

Judicial Review of CARS and MAS Determinations - Administrative Law in Practice

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In the late 1990s, the NSW Parliament enacted some significant legislation dealing with entirely new non-curial processes for compensating persons injured in motor accidents. The changes were made by the *Motor Accidents Compensation Act 1999 (NSW)* (“the MAC Act”). The legislative reforms introduced measures to provide for the determination of personal injury claims and the resolution of associated medical disputes primarily through the use of administrative and statute-based procedures and measures intended to reduce the level of litigation or confine the circumstances in which court proceedings may be instigated in respect of a claim for personal injury damages.

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

In motor accidents disputes, a large part of binding decision-making is now undertaken by (expert) statutory “non-curial” decision makers. Medical practitioners and other suitable qualified persons (who are appointed as “*medical assessors*”) make binding determinations of the cause and extent of injury, and, a panel of experienced personal injury lawyers (appointed as “*claims assessors*”) make determinations binding on the insurers as to damages (if liability had been admitted) under the MAC Act.

One significant feature of the motor accidents scheme is the lack of provision of appeal and/or review mechanisms that would enable a claimant or insurer to appeal or challenge and thereby set aside incorrect or wrong decisions throughout the process. One exception is section 63 of the MAC Act which provides for reviews by a medical assessors review panel on a *de novo* basis once the relevant or proper officer of the MAA determines that there is a

reasonable cause to suspect that the medical assessment was incorrect in a material respect (namely, in respect of an error that was considered not trivial, insignificant or immaterial - see, *Meeuwissen v Boden* [2010] NSWCA 253 (Beazley and Basten JJA and Sackville AJA)).

This paper will set out a brief explanation of the main principles of administrative law and its context as it operates in the field of damages for personal injury in NSW. For those of you who are already familiar with this area, please consider it a refresher.

Administrative Law in NSW

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

1. ***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;
2. ***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 Administrative Decisions Tribunal of NSW (“*ADT*”) is a leading example of an independent, external merits review body.
3. ***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 re-make the subject decision (usually afresh).
4. ***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 ADT);
5. ***The Ombudsman*** - whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations;
6. ***The Independent Commission Against Corruption;***

7. *The Privacy Commissioner*, and the ADT in administering the *Privacy and Personal Information Protection Act 1998* (NSW); and,
8. *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).

Administrative law did not come about in a vacuum.

It was developed by the courts in England and Australia over 500 years and for good reason. It 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;
- b. fairness;
- c. participation;
- d. accountability;
- e. consistency;
- f. rationality;
- g. proportionality; and,
- f. impartiality.

The usual aim of a **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.

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. As I said earlier, 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)]. 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 to not work against you. The discretionary factors are that a remedy will not be granted if:

- a more convenient and satisfactory remedy exists;
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay, or,
- if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the

- application is made¹; 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 process.²

Ordinarily then, grounds of judicial review known as errors of law amounting to identification of the wrong question, ignoring relevant material, relying on irrelevant material or, at least, in some circumstances, making an erroneous finding or reaching a mistaken conclusion, leading to the exercise of an excess of power or authority, will give rise to the availability of relief against the decision of that administrative body for what has come to be known nowadays as a “jurisdictional” error of law. Moreover, 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 ensuring fair-play in action.

In NSW, it may be open to an aggrieved party under both personal injury schemes to seek relief by way of an application for judicial review in 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*.

The primary statutory provisions concerned with properly invoking (by way of summons) the

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]:

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).

Supreme Court's judicial review jurisdiction are the following sections of the *Supreme Court Act 1970* (NSW):

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

In the *Uniform Civil Procedure Rules 2005*, a practitioner must first check the list in Schedule 8 (Assignment of business in the Supreme Court). The MAC Act is listed there and 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 all 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).

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. 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 appropriate 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 Spierling 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 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 authority to make the decision that was made. He or she did not have jurisdiction to make it.

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 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 constitute 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. By section 69(3)&(4) of the *Supreme Court Act 1970* (NSW), the “record” of a tribunal (such as a CARS assessor or a MAS assessor) includes the written reasons expressed for its “*ultimate determination*”.

Some Fundamental Questions in Personal Injury Law

As you are aware, some fundamental questions relating to motor accidents compensation are still being worked through by the courts – in judicial review cases and in related appeals. Some of the more recent cases will be discussed by the next two speakers.

For the present, I note that the Supreme Court has made some achievements in the following cases. Some of the highlights include: In *McKee v Allianz Australia Insurance Ltd* (2008) 71 NSWLR 609 (Allsop P, Giles and Basten JJA) where the Court of Appeal considered the nature of an appeal in a legislative setting similar to that found in the workers compensation cases – that is the proposed “*review*” to an appeal panel of medical assessors in section 63 of the MAC Act. The majority of the Court held the word “*review*” constituted a “*de novo*” review and it extended to review of the whole of the initial medical assessment now under review. This conclusion was said to be derived from the “*text and structure*” of the Act (eg,

at [7] per Allsop P). Basten JA dissented. The Act was amended to lock in the majority view on this with effect from 1 October 2008.

In *Allianz Australia Insurance Limited v Motor Accidents Authority of NSW* (2006) 47 MVR 46; [2006] NSWSC 1096 (Sully J) (16 October 2006), the Court considered a determination of a claims assessor (an exemption decision) 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 such 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) 68 NSWLR 266 (Johnson J) the Supreme Court of NSW 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.

See also, *Kelly v Motor Accidents Authority of New South Wales* (2006) 46 MVR 553; [2006] NSWSC 1444 (Rothman J) which was upheld by the Court of Appeal in *Insurance Australia Ltd t/as NRMA Insurance v Motor Accidents Authority of New South Wales* [2007] NSWCA 314 (Spigelman CJ, Beazley & Giles JJA). 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 within 21 days after such determination).

In *Gudelj v Motor Accidents Authority* (2010) 55 MVR 357; [2010] NSWSC 436

(McDougall J) the Supreme Court considered a challenge to a late claim that had been determined by the claims assessor to be rejected. It was sent to the principal claims assessor to be dismissed which was done. Challenge was made to the Supreme Court by the late claimant. The Court held that the principal claims assessor should have sent the matter for referral to a claims assessor under section 92(1)(b) of the MAC Act (and therefore possible assessment of damages). The court also held that any section 81 notice of admission of liability in relation to a late claim is simply not effective as a matter of law and that no notice is taken to have been served under the Act.

In *Motor Accidents Authority of New South Wales v Mills* (2010) 55 MVR 243; [2010] NSWCA 82 (Giles, Tobias JJA and Handley AJA) the New South Wales Court of Appeal set aside decisions made by a District Court judge who had tried to make a referral to the MAA pursuant to section 62(1) of the MAC Act for a further medical assessment. Unfortunately, the judge tried to spell out the metes and bounds of the further assessment by confining it in particular ways and to particular injuries. Most curiously, his Honour referred a back injury to the medical assessor but not the question of causation (*Mill's case* at [25]). The Court of Appeal held that section 62 (prior to its amendment on 1 October 2008) permits an entirely fresh assessment and, "*is itself a referral for assessment*" (*Mill's case* at [40]). The Court discussed the "*conclusiveness*" of the medical assessment certificate and made extensive remarks by way of *obiter dicta* as to the legal effect of medical assessment certificates under the Act before its amendment in 2008.

Thank you.