How to Run an Administrative Law Case in New South Wales

a paper by Mark Robinson SC for the NSW Bar Association's Sydney CPD Conference 25 March 2017

This paper broadly covers the conduct of a judicial review case in NSW. It outlines Rule 59 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) which took effect on 15 March 2013, the new Supreme Court Practice Note (SC CL 3) and the new form for a judicial review summons (Form 107).

Rule 59 of the UCPRs dictates the practice and procedure of judicial review cases in the Supreme Court of NSW, Common Law Division, Administrative Law List. It covers wide ranging matters, such as the time for commencement of judicial review proceedings, the evidence permitted, limited discovery and it permits the court to order a statement of reasons to be produced from a public authority decision-maker.

It also contains machinery provisions for the exchange of written submissions and the production of a paginated Court Book 7 working days before the hearing.

In addition to these matters, the paper will also deal with:

- 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);
- An overview of jurisdictional error and the grounds of judicial review.

Administrative Law in NSW

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

1. ***Self-help*** remedies or processes may 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). Sometimes it is done without a statutory provision, as a matter or practice or policy.

3. ***Need the Documents? - Freedom of Information*** (now under *Government Information (Public Access) Act 2009* (NSW)("**GIPAA**") . The agency decisions under GIPAA are subject to merits appeals to the Information Commissioner and then to the NSW Civil and Administrative Decisions Tribunal ("**NCAT**"));

4. ***Breach of Privacy? - The Privacy Commissioner***, and NCAT 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 individual applications (see NSW Treasury Circular NSW TC 11-02 dated 1 February 2011).

8. ***External Independent 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 Administrative and Equal Opportunity Division of NCAT 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. These proceedings known as "*judicial review*" of administrative action are usual dealt with by the Supreme Court of NSW, Common Law Division, in the Administrative Law List. This is usually the option of last resort for an applicant, and it is undertaken when all other options for challenge are not available. A leading NSW case concerning the nature of judicial review is *Bruce v Cole* (1998) 45 NSWLR 163. See also, Justice John Basten, "Judicial Review in State Jurisdiction" (2016) 84 AIAL Forum 10.

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 meaning, scope and purpose 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 1,212 pages long – Aronson, Groves and Weeks, Judicial Review of Administrative Action and Government Liability, 6th ed, 2017 (Lawbook Co, Sydney).

Framework and Procedure

The jurisdiction of superior courts by way of judicial review of administrative action 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).

While judicial review in NSW lies largely in the realm of the common law, its existence is constitutionally entrenched and protected by section 73 of the Commonwealth *Constitution* (see, *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 and, "*The Centrality of Jurisdictional Error*", Hon J Spigelman AC (2010) 21 Public Law Review 77). Because judicial review is protected by the Constitution, it cannot be taken away by any State legislation (at least for correction for jurisdictional error).

The NSW Government has 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 do not work against you.

The discretionary factors apply at the end of a case. Even if your client establishes legal error, the Court has discretion as to whether or not to grant your client a remedy. 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 NCAT);
- 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 or court-like process below.

Ordinarily then, the grounds of judicial review are 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.

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.

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 new Supreme Court Practice Note CL 3 dated 8 December 2016 which explains the practical operation of the Administrative Law List and some of the provisions of the *Uniform Civil Procedure Rules 2005*(NSW).

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;
- rule 6.11 – submitting appearances;
- Part 49 (internal appeals);
- Part 50 (external appeals); and
- Part 51 (Court of Appeal) and,
- the new Part 59 (judicial review).

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.

If the judicial review case as sought to be made is based on the face of the decision under review and the reasons for the decision – no other evidence need to be put on other than those documents.

Otherwise, all that is usually required to be place into in evidence is the documentary material that was before the original decision-maker (*cf*: *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302 (McColl, Basten and Macfarlan JJA)). 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 (if a procedural fairness point is taken or a no evidence point).

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 personal costs order. There will also be a bloodbath in the Court of Appeal – see, for example, *Insurance Australia Ltd t-a NRMA Insurance v Milton (No 2)* [2016] NSWCA 173 esp [7] to [12](solicitor ordered to personally pay the costs of production of the appeal books).

The Practice Note devotes significant attention to the filing of evidence in judicial review cases (at [13] to [18]).

At the first return of the summons, under the SC Practice Note, parties should be represented by somebody familiar with the case. Typically, directions are given for the filing of affidavits and the matter is often listed for final hearing at the first return. All parties should be ready for this. It is, in effect, an expedition list.

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 –except for (possibly) 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 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].

The words there "in a way" are in bold for good reason.

It must be something that moves the Court to find for vitiating legal error.

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.

If an error of this kind 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 - *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 actual 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 legal unreasonableness - *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332;
8 proportionality (not presently available, except via legal unreasonableness);
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 (possibly a sub-branch of legal unreasonableness);
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.

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 grounds of judicial review 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).

As to constructive failure, the main High Court authorities are discussed and applied in *Mitrovic v Motor Accidents Authority of New South Wales* [2012] NSWSC 1231 at [58] to [64].

By section 69(3) and (4) of the *Supreme Court Act 1970* (NSW), the "*record*" of a tribunal includes the written reasons expressed for its "*ultimate determination*".

Part 59 UCPR (Judicial Review Proceedings)

The introduction of Part 59 with effect from 15 March 2013 brought enormous and far-reaching changes to the conduct of judicial review proceedings in NSW.

It has codified many difficult to find practices and procedures and it serves as a stable process for such matters.

The new Practice Note SC CL3 (8 December 2016) focusses primary attention on the evidence required to conduct a judicial review case.

The correct form of the draft summons to be filed in such matters is UCPR Form No 85 (version 3) titled “Summons (Judicial Review)”.

The correct form of any appeal to the NSW Court of Appeal in such matters is UCPR Form 107 (version 3) titled “Summons (Supervisory Jurisdiction)”.

Both of these forms are relatively new.

End