Judicial Review of Decisions by State Tribunals

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Judicial review involves a court assessing or examining a decision or purported decision of the executive, a tribunal or a lower court and upon finding an unlawful error or want of jurisdiction in the making of that decision setting that decision aside or otherwise declaring the decision invalid or void and, in some cases, commanding the decision maker to reconsider the principal application or matter according to law.

Judicial review in NSW is no longer strictly concerned with issue of the prerogative writs which are ancient writs issued historically at the personal request of the sovereign. These writs are, in the main, no longer available in New South Wales except for the writ for habeas corpus. All the writs are still available in the original jurisdiction of the High Court of Australia. The prerogative writs include the writs of certiorari, mandamus, prohibition, quo warranto and habeas corpus.

The jurisdiction of the 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.

Judicial review in New South Wales lies largely within the realm of common law and, in relation to tribunals, the Supreme Court of NSW has inherent "supervisory" jurisdiction over them in judicial review.

The following New South Wales courts possess judicial review jurisdiction:

1 The Land & Environment Court - in respect of Class 4 proceedings (not covered in this talk);

2 The Supreme Court of New South Wales - in the Administrative Law List of the Common Law Division;

3 The Court of Appeal in its general appellate jurisdiction (for errors of law) and in respect of judicial review of decisions of specified tribunals and the District Court.

Decisions Amenable to Judicial Review

The following sets out the broad categories of decisions amenable to judicial review jurisdiction in New South Wales:

1 Decisions of members of the Executive Government of New South Wales and statutory authorities (which are generally heard in the Administrative Law List of the Common Law Division of the Supreme Court of New South Wales);

2 Decisions of tribunals and quasi-judicial tribunals (which are sometimes heard in the Court of Appeal, if a "specified tribunal", or otherwise in the Administrative Law Division of the Supreme Court of New South Wales); and

3 Decisions of the inferior courts (Judicial review of Local Court decisions are generally heard in the Common Law Division of the Supreme Court of New South Wales under Part 5 of the *Justices Act 1902* (NSW) on questions of law (replacing the former stated case procedure); District and other Court decisions are generally reviewed in the Court of Appeal).

The Supreme Court of New South Wales

Relevant provisions of the Supreme Court Act 1970 in respect of judicial review matters include:

- section 23 - General jurisdiction of Supreme Court; that which is necessary for the administration of justice in New South Wales;

- section 63 - Final Determination; the Court shall grant all remedies between parties;

- section 65 - Order to Fulfil a Public Duty (former writ of mandamus);

- section 66 - Injunction;

- section 69 - Proceedings by Summons in Lieu of the Prerogative Writs;

- section 70 - Ouster of Office;

- section 71 - Habeas Corpus; and

- sections 75 & 63 - Declarations.

Relevant provisions of the *Supreme Court Rules 1970* in respect of judicial review matters include:

- Part 4 rule 5 -Relator Actions;

- Part 14D – Administrative Law List

- Part 28 rule 1 - Injunctions;

- Part 32 generally - Stated Cases;

- Part 40 rule 1 - General Relief;

- Part 54 generally - Prerogative and Related Orders;

- Part 51 generally - Court of Appeal;

- Part 51A – Appeals to the Court (not the Court of Appeal);

- Part 51B – Appeals to the Court under Part 5 of the *Justices Act 1902* (NSW)

(replacing the former stated case procedure)

- Part 77 – Procedure under Various Acts; and

- Schedule H - Business of Administrative Law Division.

The very wide statutory base for the exercise of judicial review can be seen in the main provisions in ss 66 & 69 of the *Supreme Court Act 1970* (NSW) which provide:

> **65 Order to fulfil duty**
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> (1) The Court may order any person to fulfil any duty in the fulfilment of which the person seeking the order is personally interested.
> (2) The Court may, on terms, make an interlocutory order under subsection (1) in any case where it appears to the Court just or convenient so to do.
> (3) The powers of the Court under this section are in addition to any other powers of the Court.
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> **69 Proceedings in lieu of writs**
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> (1) Where formerly:
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> (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
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> (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,
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> then, after the commencement of this Act:
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> (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
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> (d) shall not issue any such writ, and
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> (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
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> (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.
>
> (2) Subject to the rules, this section does not apply to:
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> (a) the writ of habeas corpus ad subjiciendum,
> (b) any writ of execution for the enforcement of a judgment or order of the

Court, or

(c) any writ in aid of any such writ of execution.

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

It is important to note that proceedings in the nature of appeals from bodies presided over by a Judge (eg of the District Court or of the Administrative Decisions Tribunal Appeal Panel, when the President if presiding) are not assigned to the Administrative Law List, but to the Court of Appeal (*Supreme Court Act*, s 48).

The consequence of both the common law and the *Supreme Court Act 1970* 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 an application for judicial review may be made. 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,[1] 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 arise where the legitimate expectations of a party are adversely affected by the exercise or proposed exercise of a particular power.

Applications for judicial review in the Supreme Court of NSW are mainly dealt with in the Administrative Law List of the Common Law Division of the Court.

Practice Note 119

Practitioners must have a very good working knowledge of Practice Note 119 "Common Law Division – Administrative Law List" issued by the Chief Justice of NSW on 2 May 2001. It explains the operation of the Administrative Law List and the provisions of Part 14D of the *Supreme Court Rules*.

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1 *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) 204 CLR 82 at [38]-[41].

The Practice Note helpfully sets out some of the major grounds of judicial review, and in that small fashion, it provides a checklist similar to that in s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The common law grounds for judicial review are set out in the Practice Note as including:

- "ultra vires" - lack of jurisdiction;
- lack of procedural fairness;
- acting under dictation;
- real or apprehended bias;
- inflexible application of a policy;
- taking into account irrelevant considerations;
- failing to take into account relevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;
- bad faith; and
- "*Wednesbury*" unreasonableness.

Grounds of appeal and applications from administrative tribunals depend on the terms of the statute setting up the particular tribunal, but invariably include excess of jurisdiction and denial of natural justice, while in some cases error of law is also available (e.g. Administrative Decisions Tribunal Appeal Panel - s 119 of the *Administrative Decisions Tribunal Act 1997* and *Daykin v SAS Trustee Corp* (2001) 51 NSWLR 328 (Dunford J), and the *Consumer Trader and Tenancy Tribunal Act 2001*, s 67 which provides for appeals "*with respect to a matter of law*").

The Practice Note is quite comprehensive, although, it is a little out of date in the examples of tribunal jurisdiction reviewable in the Supreme Court. For example, it was published a year before the new Consumer Trader and Tenancy Tribunal commenced operations in February this year. As you are all aware, that entity consumed the former Fair Trading Tribunal (which in about 1998 itself consumed the Commercial Tribunal, the Consumer Claims Tribunal and the Building Disputes Tribunal) and the Residential Tenancies Tribunal.

However, the practice and procedure set out in the Practice Note is strictly adhered to by the Court.

Some of the main points are that proceedings are normally commenced by a summons with a return date (form 6 of the *Supreme Court Rules*).

On the first return, usually on a Tuesday morning at 9.30am the Court (usually Justice Dunford) will actively "case manage " the matter and make any necessary orders and directions to prepare the matter for final hearing. The Court will want to discuss the issues with the practitioners, so the practitioner dealing with the matter should appear personally.

It runs very much like an expedition list. Matters are prepared and listed for final hearing as quickly as the Court can permit. Often, a final hearing can be arranged in a matter of months.

Points of claim are not normally ordered (unless a party has no idea of the grounds of judicial

review alleged or to be relied upon).

Almost all of the appeals from decisions of the Consumer Trader and Tenancy Tribunal are referred down to the Master for final hearing. The express power for this is Schedule D, Pt 3 para 5 of the *Supreme Court Rules*. The Court will make necessary directions to ensure the matter will be ready and then refer it to a "Master's Registrar" and from there it will be allocated a hearing date.

Also on the first return before the Supreme Court of a judicial review summons, the Court may deal with a request for provision of a statement of reasons. The Note states:

> "Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Judge may at a directions hearing direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision (compare *Administrative Decisions Tribunal Act 1997* (NSW), s 49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the Administrative Law List is normally by affidavit."

This Note in effect seeks to overturn the High Court's ruling in *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 where it was held there was no general right to reasons from executive decision-makers. So far, I am not aware of a single case where anyone has even asked for reasons under the Practice Note. This is probably because in NSW nowadays, reasons (even rudimentary reasons) are usually provided with the decisin.

In addition, it is important to note that the list is managed very tightly. For example, the Court will simply not allow matters to "stand over" or to go out of the list generally. A date for return is <u>always</u> set. The Court retains close control of the matters, even while lengthy settlement negotiations are under way.

You may notice also that some parties (in particular, the State Crown) tend to put on strike out motions on frequently in this jurisdiction. Often, it appears, that because the entire list is heavily case-managed and matters tend to be heard relatively quickly, a strike out application will take up almost as much time as a final hearing (and will get on just as quickly). Such applications should not be encouraged.

The other difficulty for the Court is that there are many applicants (and respondents) who are self-represented in this particular list and this whole process can be a bit daunting for them and a little more time-consuming for the Court.

One final note, In this list, if directions are made for a timetable and a party does not comply, the Court favorably and sympathetically considers making costs orders against the breaching party. Be warned!

Thank You.

The Supreme Court of New South Wales
Practice Note No. 119
Common Law Division - Administrative Law List
Date: 02/05/2001

PRACTICE NOTE No 119
Common Law Division - Administrative Law List

The purpose of this Practice Note is to explain the operation of the Administrative Law List, which is provided for by Part 14D of the Rules.

The Supreme Court exercises both common law and statutory jurisdiction with respect to public bodies and officials. The common law jurisdiction provides for judicial review of the action and decisions of public bodies, officials and various tribunals. The statutory jurisdiction provides for appeals and applications to the Court from the decisions of various tribunals and quasi-judicial bodies.

JUDICIAL REVIEW

The Administrative Law List includes proceedings:

- for commanding or otherwise requiring a public body or a public officer to perform a public duty;

- for prohibiting or otherwise restraining a public body or public officer from performing or purporting to perform any act;

- for determining by declaration or otherwise any matter concerning the powers of a public body or a public officer; and

- in appeals or applications to the Court in respect of decisions of a public body or a public officer, under any enactment specified in the Rules.

The common law grounds for judicial review have been refined in recent years. They include:

- "ultra vires" - lack of jurisdiction;
- lack of procedural fairness;
- acting under dictation;
- real or apprehended bias;
- inflexible application of a policy;
- taking into account irrelevant considerations;
- failing to take into account relevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;
- bad faith; and
- "Wednesbury" unreasonableness.

STATUTORY APPEALS AND APPLICATIONS

The Administrative Law List also includes;

- the matters specified in Schedule H to the Rules;
- matters assigned to the List by specified rules in Part 77; and
- applications under ss 61 or 62 of the Fair Trading Tribunal Act 1998, other than proceedings on an appeal or referral relating to the Retirement Villages Act 1999.

The matters specified in Schedule H to the Rules include matters arising under a number of Acts which at publication of this Practice Note include: *Administrative Decisions Tribunal Act* 1997, ss 118, 119, 122;

Dividing Fences Act 1991, s 19;
Freedom of Information Act 1989, s 58A(1);
Independent Commission Against Corruption Act 1988;
Motor Dealers Act 1974, ss 38(2), 38(3B)(a), Part VA;
National Crime Authority Act 1984 (Cth), ss 32, 32A;
Ombudsman Act 1974, ss 21A, 35A, 35B;
Police Integrity Commission Act 1996;
Racial Discrimination Act 1975 (Cth), s 24;
Royal Commissions Act 1923, s 18B; and
Supreme Court Act 1970, s 70 (ouster of office).

Applications under Part 77 of the Rules include applications arising under the *Community Welfare Act 1987* s 66, *New South Wales Crime Commission Act 1985*, *Nurses Act 1991* s 67, *Chiropractors and Osteopaths Act 1991* s 52, *Electricity Supply Act 1995* s 95, and the *Gas Supply Act 1996* s 17.

As a general rule, all proceedings for review or in the nature of appeals from administrative bodies or administrative decision makers are assigned to the Administrative Law List, but not appeals from the Local Court, whether in committal proceedings, summary jurisdiction or civil claims, or from any other court presided over by a Magistrate, such as the Coroner's Court, Licensing Court or Mining Wardens' Court. Such matters are assigned to the ordinary general Common Law Division List.

Notwithstanding Part 14D and Schedule H, proceedings in the nature of appeals from bodies presided over by a Judge (e.g. of the District Court) are not assigned to the Administrative Law List, but to the Court of Appeal (*Supreme Court Act*, s 48).

Matters which were formally assigned to the Administrative Law List under the Taxation Administration Act 1996 (e.g. stamp duty, payroll tax and land tax appeals) are now assigned to the Equity Division, see Amendment No. 340 of 30 June 2000.

Judicial Proceedings with respect to Environmental and Planning laws are within the exclusive jurisdiction of the Land and Environment Court.

Grounds of appeal and applications from administrative tribunals depend on the terms of the statute setting up the particular tribunal, but invariably include excess of jurisdiction and denial of natural justice, whilst in some cases (e.g. Administrative Decisions Tribunal Appeal Panel, Residential Tribunal, Fair Trading Tribunal) error of law is also available.

PROCEDURE

Proceedings appropriate for the Administrative Law List should be commenced in that list in accordance with SCR Pt 14D r 2(1). If not so commenced, they may be transferred to that list pursuant to Pt 14D r 2(3) or transferred from another Division: Pt 14D r 2(4). Proceedings are generally commenced by summons stating an appointment for hearing (Form 5) although on occasions where there is an extensive challenge to the decision of a public official or public body they may be commenced by statement of claim. In either case the words, "Administrative Law List" should be added immediately under the words, "Common Law Division" on the left hand side of the front page of the originating process. These words should also be included in the Notice of Appearance and all other documents filed in the proceedings. In either case they will be given a date for a directions hearing before the Administrative Law List Judge on a Tuesday morning at 9.30 am or if he or she is unavailable another Judge acting in his or her place. Occasionally the Directions List is transferred to Wednesday at the same time.

Proceedings for prerogative relief in relation to the decisions of tribunals or other public officials or public bodies are governed by Pt 54. Such latter applications often also seek other administrative law relief such as declarations and injunctions. It should be noted that the prerogative writs have been replaced by judgments and orders to a similar effect: *Supreme Court Act 1970*, s 69.

Proceedings by way of statutory appeal from an administrative tribunal pursuant to the provisions of the Act constituting the relevant tribunal are governed by Pt 51A of the Rules. Such appeals must be instituted within 28 days (Pt 51A r 3), and there must be served with, or subscribed to the summons, a statement of the grounds relied on (Pt 51A r 5). Provision is also made for cross-appeals (Pt 51A r 12) and notices of contention (Pt 51A r 13). Where the appeal is only on a question of law and there is no allegation of denial of natural justice or procedural fairness or excess of jurisdiction, the only evidence necessary is an affidavit annexing or exhibiting a copy of the relevant judgment, and where appropriate, a transcript of the evidence before the tribunal and a copy of the exhibits.

In relation to both applications for prerogative or other administrative law relief and statutory appeals, the relevant tribunal, public body or official must be made a party to the proceedings and served with a copy of the summons, except in the case of the Administrative Decisions Tribunal Appeal Panel. Where such tribunal or public body or official files a submitting appearance save as to costs not less than 2 clear days before the first directions hearing, such tribunal, public body or official need not be represented at such directions hearing but will be automatically excused from further attendance. If another party wishes to seek an order for costs

against a submitting defendant, it must prior to such directions hearing, or within such further time as the Judge may allow, give notice in writing to such submitting defendant setting out the grounds upon which such costs order will be sought. See Pt 11 r 4(3) and (4).

URGENT APPLICATIONS

Urgent applications, e.g. for ex-parte injunctions and/or leave to serve short notice of proceedings, which on commencement will be appropriate for entry in the Administrative Law List should be made to the Administrative Law List Judge or if he or she is not available the Judge designated to assist the List Judge, or if both are unavailable, to the Common Law Duty Judge for that week. Depending on the urgency of the matter, the Judge who deals with the urgent application will normally make the proceedings returnable in the ordinary directions list on the following Tuesday and will require a summons and affidavit to be filed and served.

Urgent interlocutory relief, including stays of orders for possession of the Residential Tribunal, normally require the plaintiff to give the usual undertaking as to damages: Pt 28 r 7(2).

In cases involving stays of execution in appeals from the Residential Tribunal where the plaintiff is unrepresented, an order is commonly made for service of the summons, affidavit and notice of the stay on the estate agent who appeared for the landlord in the Tribunal. This generally has the effect of ensuring that the respondent is aware of the proceedings and someone appears on his or her behalf at the directions hearing.

DIRECTIONS HEARINGS

When the proceedings come before the List Judge for directions, all parties should be represented by someone familiar with the case so that the Judge can give directions to enable the case to be prepared for hearing. Such directions will typically include dates for the filing of affidavits, discovery, particulars and/or production of documents (if necessary) and the determination of any interlocutory issues. In the ordinary case the only directions necessary are dates for the filing of affidavits. Any timetable fixed should be adhered to so as to avoid unnecessary appearances in the Directions List and the costs occasioned with such appearances. If a party is in default in adhering to the timetable set and such default necessitates additional appearances in the Directions List, consideration may be given to ordering the party in default to pay the costs of the additional appearances. Differential Case Management (Practice Note No. 88) does not apply to proceedings in the Administrative Law List.

Only in exceptional cases will directions be given for the filing of Points of Claim and Points of Defence, but in appropriate cases, orders for particulars may be made e.g. where a plaintiff seeks orders in the nature of prohibition or certiorari but does not specify the grounds on which such relief is sought.

Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Judge may at a directions hearing direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement

in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision (compare *Administrative Decisions Tribunal Act 1997* (NSW), s 49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the Administrative Law List is normally by affidavit.

Interlocutory motions such as for summary judgment, to strike out the claim or any part thereof or for an expedited hearing should be made by notice of motion returnable in the Directions List. Unless such orders are consented to, they will generally not be heard on the Tuesday, but a date will be fixed for hearing when the List Judge is available. If they are going to be lengthy or the List Judge will not be available within a reasonable time they may be referred to the Common Law List Judge to obtain a special fixture.

When the proceedings are ready for a final hearing they are stood over to the next call-up before the Common Law List Judge for a hearing date to be allocated, although when the hearing has been expedited such matters will be referred to the List Judge on a Monday or Thursday at 9 am to fix a hearing date. Except in cases of extreme urgency, this will not be done until all affidavits have been filed and the matter is otherwise ready for hearing.

There is now express power in the Rules to refer certain proceedings to a Master (Schedule D, Pt 3 para 5) and this power is almost invariably exercised when available, particularly in relation to appeals from the Residential Tribunal and the Fair Trading Tribunal. In such cases the List Judge examines the issues in the case at the first directions hearing, gives directions for the preparation of the case and then lists the matter for further directions in the Master's List before the Deputy Registrar at 9.30 am on a suitable day. In such cases there is no right of appeal from a Master to a Judge, but only to the Court of Appeal, and usually only by leave of the Court of Appeal: Pt 60, rr 10, 17.

Proceedings in the List will not be stood over generally, even by consent. If parties require time to consider their position or negotiate a possible settlement, proceedings may, with the Judge's approval, be
adjourned for a comparatively lengthy period, but always to a fixed date with (if appropriate) liberty to restore the matter to the Directions List within that time.

2 May 2001
Chief Justice