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ADMINISTRATIVE LAW LITIGATION IN THE FEDERAL COURT OF AUSTRALIA

Today's paper will cover the above topic including:

- How to answer the question: "*what is the matter*?"
- Pleading jurisdiction properly and seeking the appropriate form of relief
- Costs in judicial review proceedings
- Objections to competency
- Appeals on a question of law.

Seeing the Ground on Which You Stand

You should plead your client's judicial review jurisdiction fully and first in the pleading, bearing in mind in particular, it is necessary for you to plainly identify and articulate what is the "*matter*" concerned – see, for example: *Mirvac Homes (NSW) P/L v Airservices Australia (No 1)* [2004] FCA 109 (Branson J); and *Brown v Health Services Union* [2012] FCA 644 (Flick J) at [41] to [46].

You need to recognise whether your client has a "*matter*" that would both enliven the jurisdiction of the Federal Court and also provide your client with sensible/appropriate relief.

The Court has jurisdiction to determine whether it has jurisdiction (and to dismiss a case if it does not – eg, as in *Parker v Vivian* [2009] FCA 933 (Mckerracher J)).

The provision in the new rules for an objection to competency (see, for example, rule 31.24 (judicial review) of the *Federal Court Rules 2011* and also rules 31.03 and 33.30) is designed to enable the questions to be notified <u>early</u> (within 14 days of service of the originating process) and, sometimes, to be determined early – see *Mirvac Homes* at [4] to [8].

In *Mirvac Homes* at [12] to [17], the Court set out the scope of the jurisdiction of the Federal Court under section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) which provides:

> *'The original jurisdiction of the Federal Court of Australia ... includes jurisdiction in any matter:*
> ...
> *(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.'*

The Court held that this is a wide jurisdiction which is normally exercised by declaratory relief (section 21 of the *Federal Court of Australia Act 1976* (Cth)) and there need not be a cause of action before the power may be exercised, provided the subject matter in respect of which the declaration is sought is within the jurisdiction of the Court and there is a real controversy to be determined (*ibid* at [15]).

It was also held that it is necessary for the party who seeks to invoke the jurisdiction [under s 39B(1A)(c)] to be able to identify a right, duty or defence which owes its existence to the law made by the Parliament upon which he or she relies or which relies on that law for its enforcement (*ibid* at [17]).

The word '*matter'* carries the same meaning in s 39B of the *Judiciary Act* as it carries in Ch III of the *Constitution* (*ibid* at [21] and see, *Allseas Construction S.A. v Minister for Immigration and Citizenship* [2012] FCA 529 at [19]-[29] per McKerracher J.

The matter must therefore be a matter in a constitutional sense.

That makes it easy.

Note that that the pleadings proposed by an applicant are <u>not</u> necessarily the sole source of determining the question of whether a "*matter*" is properly enlivened.

In an action for damages, the precise nature of the claims to be made albeit mentioned in general terms in the applicants' application may be understood by reference to available affidavit material and even a proposed pleading: cf *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 473 per Barwick CJ.

The Court has jurisdiction to hear and determine an application on the basis that the determination of the issues raised by it are "*ancillary or incidental to the exercise of judicial power in relation to the matter*": cf *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200 at 208 [25] per Finn J; *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2010] FCA 367 per Kenny J at [28].

In *Polar Aviation* (*supra*), the Court considered what is meant by the term '*matter'* in the relevant constitutional provisions that support s 39B(1A) of the *Judiciary Act*. The seminal passage from *Re Judiciary and Navigation Acts* (at 265-266) set out below was cited and followed:

> "It was suggested in argument that '*matter'* meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention; we do not think that the word '*matter'* in s 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court. If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose may, we think, adopt any existing method of legal procedure or invent a new one. But it cannot authorise this Court to make a declaration of the law divorced from any attempt to administer that law."

The reference to an "*immediate right, duty or liability*" was used by the Court to distinguish a genuine controversy from a desire to obtain an advisory opinion from the Court divorced from such a controversy. It was not intended to, and cannot be read as, denying the existence of a matter unless proceedings claiming substantive rights have been instituted.

These matters are not settled. In *Polar Aviation*, Kenny J suggests, in effect, that by merely alleging a breach of statutory duty against a body that owes its existence to federal law, the Court has jurisdiction to hear ALL claims made.

You need also to be alive to the various meanings of "*accrued rights*" in the Federal Court.

One meaning is where the Court has jurisdiction over a matter, then the Court has jurisdiction

to consider the whole of the controversy, including any non-federal claims forming part of the matter: see *Petrotimor* at 509 [3] per Black CJ and Hill J, citing *Philip Morris* and *Fencott v Muller* (1983) 152 CLR 570. This '*accrued'* jurisdiction is governed by well-established principles: see, e.g., *Philip Morris* at 474-5 per Barwick CJ; *Fencott v Muller* at 607-8; *Stack v Coast Securities (No 9) Pty Ltd* [1983] HCA 36; (1983) 154 CLR 261 at 294 per Mason, Brennan Deane JJ; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585-6 per Gummow and Hayne JJ; *Abebe v Commonwealth* [1999] HCA 14; (1999) 197 CLR 510 ('Abebe') at 530 per Gleeson CJ and Hayne J; and *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559 at 585-6 per Gleeson CJ, Gaudron and Gummow JJ.

Broadly speaking, a non-federal claim will fall within the accrued federal jurisdiction if the claim arises out of common transactions and facts, although they may not entirely coincide: see: *Fencott v Muller* at 607-8. In their joint judgment in that case, Mason, Murphy, Brennan and Deane JJ went on to say (at 608):

> "What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out. But in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter."

Public Law Pleading

You should plead available judicial review jurisdiction in the alternative: *Administrative Decisions (Judicial Review) Act 1977* (Cth) - ss 5 & 6 (or 7); *Judiciary Act* 1903 (Cth) - s 39B(1A); *Federal Court of Australia Act* 1976 (Cth) - s 24.

It is not uncommon to do this in the Federal Court, where applicants appealing from the AAT "*on a question of law*" routinely seek to invoke three jurisdictions:

(a) s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth);

(b) ss 5 & 6 of the *Administrative Decisions (Judicial Review) Act 1975* (Cth); and,
(c) s 39B(1A) of the *Judiciary Act 1903* (Cth).

See, for example, *Comcare v Etheridge* (2006) 149 FCR 522 at [29]-[31] (Spender, Branson and Nicholson JJ).

Put all the grounds of judicial review in full and early and these should be cast in order of importance or priority.

Seek public law relief if possible and appropriate (namely, prerogative writs or orders in the nature of the prerogative writs or, if remitted from the High Court, seek constitutional writs), and private/civil or equitable law relief:

a. Injunctions (sometimes);
b. Declarations (often);
c. Claims for loss and damages (rare, but might be worth attempting in some cases)?

Keep the evidence simple - normally, you would need to tender no more than:

a. The document or instrument evidencing the decision under review;
b. The statement or record of reasons; and
c. The documents that were the decision-maker as at the time of making the impugned decision (sometimes, a transcript of an oral hearing - but not always).

Settlement

Explore all settlement options (including different modes of settlement) early and continue to do so throughout the course of judicial review proceedings - NB: *The New South Wales Barristers' Rules*:

> "17A. A barrister **must** inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, **unless** the barrister believes on reasonable grounds that

> the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation. [Inserted Gazette No.7 of 21 January 2000, p.348]" (my emphasis)

Costs – One Aspect

As to costs in settled admin law/judicial review proceedings - Note: There might be no order as to costs as the matter effectively settled or was rendered futile and the government agency acted reasonably to that date (based on long-standing and accepted cost principles in administrative law in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 esp at 625.6 (McHugh J). The usual rule in civil proceedings does not apply to a Court's supervisory or administrative law jurisdiction or to civil proceedings that have settled or rendered futile before there is a hearing on the merits. In *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622, the High Court of Australia determined a costs application in respect of an administrative law challenge to a decision of the Immigration Minister relating to a refugee "protection" visa. The proceedings were rendered futile just before the hearing commenced (as the Minister granted the applicant a visa under another power under the Migration Act 1958(Cth)). The only issue therefore was as to costs.

As to costs in proceedings that have settled or been rendered futile before a hearing, McHugh J said (at 624.5 and 625.6):

> "In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order." ...
>
> "If it appears that both parties have ***acted reasonably in commencing and defending*** the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion ***will usually mean*** that the court will make ***no order as to the cost*** of the proceedings. This approach has been adopted in a large number of cases." (footnotes omitted) (my emphasis)

Remedies

Ascertain all available remedies, not limited to judicial review, eg:

a. External merits review - AAT or tribunal;
b. More documents, FOI or subpoena or discovery;
c. Internal review;
d. Ombudsman review - maladministration or systemic problems;
e. Self Help - Ministerial appeal - local Member - Questions in Parliament.

Objections to competency - Federal Court Rules 2011; NB: section 10(2)(b)(ii) ADJR Act (discretion to refuse to deal with ADJR matters if alternative remedy exists) must be made early (and sometimes heard early).

Question of Law

Section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) provides for appeals to the Federal Court "*on a questions of law*". See, for example: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389.

In judicial review proceedings, a proceeding on a question of law is the same as a proceeding on an issue of law. There is no distinction or difference. A question or issue of law is that which points to or demonstrates an error of law, preferably an error of law on the face of the record (which would enable orders in the nature of certiorari to be made). It can also point to jurisdictional errors or constructive failures to exercise jurisdiction (all vitiating errors).

It is only on appeals on or limited to a question of law where great care needs to be taken to craft or fashion an appropriate or acceptable question of law so that the matter may be heard and determined (and not dismissed, or dismissed summarily).

The most practical suggestion I can make is for you to place a question mark at the end of each asserted issue or question of law sought to be raised in a proposed appeal.

At least that will make the issue look like a question of law and therefore be arguably compliant with the requirement that there be a question of law.

Secondly, the issue of law needs to be something about which the decision below turned or it must be a decision which was a step along the way to final conclusions. It may be an express or implied decision or simply something that mattered in the making of the decision.

In summary, questions of law must be drafted with precision, as questions and which are central to the decision under appeal or review.

The price to be paid for not complying can be severe.

Discretion in Judicial Review

Remember, judicial discretion in judicial review matters - s 16 ADJR Act is a discretionary remedy, as is the common law and constitutional writs.

As to discretion in general law judicial review proceedings generally, in the case of a decision found to be erroneous in law, the established general law discretionary factors are, in short, that a remedy will not normally be granted if:

- a more convenient and satisfactory remedy exists;
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay, or,
- if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. (See the discussion of the discretion generally and citation of some of the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [88]-[92] per Kirby J.)

Another established ground for discretion was identified by Professor Mark Aronson in Judicial Review of Administrative Action, 4th edition, 2009, Law Book Co, Sydney in the following way, at [12.175]:

> "A person who has acquiesced in the conduct of proceedings known to be defective will find it very difficult to obtain certiorari or prohibition (assuming that there is a discretion to refuse those remedies)" (and see also the cases cited in footnote 238).

If vitiating error is found in the executive decision, the party alleging that a remedy should be withheld for the above reasons bears the onus to prove these matters - see; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [150]-[151] (per McHugh J).

Practical Maters

Share your case and statute authorities with your opponent early in admin law cases - most good admin lawyers settle their cases if suitable authority covers the point sought to be argued.

Remember to identify and prepare early any evidence for any extension of time application. 28 days from the date of the decision (the ADJR Act date) is the rule of thumb for all admin law matters. Any delay in late applications must be explained - do not wait for someone to ask for that evidence (such as the judge at the conclusion of a fully contested hearing).

E-Search on the Internet - contains listings, names the justice and has printable orders (no longer need to rely on others in this regard).

Directions hearings - one safety valve is to ask for an extended directions hearing (rule of thumb is any argument that will take longer than half an hour).

The ***Hardiman*** principle: When to Argue, Intervene or Appear as Amicus for a Government Defendant or Respondent - A continuing and difficult issue for government or public sector defendants is to know when, and if so, to what extent, to oppose an applicant in judicial review proceedings as an active party.

Ordinarily, an administrative tribunal would not seek to participate in Court as a party where its decision is impugned where there is an active contradictor based on the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35 & 36. The

rationale is that there is a risk that such participation might endanger the perception of impartiality of the decision maker (*ibid* at 36).

In Court proceedings, if the defendant is a statutory decision-maker (whether independent from his or her employer in this regard or not) the choice is usually to file an ordinary appearance and to contest the proceedings (asserting that the decision was valid or correct in law). That decision exposes the agency to full costs orders and, possibly, judicial criticism.

Other options might include:

1. To put on a submitting appearance and let another interested party play the role of the contradictor (only available if there are opposing applications before the original decision-maker and where both or some of them are also joined as parties);
2. To examine the alleged grounds of review and accept them and agree or consent to orders setting aside the impugned decision (for those grounds pleaded or for other reasons); the applicant/plaintiff would expect an award of costs; or,
3. To accept that the decision is invalid (or affected by jurisdictional error) and re-make the decision (applying *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597) either before litigation has commenced or by consenting to the applicant discontinuing pending litigation (without any order as to costs);
4. To determine that a new decision may be made as an exercise of the Interpretation Act power to make a decision "from time to time as occasion requires" (provided there is no contrary intention in the Act – eg: *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (Gillard J)) and *Allianz Australia Insurance Limited v Crazzi* [2006] NSWSC 1090 (Johnson J) – again, either as a term of settlement of pending litigation or before proceedings have commenced.

In judicial review proceedings, the defendant may be a tribunal or a quasi-judicial body, particularly one that hears evidence or submissions from two or more parties, or undertakes

or conducts hearings and makes an impartial and binding determination.

Ordinarily, the tribunal or entity would not seek to participate in Court as an active party where there is an active contradictor based on the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35 & 36. The rationale is that there is a risk that such participation might endanger the important perception of impartiality of the tribunal or its members if and when the subject matter of the impugned decision comes before it again upon remittal (ibid at page 36)

The options for an active role are:

1. If there is no or no adequate contradictor at the hearing, consider whether the Attorney-General should be joined as an active party (who can appeal if the Court makes the wrong decision) (See, eg, *Police Integrity Commission v Shaw* [2006] NSWCA 165 (per Basten JA) at [39]–[43]);
2. Appear at the hearing and make submissions only going to the tribunal's powers, functions guidelines and procedures (as permitted by Hardiman);
3. Maintain (or file, if not already filed) a submitting appearance and do not turn up (or appear once as a courtesy to the Court and seek to be excused from further attendance at the hearing); or
4. Put on a submitting appearance, do not appear but maintain a "*watching brief*" at court in order to monitor the progress of the hearing and, if necessary, speak to the solicitors and/or counsel for the relevant parties at a convenient juncture about particular issues or facts that might arise (perhaps, including implications of particular questions from the Bench).

In *Police Integrity Commission v Shaw* (2006) 46 MVR 257 ([2006] NSWCA 165) (per Basten JA) at [39]–[43], the Commission was roundly criticised for appearing, arguing a position as to its jurisdiction to continue to conduct a hearing and for appealing that decision to the Court of Appeal. Basten JA held that the active participation of both the Commission and the Commissioner in the proceedings was of "*particular concern*" and raised the question whether there could later be a "*disinterested inquiry*" in the particular matter then before it (at

[42]). The Commission was undertaking an inquiry into a former Supreme Court judge as to whether there was any misconduct on the part of the NSW police force in relation to a particular alleged drink-driving incident and a missing blood sample.

See also, *Campbelltown City Council v Vegan* [2006] NSWCA 284 at [54]-[64](per Basten JA with McColl JA agreeing) where the Court held that NSW WorkCover should not have played an active role in the litigation (which should have been run inter-parties) and it should have confined its role to that of an amicus curiae. The Court refused to make any costs order in relation to the Authority.

See also: *Ho v Professional Services Review Committee No 295 [2007] FCA 388* at [111] to [115] (Rares J); *Ho v Professional Services Review Committee No 295(No 2)* [2007] FCA 603 (Rares J) [reversed in *Willcock v Do* (2008) 166 FCR 251 (Mansfield, Emmett and Middleton JJ) but not on the *Hardiman* ground].

The Crown and all of its emanations and its legal representatives are required both by common law and by direction from the Premier's office to act as a "*model litigant*" in all dealings in civil litigation generally in courts and tribunals in New South Wales. The Premier's long-standing "*Model Litigant Policy for Civil Litigation*" is published at http://www.lawlink.nsw.gov.au/lawlink/lms/ll_lms.nsf/pages/lms_important_rules.

The Premier's policy provides plainly that "*the State and its agencies must act as a model litigant in the conduct of litigation*". The nature of the obligations referred to in the policy is set out at [3.1] and [3.2] of the policy.

The common law obligation for the Crown to act as a model litigant was well set out and discussed by the New South Wales Court of Appeal in *Mahenthirarasa v State Rail Authority (NSW) (No 2)* (2008) 72 NSWLR 273 at [16]–[20] (per Basten JA, with Giles and Bell JJA agreeing).

Remember to read the Federal Court Rules - first! – The new ones.

Thank You