ADMINISTRATIVE LAW UPDATE

A Paper Delivered by Mark A Robinson, Barrister,
To the "Public Sector In-House Counsel"
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Introduction

I am speaking to you today on a broad topic.

The specific contribution that I am asked to make to this excellent seminar program concerns issues arising under administrative law. I consider it best to approach the topic by identifying some areas of emerging interest which trouble administrative decision-makers, state and federal, on a day to day basis (in the real world). They are, in the main, your clients.

In the world of judicial review and constitutional writs, I propose to touch on:

1 What is Jurisdictional Error and Why is Everyone Talking About it?
2 Re-visiting or Re-Opening Government Decisions;
3 The Resurgence of Procedural Ultra Vires after *SAAP*;
4 Wither Manifest Irrationality - *S/20*?;
5 When to Argue, Intervene or Appear as Amicus for a Government Defendant or Respondent;
6 A Natural Justice – Procedural Fairness Update; and
7 Privative Clauses – a Note.

In the world of tribunal or merits review, particularly, the Administrative Appeals Tribunal, I will briefly look at:

8 Alternative Dispute Resolution; and
9 What are your Statutory Responsibilities to Assist the AAT as a Government Respondent?

The Context of the Paper

In short, administrative law relates to:

A. Judicial Review - the <u>legality</u> of administrative decisions, including those of Ministers, Governments and Tribunals that affect rights, interests or legitimate expectations of persons or entities (usually determined in the Federal Court of Australia or the Federal Magistrates Court or, in New South Wales, the Supreme Court of NSW, Common Law Division, Administrative Law List - known as "judicial review" of administrative action);

B. Merits Review - is the process of an external review of the <u>merits</u> 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*" (literally, from the very

beginning, anew). It has also been referred to as "*standing in the shoes of the decision-maker*" and remaking the decision in order to come to the correct or preferable decision. The jurisdiction of the Commonwealth Administrative Appeals Tribunal ("**AAT**") or the General Division of the Administrative Decisions Tribunal of NSW ("**ADT**") are examples of an independent, external merits review body.

C. Internal Review - where there is provision (usually in the enabling Act, but not necessarily so) for a person superior to the administrative decision-maker to re-make the subject decision (usually afresh).

D. Freedom of Information (itself subject to external review by an Ombudsman or merits appeals in a tribunal).

E. The Ombudsman - who's office investigates and reports on systemic and particular instances of maladministration and makes recommendations;

F. The Independent Commission Against Corruption and like permanent or ad hoc statutory investigative bodies ;

G. Privacy matters; for example, in NSW, the Privacy Commissioner, and the ADT administering the *Privacy and Personal Information Protection Act 1998* (NSW); and

H. Self-help remedies or processes that might be sought to be invoked by aggrieved persons or entities from time to time (be they personal, political, fair or unfair, lawful or not).

The objectives or primary tenets of administrative law generally are to ensure that in the making of administrative decisions, there is:

a. fairness;
b. participation;
c. accountability;
d. consistency;
e. rationality; and
f. impartiality.

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

The usual aim of a merits review process 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.

Judicial Review of Administrative Action

The jurisdiction of the superior courts by way of judicial review of administrative action is a jurisdiction that has been developed by the courts in accordance with the common law (also known as the "general law", which is the law as declared or made by judges).

Judicial review of administrative decisions 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 set aside the decision, declare the decision invalid or void or, in some cases, 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 at the High Court of Australia level is primarily undertaken in:

1. The Court's original "constitutional writ" jurisdiction pursuant to section 75(v) of the *Constitution*; or,

2. in its appellate jurisdiction from federal, state and territory superior courts pursuant to section 73 of the *Constitution*.

Jurisdiction to undertake judicial review at the Federal Court of Australia and Federal Magistrates Court levels is usually derived from:

1. Section 39B of the *Judiciary Act 1903* (Cth);

2. The *Administrative Decisions (Judicial Review) Act 1977* (Cth), and/or,

3. Individual Acts, such as contained in the *Migration Act 1958*(Cth).

Judicial review in the states lies largely within the realm of common law. 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, there are a large number of grounds upon which applications for judicial review may be made. These grounds are still evolving and many of them overlap.

Errors of law amounting to identification of the wrong question, ignoring relevant material, relying on irrelevant material or, at least, in some circumstances, making an erroneous finding or reaching a mistaken conclusion, leading to the exercise of an excess of power or authority, will give rise to the availability of relief against the decision of that administrative body for jurisdictional error.

Jurisdictional Error

Examples of jurisdictional errors of tribunals and executive decision-makers include the decision-maker:

- 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 - *Craig v State of South Australia* (1995) 184 CLR 163 and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323).

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

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 be discussed as follows:

- The definition of "jurisdictional error" in *Craig's case,* is not exhaustive.

- 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.

What is important, however, is that:

- identifying a wrong issue,
- asking a wrong question,
- ignoring relevant material or
- relying on irrelevant material

<u>in such a way</u> that affects the exercise of power is to make an error of law.

Further, doing so 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.

Yusuf's case also determined that:

- the concept of "jurisdictional error" is the same concept as "the doctrine of illegality or ultra vires" (in that the decision was not authorised by the Act or the regulations)

- "jurisdictional error" also includes the notion that particular errors of law,

    - being an error involving an incorrect interpretation of the applicable law, or,
    - an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

    are errors that can go to jurisdiction (or power) and that such errors would enable the High Court to intervene in its original jurisdiction (under s 75(v) of the *Constitution*).

See also, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 on the application of jurisdictional error in the face of a strongly-worded privative clause in the *Migration Act* 1958(Cth).

In December 2005, the High Court in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 (Gleeson CJ, Kirby, Callinan and Heydon JJ; Gummow, & Hayne JJ dissenting) held that an extraordinary delay (of several years) in the Refugee Review Tribunal handing down a determination on refugee status in a particular matter was infected with jurisdictional error and invalid. The Tribunal relied on its observations of demeanour of the applicant to determine he was not credible without having seen him for years. Kirby J said (at [71] to [72]):

> "71 By decisions of this Court, jurisdictional error amounts to a failure of the decision-maker to fulfil the essential requirements of the decision-making process established by law. Where a relevant failure to comply with the basic requirements of procedural fairness (natural justice) is shown, jurisdictional error exists. This is either because the common law requirements of procedural fairness are ordinarily to be taken as grafted onto the operations of a statutory decision-maker, such as the Tribunal, or because it is inferred that such requirements are implicit in the conduct of a tribunal established by the Parliament, absent clear provisions to the contrary. Where a decision does not conform to the fundamental hypotheses of the legislation, as by a material departure from the requirements of procedural fairness, the law treats the resulting outcome as fatally flawed. In short, it is not a "decision" at all within the statutory grant. It is infected by "jurisdictional error". " (footnotes omitted)

Grounds of Judicial Review

The 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, and which would ordinarily result in the decision being set aside, 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 (in that the result of the exercise of a power is uncertain);
11 inflexible application of a policy;
12 manifest irrationality or illogicality; and
13 failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker's power.

Jurisdictional Error vs Non-Jurisdictional Error

While there remains in Australia a formal distinction between these two concepts in respect of decisions of courts (and, perhaps, some quasi-judicial tribunals) the distinction no longer matters in relation to ordinary tribunal and executive decision-makers (*Craig's case and Yusuf's case*). The distinction is quite difficult to discern and minds differ on how to approach the question.

In *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, Kirby J said (in dissent, but not on this point) at [173]:

> "The unsatisfactory distinction between an "error within jurisdiction", "jurisdictional error" (including a constructive failure to exercise jurisdiction) and "non-jurisdictional error" has been noted in many cases. The distinction, always elusive to judges, has been abolished in England. However, it has not been discarded by this Court. The given explanation for its retention in this Court's doctrine is the separation, envisaged by the Constitution, between federal judicial power and other governmental powers conferred by or under the Constitution and hence the suggested need to preserve the concept of "jurisdictional error"." (footnotes omitted)

Further, in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1, Kirby J stated (at [97]):

> "[T]he Federal Court would be aware of the importance of refugee decisions under the [Migration] Act and that unrepresented applicants could not be expected to know about all the many nuances of [refugee] law. Trained lawyers often find it difficult to distinguish jurisdictional from non-jurisdictional error. I have confessed to difficulty myself."

In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171; (2005) 80 ALJR 367, Kirby J said (at [72]):

> "Differences sometimes exist over the borderline between valid but imperfect decisions made within jurisdiction and invalid "decisions" affected by such an error and thus outside jurisdiction. However, by the authority of this Court, the distinction exists both for the constitutional writs and for their statutory derivatives and elaborations in the Judiciary Act, such as those that the appellants invoked in this case." (footnotes omitted)"

Indeed, identifying and seeking to establish "jurisdictional error" is only significant in respect of:

1. The High Court's constitutional writ jurisdiction under s 75(v) of the *Constitution* – where in order to obtain the prerogative writs, one must ordinarily first establish jurisdictional error (or, for certiorari to be sought as an ancillary remedy, non-jurisdictional error on the face of the record);

2. Decisions of inferior courts - *Craig v State of South Australia* (1995) 184 CLR 163; or

3. Where there is an ouster or privative clause - *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; or

4. To the extent these concepts may be applied at state and federal court levels under the general law or the principles set out by the High Court in respect of the development of the constitutional writs (the "statutory derivatives and elaborations" mentioned by Kirby J in *NAIS* at [72]).

It does not normally apply at all to the following kinds of applications:

1. Applications under the ADJR Act (unless it is a specified ground under, for example, section 5(1)(c) of the Act);

2. Applications relating to statutory decision-makers or tribunals who's decisions are not affected by an ouster or privative clause;

3. Applications under a statutory right of appeal or review for say, error of law, or, on a question of law (for example, the right of appeal to the Federal Court from decisions of the AAT in section 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), discussed in *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at [101] (per Kirby J));

4. Applications relating to declarations or injunctions or other remedies (that are not prohibition, mandamus or certiorari) in most cases.

At a practical level in day to day legal practice, the distinction normally only matters when an application is made direct to a statutory decision-maker or to a Tribunal to set aside or disregard one of their or its own decisions on the ground of jurisdictional

error (on the principles in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597).

Re-visiting or Re-Opening Government Decisions

Increasingly, statutory decision-makers and tribunals are bring 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 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); or

    b. The decision being successfully challenged in a Court of superior jurisdiction and being set aside or quashed; or

2. For obvious error or under a “slip rule” in curial proceedings – there must exist statutory or implied power or jurisdiction 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.

3. By exercising the statutory power from time to time if permissible - 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.

Decision-makers may lawfully revisit decisions that can properly be considered as wholly invalid without a court order subject to the proviso that the decision must have involved a 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 question is - what is the jurisdictional error?

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 discretional factors would also have to be borne in mind as well (delay, futility and a party being the source of his or her own problems).

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."

Exercising a Power from Time to Time

Section 33(1) of the *Acts Interpretation Act 1901*(Cth) provides:

> "**33 Exercise of powers and duties**
>
> (1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

Section 48(1) of the *Interpretation Act* 1987 (NSW) and section 40 of the *Interpretation of Legislation Act 1984* (VIC) are in similar terms. They were taken from section 32 of the *Interpretation Act 1889* (UK).

Until the High Court decision in *Bhardwaj*, that power had received little consideration in the Courts. Although that case did not consider the power in detail, the Court did give it some attention.

In *Parkes Rural Distributions Pty Ltd v Glasson* (1986) 7 NSWLR 332 at 335-336 (Glass, Samuels and Priestley JJA) (this point was not affected by the successful appeal in *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 155 CLR 234) the Supreme Court of NSW considered the earlier incarnation of the same NSW provision and held that there could properly exist two certificates issued under a statutory power to make adjustments of grants paid or payable under a petroleum subsidy scheme. The first statutory certificate could be withdrawn and a second certificate could issue.

The Commonwealth provision was considered by Justice Gummow in *Minister for Immigration v Kurtovic* (1990) 21 FCR 193 at 218. There, the Court treated the matter of whether the Minister's deportation power was spent when used once as primarily one of statutory construction of the primary provision. In that particular case, the power (when used by one Minister) was not spent (when later used differently by another, new Minister).

In *Firearm Distributors Pty Ltd v Carson* [2001] 2 Qd R 26, Justice Chesterman of the Queensland Supreme Court considered a claim by an owner of a firearms supply business that was put out of business by new laws banning firearms and offering compensation in return. A statutory certificate offering the plaintiff $900,000 odd for the loss of the business was withdrawn and replaced by a new decision offering the plaintiff only $300,000 odd.

The Court ruled in favour of the plaintiff on the breach of contract claim. On the alternative claim in judicial review, the Court held that section 24AA of the Queensland *Acts Interpretation Act* (Qld) (the broad equivalent of s 48(1) of the NSW Act) could not be used where a financial benefit was the result of the original decision. It also reviewed many of the relevant cases in this area (at paragraphs [31] to [39]) and stated (at [40]):

> "These decisions, and some others, were discussed by Professor Enid Campbell in an article, "*Revocation and Variation of Administrative Decisions*" published in 1996 22 *Monash University Law Review* p 30. Professor Campbell noted (at 49) that:
>
> > "There are many cases in which courts have asserted or assumed that a valid and perfected decision of an administrative character which affects individual rights or liabilities cannot be revoked or altered by the decision maker unless there is statutory authority (express or implied) to revoke or alter the decision. This general rule has been applied even where the decision has been based on some error of fact or has been sought to be reopened after discovery of fresh evidence. Valid and perfected decisions which courts have held to be irrevocable, in the absence of statutory authority to rescind or vary them, have included decisions about compensation or other monetary grants payable under legislation . . .".
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> Having discussed the cases she continues (at 53):
>
> > "The general legal principle which, in my opinion, should be adopted and applied, is that, where a valid administrative determination is made in respect of a person's rights, entitlements or liabilities, that determination cannot, in the absence of fraud or misrepresentation, be rescinded or varied by the decision maker on the ground of error of fact on the part of the decision maker, except possibly with the consent of the party or parties affected."
>
> In my opinion the cases do support Professor Campbell's opinion. In two of them, *Livingstone* [*Livingstone v Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109] and *Export Grants Board* [*Export Development & Grants Board v EMI (Australia) Ltd* (1985) 61 ALR 115], a factor in the reasoning was that the legislation in question provided a

> procedure to be followed if a mistake had been made in the initial determination. This feature supported the conclusion that the legislation intended that the power to make decisions did not extend to multiple determinations. That feature is absent from reg 71 which is exceptionally sparse in content. Nevertheless the underlying reasoning made explicit by Vaisey J, and adverted to by Gummow J and Lawton LJ is, that where a power is adjudicative in nature, affecting rights or liabilities, it can only be exercised once. Such a view would accord with the law relating to arbitral awards and judicial pronouncements. The common law very early insisted that an arbitrator could not vary or recall an award. The rule was very strict. See for example *Irvine v Elnon* (1806) 8 East 53 at 54 per Lord Ellenborough CJ:
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> > "The arbitrator's authority, having been once completely exercised pursuant to the terms of the reference, was at an end, and could not be revived again even if the purpose of correcting a mistake in calculation of figures . . . such mistakes might and include the essential merits of the case."
>
> In *Mordue v Palmer* [1870] 6 LR Ch App 22 at 31 Mellish LJ said:
>
> > "I think the result of the cases at law is, that when an arbitrator has signed a document as and for his award, he is *functus officio,* and he cannot of his own authority remedy any mistake."
>
> See also *Halsbury's Laws of England* 4th ed vol 2 para 613. The same rule holds true for courts. Once the process of adjudication is complete, and the judgment is "passed and entered" or "taken out", a judge cannot reconsider or alter it. Legislation allows a judge or arbitrator to correct accidental errors but this does not affect the underlying notion which is, I think, that decisions which adjust rights between contestants, are not amenable to fluctuation."

In *Ping v Medical Board of Queensland* [2004] 1 Qd R 282 (Moynihan J), the Supreme Court of Queensland, the Medical Board had investigated a complaint against a medical practitioner and resolved to deal with matter by itself and take disciplinary proceedings by way of correspondence (an option open to it under the enabling legislation). However, the Board then decided to rescind the said resolution and conduct disciplinary proceedings by way of a hearing. The Supreme Court held that once an election was made under section 164(1) of the *Health Practitioners (Professional Standards) Act 1999* (QLD), the Board was unable to abandon its chosen course once adopted.

In *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (Gillard J) the Medical Board there decided to hold a second hearing into the professional conduct of the medical practitioner after the first hearing (undertaken on 30 October 2003 by a panel of 3 practitioners set up by the Board) had already occurred and a which he was exonerated.

After a complaint had been made to the State Ombudsman, the Board discovered that due to an administrative oversight it had failed to place a crucial and relevant piece of evidence before the panel (namely, an expert medical opinion adverse to the practitioner). The Board resolved (over one year later - on 18 November 2004) to

conduct a second hearing. The medical practitioner commenced judicial review proceedings claiming, *inter alia*, the Board was "functus officio" (that is, having discharged the duty to investigate and having made a determination, the Board did not have the power to ignore what had occurred and start again) and "res judicata" (that is, a decision is conclusive until reversed).

The Court held (at [28]-[37]) that the Parliament had intended that the Board's powers to investigate a practitioner could be exercised a second time and there existed a separate power in the relevant Act which specifically authorised it. However, in addition, it held section 40 of the *Interpretation of Legislation Act 1984* (VIC) provided the Medical Board with a wide "implied" (at [93]) power to re-make the decision as occasion requires it. The Court extensively reviewed the authorities from England and Australia (from [48] to [72]) including *Bhardwaj*, and determined that (at [73]):

> "The final determinant is a question of interpretation of the Act in question. Giving full effect to the importance of finality, the Act does not contain a contrary intention to the implication of s.40."

The Court observed (at [48]):

> "The provision was enacted to overcome the functus officio rule, that is, that once a person or body has discharged a statutory power or duty by exercising it, the person or body has no authority thereafter to embark upon the exercise again. It is a rule that has been applied for well over 200 years."

As to Tribunals, Deputy President Forgie recently held in the AAT that the power conferred by s.42C of the *Administrative Appeals Tribunal Act 1975* (Cth) (to make a determination after an agreement is reached between the parties) may not be exercised "from time to time". Once determined, the Tribunal was functus officio and it had no jurisdiction to later make any further decision - *D'Alfonso and Telstra Corporation Limited* [2006] AATA 492.

We can expect increasing attention to be given to these "from time to time" provisions by the Courts as the implications of the High Court's decision in *Bhardwaj* are more fully realised.

The Resurgence of Procedural Ultra Vires after *SAAP*

In addition to the above grounds of judicial review are the concepts of substantive ultra vires and procedural ultra vires. The former is merely another way of saying "jurisdictional error". The latter is not always so - it depends on whether the power can be said to be "conditioned" upon the happening of a certain event or the doing of a particular thing. In other words, the step must be properly regarded as a necessary condition precedent to the valid exercise of statutory power.

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 - *Italiano v Carbone* [2005] NSWCA 177 at [105] to [106] per Basten JA, failure to take that step is a jurisdictional error. 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]).

The long-term effect of *SAAP* is still being felt. As you recall, in *SAAP*, the Refugee Review Tribunal was held to be bound by the "mandatory" statutory procedures set out in section 424A of the *Migration Act 1958* (Cth) so that in a refugee status hearing (which is inquisitorial by nature and heard in private with no contradictor present) the Tribunal was bound to give the applicant written notice of certain particulars of any information that would be the reason or part of the reason for affirming the Minister's delegate's rejection decision. If the Tribunal failed to do this, any resulting decision was ultra vires. The decision has caused the long lists of the Federal Magistrates Court to disappear as countless refugee matters are sent back by consent or otherwise to the RRT for re-determination.

However, in other contexts, SAAP is providing for a long-awaited resurgence in procedural ultra vires as a ground of judicial review. It has been applied in numerous contexts at state and federal levels. For example, in *Mathews v Health Insurance Commission* (2006) 90 ALD 49 (Edmonds J) the Federal Court held that a Professional Services Review Committee (being a statutory panel of 3 medical practitioners examining whether a Medicare doctor was engaging in "inappropriate practice" under s 82 of the *Health Insurance Act 1973* (Cth)) committed vitiating error when it failed to strictly follow the sampling methodology laid out in a statutory instrument. Random sampling had been made mandatory by the instrument. It was held that "a finding made in reliance on an act done in breach of" that instrument was an invalid finding (at [67]).

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

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

2. The language of the provision is such that it is mandatory that the decision-maker cannot make an adverse finding unless 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).

In respect of the ground of judicial review styled "failure to provide reasons or adequate reasons", the issue might rise to the level of a procedural ultra vires if the relevant enabling provision is of a kind that would have been contemplated by McHugh J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212 at [55] where his Honour said:

> "[I]t is always possible that a statutory scheme has made the giving of reasons a condition precedent to the validity of a decision. If it has, a decision that does not give reasons will be made without authority. Whether a scheme has that effect is determined by applying the principles stated by this Court in *Project Blue Sky Inc v Australian Broadcasting Authority* ((1998) 194 CLR 355). In *Project Blue Sky*, the majority Justices rejected (at 389-391 [92]-[93]) the traditional distinction between ‘‘mandatory" and ‘‘directory" requirements, saying that ‘‘[a] better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid". In determining the purpose of the legislation, regard has to be had to ‘‘the language of the relevant provision and the scope and object of the whole statute"."

Wither Manifest Irrationality and Illogicality - *S/20*?

A ground of judicial review that was first offered up by the High Court in 203 is where the administrative decision may be held to be 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) 198 ALR 59; (2003) 77 ALJR 1165. It would also apply to a decision or reasoning that is hopelessly confused and irrational. However, this ground is available only in relation to such errors that are in the extremely serious category. While the ground is now firmly established as an available ground of judicial review in the High Court's "constitutional writ" jurisdiction, it also applies in the state and territory courts. 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]).

The only problem with this offering is that (perhaps a bit like "Wednesbury" unreasonableness) the level is set so high by the Court that it can rarely be successfully argued.

However, the fact that a tribunal or administrative decision contains illogicality or irrationality in its reasoning is often sufficient for a Court to seek to ascribe other errors to it or other grounds of judicial review. For example, Rares J in *SZEJF v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 724 (9 June 2006) held that the Refugee Review Tribunal's decision set aside as it was

replete with illogicality (at [50]) and irrationality (at [55]). The decision was set aside for other reasons, primarily, for the Tribunal failing to address the correct legal refugee test (eg: at [64]) and for its failure to accord procedural fairness by failing to give "proper genuine and real consideration" the applicant's claims (at [39] and [60] cf: *Oreb v Willcock* [2004] FCA 1520 (Jacobson J) at [171]-[172] – not dealt with in the appeal in *Oreb v Willcock* (2005) 146 FCR 237).

In the meantime, Kirby J has recently hinted that the time is ripe for the old issue of the review by Court of perverse findings of fact to be argued in and settled by the High Court. In *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at [67]-[68] he said:

> "*Perverse fact finding*?: Statutory provisions limiting appeals to those involving an error or question of law are relatively common. Accordingly, the scope of these expressions has attracted much judicial attention. In the New South Wales Court of Appeal, at least after *Poricanin v Australian Consolidated Industries Limited* [[1979] 2 NSWLR 419 at 426], it was repeatedly held that even perverse or unreasonable findings of fact do not constitute errors of law. Consequently, such findings could not raise a question of law. So much was held by majority in that Court in *Azzopardi v Tasman UEB Industries Limited* [(1985) 4 NSWLR 139 at 155-156 per Glass JA (Samuels JA concurring)]. I dissented there from the view so expressed. I did so by reference to considerations of legal authority and principle. In particular, to combat the notion that errors of fact-finding could never rise to an error of law, I drew attention to the opinion of the Court, delivered by Jordan CJ, in *Brakell v Metropolitan Ice & Cold Storage Works (W Angliss & Co Aust Pty Ltd)* [(1946) 63 WN (NSW) 203 at 203] to the effect that "in extreme cases only one [factual] inference may be possible as a matter of law"[*Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 at 149]. The notion that a decision-maker, including a judge, could reach perverse conclusions on the facts and the evidence, and yet be immune from judicial correction, is one that I have never accepted [*Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 at 146-151. See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 253-254; *Warley Pty Ltd v Adco Constructions Pty Ltd* (1988) 8 BCL 300 at 305-308; *X v The Commonwealth* (1999) 200 CLR 177 at 218-219 [136].].
>
> Nonetheless, *Poricanin*, affirmed in *Azzopardi*, has continued to enjoy judicial support [See eg *Mahony v Industrial Registrar of New South Wales* (1986) 8 NSWLR 1 at 5; *Haines v Leves* (1987) 8 NSWLR 442 at 476; cf at 469-470; *Warley Pty Ltd v Adco Construction Pty Ltd* (1988) 8 BCL 300 at 310-311; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 37; *Bowen-James v Delegate of the Director-General of the Department of Health* (1992) 27 NSWLR 457 at 474-475; *Wilson v Lowery* (1993) 110 FLR 142 at 146-147; *Bruce v Cole* (1998) 45 NSWLR 163 at 188.]. Applying that authority, if all that was involved in the present case was a question whether the Tribunal had reached a "perverse" finding of fact, on the basis of the evidence submitted to it concerning the relationship of the appellant's fall and injury to his defence service, the appeal would be doomed to fail. If "perverse" findings of fact are protected from disturbance by courts limited to a

> jurisdiction confined to correcting errors on questions of law, a conclusion which is far from "perverse" is even more obviously protected from disturbance."

When to Argue, Intervene or Appear as Amicus for a Government Defendant or Respondent

A continuing and difficult issue for government defendants is to know when, and if so, to what extent, to fight an applicant in judicial review proceedings.

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 fight the proceedings (asserting that the decision was valid or correct in law). That decision exposes the agency to full costs orders.

Other options might include:

1. Putting on a submitting appearance and letting another interested party play the role of the contradictor (only available if there were opposing applications before the original decision-maker and where both or some of them are also joined as parties);

2. 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 there being a hearing on the merits of the judicial review case, the proper order is each party 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. Outside of the litigation, accept that the decision is invalid (or affected by jurisdictional error) and re-make the decision;

4. Outside of the litigation, determine to make a new decision as an exercise of the *Interpretation Act* power to make a new 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)).

In judicial review proceedings, if the defendant is a tribunal or a quasi-judicial body, particularly one that hears evidence or submissions from two or more parties, undertakes or conducts hearings and makes an impartial and binding determination, the options for action in response to the service of the originating process include:

1. 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);

2. If there is no or no adequate contradictor at the hearing consideration should be given to having the Attorney-General 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]);

3. Appear at the hearing and make submissions only going to the tribunal's powers, functions guidelines and procedures (as permitted by *Hardiman*);

4. Maintain (or file, if not already filed) a submitting appearance and do not turn up (or appear as a courtesy to the Court and seek to be excused from further attendance at the hearing); or

5. Put on a submitting appearance, do not appear and turn up 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 if necessary (not privately) about particular issues or facts that might arise (perhaps, for example as to the manner by which to answer particular questions from the Bench).

In *Police Integrity Commission v Shaw* [2006] NSWCA 165 (per Basten JA) at [39]–[43], the Commission was firmly 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 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.

Natural Justice – Procedural Fairness

There are a few interesting developments in the broad field of procedural fairness.

In *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, the High Court considered a refugee matter that was before the Refugee Review Tribunal. At the end of the oral hearing, the Tribunal member stated that it would write to the applicant about inconsistencies in his evidence and provide a time to respond to the Tribunal's questions and to put any more information before the Tribunal that the applicant wished. The Tribunal did not so write, but published its reasons rejecting the refuge status application without seeking or receiving any further material from him. In its reasons for decision, the Tribunal did not refer to the inconsistency expressly but found that the applicant lacked credibility and stated that the Tribunal did not believe his statements.

The Court unanimously set aside the decision. The joint judgment said (at [27]):

> "One aspect of the overall duty to review [the delegate's decision] was the duty to invite the appellant to give evidence and present arguments: s 425(1) [of the *Migration Act 1958*]. The duty to review therefore entailed a statutory duty to consider the arguments presented and in that way to afford the appellant procedural fairness. That implied that if the Tribunal thought that the arguments had been presented so inadequately that the review could not be completed until further steps had been directed and performed, it could not be peremptorily concluded by the making of a decision before that direction was complied with or withdrawn."

Another High Court case to watch out for is its decision on the appeal from *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 59 (Graham J). Kirby and Heydon gave leave for the refugee applicant to appeal on 4 August 2006. The hearing will raise the important issue of whether it is a denial of procedural fairness for a decision-maker to reject an application because of adverse conclusions based on specific factual assumptions that were neither reasonably obvious from the material before it nor raised for comment with the applicant. It asks the Court for clarification of the comments of the Full Court in the issue in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Limited* (1994) 49 FCR 576 at 592. The Commonwealth representative predicted on the special leave application that requiring decision-makers to come back to the applicants with queries or in order for them to provide them with information about how they might determine the matter might create "the prospect of a never-ending series of disclosure between decision-maker and disappointed applicant of going back and forth with each aspect of the reasoning being tested".

Privative Clauses – Note

One of the larger issues that will need to be determined in due course by the High Court will be the question of the effectiveness from 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 recently in *Fish v Solution 6 Holdings Limited* (2006) 225 CLR 180 and *Batterham v QSR Limited* (2006) 225 CLR 237.

In *Solution 6*, the relevant presumptions of Parliament in enacting ouster clauses were set out by the majority judgment, including, as follows (in [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."

There is much activity (particularly in NSW) on the scope and effect of such State clauses. In my view, 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 - *Plaintiff S157/2002 v*

Commonwealth of Australia (2003) 211 CLR 476 at [76] and the cases referred to there (per the majority). However, the NSW Court of Appeal is presently more concerned with identifying the errors as 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.

In Tribunals
Alternative Dispute Resolution

Sections 34A & 34C of the *Administrative Appeals Tribunal Act 1975* (Cth) provides for the President of the Tribunal to direct proceedings be referred to a particular alternative dispute resolution process.

This is regularly happening in Sydney. The whole of Part IV, Division 3 of the AAT Act is new. Further, the expression "alternative dispute resolution" is defined very widely. I sometimes suggest a (structured) settlement conference be conducted that is overseen by an AAT member or Registrar. However, often the impetus to send the matter off to mediation comes from the Tribunal itself. Be prepared for it early.

In *Re Campbell and Repatriation Commission,* [2006] AATA 455 the Tribunal observed that the proceedings were "*more suitable for referral or direction to a dispute resolution process.*" The applicant was 88 years of age and unwell. The Tribunal concluded:-

> [76] I would hope that claimants under the Repatriation legislation, both widows and veterans, their representatives, the Department of Veterans' Affairs and their advocates will come to recognise that entitlement to pension and benefits often arise out of life threatening events where there has subsequently been periods of illness and unhappiness and where domestic relationships have suffered. The veterans' community, and by that I include the Department of Veterans' Affairs, should approach the resolution of disputes by the ADR processes now found within the AAT legislation.

What are your Statutory Responsibilities to Assist the AAT as a Government Respondent?

One of the amendments made in 2005 was the introduction of s.33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth) which now provides that "the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding."

See comments regarding this obligation at: *Re The International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage* [2006] AATA 94 at [11] and *Re Secretary, Department of Family and Community Services*

and Pitkin [2005] AATA 532 at [5], 40 AAR 524 at 526, 87 ALD 119 at 120. In the latter case, Tribunal Member Webb said (at [4] to [6]):

> "The Applicant Secretary in this matter failed to comply with the Tribunal's General Practice Direction and was not adequately prepared for the hearing on 6 May 2005
>
> There is an obligation on Commonwealth agencies to act as a model litigant, which has long been recognised by the Courts (see *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342) and by this Tribunal (see *Re Moline and Comcare* [2003] AATA 827). It follows that there was an obligation on the Applicant Secretary in these proceedings to act as a model litigant. That obligation is given expression and legal force by legal services directions issued by the Attorney-General pursuant to s 55ZF of the *Judiciary Act 1903* with effect from 1 September 1999, specifically the "Directions on the Commonwealth's Obligation to Act as a Model Litigant". I also note that the new section 33(1AA) of the AAT Act, that came into force on 16 May 2005, provides that agencies and agency representatives have a duty to assist the Tribunal.
>
> The model litigant policy does not preclude Commonwealth agencies from acting firmly and properly in cases such as this. It is expected, however, that the model litigant policy will be upheld and that cases will be properly prepared, with due regard to issues of procedural fairness, in order to assist the Tribunal come to the correct and preferable decision."

You have been warned.