THE EXPLOSION IN ADMINISTRATIVE LAW AT THE STATE LEVEL

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(A paper delivered by Mark A Robinson, Barrister, to a Seminar of the Australian Institute of Administrative Law, NSW Chapter in Sydney on 21 June 2007)

Introduction

There is no doubt that administrative law in New South Wales is correctly described as a sunrise industry at the moment for legal practitioners. In recent years, increasing numbers are participating in judicial review and external merits review proceedings, many for the first time. The trend was noted in one context by solicitor, Nicholas Studdert in his article "The Increasing Role of Administrative Law in Personal Injury Matters", (2007 – February) 45 *Law Society Journal* 55. It is unrelated to the well known 1980s federal expansion then caused by the "new administrative law" (it was Victorian solicitor Emilios Kyrou who then called it a "sunrise industry" for lawyers and identified new practice opportunities for them in 1987 *NSW Law Society Journal* 45).

How long it will last is an open and interesting question.

A combination of factors might explain the phenomenon:

1. The wholesale introduction of executive decision-making processes in NSW workers compensation and motor accidents law;

2. The introduction of a limited administrative law jurisdiction to the NSW District Court (by way of permitting the ground of procedural fairness to be argued in order to seek to set aside a Medical Assessor's otherwise conclusive certificate in motor accident matters);

3. Personal injury lawyers moving into the area by necessity, and, by wider application by them of the new litigation skills they are developing;

4. The consolidation of and expansion of state super-tribunals such as the Administrative Decisions Tribunal of NSW and the Consumer, Trader and Tenancy Tribunal of NSW and the statutory appeal/judicial review rights so attached;

5. The NSW Parliament amending and seeking to strengthen privative or ouster clauses and adjusting jurisdiction in the industrial relations area;

6. Testing, by certain law enforcement agencies, of the limits and scope of their powers in criminal investigations; and,

7. The latent impact of the subject "Administrative Law" being firmly established as a core and compulsory course of undergraduate study at all tertiary institutions leading to legal practice qualifications.

When combined with the continued growth of administrative law at the federal level, and particularly since the introduction of the Federal Magistrates Court of Australia in 1999, with its large administrative, migration and privacy jurisdictions, and with 16 justices presently sitting in NSW (and on circuit), administrative law has been introduced to a much wider group of legal practitioners.

Finally, the present bench of the High Court of Australia has developed a strong sense of and feeling for administrative law, particularly in its development and nurturing of its special "constitutional writ" jurisdiction and its robust response to Commonwealth privative clauses and statutes that seek to restrict access to judicial review (most recently in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 234 ALR 114 (18 April 2007)). In response to Parliament seeking to restrict the grounds of judicial review, such as procedural fairness, the High Court's approach to modern statutory interpretation has been noticeably more broad and creative (as in, for example, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592).

I propose to discuss in this paper some of the more interesting judicial review developments at the State level in NSW concerning the following areas:

1 The NSW Administrative Decisions Tribunal, on - extending merits jurisdiction on appeals; the power to determine constitutional issues, and the FOI "override discretion";

2 The many challenges to the decisions of the new Motor Accidents Authority of NSW (MAA) and the new Workers Compensation Commission of NSW (as one door closes - personal injury litigation – another opens – judicial review);

3 Testing the limits of the powers of NSW law enforcement agencies;

4 Reasons for executive decisions;

5 Re-visiting or re-opening government decisions;

6 Life after *SAAP* – the rise of procedural ultra vires?

7 When to argue, intervene or appear as amicus for a government defendant or respondent; and,

8 State privative clauses.

I will review some of the developments in these areas and conclude with a personal wish list for future developments in State (and Federal) administrative law and tell you a little story about two dogs, Jacko and Ruffy.

Leave to appeal on merits – Administrative Decisions Tribunal, NSW (ADT)

The right to appeal to the Appeal Panel of the NSW Administrative Decisions Tribunal is governed by s 113 of the *Administrative Decisions Tribunal Act 1997* (NSW) which allows (under ss 113(2)(a) and (b)) an appeal "*on any question of law*" and, "*with leave of the Appeal Panel*", an appeal which "*extend(s) to a review of the merits of the appealable decision*". In numerous decisions, the Tribunal interpreted the extension of an appeal to the merits of the case as requiring a party to at least establish an arguable question of law. It is now settled by the NSW Court of Appeal that there is no need for the applicant to first establish an actual or arguable question of law or error of law to enliven the right to a merits based appeal. In *Lloyd v Veterinary Surgeons Investigating Committee* [2005] NSWCA 456, the NSW Court of Appeal determined that the provisions in section 113(2)(a) and (b) of the ADT Act are not cumulative and are quite distinct sources of power empowering an Appeal Panel to deal with the merits of any appeal. The Court of Appeal held at [14] and [60]-[63] (per Tobias JA, with Spigelman CJ agreeing) that earlier dicta of the ADT Appeal Panels on the construction of the section were "clearly in error" - *Lloyd v Veterinary Surgeons Investigating Committee* [2005] NSWCA 456 at [57]-[59]; see also *Skiwing Pty Ltd v Trust Company of Australia* [2006] NSWCA 276 (9 October 2006) at [48] where the "jurisprudence" of the Appeal Panel in this regard was said to have been "overturned" by the *Lloyd* decision.

Power to Determine Constitutional Issues – NSW ADT

In *Attorney General v 2UE Sydney Pty Ltd* [2006] NSWCA 349 (Spigelman CJ, Hodgson and Ipp JJA), the NSW Court of Appeal held that in considering the "*applicable written or unwritten law*" in s115(1)(b) of the *Administrative Decisions Tribunal Act 1997* and s31(1) of the *Interpretation Act 1987* the Tribunal may have regard to any relevant constitutional limits in construing legislation. The Tribunal is competent to consider a Commonwealth constitutional immunity for political speech and interpret the relevant section so as to conform. It cannot, however, definitively determine a federal constitutional question (*ibid*, at [30], [31], [32], [37], [98], [100], [104] & [105]). In that case, the Appeal Panel was considering a constitutional argument in the context of alleged vilification in breach of s49ZT(1) of the *Anti-Discrimination Act* 1997. For the purposes of that Act, the Tribunal's decision could be "registered" as an enforceable judgment in the Supreme Court of NSW. The Court of Appeal held that a State Parliament cannot invest a court or tribunal with Federal jurisdiction (at [54]-[55]). Further, applying *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, it held that a State tribunal was in the same position as a Commonwealth tribunal, namely, while it may validly consider issues arising under the Commonwealth Constitution, the presence of a scheme which gives judicial force to a tribunal decision upon mere "registration", converts the tribunal's otherwise permissible actions into an impermissible exercise of Federal jurisdiction ([2006] NSWCA 349 at [70], [71], [75], [76], [80]).

The Court of Appeal referred to the Tribunal and the Appeal Panel variously as "*administrative bodies with statutory powers the exercise of which have legal consequences*" (at [29]), as a "*quasi-judicial tribunal*" (at [52]) and as an "*administrative tribunal*" (at [57]) which did not possess any Federal judicial power such that it could determine Federal constitutional issues. It made a declaration that the Appeal Panel of the Tribunal had no jurisdiction to determine whether s49ZT of the *Anti-Discrimination Act* 1977 (NSW), should be read down so as not to infringe the constitutional implication of freedom of communication about government or political matters.

In *Trust Company of Australia Limited (trading as Stockland Property Management) v Skiwing Pty Ltd (trading as Café Tiffany's)* [2006] NSWCA 185 (Spigelman CJ, Hodgson & Bryson JJA), the Court of Appeal held that the tribunal was not a "court of a State" for the purposes of determining matters under the *Trade Practices Act 1974* (Cth) as it was not predominantly composed of judges (at [65]). Note also, in *Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] NSWCA 387 (Handley & Basten JJA and McDougall J), the Court of Appeal held that the Appeal Panel of the tribunal had the relevant characteristics to constitute a "court" for the purposes of the *Suitors' Fund Act 1951* (NSW) (at [74]) and the costs of the appeal.

The Return of the FOI "Override Discretion" – NSW ADT

Mention should be made of the decision in *University of New South Wales v McGuirk* [2006] NSWSC 1362 (Nicholas J) where the Court held that the jurisprudence of the ADT and its Appeal Panel was wrong in law as to the existence of what has come to be known as the public interest "override discretion" in freedom of information matters.

The Appeal Panel had held that the discretion did not exist and that the tribunal could not hand over documents it had declared to be "exempt" (it arose from a construction of s 55 of the *Freedom of Information Act 1989* (NSW) and s 124 of the *Administrative Decisions Tribunal Act 1997*(NSW)).

The Supreme Court held (at [103]) that is <u>did</u> exist and the Tribunal did possess discretion to release the contested subject documents. The decision has enormous implications for the future release of otherwise sensitive State government held documents. This is particularly so after NSW Court of Appeal's decision in *General Manager, WorkCover Authority of NSW v Law Society of NSW* (2006) 65 NSWLR 502 (Handley, Hodgson and McColl JJA) on the "internal working documents" exemption in FOI. The Court gave the exemption a relatively restricted operation and gave some encouragement to future FOI applicants.

Judicial Review of Decisions of the NSW Workers Compensation Commission and the NSW Motor Accidents Authority ("MAA")

This is the largest component of the "sunrise industry" in New South Wales, particularly for personal injury lawyers and administrative law lawyers. After the 1999 amendments to the State motor accidents legislation, a large part of binding decision-making is now undertaken by (expert) statutory "non-curial" decision makers.

Doctors (appointed as "medical assessors") make binding determinations of the extent of injury, and experienced personal injury lawyers (appointed as "claims and resolution service assessors") make determinations binding on the insurers as to damages (see, the *Motor Accidents Compensation Act 1999* (NSW)). The same is the case in the workers compensation area where the Compensation Court was abolished and entirely replaced by a statutory "Commission" – (see, *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and the *Workers Compensation Act 1987* (NSW)).

There is not a lot left here for the courts to do, when binding executive personal injury decisions are made – apart from exercising its supervisory jurisdiction in judicial review proceedings.

Some recent cases (amongst many) are as follows.

In *Campbelltown City Council v Vegan* [2004] NSWSC 1129, Wood CJ at CL held that the provisions in the State workers' compensation legislation providing for an appeal to an appeal panel by way of "review" of the original medical assessment (including a review of a medical assessor's binding determination on medical conditions) gave rise, in the context of the relevant legislation, to a hearing "de novo". In *Campbelltown City Council v Vegan* [2006] NSWCA 284, the NSW Court of Appeal effectively overturned that decision (but stopped short of formally doing so). Handley JA (with McColl JA agreeing) equated the nature of the appeal to the Appeal Panel with an appeal "in the strict sense" to a superior court, with the aim being to redress error of the court below. Of the workers compensation medical Appeal Panel, His Honour said (at [17]-[18]):

> "Administrative appeals were unknown, or relatively unknown, in Australia and Britain in 1950, but are now common in both jurisdictions. Parliament by providing for such appeals must be taken to have intended that an appeal to a superior administrative body should be similar to an appeal to a superior court.
>
> Since an appeal is a means of redressing or correcting an error of the primary decision maker a successful appeal should produce the correct decision, that is the decision the original decision maker should have made. It is therefore an inherent feature of the appellate process that the appellate decision maker exercises, within the limits of the right of appeal, the jurisdiction or power of the original decision maker."

Basten JA (with McColl JA "generally" agreeing with His Honour's reasons) considered (at [76] to [87] and [131] to [137]) that the nature of the appeal to the workers compensation medical Appeal Panel was not entirely clear. His Honour noted the "tendency" of the legislature to identify available grounds for an appeal but without separately determining the scope of the appellate tribunal's powers and that this had "given rise to difficulties in other situations". His Honour considered that the approach adopted by the primary judge may have been erroneous in this respect and suggested, tentatively (without deciding) that the proper approach may be to limit the powers of the Appeal Panel "to addressing, and if thought necessary, correcting,

errors identified in the certificate granted by the approved medical specialist…" (at [137]).

In the workers compensation area generally, the judicial review cases are building up. *Summerfield v Registrar of the Workers Compensation Commission of NSW* [2006] NSWSC 515 (Johnson J)(31 May 2006) at [19] sets out past challenges comprising a "long line of cases" (see also, *Massie v Southern NSW Timber and Hardware Pty Limited* [2006] NSWSC 1045 (Sully J)(6 October 2006).

Notable also is *Dar v State Transit Authority of NSW* [2007] NSWSC 260 (Bell J) where the Court vitiated a medical Appeal Panel for failing to undertake an oral hearing and for (wrongly) presuming that the applicant desired this procedure. The Court applied the High Court decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

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

In *Allianz Australia Insurance Limited v Crazzi* [2006] NSWSC 1090 (Johnson J) (18 October 2006) the Court considered another challenge to a CARS assessment of damages for a motor vehicle accident. Three separate decisions were purportedly made in succession by the assessor. The first decision was a draft, mistakenly sent to the parties; the second decision omitted consideration of the question of interest which had not been argued but which was foreshadowed at the hearing, so the assessor held a further hearing many months later and then made a third decision. The final decision was held to be valid as the earlier decisions were infected with jurisdictional error. The Court applied and explained jurisdictional error and the effect of the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 in this regard. The Full Federal Court decision in *Jadwan Pty Limited v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1, which had also sought to explain the *Bhardwaj* decision, was distinguished by the Court.

See also *Kelly v Motor Accidents Authority of New South Wales* [2006] NSWSC 1444 (Rothman J) (on appeal) where the Court dismissed a challenge to a decision of a claims assessor not to exempt a matter from claims assessment (thereby possibly binding the insurer to pay a determined amount of assessed monetary damages accepted by the plaintiff with in 21 days after such determination).

In *Hayek v Trujillo* [2007] NSWCA 139 (18 June 2007) (Mason P, Ipp and McColl JJA), the Court considered the late claims and the timing, exemption and litigation provisions of the *Motor Accidents Compensation Act 1999* (NSW) (**MAA Act**) and the status of a "special assessment" certificate relating to the assessment of a dispute issued under s 96 of the Act.

District Court of NSW

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

The introduction of the District Court into this area brings new life and judicial minds to some interesting and complex administrative law questions. Divergent and some creative approaches are emerging. Publication of some District Court decision on the Lawlink web site has also assisted in lifting the quality and reasoning of many of the decisions. Applications made for merely tactical advantages by parties are usually readily transparent before the trial judges and are dispatched by the Court *before* the substantive personal injury hearing commences. (Note: I discussed some of the early cases relating to these developments in a paper titled "*Administrative Law in NSW Workers Compensation and Motor Accidents Compensation*" delivered to the Australian Insurance Law Association seminar held on 18 August 2005 in Sydney)

Testing the Limits of the Powers of NSW Law Enforcement Agencies

In *Ballis v Randall* [2007] NSWSC 422 (Hall J) the Court held unlawful the execution of three search warrants that were each executed covertly. The NSW police had waited until the suspect had travelled to Melbourne for the day and then they applied for and obtained warrants to secretly search and film the suspect's residential premises. Hall J held that while the search warrants were valid on their face, the execution of them was declared to have been unlawful. They are know as "sneak and peek" warrants in the United States.

In *Dowe v Crime Commission* [2007] NSWSC 166 (see also[2006] NSWSC 1312) (Hall J) the Supreme Court of NSW considered the validity of a number of statutory "controlled operation" authorities purportedly issued pursuant to the provisions of the Law Enforcement (Controlled Operations) Act 1997 (NSW). The instruments allow law enforcement officers to do that which would be otherwise illegal, such as, in the Dowe case, to deal with and sell 6 kilos of illegally imported cocaine to street level for criminal investigation purposes (and to improve the standing of their drug informant). An appeal hearing is presently fixed listed in the NSW Court of Appeal later in the year.

The Right to Reasons – New Duty? Clarification? The Demise of Osmond?

There are three significant recent decisions in this area:

As to the duty for administrative decision-makers to provide proper reasons, the NSW Court of Appeal has considered the duty in the context of a legal costs assessment "panel" (comprised of two legal practitioners) under the *Legal Profession Act 1987* (NSW). In *Frumar v The Owners of Strata Plan 36957* [2006] NSWCA 278 (Beazley, Giles and Ipp JJA) (17 October 2006) the Court held (at [42]) that the statutory duty of a costs assessor and the review panel to provide reasons, identified only the "minimum" extent of the duty at common law. Further (at [43]-[45]), any such statement of reasons should have sufficient content not only to facilitate any right of appeal on questions of law, but also to determine questions of fact. The Court set aside the panel's decision as the reasons were inadequate in that the basis for the approach to costs assessment was not explained and calculations of the final amount of costs allowed were not set out. The Court's remarks also apply to the new, and similar, costs assessment regime under the *Legal Profession Act 2004* (NSW) which is to be part of national model legislation (*Frumar* at [26]).

The importance of fully stated reasons as an essential legal requirement for a quasi-judicial tribunal (the NSW workers compensation medical Appeal Panel) was discussed in *Campbelltown City Council v Vegan* [2006] NSWCA 284 (25 October 2006) where the NSW Court of Appeal held that the Panel members had a duty to give full and proper reasons (at [24] per Handley JA with McColl JA agreeing) even though that was not an express requirement in the relevant legislation. The reasons were held to be inadequate and the Panel's decision was set aside. At common law, *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 held that there is no general law duty for administrators to provide reasons for statutory decisions in the absence of "special or exceptional circumstances" (see the cases on this cited in *Vegan* at [118]-[120]). In *Vegan*, the Court of Appeal held, as a matter of statutory construction and as a matter of principle, as the Panel was a quasi-judicial entity, it was required to provide reasons and indicated (at [106], per Basten JA with McColl JA "generally" agreeing) that the authorities that underpin *Osmond's case* might "no longer be as definitive as they once were".

In *Saville v Health Care Complaints Commission* [2006] NSWCA 298 (2 November 2006) the NSW Court of Appeal considered whether a failure of the NSW Medical Tribunal to provide adequate reasons would constitute a "jurisdictional error" (as had been pleaded in the summons in that case). The Court held that the Tribunal's reasons were brief but sufficient in the circumstances (where consent orders were largely being sought by the parties and the Tribunal added its own orders). As to the consequences of a determination of inadequate reasons, it was considered (at [24] per Basten JA, Handley and Tobias JJA agreeing) that even if the reasons were inadequate, it was entirely another question to be resolved altogether whether the decision would be held to be invalid if subject to jurisdictional error.

As for review of the decisions of judges, the NSW Court of Appeal emphasised in *Nasr v NSW* [2007] NSWCA 101 at [19] – [27] (Beazley, Hodgson and Campbell JJA) that the test for the adequacy of a judge's reasons is a broad one and that the touchstone is not as much the identified error as it is identification of a "substantial

wrong or miscarriage". The Court applied the principles in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443-444 (per Meagher JA) where it was said "Examination of nearly any statement of reasons with a fine-tooth comb would throw up some inadequacies".

Re-visiting or Re-Opening Government Decisions

Increasingly, State statutory decision-makers and tribunals are being asked to reconsider their decisions, or they are doing so of their own motion under the principles in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

This is occurring at all levels of government as the full implications of *Bhardwaj* are still being worked out by the Courts and the Executive.

There are many reasons why and ways in which a party, the decision maker or even a third-party might seek to have a decision reopened or revisited.

The authorities in this area suggest the following matters are crucial in determining whether a decision may properly or lawfully be revisited:

1. the identity of the applicant;
2. the timing of the application; and
3. the reasons for the application.

The three principal ways in which an executive or tribunal decision may be revisited are where there is:

1. Invalidity - by:

    a. The decision being so affected by fundamental or jurisdictional error that it is not a decision at all (in fact, the exercise of the statutory power remains unperformed – the *Bhardwaj* decision); or

    b. The decision being successfully challenged in a superior court in its supervisory jurisdiction and being set aside or quashed.

2. For "obvious error" or under a "slip rule" in curial proceedings or in some administrative review or external appeal contexts (such as in the Commonwealth AAT) – statutory or implied power or jurisdiction must be identified to exist for this to be available (for example, in the Courts of NSW, rule 36.17 of the *Uniform Civil Procedure Rules 2005* (NSW) provides that "If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error). Provision for dealing with "obvious error" is contained in the NSW workers compensation and motor accidents legislation.

3. By exercising the statutory power from time to time if permissible – for example, by section 33(1) of the *Acts Interpretation Act 1901*(Cth) (also for

> example, section 48(1) of the *Interpretation Act* 1987 (NSW)) which provides that a person or body which has a statutory function or duty may exercise that function or duty from time to time as occasion requires.

The fundamental principle that has emerged from the case law is that decision-makers may lawfully revisit decisions without a court order where those decisions can properly be considered as wholly invalid by reason of jurisdictional error. Indeed, they may well have a duty to revisit a decision in an appropriate case - *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 esp at [51] to [53] (per Gaudron & Gummow JJ).

The difficult questions are - what is the jurisdictional error and when does that error render a purported decision wholly invalid?

It does not normally matter who first identifies the jurisdictional error. It may be pointed out by one of parties or the applicant, or it may be recognised or identified by the decision-maker himself or herself. Plainly, for the decision-maker to seek to revisit the decision, the decision-maker will need to be quite satisfied that a court would, if presented with the true facts, accept there was jurisdictional error and would (almost as a matter of course) invalidate the decision. The usual discretionary factors would also have to be borne in mind (delay, futility and a party being the source of his or her own problems). The key is, of course, the relevant statutory context – including the constating purpose of the statutory provisions – within which the primary decision was made. But the consequences of jurisdictional error may not always readily be discerned.

As His Honour Justice Kirby stated (in his dissenting judgement in *Bhardwaj, ibid,* at [101]) the issue of invalidity:

> "… presents one of the most vexing puzzles of public law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction."

In *Allianz Australia Insurance Limited v Crazzi* [2006] NSWSC 1090 (Johnson J) the Supreme Court of NSW held that a Claims Assessment and Resolution Service Assessor's assessment of a damages claim (after a non-curial hearing) was not able to be re-visited from time to time as it bound the insurer if the claimant accepted the determination within a fixed 21 days. The assessment could be quashed or held never to have been made on the ground of jurisdictional error (which was established in that case). This does not resolve the void/voidable distinction, which itself was not resolved in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

The void/voidable distinction might never be resolved – see, for example, *Deveigne v Askar* [2007] NSWCA 45 (Hodgson, Giles and McColl JJA) in relation to an alleged invalidity or "nullity" of certain District Court proceedings.

The Resurgence of Procedural Ultra Vires after *SAAP*?

If a procedural step is properly considered part of a statutory scheme whereby it encapsulates or constitutes a "core element" of the duty to accord procedural fairness,

failure to take that step is a jurisdictional error: *Italiano v Carbone* [2005] NSWCA 177 at [105] to [106] per Basten JA. It is all a matter of statutory construction.

The principle was applied in majority decisions of the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162; (2005) 79 ALJR 1009. That case was also discussed in *Italiano v Carbone* [2005] NSWCA 177 at [63] by Basten JA (in dissent on this point – on application only, the principle is still good) in the following terms:

> "[*SAAP*] gives support to the contention that, in particular circumstances, breach of a mandatory statutory procedure may lead to invalidity of any resulting decision." (See also Einstein J at [2005] NSWCA 177 at [163]).

Italiano v Carbone involved judicial review of a Consumer Trader and Tenancy Tribunal case where damages were made against an entity that was never a party before the Tribunal. The Court of Appeal set aside the decision.

The real implications of *SAAP* are still to be felt at the State level.

Legislative provisions that may properly be characterised as open to fall within the *SAAP* principle, include where:

1. An essential part of a statutory scheme is a strict procedure that must be followed before any relevant finding or determination can permissibly arise;

2. The language of the relevant statutory provision is such that it is mandatory that the decision-maker not make an adverse finding unless or until some other step is taken; and/or,

3. The provision provides for a fair procedure or is part of Parliament affording a fair procedure (in the context of what might otherwise have been characterised as procedural fairness) before the decision or finding may lawfully be made,

(See, *SAAP* at [77] and [83] (per McHugh J - with Kirby J agreeing at [173] fn 129); [173] (per Kirby J); and [205] to [208] (per Hayne J - with Kirby J agreeing at [173] fn 129).

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.

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 (Rule 6.11(1) of the *Uniform Civil Procedure Rules 2005* (NSW)) 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). Leave can always be sought later to appear and play an active role if required (Rule 6.11(2) *UCPR*);

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. However, if a government agency consents to vitiating orders without a hearing on the merits of the judicial review case taking place, the proper order is for each party to pay their own costs – provided the matter was effectively settled or was rendered futile and the agency acted reasonably up to that date (*Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 esp at 624.5 and 625.6 (McHugh J)); 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 (such as the NSW Workers Compensation Commission and the NSW Motor Accidents Authority).

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.

These cases were recently considered in the context of *Hardiman* in *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [110]-[114](26 March 2007) (Rares J) and in *Ho v Professional Services Review Committee No 295(No 2)* [2007] FCA 603 (28 March 2007) (Rares J) (NB: these are on appeal to the Full Court of the Federal Court). In that case, the Court held that the Committee, a quasi-judicial tribunal, dealing with Medicare disciplinary matters, should not have appeared and played an active contradictor as by doing so, it gave the appearance of future apprehended bias were the matter to be remitted to it (as formerly constituted). It was held that in future, the Commonwealth should be joined as an active party *or* the Commonwealth Attorney General should appear to argue as the contradictor.

A creative approach to the issue was displayed in *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224 at [99]-[103] (per Sheller JA, with Priestly and Stern JJA agreeing) where the NSW Court of Appeal held in a solicitor's disciplinary proceedings, a failure by the Commissioner (made before the commencement of

disciplinary proceedings) to provide the solicitor with a copy of the original complaint and to permit him to respond vitiated the later disciplinary proceedings. In so holding, that Court found that the Commissioner's submissions as made in Court unintentionally suggested pre-judgment of the substantive matter (at [102]) and requested that, on remittal, the Commissioner refer the matter out to the Law Society Council for it to further deal with the original complaint (at [103]).

State Privative Clauses

One of the larger issues that will need to be determined in due course by the High Court is the question of the effectiveness of judicial review of wide ouster or privative clauses of the States, such as the one in s 179 of the *Industrial Relations Act 1996* (NSW) considered this year (and largely avoided) in *Fish v Solution 6 Holdings Limited* (2006) 80 ALJR 959 ([2006] HCA 22) and *Batterham v QSR Limited* (2006) 80 ALJR 995 ([2006] HCA 23). It has been described by some commentators as the "mother of all privative clauses" – it is cast in such wide terms.

At the Commonwealth level, the last significant word was *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 on the application of jurisdictional error in the face of a strongly-worded federal privative clause in the *Migration Act* 1958(Cth).

In *Solution 6*, the High Court dealt with a NSW privative clause and held relevant presumptions of Parliament in enacting ouster clauses as set out by the majority judgment, including (at [33]):

> "...the "basic rule, which applies to privative clauses generally … that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies". In addition, it must also be presumed that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution."

Whether the High Court follows through on this remark remains to be seen in a future case.

There is much activity at the State level (particularly in NSW) on the scope and effect of such State clauses. There is strong support among practitioners and commentators for the view that all that should be required to overcome an ouster clause is the establishment of a jurisdictional error. Upon that event, it can be said that a lawful decision was never made or the power never exercised – see, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [76] and the cases referred to there (per the majority). However, in the face of a State ouster clause, the NSW Court of Appeal is presently preoccupied with the task of identifying or characterising any errors as first constituting breaches of "essential", "imperative" and "inviolable" provisions before setting them aside – see, for example, *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales* (2005) 145 IR 327 at [56] & [57]; *Mitchforce Pty Ltd v Industrial Relations Commission* (2003) 57 NSWLR 212;

Uniting Church in Australia Property Trust (NSW) v Industrial Relations Commission of NSW (2004) 60 NSWLR 602; cf: *Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd* (2004) 88 SASR 311.

See also, Keith Mason's excellent paper "The New South Wales Landscape: Judicial Review at State Level" in *AIAL 3rd National Lecture Series*, 2006, AIAL, Canberra, page 79.

Wish List for State (and Federal) Administrative Law

Some of the developments I wish for (to achieve clarity and certainty) in this area include:

1 That "error of law", whether or not appearing on any "record" (however defined), be plainly justiciable for executive decisions in all matters, not merely for tribunals or quasi-judicial tribunals;

2 That the nature of an external or internal administrative appeal that is expressed by Parliament in broad terms (such as in providing merely for a "review" by a panel) be settled;

3 That the bounds of the scope of a permissible State privative clause be finally determined and that the word "*inviolable*" be stricken from the relevant State and constitutional writ jurisprudence (along with the word "*reconciliation*" - in an administrative law context - and the "*Hickman principles*"). The concept of jurisdictional error should be sufficient;

4 That the void/voidable distinction be settled so that it is capable of being explained sensibly to clients;

5 That procedural ultra vires rise from the ashes as an effective ground of review and that *Project Blue Sky* be distinguished or overturned;

6 That "Wednesbury unreasonableness" be renamed "manifest unreasonableness" (as suggested by Basten JA in *Saville v Health Care Complaints Commission* [2006] NSWCA 298) and become useful and effective again (as it remains so in Tasmania); and,

7 That an applicant in <u>any</u> case has good prospects of succeeding on the apparently available (and so far largely unattainable) "*S20"* ground of "manifest irrationality".

Harmonisation

In the near future, one might follow with interest the Commonwealth Attorney-General's new-found interest in both Federal ***and*** State administrative law and his proposed "harmonisation" project recently announced (see, his Media Release 113/2007 - 19 June 2007 and his paper given to the 2007 National Administrative Law Forum in Canberra on 14 June 2007). He is raising his project with the Standing Committee of Attorneys-General. From this we might see harmonising of:

- existing procedures across jurisdictions, for example by implementing a consistent approach to the availability of alternative dispute resolution and mediation;
- rules of standing;
- exemptions to application fees;
- the right to obtain reasons for decisions; and
- the level of assistance provided to unrepresented applicants.

The Attorney has had some success with defamation law and regulation of the legal profession. It is hoped that some gains can be made in administrative law as well.

Jacko and Ruffy

I conclude with a heart-rending story highlighting a dubious development in what has come to be styled "elder law" in NSW judicial review. It is an emerging area.

In *Allkins v Consumer Trader and Tenancy Tribunal* [2006] NSWSC 1093(Associate Justice Malpass) (19 October 2006) Jacko, a dog, was allowed to be kept at a mobile home by a couple at a residential park at a seaside town in NSW. The park rules were made pursuant to s62 of the *Residential Parks Act 1998* (NSW). The plaintiffs had a dog, Jacko. He died. The plaintiffs sought to replace him with another dog, Ruffy. Ruffy was brought into the village without prior approval by management. Subsequent applications for approval were not granted. The merits challenge in the NSW Consumer Trader and Tenancy Tribunal failed as the park had a policy and it in fact had amended the rules so as not to allow such pets in future. One might have thought that an opportunity presented itself to develop notions not only of procedural fairness but also of the circumstances in which "accrued rights" might be preserved. In the Supreme Court of NSW (with Legal Aid funding and senior counsel) it was alleged there had been a denial of procedural fairness and the new park rules were invalid.

The summons was given short shrift by the Court and was dismissed with costs. The decision was a bit harsh - for the plaintiffs, one might even say - the plaintiffs were barking up the wrong tree. Alternatively, one might say that the plaintiffs had bitten off more than they could chew. However, I would not say that. I would say the decision was a bit - "ruff".

Thank You