The Legal Framework of Challenges to Administrative Decision Making in NSW - A NSW Administrative Law Refresher

A paper delivered by Mark Robinson SC to a Learned Friends conference held at Lord Howe Island on 1 April 2012

I am asked to speak to you today on some matters pertaining to administrative law in New South Wales.

I propose to take you through what is in effect a brief refresher on administrative law in NSW. I will not cover the Commonwealth or the other states and territories – or you will never get to leave the building. There is too much.

I will talk about:

- Administrative law process and remedies in New South Wales;
- The primary tenets of administrative law;
- Merits review and judicial review in NSW (the legality/merits distinction);
- Update on jurisdictional error and the grounds of judicial review;
- Apprehended Bias and the Document "*Retention*" Policy - *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283;
- Administrative Law Reform in NSW - Statutory Judicial Review?
- Opportunities to Consolidate Tribunals in NSW – Upper House Report.

Administrative Law in NSW

The full range and scope of administrative law process and remedies should be first identified. At its most broad, administrative law in New South Wales relates to or concerns the following:

1. ***Self-help*** remedies or processes that might be invoked by aggrieved persons or entities from time to time (be they personal, political, fair or unfair, lawful or not). It can be as simple as picking up the telephone and speaking to the administrator who made the impugned decision or a letter-writing campaign.

2. ***Internal Review*** - where there is provision (usually in the enabling Act, but not necessarily so) for a person superior in employment status to the original administrative decision-maker to look at and re-make the subject decision (usually afresh).

3. ***Need the Documents? - Freedom of Information*** (now under *Government*

Information (Public Access) Act 2009 (NSW) - decisions are subject to merits appeals to the Information Commissioner and then to the Administrative Decisions Tribunal of NSW ("**ADT**"));

4. ***Breach of Privacy? - The Privacy Commissioner***, and the ADT in administering the *Privacy and Personal Information Protection Act 1998* (NSW) – involves breach of privacy by a State government agency only; and,

5. ***Maladministration? - The Ombudsman*** - whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations (which are usually accepted by the NSW Government);

6. ***Corrupt Conduct? - The Independent Commission Against Corruption***;

7. ***Ex gratia or act of grace payments*** – When someone has suffered a financial or other detriment as a result of the workings of the government. This detriment must be of a nature which cannot be remedied or compensated through recourse to legal proceedings. Payments are discretionary in nature and it is for Ministers to determine applications – see; NSW Treasury Circular NSW TC 05/05, 29 June 2005.

8. ***External Merits Review*** - is the process of obtaining an external review of the merits of a statutory (administrative) decision by a person or entity independent of the original decision-maker, who comes to a new decision. Merits review involves making a decision "*de novo*" (meaning, literally, from the very beginning, anew). It has also been referred to as "*standing in the shoes of the decision-maker*" and concerns a "*remaking*" of the decision under review in order to come to the correct or preferable decision based on evidence now presented. The jurisdiction of the General Division of the *ADT* is a leading example of an independent, external merits review body. The leading case on the nature of external merits review is *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

9. ***Judicial Review*** - the legality of administrative decisions, including those of Ministers, Governments and Tribunals that affect rights, interests or legitimate expectations of persons or entities (it usually arises in the Supreme Court of NSW, Common Law Division, Administrative Law List - by proceedings known as "*judicial review*" of administrative action). This is usually the option of last resort for an applicant, and it is undertaken when all other options for challenge are not available. I leading NSW case concerning judicial review is *Bruce v Cole* (1998) 45 NSWLR 163.

Administrative law did not develop in a vacuum.

It was developed by the courts in England and Australia over 500 years and for good reason. Its purpose was to keep a check on inferior court judges and tribunals and quasi-judicial tribunals as well as to keep check on executive decision-makers so as to ensure they all acted lawfully and within the scope of their legal powers. Primary tenets of administrative law have

developed over time. Overall, they are to ensure that in the making of administrative decisions, there is:

a. legality (judicial review and merits);
b. fairness; (judicial review and merits)
c. participation (merits);
d. accountability; (merits)
e. consistency; (merits)
f. rationality; (judicial review and merits)
g. proportionality (judicial review and merits); and,
f. impartiality (judicial review and merits).

The usual aim of an **external merits review** process in a tribunal is to provide the review applicant with a correct or preferable administrative decision, while at the same time, improving quality and consistency in relation to the making of decisions of that kind. It is an aid to good public administration.

The primary aim of **judicial review** in the court is to ensure (and to some extent, enforce) legality, namely the legal correctness of administrative decisions. It seeks to prevent unlawful decisions from remaining or standing on the public record.

The fundamental distinction between the two is known as the "*legality/merits distinction*".

Judicial Review of Administrative Action in NSW

The leading academic text in this area is 1,023 pages long - Aronson, Dyer and Groves, Judicial Review of Administrative Action, 4th ed, 2009 (Lawbook Co, Sydney).

Framework and Procedure

The jurisdiction of the superior courts by way of judicial review of administrative action is a jurisdiction that was developed by the courts in accordance with the common law or general law. It involves a court assessing or examining a decision or purported decision of an executive or governmental body or a tribunal for legal error (and not on the merits of the particular case).

The relief granted (which is discretionary) may be to quash or set aside the decision, declare the decision invalid or void and, in some cases, to remit the decision to the original or primary decision-maker for re-consideration according to law (sometimes with a direction that the matter be decided by a different decision-maker or differently constituted tribunal).

Judicial review in New South Wales lies largely within the realm of common law.

The NSW Government has deliberately chosen ***not*** to enact a codification of the law here [such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("**ADJR Act**") or the *Judicial Review Act 1991* (Qld)] – although that might change soon. The consequence is that, in so far as decisions of most public bodies and officials made or required to be made under statute are concerned, the avenue for judicial review is neither helped nor hindered by statutory considerations. The grounds for such review are still evolving through decisions of various courts and many of these grounds overlap.

Early identification of the most appropriate ground or grounds of judicial review is the key to success in this area, providing you have also sought the appropriate remedy and the discretionary factors do not work against you. The discretionary factors are these. A remedy will not normally be granted (on the finding of a legal error or defect) if:

- a more convenient and satisfactory remedy exists (such as a merits appeal to the ADT);
- 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[1]; also;
- an applicant should not have acquiesced in the conduct of proceedings known to be defective. An applicant cannot "*sleep on their rights*" - they should make an election to challenge or no longer participate in the executive of court-like process below.[2]

1 See the discussion of the discretion and the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [91]-[92] per Kirby J.

2 Aronson and Dyer and Groves Judicial Review of Administrative Action, 4th edition, 2009, Law Book Co, Sydney at [12.175]. cf: *Rodger v De Gelder* (2011) 58 MVR 23; [2011] NSWCA 97 (Beazley, McColl and Macfarlan JJA)

Ordinarily then, grounds of judicial review known as:

- error 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 an excess of power or authority, will give rise to the availability of relief against the decision of that administrative body for what has come to be known nowadays as a "**jurisdictional**" error of law. As the High Court has indicated,[3] 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)[4]. An obligation to accord procedural fairness will also arise where the legitimate expectations of a party are adversely affected by the exercise or proposed exercise of a particular power. It is essentially a matter of seeking to ensure "fair-play in action"[5].

Practice and Procedure

In NSW, an aggrieved party hoping to seek relief by way of an application for judicial review must apply to the Supreme Court of NSW– usually in the ***Administrative Law List*** of the Common Law Division of the Court.

To this end, legal practitioners need to be aware of the Supreme Court Practice Note CL 3 dated 6 July 2007 which explains the operation of the Administrative Law List and some of the provisions of the *Uniform Civil Procedure Rules 2005*(NSW).

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3 *Kioa v West* (1985) 159 CLR 550 at 576, 582-5, 632; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 574-5; cf *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 75 ALJR 52 at [38]-[41].
4 There remains some controversy as to the "*precise jurisprudential character of the process of statutory interpretation that is necessarily involved in determining whether a duty (to afford procedural fairness) exists*": see- *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* [2008] NSWCA 356 at [53]-[54] (Spigelman CJ, with Allsop P and Sackville AJA agreeing) and Stewart v Ronalds (2009) 76 NSWLR 99 at [67]-[70] and [78] (Allsop P, Hodgson JA, Handley AJA).
5 *Ridge v Baldwin* [1963] 1 QB 539 at 578 per Harman LJ; and *TCN Channel Nine Pty Ltd v ABT* (1992) 28 ALD 829 at 858.

The primary statutory provisions concerned with properly invoking the Supreme Court's judicial review jurisdiction (by way of the filing of a summons) are the following sections of the *Supreme Court Act 1970* (NSW):

- s69 – proceedings by summons in lieu of the prerogative writs;
- s65 – an order to fulfil a public duty;
- s66 – injunction; and
- ss75 and 63 – declarations.

In the *Uniform Civil Procedure Rules 2005*, a practitioner must first check the list of legislation in Schedule 8 (Assignment of business in the Supreme Court). If an Act is listed there, any proceedings in the Supreme Court regarding any section of that Act are thereby assigned to be heard in the Administrative Law List of the Common Law Division. By reason of rule 45.3, judicial review proceedings should <u>all</u> be assigned or transferred to the Administrative Law List. Other UCPRs that must be checked are rule 1.18(b)&(c) – assignment of business; Part 49 (internal appeals); Part 50 (external appeals); and Part 51 (Court of Appeal).

Section 48 of the *Supreme Court Act 1970* (NSW) sets out which matters are assigned to be heard in the Court of Appeal.

Once proceedings are commenced, in the ordinary course, a directions hearing will be convened before the Registrar of the Supreme Court (sometimes before a judge). At that hearing, orders are made for the orderly preparation of the matter for trial.

The principal concerns are then:

- Obtaining any available documents and affidavits for tender; and
- Obtaining an early hearing date.

Usually, all that is required in evidence is the tender of the documentary material that was before the original decision-maker (*cf*: *Allianz Australia Insurance Ltd v Kerr* [2012]

NSWCA 13 (McColl, Basten and Macfarlan JJA)(16 February 2012)). In some cases (depending on the ground of judicial review relied upon) more evidence than just the exhibits is required, such as an affidavit or a transcript of the hearing of the proceedings below. Oral evidence and cross examination is almost never required in judicial review matters. If evidence is put on that is voluminous and is not required, one can expect significant criticism from the bench and maybe an adverse costs order.

At the first return of the summons, under the Practice Direction, an application may be made seeking a direction that the person or body whose decision has been challenged furnish to the plaintiff a statement of reasons for the impugned decision. The statement must not only set out the decision-maker's reasons for decision but must also include that person's findings on material questions of fact, referring to the evidence or other material on which those findings were based, together with that person's "*understanding of the applicable law and the reasoning processes leading to the decision*".

It can readily be seen that in a number of circumstances, an order of the Court requiring a decision-maker to provide his/her "*understanding of the applicable law and the reasoning processes leading to the decision*" might be an extremely useful forensic tool or weapon.

Obtaining reasons by order of the Court might well be the only option available to aggrieved applicants in NSW, as, ordinarily, reasons are not required to be given by an executive decision-maker unless there are special circumstances - *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656. The general law requires that, in the ordinary case, where an administrative decision-maker exercises discretionary statutory power to make a decision, there is no common law duty to provide reasons for that decision. However, the High Court also held in *Osmond* that, on occasion, there were "*special circumstances*" either in the relevant Act or in the principles of natural justice such that the general rule did not apply and reasons were required to be provided (see, *Osmond* at 670.5 (per Gibbs CJ) and 676.7 per Deane J). This proviso was explained and applied in NSW in relation to a ruling that costs assessors must provide reasons for their decision (the Act was silent on the question) otherwise, the appeal rights given by the Act would be close to useless - see, *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729 at

734C to 735C (per Priestley JA, with Handley and Powell JJA agreeing), adopting in part Sperling J's decision in *Kennedy Miller Television Pty Limited v Lancken*, New South Wales Supreme Court, unreported, 1 August 1997 (BC9703385).

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) 67 NSWLR 372 where the NSW Court of Appeal held that the Appeal Panel members in workers compensation had a duty to give full and proper reasons (at [24] per Handley JA with McColl JA agreeing) even though that was not expressly stated in the relevant legislation. The reasons were held to be inadequate and the Panel's decision was set aside. The Court indicated (at [106], per Basten JA with McColl JA agreeing) that the authorities that underpin *Osmond's* case might "*no longer be as definitive as they once were*". In *Vegan*, the Court of Appeal further held that, as a matter of statutory construction and as a matter of principle the medical Appeal Panel was a quasi-judicial entity and it should be required to provide reasons for that reason alone.

Jurisdictional Error and the Grounds of Judicial Review

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari, prohibition and mandamus and injunctions and declarations) are available under the *Supreme Court Act* 1970 (NSW) in the Court's exercise of its supervisory jurisdiction over State statutory decision-makers and tribunals.

Establishing a ground of judicial review is all that is ordinarily required in order to move the Court for a remedy (which in judicial review, as we have seen, is discretionary in most cases – possibly except for denials of natural justice – see: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, at [80] (per McHugh, with Kirby J agreeing)).

Examples of jurisdictional errors of State tribunals and executive decision-makers include them:

- identifying a wrong issue;

- asking a wrong question;
- ignoring relevant material;
- relying on irrelevant material; or
- an incorrect interpretation and/or application to the facts of the applicable law,

in a way that affects the exercise of power (see: *Craig v State of South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; and *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [60] to [70].

Jurisdictional errors that may be committed by a tribunal or executive body (post *Craig's case*) that will always be corrected by a Superior Court (as extended by the High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [61]-[63]) can also be discussed as follows:

- The definition of "*jurisdictional error*" in *Craig's case*, is not exhaustive (*Kirk's* case also held this at [60] to [70]).

- Those different kinds of error may well overlap.

- The circumstances of a particular case may permit more than one characterisation of the error identified, for example,

  - as the decision-maker both asking the wrong question, and
  - ignoring relevant material.

Further, doing the above results in the decision-maker exceeding the authority or powers given by the relevant statute (*ie*: committing a "*jurisdictional error*"). In other words, if an error of those types is made, the decision-maker did not have <u>authority</u> to make the decision that was made. He or she did not have jurisdiction to make it - *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 esp at [51] to [53].

Denials of natural justice or breaches of the rules of procedural fairness almost invariably result in a jurisdictional error - *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 508 [83]; *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82; and, *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* (2001) 206 CLR 57.

The remaining traditional grounds of judicial review (in addition to denials of natural justice

or breaches of procedural fairness – including bias and apprehended bias) in respect of tribunals and executive decision-makers include:

1 Errors of law (including identifying a wrong issue; making an erroneous finding; and reaching a mistaken conclusion).
2 improper purpose;
3 bad faith;
4 irrelevant/relevant considerations;
5 *duty to inquire* (in very limited circumstances);
6 acting under dictation;
7 unreasonableness;
8 *proportionality* (not presently available);
9 no evidence;
10 *uncertainty*;
11 inflexible application of a policy (without regard to the individual merits of the application);
12 manifest irrationality or illogicality;
13 failure to afford a "*proper, genuine and realistic consideration*" of material; and,
14 *failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker's power.*

As to **improper purpose**, this ground of judicial review is best explained by the description of it in s 5(1)(e) read with s 5(2)(c) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which provides: "*The making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made [in that there was] an exercise of a power for a purpose other than a purpose for which the power is conferred*." The common law position in Australia is that the improper purpose complained of must be or have been a substantial purpose in the sense that the decision or act complained of would not have occurred but for the improper purpose: *Thompson v Randwick Municipal Council* (1950) 81 CLR 87 at 105–106 and *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491. Improper purpose is also sometimes linked to *Wednesbury* unreasonableness – see, for example, *East Melbourne Group v Minister for Planning* (2008) 23 VR 605; [2008] VSCA 217 at [340]–[341] (per Ashley and Redlich JJA).

As to **bad faith** - this ground relates to the discretionary powers of a decision-maker. Fraud and bad faith operate very much like their common law counterparts. A finding of fraud or bad faith in the making of a decision will vitiate the decision. The High Court considered the concepts of fraud and bad faith in public law in *SZFDE v Minister for Immigration &*

Citizenship (2007) 232 CLR 189 in particular, in the context of federal executive decisions and federal constitutional law. The Refugee Review Tribunal was held to have made a decision affected by a third party fraud, in that the refugee applicant's former migration advisor had fraudulently advised the applicants to not turn up at the tribunal's oral hearing.

As to **irrelevant/relevant considerations** - A decision-maker must take into account only relevant considerations and must not take into account irrelevant considerations. The leading case in Australia is *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–42 where Mason J (as he then was) set out the position.

As to **dictation** - this ground of judicial review applies when a decision-maker is possessed of personal statutory decision-making power. In that circumstance, the decision-maker must not be dictated to by politicians or more senior public servants, or by anyone else. Further, blind adherence to government policy might well provide evidence of dictation. A decision-maker must not abdicate his or her personal judgment or personal duty to anyone. The leading cases are: *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 and *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

As to **unreasonableness** - this ground is also described as "*Wednesbury unreasonableness*" after the leading English Court of Appeal decision *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. It was discussed in *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; [2008] VSCA 217 where leading authorities were gathered and the principles derived from many cases were set out[6]. The Victorian Court of Appeal held invalid the exercise of a planning Minister's statutory power to exempt a proposed development from the public notification process because her public reasons for her decision did not fit the actual facts relating to the development and it was held to be unreasonable. The Court considered (at [182]-[184] - per Ashley and Redlich JJA) that the following matters or situations <u>*each*</u> satisfy the *Wednesbury* test for unreasonableness – where the decision under challenge:

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6 See also - Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed, 2009 (Lawbook Co, Sydney) at [6.175]-[6.220]

- is devoid of any plausible justification;
- is one that no reasonable person could have made;
- concerns the engagement by the decision-maker in an abuse of discretion;
- is manifestly unreasonable in that it simply defies comprehension;
- it must be obvious that the decision-maker consciously or unconsciously acted perversely;
- involves manifest illogicality in arriving at the decision (there being illogical findings, or inferences of fact unsupported by probative material or logical grounds);
- involves irrationality (which encompasses disregard of relevant considerations, giving regard to irrelevant considerations and manifest unreasonableness);
- is manifestly illogical;
- involves an absence of any foundation in fact for the fulfilment of the conditions upon which the existence of the power depends;
- involves a factual finding where all of the evidence points one way, and the opinion rests upon a contrary view;
- where the decision is not supported on logical grounds by the material adduced;
- where important parts of the reasons of the decision-maker were, upon consideration of the evidence, in error and could not be supported on any reasonable basis;
- if the facts disclose no basis for the decision, it will be invalidated without any distinction being drawn between errors of law and fact; or,
- where by the decision-maker's own criteria it can be seen that the factual result is perverse.

As to the **no evidence** ground - decisions which are based upon findings of fact must be founded upon logically probative evidence and not on mere suspicion. The leading cases are *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 4 ALD 139; 44 FLR 41 at 62–68 per Deane J (with Evatt J agreeing).

As to the **inflexible application of a policy** ground - a ground of judicial review will be established where a decision-maker exercises a discretionary power in accordance with a rule or policy and without regard or apparent regard for the merits of the applicant's case.
The leading case in Australia is *Green v Daniels* (1977) 51 ALJR 463.

As to **manifest irrationality or illogicality** - A comparatively recently identified ground of judicial review is that the administrative decision was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds such that the decision-maker

misconceived his or her purpose or function - *Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165[7]. The refugee applicant there lost the case, but the principle emerged from it. The ground would also apply to a decision or reasoning that is hopelessly confused and irrational. However, it is available only in relation to such errors that are in the extremely serious category. While the ground is now established in the High Court's "constitutional writ" jurisdiction, it also applies in the NSW Courts as part of the general law.

The concept of manifest illogicality or irrationality was considered by the NSW Court of Appeal in *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [57]-[66] (see also, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [92]).

As to the "**proper, genuine and realistic consideration**" ground - other grounds of judicial review or formulations of the same are adopted from time to time. Some of them fall in and out of favour with the Courts. One example is the ground styled in terms that the decision-maker failed to give the matter "*proper, genuine and realistic consideration*" to a relevant matter.

It first came to attention as a separate ground of judicial review in *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 ALD 291 (Gummow J). While it is arguably appropriate to rely on it as a proper and separate ground of judicial review, be aware it was soundly criticised in the Federal Court in *Minister for Immigration & Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 441-442 and in the NSW Court of Appeal in *Anderson v Director General of the Department of Environmental and Climate Change* [2008] NSWCA 337 at [51]-[60] (Tobias JA, with Spigelman CJ and Macfarlan JA agreeing).

The criticisms of the ground relate to its vague or imprecise nature and that it is often capable of being the platform for an impermissible merits-based attack under the guise of judicial review. Notwithstanding this, the ground has been accepted and applied in NSW a number of times and at Court of Appeal level. The arguments are set out in detail in *Anderson* (*ibid*).

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7 See also the discussion of the *S20/2002* case and the ground of judicial review at Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed, 2009 (Lawbook Co,

In 2010, the High Court allowed the ground of review some oxygen in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [26]-[33] before ruling it did not apply in the instant case.

However, the same may be said of the *Wednesbury* unreasonableness ground and other grounds. The Court is always vigilant to keep the parties to the question of legality in judicial review proceedings. Review on the merits is not permissible in such proceedings.

It would sometimes be preferable for a practitioner to attempt to recast any ground founded on the "*proper, genuine and realistic consideration*" ground into one or other of the grounds of judicial review so as to avoid this criticism.

The Record

It should be borne in mind that as an alternative to jurisdictional error, one need only prove that there was an error of law on the face of the record on any of these grounds in order to obtain relief in the nature of certiorari (quashing or setting aside). Accordingly, attention should be drawn to errors such as this as they go to legality as well in the sense that once found, a decision is usually set aside by the court. Any of the above errors is capable of constituting error of law on the face of the record, and, if they are serious enough, they also constitute jurisdictional error or a constructive failure of the decision maker to exercise his or her jurisdiction (or both or all three). By section 69(3)&(4) of the *Supreme Court Act 1970* (NSW), the "*record*" of a tribunal includes the written reasons expressed for its "*ultimate determination*".

Apprehended Bias Developments

The bias rule of procedural fairness is that a decision maker must not be personally biased (actual bias) or be seen by an informed observer to be biased in any way (apprehended or ostensible bias) in the hearing of or dealing with a matter during the course of making of a

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Sydney) at [5.65]-[5.75] and [4.410]-[4.420]

decision.

The rules in this area are broadly the same in respect of courts, tribunals and for executive decision makers (even expert executive decision-makers).

The apprehension of bias principle has its justification in the concept that judges, tribunal and statutory decision-makers should be independent and impartial. The essential question is whether there is a *possibility* (real and not remote) and not a *probability* that a decision-maker *might* not bring an impartial mind to the question to be determined (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7]-[8]). The question is answered by reference to whether the fair-minded lay observer *might* reasonably apprehend that the decision-maker *might* not bring an impartial mind to the resolution of the issue to be decided (*ibid*, at [33]).

Bias may arise from:

1 interest - pecuniary or proprietary;
2 conduct;
3 association;
4 extraneous information; or
5 from some other circumstance (*Ebner, ibid*).

The High Court has stated that the apprehension of bias principle "*admits of the possibility of human frailty*" and "*its application is as diverse as human frailty*" (*Ebner, ibid*, at [7]).

In the case of administrative proceedings conducted in private (as, for example, the way that MAA motor accident claims assessment conferences are conducted) the appropriate apprehended bias rule might in future be stated in the following terms (from the High Court in *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [28]:

> "Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a *hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias*." (my emphasis)

Normally, if bias becomes an issue, it should be raised or dealt with by an applicant's legal

representative immediately upon the issue becoming apparent. In court proceedings this might well occur while proceedings are being conducted. Occurrences of bias can readily, albeit inadvertently, be waived by failing to raise the issue promptly and before the decision maker concerned.

Actual bias cases are rare. They are normally clear cut and rarely become the subject of legal proceedings. Apprehended or ostensible bias is not as straightforward. There is a real potential for litigation where the perception of such bias arises.

Apprehended bias was considered by the High Court in *Vakauta v Kelly* (1989) 167 CLR 568. There, the Court examined comments made by Justice Hunt in the Supreme Court of NSW while he was hearing a personal injuries case. The judge was making some observations about expert doctors in the early part of the proceedings. The High Court determined that these comments amounted to ostensible or apprehended bias because they might lead to the conclusion, in the mind of the reasonable or fair-minded observer, that the judge was heavily influenced by views he had formed on other occasions rather than by an assessment based on the case in hand. In that case, at page 572-3, the High Court said:

> "The learned trial judge's adverse comments about Dr. Lawson, Dr. Revai and Dr. Dyball in the course of the trial of the present case were indeed strong:
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> > *"that unholy trinity"; the G.I.O.'s "usual panel of doctors who think you can do a full week's work without any arms or legs"; whose "views are almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously."*
>
> His Honour below had indicated that he regarded those three medical practitioners as falling within a "*particular category of doctors*" to whom he had an adverse attitude. He stated that he expressed his views "*for the benefit of the present parties in the negotiations which were taking place*." The implication of that last comment would seem to have been that the parties should negotiate any settlement on the basis that his Honour would not be influenced by what those three doctors might say in evidence. In the event, only Dr. Lawson was called to give oral evidence. Dr. Revai's written report was received in evidence. No evidence from Dr. Dyball was received."

The High Court held that as counsel had failed to object to these remarks during the course of the hearing, that party had waived its right to complain about it. **However**, there were ***further***

remarks made by the judge after the hearing and in the reserved judgment itself (which came down in favour of the plaintiff) where the High Court held that there was plainly evidence of apprehended bias and it set aside the decision below. For example, his Honour said in the judgment that the evidence of one of the doctors was "*as negative as it always seems to be — and based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints of pain*".

The Document "Retention" Policy that Destroyed Documents

In *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283, the High Court considered an apprehended bias case where Judge Jim Curtis of the NSW Dust Diseases Tribunal was asked to recuse himself by one of the parties because he was about to hear a case that involved determination of the very same factual issue that had been decided adversely to the defendant party in an earlier component of the case. The issue concerned whether or not a cigarette manufacturer had deliberately devised and deployed a policy of selectively destroying pesky documents that might be called for in discovery or on subpoena in legal proceedings. The primary witness to be called was to be the same witness called in the earlier proceedings. This was also in circumstances where in a interlocutory ruling on discovery, the judge had found actual fraud on the defendant party as to its document retention policy in terms of the high test in section 125(1) of the *Evidence Act 1995*(NSW) (and not the "*reasonable grounds*" test in section 125(2)).

The High Court broadly agreed on the formulation of the correct legal test for ascertaining apprehended bias (for judges). However, there was disagreement as to the attributes to be ascribed to the hypothetical observer. The majority judgment was by Heydon, Kiefel and Bell JJ and the minority judgments were by French CJ and Gummow J.

The Court stated the accepted legal test for apprehended bias as being in the following terms (at [104]):

> "The rule requires that a judge not sit to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide [*Livesey v New South*

> *Wales Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337]. The apprehension here raised is of pre-judgment; it is an apprehension that, having determined the existence of the policy in the earlier proceeding, Judge Curtis might not be open to persuasion towards a different conclusion in Mrs Laurie's proceeding."

As to the rationale for the apprehended bias rule, the High Court (majority) explained (at [139]-[140]):

> "It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification. Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned. In *Livesey* it was recognised that the lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.
>
> Of course judges are equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence. Trial judges are frequently required to make rulings excluding irrelevant and prejudicial material from evidence. Routine rulings of this nature are unlikely to disqualify the judge from further hearing the proceeding. This is not a case of that kind. It does not raise considerations of case management and the active role of the judge in the identification of issues with which Johnson was concerned. At issue is not the incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knows that Judge Curtis has found that [the defendant party] engaged in fraud and who has read his Honour's reasons for that finding. Some further reference should be made to those reasons." (footnotes omitted)

The Court of Appeal decision which held that Judge Curtis's decision not to recuse himself was correct was set aside in the High Court which ordered that Judge Curtis be prohibited from further hearing or determining the Dust Diseases Tribunal proceedings.

Proposed Reform of Judicial Review in NSW

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

Some other Australian jurisdictions have established a <u>statutory</u> right to judicial review that

effectively constitutes an entire code (of reasons, standing, grounds of judicial review and relief).

The most recognised of these statutes is the Commonwealth's *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**). [8] It is essentially a codification of the common law judicial review that stripped away most of its historical complexities. It was drawn up after Parliament received the Report of the Kerr Committee in 1971. The Kerr Committee, established on the recommendation of the then Solicitor-General, Sir Anthony Mason, presented an entirely new structure for administrative law in Australia [9].

The ADJR Act celebrated its 30th anniversary in 2010. It commenced operation on 1 October 1980. Sir Anthony Mason presented a paper in 2010 to the Australian Institute of Administrative Law[10] explaining his views as to the success of the "New Administrative Law" as it came to be known (together with the Commonwealth Administrative Appeals Tribunal, the Ombudsman and Freedom of Information legislation).

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

In March 2011, the NSW Attorney General released a discussion paper on this topic titled "Reform of Judicial Review in NSW". It is on the AG's "Lawlink" web site.

The discussion paper analyses the current operation of judicial review in NSW and reforms in other jurisdictions, with particular focus on the ADJR Act [in this regard the discussion paper also serves as an excellent research paper for busy practitioners]. It asks whether there is a

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

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

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

need for reform of judicial review in NSW and, if so, what are the key issues that should be addressed in any reform measures. Specifically, the discussion paper asks:

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

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

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

Note that the Supreme Court Practice Note CL 3 dated 6 July 2007 which explains the operation of the Administrative Law List and some of the provisions of the *Uniform Civil Procedure Rules 2005* also provides for a party asking the Court for a statement of reasons at directions hearings of administrative law matters. However, this remedy can only be deployed in litigation matters pursuant to section 69 of the *Supreme Court Act 1970* (NSW). It would be convenient to have reasons prior to any such litigation.

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

Opportunities to Consolidate Tribunals in NSW – Upper House Report.

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

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

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

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

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

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

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

There is a range of tribunals operating now in New South Wales.

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

There are also a number of other tribunals, including the:

- MAS and CARS in the Motor Accidents Compensation Authority of NSW
- Workers Compensation Commission
- Guardianship Tribunal
- Mental Health Review Tribunal
- Local Government Remuneration Tribunal
- Statutory and Other Offices Remuneration Tribunal
- Parliamentary Remuneration Tribunal
- Victims Compensation Tribunal
- Anti-Discrimination Board
- Local Government Pecuniary Interest Tribunal
- Vocational Training Tribunal
- Local Land Boards.

There are also specific health professional disciplinary tribunals functioning in New South Wales including the:

- Medical Tribunal
- Nursing and Midwifery Tribunal
- Chiropractors Tribunal
- Dental Tribunal
- Optometry Tribunal
- Osteopathy Tribunal
- Pharmacy Tribunal
- Physiotherapy Tribunal
- Podiatry Tribunal
- Psychology Tribunal.

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

It will be a most interesting year.

Thank you