Institute of Public Administration Australia

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What is administrative law?

The law that regulates the exercise of public power

Appeal v Judicial Review

My aim today is to give you some guidance about how to approach decision making so that you act lawfully and minimise the risk of a successful judicial review application.

I need to distinguish between an appeal and a judicial review.

Appeal rights must be conferred by a particular statute. Unlike judicial review, there is no common law right to appeal.

While it is an oversimplification, in essence, an appeal considers whether the decision is right or wrong.

In contrast, judicial review is concerned with the lawfulness of the process that led to the decision.

When dealing with a judicial review, the Court is not concerned with the merits of the decision. Thus, it does not matter whether or not the judge would have made the same decision.

The issue is the lawfulness of the decision making process.

What I am going to say today deals with that question.

Judicial Review in the Supreme Court

Six months time limit

May be extended

Judicial review (unlike an appeal) is a common law right

Now constitutionally entrenched at State level (the High Court decision in *Kirk*).

While this area is highly technical, and I cannot cover it today, the result of the *Kirk* decision is that while Parliament may narrow to some extent the circumstances in which judicial review may be available in the Supreme Court, it cannot be entirely excluded.

There is plenty of legislation still on the statute book where a privative clause purports to limit the availability of judicial review.

Many of those clauses are no longer effective, or fully effective, because of the High Court decision in *Kirk.*

The important point from all of this is that when you are making administrative decisions you should proceed on the basis that your decision may potentially be challenged in an application for judicial review in the Supreme Court.

Remedies

Without getting too technical, when a court considers a judicial review application it has certain specific remedies available to it.

These are:

Mandamus order to compel the making of a decision

	Green v Daniels (HCA 1977) refusal to process unemployment benefit applications – ordered to deal with them in accordance with law
Certiorari	order to quash a decision made invalidly
Prohibition	order to prevent something being done unlawfully
Declaration	court declares legal rights
Injunction	2 types prohibitory – an order not to do something that affects a legal right mandatory – not available against Crown under State law – s.7 of the *Crown Proceedings Act*

No damages in administrative law.

However, the conduct of a decision maker may potentially attract another remedy that provides for damages:

Breach of Contract

Tort ie a civil wrong

- Negligence
- Misfeasance in public office (knowingly commit an intentional and wrongful act which causes economic loss)
- Trespass, false imprisonment, public or private nuisance etc

I will now take you quickly through the various grounds upon which a decision may potentially be found unlawful in judicial review proceedings.

Ultra Vires

Literally means ”beyond power”

ie the decision maker exceeded their power

May arise in a wide number of different ways

In narrow sense means that the decision maker was not empowered to act under the statute

In broader sense means while the decision maker ostensibly had power, they went about the decision making process in a manner that deprived them of power because they acted in a fashion that the Parliament could not have intended.

Ultra Vires in the narrow sense

Does the relevant legislation authorise the decision?

A person exercising statutory power can only do what the Act authorises and

“whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorised”

Attorney General v Great Eastern Railway Co (1880)

What the Act authorises is a matter of statutory interpretation

Read the Act carefully and fully

Look at both the general and specific definitions - may create a statutory fiction (eg CLCA used to define “cattle” to mean sheep, goats, deer, camels, llama, alpaca etc but not horses)

Get legal advice if not sure

Whom does the legislation empower?

Governor, Minister, Chief Executive, Board, Inspector, Authorised Officer etc

If the Act does not specifically confer power on the proposed decision maker,

then a valid and current delegation will be required to empower that person to make the decision

Valid Delegation

Delegation of power under an Act is different to an authorisation to expend public money or to enter contracts

Power to delegate must be conferred by the relevant Act

Any procedural requirements in the Act relating to the making of a delegation must be observed, eg

- Generally must be in writing - anyway ought to be
- Sometimes delegation can only be to a particular class of person, e.g. officer of the Department, public sector employee etc
- Generally better to delegate to position rather than named person
- Watch for changes in titles- remake after reorganisation

Change in delegator (e.g. Minister) does not invalidate but good idea to review

Sometimes need approval for a delegation, rare but see e.g.

s.7 of the *Correctional Services Act* where approval of the Minister required

Once confident that you actually have power, you must then satisfy any procedural requirements that the Act imposes before the making of a decision

There is another very important procedural requirement that the courts will imply.

That is the duty to accord procedural fairness or natural justice. I will come back to that as it is a very important topic in its own right.

Some Acts require approval or consultation with another person prior to making the decision, eg

S 54(3) of the *Public Sector Act* requires consultation with the Commissioner for Public Sector Employment before dismissal of an employee by a CEO

Kirkham v Industrial Relations Commission (2015)

While failure to adhere strictly to statutory procedure may not necessarily invalidate, should always comply.

Two reasons,

1. that is what the Parliament has instructed you to do; and
2. removes that as a risk of invalidity.

It is also very common for an Act to impose a requirement that the decision maker must be satisfied of a certain fact or matter before they exercise their power.

Failure to satisfy such a requirement is a very common ground for decisions to be set aside.

The following is a typical example.

Section 56 of the *Public Sector Act* provides that if an employee of a public sector agency is not performing their duty satisfactorily and it appears to the agency that there unsatisfactory performance may be caused by mental or physical incapacity, they may be required to undergo a medical examination by a medical practitioner selected by the employee from a panel of practitioners nominated by the agency.

To give a valid direction the Chief Executive (or their delegate) must:

- be satisfied that the employee is not performing their duties satisfactorily; and also
- form the opinion that the unsatisfactory performance is caused by a mental or physical incapacity.

Before making a decision on either of those points the CEO or delegate would need to give proper consideration to those two discrete issues and have a sound factual basis to justify the decision.

Once they are properly satisfied on those points they ought to record their decision in writing. That requirement might simply be met by recording their approval on a recommendation submitted to them. If that approach is to be adopted, the decision maker needs to read the recommendation and then carefully consider the issues. If the information provided is insufficient to satisfy them they must seek more information.

For completeness, I point out that in this example there are two further procedural requirements that must be met.

First, a panel of doctors must be nominated. Second, the employee must be permitted to choose from that panel.

Ultra Vires in the Broad Sense

As I mentioned earlier, ultra vires in the broad sense is concerned with situations where the decision making process has been approached in a manner that deprived the person of power that they ostensibly held.

In essence, the courts infer that the Parliament could not have intended the power to be exercised in the impugned manner. A number of different grounds have been identified by the courts.

Taking into Account an Irrelevant Consideration or

Failure to Take into Account a Relevant Consideration

These are really two different sides of the same coin.

The issue is how to identify what must be taken into account and what cannot be taken into account.

Some Acts specify matters that must be taken into account

An important question then is whether the list is exhaustive or inclusive, ie is it permissible to take into account additional matters?

Most Acts do not specify what can or cannot be considered.

Therefore need to infer what is relevant or not relevant by looking at the subject matter, objects and scope of the Act and the particular provision that is being applied.

When deciding whether decision ought to be set aside on these grounds, courts ordinarily apply a “but for” test, ie would this decision have been made if the irrelevant matter had not or the relevant matter had been taken into account.

“Consider” means proper, genuine and realistic consideration

Example

SF Bowser & Co (1927) local council decision only to allow Australian made petrol pumps held invalid as trade protection not relevant consideration for the Council under the legislation it administered.

Improper purpose

Not mean “improper” in sense of criminal or even immoral

Issue is whether power has been used for a purpose intended by the Parliament when it passed the legislation or for some extraneous purpose

Look at Act as whole and, in particular the objects, to determine what is a proper purpose.

Examples

Sydney Municipal Council v Campbell (1925)

Power to acquire land under LG Act conferred for purpose of carrying out improvements, remodel city, road widening and the like.

Council acquired land with view to make capital gain. Held not a proper purpose

Thompson v Randwick Municipal Council (1955)

Similar facts but council argued proper purpose as would use profit to defray its costs. Held not make proper

S.36 *Correctional Services Act* prescribes circumstances in which prisoner can be held "separately and apart", eg own safety or that of others etc – cannot use this power to punish a prisoner or to achive some other object

Unreasonableness

Lawyers refer to unreasonable in the *Wednesbury* sense (1948 English case)

Decision so unreasonable that no reasonable decision maker could have made such a decision

In practice, such a decision will quite often be invalid on other grounds.

Until recently one might properly have regarded assertion of unreasonableness in the *Wednesbury* sense as the last resort of a desperate plaintiff.

However, the High Court decision in ***Li*** in 2013 may lead to greater use of this ground of invalidity.

Three members of the court said "unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification".

An example that predates *Li* is *Payne v Deer* (Qld 2000) Qld Supreme Court invalidated decision of Chief Magistrate to order a magistrate

to move to a different city within four weeks when she was a single mother with five children aged between 17 months and 11 years old.

Held: unreasonable in the *Wednesbury* sense

Uncertainty

Probably not a ground, of itself, for challenge at State level (Commonwealth different because of AD(JR)Act)

nevertheless, decisions that affect rights or duties must be capable of being understood and not leave citizens uncertain as to their obligations

Citizen may choose to ignore decision. Certainty of decision would then need to be proven if decide to prosecute.

Cases Where There Has Been a Failure to Exercise Power

This ground of invalidity arises in a couple of different ways.

Inflexible application of policy or rule

Courts recognise that it is a good practice for public sector agencies to have policies.

Policies help with consistency of decision making, assist decision-makers to know what is relevant and assist the public by knowing the test they need to satisfy and information they should supply.

Any policy must itself be valid, ie consistent with the statutory power, not adopted for a improper purpose, take into account relevant matters and not irrelevant matters, not be unreasonable and so forth.

While an agency is entitled to adopt a general policy which will govern the exercise of its discretionary powers in ordinary cases it must be prepared to depart from the policy in exceptional cases.

That will require a willingness to listen to somebody who says their case is exceptional and the ordinary policy ought not be applied.

In practice, in larger agencies where decision making can be pushed well down the hierarchy, such issues might best be dealt with by referring the matter to a more senior decision maker who is able to depart from policy.

Must not act under dictation

At its simplest, this means that the decision maker must decide the matter himself and not how somebody else told them.

This area of law is not as clear as might be preferred, at least in relation to very high level decisions with wide discretionary policy element (ie the two Two Airline Policy cases ie *R v Anderson; Ex parte IPEC; Ansett v Commonwealth*)

But also High Court this month in the case re holding refugees on ship in Indian Ocean for several weeks – discretionary operational matter in disciplined service, ie Navy and Customs

I suggest that it is safest to proceed on the basis that when you are making a decision on the merits or facts of an individual case, the decision maker cannot be directed, eg amongst many examples, FOI, business or occupational licensing, individual decisions about prisoners, decisions to prosecute, employment questions and the like.

Some Acts specifically prohibit any direction, e.g. *Public Sector Act* in relation to employment matters

Other Acts confer a power to direct but then make specific exceptions.

However, taking into account a government policy preference will generally be permissible provided always that the facts of the particular case are properly taken into account. In many circumstances government policies will be a relevant consideration but not decisive.

Procedural Fairness or Natural Justice

Procedural fairness has two core elements; ie

Hearing Rule –must be given a reasonable opportunity for a fair hearing

Bias Rule – right to have the matter decided by an unbiased decision maker

I will explain those two concepts more fully. But first:

When does procedural fairness apply?

"*In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public) is bound to observe the requirements of natural justice or procedural fairness."*

Kioa v West (1985) Deane J

"It is a fundamental rule of the common law doctrine of natural justice … that, generally speaking, when an order is to be made which will deprive a person of some right or interest or of the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and be given an opportunity of replying to it …

…

The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of

livelihood and reputation, as well as to proprietary rights and interests …"

Kioa v West (1985) Mason J

Thus, in most circumstances, there will be an obligation to accord procedural fairness where a proposed decision will adversely affect rights, interests or a legitimate expectation.

Right - can be but need not be a legal right

Interest - may be a pecuniary interest such as employment or the right to carry on an occupation or business,

or a personal interest wide concept, includes good reputation, membership of an organization, the avoidance of punishment.

Legitimate expectation

This is a very wide concept. A legitimate expectation may arise because of:

- a past favourable decision that has created an expectation (eg the grant of a permission or licence that might now be revoked)
- a standing practice or policy of dealing with matters in a particular way that people have come to rely upon.
- because the person has an important interest at stake and it is reasonable for them to expect that they will be heard before an adverse decision is made.

A legitimate expectation must have a reasonable basis.

The end result is that most decisions that you make that adversely effect individuals, as distinct from the public generally or a large group of the public, will attract a duty to accord procedural fairness.

When does procedural fairness not apply?

As the quote from *Kioa* suggests, the rules of procedural fairness will not apply where a person is not affected individually but rather as a member of the general public or a large class of the public.

Thus, there is no obligation to accord procedural fairness before a general policy is changed.

And there is certainly not any obligation to give procedural fairness in relation to a change in legislation, whether an Act or regulation.

Where legislation sets out a detailed procedure dealing with procedural fairness issues, it is likely that there will be no wider right.

Genuine great urgency will generally only truncate time for hearing rather than remove altogether.

The Hearing Rule

In essence what this requires is a reasonable opportunity to respond to adverse material

What is required for a fair hearing?

It will depend on the overall circumstances and the issues to be decided.

At a minimum, the person whose interest may be affected must be properly informed of any concerns or allegations that are contrary to

their interests before an adverse decision is made relying on those matters.

It is generally not necessary to set out the concerns or allegations in great detail provided that the clear pith and substance of the allegation is put to them in an intelligible form so that they can respond effectively.

The person must then be given a reasonable opportunity to respond to the adverse material.

That will require sufficient time being allowed to prepare a response.

The length of time to be allowed will depend upon:

- the complexity of the issues,
- what earlier notice the person may have had about the issue of concern, and
- their own particular circumstances, eg
    - whether they will need assistance to prepare a response, or
    - will they need time to gather additional information.

An oral hearing is generally not required for most admin decisions.

In most circumstances it will be sufficient to allow the person the opportunity to provide a written submission. However, what is required will depend very much upon the nature of the issues.

If an oral hearing is given, it need not necessarily be with the decision maker personally provided that they are fully and accurately informed of the matters that the person wishes to be taken into account.

There is no general right to legal representation in administrative decision making. However, it may be necessary to permit legal (or

other) representation where the issues are factually or legally complex or the person lacks the capacity to present their own case adequately.

Bias Rule

Would a reasonable observer, being fully informed of the relevant facts, reasonably apprehend that the decision maker may not approach the matter with an impartial mind.

I stress that the issue is what would a reasonable observer think in the circumstances. The issue is not whether the decision-maker is actually biased.

In determining whether there is a reasonable apprehension of bias the impartial observer will be taken to know the relevant facts.

There will clearly be bias where the decision-maker has a pecuniary or personal interest in the outcome of the decision.

Of course, in those circumstances a SA public sector decision-maker will be disqualified from acting under the *Public Sector (Honesty and Accountability) Act* and may commit a criminal offence if they act.

In fact, most disqualifications do not arise because of a personal or pecuniary interest but for other reasons.

A frequent ground for a bias disqualification is that the decision-maker has somehow acted in a fashion which may be taken by the reasonable observer to suggest that they have prejudged the matter.

This most commonly occurs because the decision maker has written or said something which suggests that they have already made up

their mind about the proposed decision before they hear any submissions that the subject of the decision may wish to make.

One pitfall when you seek submissions from a person potentially affected by a proposed decision is to suggest that you have already mind up your mind.

Rather than saying “I think you are a liar and a cheat, what have you got to say about that.”

You should say something along the following lines:

"My preliminary assessment of the information currently available to me is that the following issues cause me concern (identify them) and may lead me to revoke your current permission to (do whatever). Before I make my final decision I am inviting you to inform me in writing within X days of any matters that you wish me to take into account.”

That approach should address problems with both the bias rule and the hearing rule.

Hopefully these tips on lawful decision making should help you to avoid seeing me in court.