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Judicial review of administrative decisions

A guide for personal injury lawyers

This article outlines the scope of administrative law, and covers the conduct of a judicial review case in NSW for personal injury lawyers. It also outlines the scope and operation of pt 59 of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*). This part of the *UCPR* is examined in detail, as it dictates the practice and procedure of judicial review cases in the Supreme Court of NSW.

This article also deals with:

- administrative law processes and remedies in NSW;
- the primary tenets of administrative law;
- merits review and judicial review in NSW (the legality/merits distinction); and
- an overview of jurisdictional error and the grounds of judicial review.

Part 59 of the *UCPR* covers wide ranging matters, such as the time for commencement of judicial review proceedings, the evidence permitted and limited discovery. It also permits the

court to order a statement of reasons to be produced from a public authority decision-maker. In addition, it contains machinery provisions for submissions and the production of a court book before the final hearing in any judicial review matter.

THE SCOPE OF ADMINISTRATIVE LAW

Administrative law did not develop in a vacuum; it was developed by the courts in England and Australia over 500 years. Its original purpose was to keep a check on inferior court judges and tribunals and quasi-judicial tribunals as well as executive decision-makers, to ensure they all acted lawfully and within the meaning, scope and purpose of their legal powers.

Most state and territory supreme courts in Australia have an inherent or common law jurisdiction to control government action through the issue of prerogative relief (now usually orders in the nature of prerogative writs) and equitable remedies, with some statutory modification to simplify procedural requirements.[1] There are a number of statutory schemes that work with or replace the common law remedies.[2]

The primary tenets of administrative law have developed over time. Overall, these are to ensure that in the making of administrative decisions (which are decisions made by government, usually under statutory power), there is:

- legality (judicial review and merits);
- fairness (judicial review and merits);
- participation (merits);
- accountability (merits);
- consistency (merits);
- rationality (judicial review and merits);
- proportionality (judicial review and merits); and
- 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. The independent review process 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. Merits review is usually undertaken in a tribunal. Judicial review is done in a court.

ADMINISTRATIVE LAW IN NSW

The full range and scope of administrative law processes and remedies are identified in this section. Broadly speaking, they apply to the Commonwealth and the states and territories. At its broadest, administrative law in NSW relates to the following:

1. *Self-help remedies or processes*. These may be invoked by aggrieved persons or entities from time to time (whether the issue is personal or political, fair or unfair, lawful or not). The remedy can be as simple as picking up the telephone and speaking to the administrator who made the impugned decision, or creating a letter-writing campaign.
2. *Internal review*. This may be invoked where there is provision (usually, but not necessarily, in the enabling Act) for a superior to the original administrative decision-maker to look at and remake the subject decision. Sometimes this can be done without a statutory provision, as a matter of practice or policy.
3. *The need to access documents.* This relates to freedom of information (FOI) requests under the *Government Information (Public Access) Act 2009* (NSW) (*GIPAA*). The relevant agency's decisions on FOI requests under the *GIPAA* are subject to merits appeals to the Information Commissioner and then to the NSW Civil and Administrative Tribunal (NCAT).
4. *Breach of privacy.* This area includes the role of the Privacy Commissioner, and of NCAT in administering the *Privacy and Personal Information Protection Act* 1998 (NSW) – in terms of breach of privacy by a state government agency only.
5. *Maladministration.* Remedies can be sought through 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.* As determined by the Independent Commission Against Corruption (ICAC).
7. *Ex gratia or act of grace payments.* Payment of this type can be made 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 that cannot be remedied or compensated through recourse to legal proceedings. Such payments are discretionary in nature, and it is for ministers to determine individual applications.[3]
8. *External independent merits review*. This 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* (anew). This type of review 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 currently 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*.[4]
9. *Judicial reviews.* These are proceedings concerning the legality of administrative decisions, including those of ministers, governments and tribunals, that affect rights, interests or legitimate expectations of persons or entities. Judicial reviews are usually dealt with by the Supreme Court of NSW. This is usually the option of last resort for an applicant, and is undertaken when all other options for challenge are not available.[5]

FRAMEWORK AND PROCEDURE

The jurisdiction of superior courts in the judicial review of administrative action was developed by the courts in accordance with the common law. The review process 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).

Relief is discretionary and may include: quashing or setting aside the decision; declaring the decision invalid or void; and, in some cases, remitting the decision to the original or primary decision-maker for reconsideration 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 in all states by s73 of the *Australian Constitution* (*Constitution*).[6] 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 grounds of judicial 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 personal injury matters, providing you have also sought the appropriate remedy and the discretionary factors do not work against you. Also, proof is needed of the materiality of the alleged breach – see *Minister for Immigration and Border Protection v SZMTA*.[7] A plaintiff must now establish that there is a realistic possibility that the challenged decision could have been different had the alleged breach not occurred.

In judicial review, 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;
- 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;[8] or
- an applicant 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 tribunal process below.

Ordinarily, then, the grounds of judicial review are:

- an error of law amounting to identification of the wrong question;
- ignoring relevant material;
- relying on material that is, at least in some circumstances, irrelevant; or
- making an erroneous finding or reaching a mistaken conclusion leading to an excess of power or authority, which 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.

PRACTICE AND PROCEDURE IN NSW

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

To this end, personal injury practitioners need to be aware of Supreme Court Practice Note No. SC CL 3, dated 21 May 2020,[9] which explains the practical operation of the Administrative Law List and some of the provisions of the *UCPR*.

The Supreme Court's judicial review jurisdiction (by way of the filing of a summons) is primarily invoked by the following sections of the *Supreme Court Act 1970* (NSW) (*SCA*):

- s69 – proceedings by summons in lieu of the prerogative writs;
- s65 – an order to fulfil a public duty;
- s66 – an injunction; and
- ss63 and 75 – declarations.

Under the *UCPR*, a practitioner must first check the list of legislation in sch 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 r 45.3, judicial review proceedings should all be assigned or transferred to the Administrative Law List. Other *UCPR* rules that must be checked are:

- r 1.18(b), (c) (assignment of business);
- r 6.11 (submitting appearances);
- pt 49 (internal appeals);
- pt 50 (external appeals);
- pt 51 (Court of Appeal); and
- pt 59 (judicial review).

Section 48 of the *SCA* 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 nature of the error alleged is error of law on the face of the record then usually only the record need be tendered. This includes the reasons for decision, at least in cases where the statute requires reasons to be given.[10] If jurisdictional error is alleged, usually all that is required in evidence is the tender of the documentary material that was before the original decision-maker (see *Allianz Australia Insurance Ltd v Kerr*).[11] 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 are almost never required in judicial review matters. If evidence is put on that is voluminous and is not required, one can expect significant criticism from the bench and maybe an adverse costs order. There will also be repercussions in the Court of Appeal – see for example *Insurance Australia Ltd t/a NRMA*

Insurance v Milton (No 2),[12] where a solicitor was ordered to personally pay the costs of some of the appeal books.

At the first return of the summons, under the practice direction (*UCPR*, r 59.9(3)), 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 the 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 the 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 their 'understanding of the applicable law and the reasoning processes leading to the decision' may be an extremely useful forensic tool or weapon for a plaintiff.

Obtaining reasons by order of the Court may well be the only option available to aggrieved applicants in NSW, as reasons are not ordinarily required to be given by an executive decision-maker unless there are special circumstances; see for example *Public Service Board of NSW v Osmond* (*Osmond*).[13]

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 where there were 'special circumstances', either in the relevant Act or as required by the principles of natural justice, the general rule did not apply and reasons were required to be provided.[14] 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.[15]

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* (*Vegan*), where the NSW Court of Appeal held that the appeal panel members in workers compensation had a duty to give full and proper reasons[16] even though this 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 that the authorities that underpinned *Osmond's* case might 'no longer be as definitive as they once were'.[17] In *Vegan*, the Court of Appeal further held that, as a matter of statutory construction and as a matter of principle, the Medical Appeal Panel was a quasi-judicial entity and it should be required to provide reasons for that reason alone.

JURISDICTIONAL ERROR AND THE GROUNDS OF JUDICIAL REVIEW

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari,[18] prohibition and mandamus and injunctions and declarations) are available under the *SCA* 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 possibly for denials of natural justice – see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[19]).

Examples of jurisdictional errors of state tribunals and executive decision-makers include:[20]

- identifying an incorrect issue;
- asking a wrong question;
- ignoring relevant material;
- relying on irrelevant material; and
- making an incorrect interpretation and/or application to the facts of the applicable law, *in a way* that affects the exercise of power.

The words 'in a way', above, are in italics for good reason – the alleged error must be something that moves the court to find for legal error.

The following can also be noted about jurisdictional errors that may be committed by a tribunal or executive body (post *Craig v State of South Australia* (*Craig's case*))[21] and 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*):[22]

- The definition of 'jurisdictional error' in *Craig's case* is not exhaustive (*Kirk v Industrial Relations Commission of New South Wales* (*Kirk's case*) also held this).[23]
- Those different kinds of jurisdictional 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.

An error of this kind arises where the decision-maker did not have the authority – the jurisdiction – to make the decision that was made (see *Minister for Immigration and Multicultural Affairs v Bhardwaj*[24]).

Denials of natural justice or breaches of the rules of procedural fairness almost invariably result in a jurisdictional error: see *Plaintiff S157/2002 v Commonwealth of Australia*;[25]

Re Refugee Review Tribunal; Ex parte Aala;[26] and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*.[27] This is subject to the issue of materiality discussed above.

The remaining grounds of judicial review (in addition to denials of natural justice or breaches of procedural fairness, which include 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;[28]
8. proportionality (not currently 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 now 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 proving 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. Accordingly, attention should be drawn to errors such as these, as they go to legality as well in the sense that, once they are found, a decision is usually set aside by the court.

Any of the above grounds of judicial review is capable of establishing error of law on the face of the record, which, if serious enough, might also constitute jurisdictional error, including a constructive failure of the decision-maker to exercise their jurisdiction. By ss69(3) and 69(4) of the *SCA*, the 'record' of a tribunal includes the written reasons expressed for its 'ultimate determination'.

CONCLUSION

Part 59 of the *UCPR* 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. ■

This article is based on, and updates, the article 'Conducting an administrative law case in NSW' by Mark Robinson SC, published in *Precedent* 136, September/October 2016, pp 4–9.

Notes: **1** *Supreme Court Act 1933* (ACT), s20; *Court Procedures Rules 2006* (ACT), pt 3.10; *Supreme Court Act 1970* (NSW), ss65, 66, 69, 69B, 69C, 70, 71; *Uniform Civil Procedural Rules 2005* (NSW), r 6.4, pt 59; *Supreme Court Act 1979* (NT), s20; *Supreme Court Rules 1987* (NT), O 56; *Judicial Review Act 1991* (Qld), s10, pt 5; *Supreme Court Act 1935* (SA), s17; *Supreme Court Civil Rules 2006* (SA), ch 8, pt 3; *Judicial Review Act 2000* (Tas), s43; *Supreme Court Act 1986* (Vic), s3(6); *Supreme Court (General Civil Procedure) Rules 2005* (Vic), O 56; *Supreme Court Act 1935* (WA), s16. Note: other judicial bodies in the states and territories may have a judicial review jurisdiction, for example Classes 4 and 8 of the NSW Land and Environment Court (*Land and Environment Court Act 1979* (NSW), ss20, 21C). **2** *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); *Administrative Law Act 1978* (Vic). **3** See NSW Treasury, 'Treasury Circular NSW TC 11-02', 1 February 2011. For the Commonwealth, see Commonwealth of Australia, 'Finance Circular No. 2006/05 To all agencies under the *Financial Management and Accountability Act 1997*' <http://asutax.asn.au/docs/financewaiver.pdf>. **4** (2008) 235 CLR 286. **5** The leading academic text on judicial review of administrative action in NSW is M Aronson and M Groves (eds), *Judicial Review of Administrative Action and Government Liability*, 7th ed, Law Book Company, Sydney, 2021. See also M Robinson (ed), *Judicial Review – The Laws of Australia*, Thomson Reuters, 2015. **6** *Kirk v Industrial Court of NSW* (2010) 239 CLR 531; [2010] HCA 1 (*Kirk's case*). See also J Spigelman, 'The Centrality of Jurisdictional Error', *Public Law Review*, Vol. 21, No. 2, 2010, 77–91. **7** (2019) 264 CLR 421; [2019] HCA 3. **8** See the discussion by Kirby J of the discretion and the relevant cases in *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146; [2008] HCA 32. **9** See Chief Justice of NSW, 'Practice Note SC CL 3, Supreme Court Common Law Division – Industrial and Administrative Law List' <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/fa642c44a4865bf4ca258083001c7a7f?OpenDocument>. **10** *Pham v NRMA Insurance Ltd* (2014) 66 MVR 152, [27] (per Leeming JA, with Tobias AJA agreeing) in relation to claim assessment decisions under the CTP scheme, *Insurance Commission of Western Australia v Gargoura* (2020) 94 MVR 488, [44] in relation to medical assessment decisions under the same scheme. **11** (2012) 83 NSWLR 302; [2012] NSWCA 13 (McColl, Basten and Macfarlan JJA). **12** [2016] NSWCA 173. **13** (1986) 159 CLR 656; [1986] HCA 7. **14** (1986) 159 CLR 656, 670 (Gibbs CJ), (Deane J); [1986] HCA 7, [2] (Deane J), [14] (Gibbs CJ). **15** See *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729, 734C–735C (Priestley JA; Handley and Powell JJA agreeing), adopting in part Sperling J's decision in *Kennedy Miller Television Pty Limited v Lancken* (Unreported, Supreme Court of New South Wales, 1 August 1997 (BC9703385)). **16** (2006) 67 NSWLR 372, [24]; [2006] NSWCA 284, [24] (Handley JA; McColl JA agreeing). **17** [2006] NSWCA 284, [106] (Basten JA; McColl JA agreeing). **18** Quashing, or setting aside. **19** (2005) 228 CLR 294, [80] (McHugh J; Kirby J agreeing). **20** For examples see *Craig v State of South Australia* (1995) 184 CLR 163 (*Craig's case*), 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (*Yusuf*), [82]; and *Kirk's case,* above note 7, [60]–[70]. **21** *Craig's case*, above note 20. **22** *Yusuf*, above note 20, [61]–[63]. **23** (2010) 239 CLR 531, [60]–[70]. **24** (2002) 209 CLR 597, [51]–[53]. **25** (2003) 211 CLR 476, 508; [2003] HCA 2, [83]. **26** (2000) 204 CLR 82. **27** (2001) 206 CLR 57; [2001] HCA 22. **28** *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

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