165. It 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 that the ground would ordinarily be able to be established. While the ground is now established in the High Court's "constitutional writ" jurisdiction, it would also apply in the NSW Courts.

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] NSWCA 422 at [92]).

Privative or Ouster Clauses

Privative clauses are also known as ouster clauses. They are an attempt by the legislature to oust the jurisdiction of the Supreme Court (or any court) in possible judicial review proceedings. An example of an ouster or privative clause in New South Wales is s301 of the *Industrial Relations Act* 1991, which related to the then NSW Industrial Court. It was considered in *Walker v Industrial Court of NSW* (1994) 53 IR 121 (Court of Appeal - Kirby P (in dissent), Meagher and Sheller JJA) where it was held the ouster clause did not render a decision of the Industrial Court immune from review by the Supreme Court where the decision was made without jurisdiction. Any such decision was only rendered immune from non-jurisdictional error (*ibid* at 149). The Court applied the High Court's difficult distinction between jurisdictional error and non-jurisdictional error as discussed in *Public Service Association of South Australia v Federated Clerks' Union of Australia* (1991) 73 CLR 132 (see also *Craig v South Australia* (1995) 184 CLR 163).

A privative clause, such as the one that appears in s 350 of the WIM 1998 Act, might still be effective if the Hickman principles are applied to it. Those principles are derived from *The King v Hickman: Ex parte Fox* (1945) 70 CLR 598 at 614-615 where Dixon J stated:

> "The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary Constitution, the interpretation of provisions of the general nature of reg. 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."

That decision was accepted by the High Court in recent times; eg, *The Queen v Coldham* (1982) 153 CLR 415 at 421-422, 428; *O'Toole v Charles David Pty Limited* (1991) 171 CLR 232 at 248, 274, 286; and *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; and *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, at 631-632.

However, in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, the High Court indicated that it would take a significantly tougher line regarding privative clauses and narrowly construe them in such a fashion that any decision involving a jurisdictional error is not to be regarded as a "decision" at all within the meaning of the enabling Act and would not be caught by the privative clause (211 CLR at 508 [83]). The Court did not encourage the use of or application of the *Hickman* principles and confined them to more serious cases where the terms of the Act required a "reconciliation" between possibly competing powers and duties in the terms of the Act.

Whatever might be held to be the scope of privative clauses generally, the Courts have traditionally had no hesitation in the past in finding jurisdictional error in appropriate cases.

In *Hockey v Yelland* (1984) 157 CLR 124 the Court considered judicial review of decisions of the medical panel, called the Neurology Board, in the Queensland workers compensation scheme. Such decisions were supposed to be "final and conclusive" under the Act. However the Court held expressly that decisions of the Board (and in particular, decisions of the kind that could not be "quashed or called into question" as that identified in section 350 of the WIM 1998 Act) were able to be reviewed for jurisdictional error (see, esp. page 130).

In the recent case of *Re McBain; Ex parte Australian Catholic Bishops Conference*, (2002) 209 CLR 372, Kirby J stated (at [173]):

> *"The unsatisfactory distinction between an "error within jurisdiction", "jurisdictional error" (including a constructive failure to exercise jurisdiction) and "non-jurisdictional error" has been noted in many cases. The distinction, always elusive to judges, has been abolished in England. However, it has not been discarded by this Court. The given explanation for its retention in this Court's doctrine is the separation, envisaged by the Constitution, between federal judicial power and other governmental powers conferred by or under the Constitution and hence the suggested need to preserve the concept of "jurisdictional error"."* (footnotes omitted)

The latter consideration mentioned by Kirby J applies only to the Commonwealth. It does not apply to the State constitutional arrangements where there is no bright line between judicial and administrative/governmental powers. Accordingly, it may be that the distinction between an "error within jurisdiction" (a non-jurisdictional error) and a "jurisdictional error" might not be held to matter in New South Wales.

Workers Compensation Scheme
Areas of Decision-Making Amenable to Judicial Review

The primary avenues of administrative law remedies and appeals in the modern workers compensation scheme lie in the areas of:

(1) **Internal appeals** from decisions of the Registrar or arbitrators (or non-Presidential members) of the Workers Compensation Commission ("the Commission"): such decisions are:

- "final and conclusive" (s 350 of the WIM 1998 Act) except for the following;
- limited appeals to the Commission constituted by a Presidential member with leave by way of a "review" of the correctness of the decision (s 352 of the WIM 1998 Act);
- note that questions of law may be referred by arbitrators up to a Presidential member with leave of the President (s 351 of the WIM 1998 Act).

(2) **Limited appeals to the NSW Court of Appeal** from decisions of the Commission constituted by a Presidential member "in a point of law" only (s 353 of the WIM 1998 Act). Appeals on the merits of a particular case are not permitted under the scheme. Some Presidential member decisions are only able to be appealed with leave of the Court of Appeal, eg when the amount of compensation in dispute is less than $20,000 (s 353(4) of the WIM 1998 Act).

(3) **Challenges to administrative decisions made by the Registrar** and other officers of the of the Commission (not when giving directions (under s 375(2) of the WIM 1998 Act) in particular matters) in a number of areas concerning administration of the Acts (eg: for decisions made under the Acts, Regulations and Guidelines).

(4) **Challenges to and appeals from administrative decisions made by Approved Medical Specialists** (medical practitioners appointed under Part 7 of the WIM 1998 Act as approved medical specialists) for a number of binding decisions made under the WIM 1998 Act, the Regulations and Guidelines.

Judicial Review of decisions of the Workers Compensation Commission Registrar or Arbitrators

In respect of those decisions where an internal appeal or an application to the Court of Appeal under the WIM 1998 Act is not available, judicial review of the decisions is often available, provided that the Court is able to deal with the privative clause in section 350 of the WIM 1998 Act. Section 350 of the WIM 1998 Act provides:

*"**Decisions of Commission***

(1) *Except as otherwise provided by this Act, a decision of the Commission under the Workers Compensation Acts is **final and binding on the parties and is not subject to appeal or review***

.

(2) *A decision of or proceeding before the Commission is* **not***:*

(a) *to be vitiated because of any informality or want of form, or*

(b) *liable to be **challenged, appealed against, reviewed, quashed***

or called into question by any court.

(3) The Commission may reconsider any matter that has been dealt with by the Commission and rescind, alter or amend any decision previously made or given by the Commission." (my emphasis)

This provision in very similar in terms to the *Migration Act* 1958(Cth) privative clause considered by the High Court in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

In *Campbelltown City Council v Vegan* [2004] NSWSC 1129 at [31] to [36] (Wood CJ at CL), the Supreme Court held that AMS and the medical Appeal Panel did not constitute "the Commission" for the purposes of the privative clause in section 350 of the WIM 1998 Act.

Challenges to Administrative Decisions of the Workers Compensation Commission Registrar

When the Registrar gives directions under s 375(2) of the WIM 1998 Act in particular matters, the officer is acting as a Commission so constituted for particular proceedings. Decisions made by the Registrar in that capacity are final and conclusive (s 350 of the WIM 1998 Act). Notwithstanding this, they are still amenable to judicial review for jurisdictional error (eg: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476).

However, there are a raft of administrative decisions to be made by the Registrar or the Registrar's delegate (delegated under s 371(2) of the WIM 1998 Act) from time to time that are each amenable to judicial review and that are not appropriately characterised as "Commission decisions" (and they are therefore arguably not final and conclusive under the WIM 1998 Act) (such as in *Campbelltown City Council v Vegan* [2004] NSWSC 1129 at [33]).

Some brief examples of Registrar decisions that may be subject to judicial review are as follows:

<u>Under the WIM 1998 Act</u>

(1) Decisions to exert general control over direction of Arbitrators (s 372 of the WIM 1998 Act);

(2) Giving of interim payment directions under Part 5 ("Expedited Assessment"), Chapter 7 (New Claims Procedure) (ss 295-310) of the WIM 1998 Act. NB: s 296(2) of the WIM 1998 Act provides that the exercise of any function of the Registrar under Part 5, Chapter 7 is not subject to appeal or review;

- The Registrar may in certain urgent cases make an expedited assessment and direct an employer to commence limited weekly payments and make limited past weekly payments. Under Part 5, Chapter 7 it is an offence not to make the so directed payment and it is deemed not to be an admission of liability to make it.

(3) Recommending that a party to a dispute concerning Chapter 5 of the WIM 1998 Act ("Workplace Injury Management") take specified action, being action that the Registrar considers necessary or desirable to remedy the failure with which the dispute is concerned (s 307 of the WIM 1998 Act). Such disputes may be referred to the Commission, but it might be preferable in some cases to seek to challenge the Registrar's decision before the decision is referred to the WorkCover Authority of the Commission under the Act. Chapter 3 concerns, for example, employer injury management programs and providing suitable work for injured workers.

(4) The manner and timeliness in which disputes referred to the Registrar are dealt with by the Registrar (eg s 293 of the WIM 1998 Act);

(5) Decisions affecting the process and procedure of obtaining a medical assessment under Part 7, Chapter 7 of the WIM 1998 Act. Medical assessments by "approved medical specialists" appointed under s 320 of the Act are crucial in the new scheme in:

- determining medical disputes (as defined in s 319 of the WIM 1998 Act);

- issuing medical assessment certificates that are "conclusively presumed to be correct" (s326 of the WIM 1998 Act) (and which are binding in a court or the Commission) as to:

    - the degree of permanent impairment of the worker as a result of an injury,

    - whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,

    - the nature and extent of loss of hearing suffered by a worker,

    - whether impairment is permanent, or

    - whether the degree of permanent impairment is fully ascertainable.

(6) Registrar decisions amenable to review in the medical assessment process under Part 7 Chapter 7 of the WIM 1998 Act include:

    - decisions to refer the medical dispute for assessment (s 321(1));

    - decisions to appoint a particular approved medical specialist to determine the dispute (s 321(2));

    - decisions to correct medical assessment certificates by reason of "obvious error" appearing on the certificate (s 325(3);

- "gateway" decisions of the Registrar to allow an appeal against a medical assessment to proceed or to allow for a further medical assessment and to determine extension of time applications (ss 327 & 329 of the WIM 1998 Act) (eg: *Campbelltown City Council v Vegan* [2004] NSWSC 1129).

Under the Guidelines

(7) Registrar decisions relating to interim payment directions under the *WorkCover Interim Payment Direction Guidelines* made under s 376(1) of the WIM 1998 Act (December 2001);

(8) Registrar decisions relating to the WorkCover Medical Assessment Guidelines made under section 376(1) and s 331 of the WIM 1998 Act (December 2001) ("**the Medical Assessment Guidelines**"). Decisions that may be amenable to challenge here include:

- appointment of an approved medical specialist (clause 5.1);
- the creation of forms with specific content (clause 16);
- reviewing and correcting a medical certificate (clause 17); and
- decisions on applications to review of appeal the assessment (Chapter E)

The "gateway" decisions of the Registrar to allow an appeal against a medical assessment to proceed or to allow for a further medical assessment and to determine extension of time applications (ss 327 & 329 of the WIM 1998 Act) are of crucial importance to the fairness and effectiveness of the new workers compensation system (cf: the objects in s 3(d) & (f) of the WIM 1998 Act).

Under s 327 of the WIM 1998 Act, appeals to an Appeal Panel (comprised of two approved medical specialists and one arbitrator - s 328) may only be made as to that part of the certificate that is deemed by s 326 of the Act to be conclusively presumed to be correct and **only** on four specified grounds.

The only available grounds of appeal (or the basis for a second or further assessment) are - s 327(3):

(a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,

(b) availability of additional relevant information (being evidence that was not available to the appellant before the medical assessment appealed against or that could not reasonably have been obtained by the appellant before that medical assessment),

(c) the assessment was made on the basis of ***incorrect criteria***,

(d) the medical assessment certificate contains a ***demonstrable error***.

Section 327(4)-(6) provides for the said crucial power of the Registrar in the following terms:

> "(4) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless it ***appears to the Registrar*** that at least one of the grounds for appeal specified in subsection (3) exists.
>
> (5) If the appeal is on a ground referred to in subsection (3) (c) or (d), the appeal must be made within 28 days after the medical assessment appealed against, unless the ***Registrar is satisfied*** that ***special circumstances*** justify an increase in the period for an appeal.
>
> (6) If the appeal is on a ground referred to in subsection (3) (a) or (b), the Registrar may refer the medical assessment for further assessment under section 329 as an alternative to an appeal against the assessment." (my emphasis)

Challenges to Administrative Decisions of Approved Medical Specialists of the Workers Compensation Commission

Approved medical specialists are medical practitioners appointed by the President of the Commission under s 320 of the WIM 1998 Act as approved medical specialists. Under that section, the President is to appoint them only in accordance with criteria developed by the Minister in consultation with the Workers Compensation and Workplace Occupational Health and Safety Council of NSW. The President is to ensure they have the proper facilities and the WorkCover Authority may arrange for the provision of training and information to approved medical specialists to promote accurate and consistent assessments under Part7 Chapter 7 of the Act.

Approved medical specialists undertake medical assessments of disputes under Part 7 ("Medical Assessment"), Chapter 7 (New Claims Procedure) (ss 319-331) of the WIM 1998 Act.

Medical assessment certificates are then issued that are conclusively presumed to be correct, as set out earlier in this paper.

The issuance of the certificate is central to and underpins the entire new workers compensation scheme.

It is required if there is any real dispute between employer/insurer and the injured worker. It is required before any application for common law damages can be determined where an approved medical specialist must assess the degree of permanent impairment of the injured worker resulting from an injury (s 313 of the WIM 1998 Act). The worker must achieve an assessed degree of permanent impairment of at least 15% of whole person impairment in order to be entitled to seek common law damages.

Decisions of approved medical specialists that may be amenable to judicial review and/or

administrative challenge (by way of appeal under s 327 of the WIM 1998 Act) include the following (subject to the proviso that, ordinarily, if a sufficient appeal is provided for within the enabling Act, the Supreme Court might not entertain a judicial review action as a matter of its discretion – see, eg: *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501):

(1) Making a medical assessment on the basis of "incorrect criteria" or that contained a "demonstrable error" (However, this would plainly found a basis for an appeal under s 327 of the Act).

(2) Failing to consult with any medical practitioner or other health care professional who is treating or has treated the worker (an approved medical specialist may do this under s 324(1)(a) of the WIM 1998 Act and clause 10 of the Medical Assessment Guidelines).

(3) Failing to call for the production of "necessary or desirable" medical records (including X-rays and the results of other tests) and other information for the purposes of assessing a medical dispute (an approved medical specialist may do this under s 324(1)(b) of the WIM 1998 Act and clause 10 of the Medical Assessment Guidelines).

(4) Failing to undertake an examination of the injured worker (an approved medical specialist may do this under s 324(1)(c) of the WIM 1998 Act and clause 10 of the Medical Assessment Guidelines).

(5) Decisions (assessments) made under the WorkCover Guidelines - s 322(1) of the WIM 1998 Act. The Act requires assessments of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts to be made in accordance with WorkCover Guidelines issued for that purpose. The guidelines that are applicable (assuming them to be properly made and valid) include:

- Work Cover Guides for the Evaluation of Permanent Impairment, first edition, June 2002, made under s 376 of the WIM 1998 Act for the purposes of section 322(1) of that Act ("**the Permanent Impairment Guidelines**").

- *WorkCover Medical Assessment Guidelines* made under section 376(1) and s 331 of the WIM 1998 Act ("**the Medical Assessment Guidelines**").

(6) Decisions in an assessment of permanent impairment to make an "assumed" deduction for previous injury or pre-existing condition or abnormality on 10% impairment. Section 323 of the WIM 1998 Act relevantly provides:

"323(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the WCA 1987 Act) or that is due

to any pre-existing condition or abnormality.

(2) If the extent of a deduction under this section (or a part of it) will be ***difficult or costly to determine*** (because, for example, of the absence of medical evidence), ***it is to be assumed*** (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.

Note. So if the degree of permanent impairment is assessed as 30% and subsection (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).

(3) The reference in subsection (2) to medical evidence is a reference to medical evidence ***accepted or preferred by the approved medical specialist*** in connection with the medical assessment of the matter.

(4) The WorkCover Guidelines may make provision for or with respect to the determination of the deduction required by this section." (my emphasis)

(7) Failing to state reasons or to adequately or properly state reasons for an assessment and the facts on which that assessment is based as required under section 325 of the WIM 1998 Act and clause 16 of the Medical Assessment Guidelines. Failure to state reasons or set out the relevant facts might well constitute an error of law or render the decision procedurally ultra vires. Section 325(2) of the WIM 1998 Act provides:

"(2) A medical assessment certificate is to be in a form approved by the Registrar and is to:

(a) set out details of the matters referred for assessment, and
(b) certify as to the approved medical specialist's assessment with respect to those matters, and
(c) set out the approved medical specialist's reasons for that assessment, and
(d) set out the facts on which that assessment is based."

In *Campbelltown City Council v Vegan* [2004] NSWSC 1129 (at [94] to [100])(Wood CJ at CL), the Supreme Court held that the Workers Compensation Commission's medical Appeal Panel was <u>not</u> required to set out reasons for its decisions on review assessments made pursuant to section 328 of the WIM 1998 Act.

Conclusions on Administrative Law Challenges in the Workers Compensation Scheme

The majority of Supreme Court administrative law disputes regarding the Workers Compensation scheme will likely revolve around applications to the medical Appeals Panel

and for applications seeking further assessment. These challenges would involve judicial determination on the question what it means for an approved medical specialist to make an assessment on the basis of "incorrect criteria" or that containing a "demonstrable error".

In time, I also expect the validity, application and proper interaction of the various workers compensations guidelines to be considered by the Supreme Court or the Court of Appeal.

The content and scope of natural justice and the manner of according procedural fairness by the approved medical specialists, the Appeal Panel, the Registrar and the Commission might also receive consideration by the Court in due course.

The significant amount of judicial review activity in the Western Australian Supreme Court should be noted in relation to decisions of the Medical Assessment Panel and "gateway" decisions of the equivalent of the Registrar (known as the Director, Conciliation and Review Directorate in WA). A "gateway" decision was challenged in relation to a decision to refer new evidence to the Medical Assessment Panel in *In the Matter of Monger; Ex parte Rock Engineering (Aust) Pty Ltd*, unreported, 22/01/1998 SCWA, CIV1551/97 (Kennedy, Pidgeon and Ipp JJ). Decisions successfully quashing the whole or part of WA's Medical Assessment Panel include: *Ansett Australia Ltd v Medical Assessment Panel* (1998) 19 WAR 395 (Pidgeon, Wallwork and Owen JJ); *Re Hales; Ex parte Barr*, unreported, BC 200008518; [2001] WASCA 89 (Malcolm CJ, Kennedy and Pidgeon JJ); *Re Gillett; Ex parte Rusich*, unreported, BC 200101604; [2001] WASCA 111 (Ipp, Murray and Miller JJ); *Re Anastas; Ex parte Welsby*, unreported, BC 200103926; [2001] WASC 178 (McLure J); *Re Babban; Ex parte Suleski*, unreported, BC 200105856; [2001] WASCA 289 (Kennedy, Wallwork and Steytler JJ); and *Re Croser; Ex parte Rutherford*, unreported, BC 200108159; [2001] WASCA 422 (Murray, Steytler JJ and Olsson AUJ).

Some of these decisions were considered (and distinguished) by the NSW Supreme Court in the context of a medical Appeal Panel in *Campbelltown City Council v Vegan* [2004] NSWSC 1129 at [88] to [89] (Wood CJ at CL).

While it is true to say in New South Wales that a door has closed on an important and significant area of legal work (that once flourished in the NSW Compensation Court), a close examination of the new scheme from an administrative law perspective reveals that another door is well and truly open.

As at the time of writing, I understand that there is already some significant further administrative law litigation on its way in NSW in this area. The *Vegan* case is on appeal to the Court of Appeal (to be heard on 24 October 2005). There are challenges to decisions of the Registrar before the Court and numerous challenges to medical Appeal Panel decisions (many of them following on from *Vegan*).

The Motor Accidents Scheme
Administrative Law Challenges

There has been some administrative law activity in recent years in the conduct of the MAA's motor accidents scheme. Examples include District Court litigation pursuant to section 61(4) of the MAC Act (on questions of procedural fairness and substantial injustice):

Yacoub v Nguon, unreported, District Court of NSW at Sydney, Gibb DCJ, 29 April 2005, (matter No 3770 of 2003) – where the MAA appeared as amicus curiae and made submissions;
Miahlopoulos v Van Huen Vu, unreported, District Court of NSW at Sydney, Garling DCJ, 23 April 2004 (matter No 6129 of 2003);
Catsicas v Mullaney, unreported, District Court at Newcastle, Sidis DCJ, 30 July 2004 (No 17 of 2003); and,
El Debal v Network Welding Pty Ltd, unreported, District Court at Sydney, Christie ADCJ, 14 December 2004 (No 8848 of 2001) (the relevant pages relating to the section 61(4) "rejection" are: pages 32.5, 33.7 and 34.1).

In addition, there is a Supreme Court administrative law challenge under way at present to challenge the validity of a "gateway" decision of the "proper officer" of the MAA pursuant to section 63(3) of the MAC Act to refuse to refer a medical assessment to a Review Panel of at least 3 medical assessors as the proper officer was not satisfied that there was "reasonable cause to suspect that the medical assessment was incorrect in a material respect".

One issue waiting to be determined by the NSW Court of Appeal is the question whether medical assessors (and their deliberations and communications with the MAA on draft medical assessments) are protected by public interest immunity under the common law, sections 130 of the *Evidence Act* 1995 (NSW) and/or provisions of the District Court and Supreme Court rules relating to the said privilege. The issue was argued before the court on 11 July 2005 in *Dr Ryan v Watkins*, matter No 40955 of 2004 (on appeal from *Dr Ryan: Re Watkins*, unreported, 14 October 2004, District Court of NSW at Newcastle NO 642 of 2003 Sidis DCJ).

That case also concerns the appropriateness of and implications of a party tendering medical assessments in District Court compensation proceedings that contain "non-conclusive" assessments under the MAC Act.

One other challenge was on a question of the proper construction of the MAC Act, and the MAA Medical Guidelines (the Permanent Impairment Guidelines) in respect of deceased persons who had earlier made a claim. In *NRMA Insurance Ltd v Motor Accidents Authority of NSW* [2004] NSWSC 567 (Dunford J), the Supreme Court held that there was nothing in the MAC Act or the Permanent Impairment Guidelines that prevented a medical assessor from undertaking a medical assessment of permanent impairment under the Act of an injured person who had died since making an application for determination of a medical dispute.

16 August 2005