



Précis Paper

Judicial Review of Administrative Action

Graham Barter believes the practice of judicial review is a most exciting area of current law. We agree.

Discussion Includes

- The nature of judicial review of administrative action
- The importance of judicial review in the Australian legal system
- The basis of the court's jurisdiction to engage in judicial review
- What are jurisdictional facts?
- The approach taken by the legislature to attempt to limit judicial review.

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Judicial Review of Administrative Action

1. In this edition of BenchTV, Graham Barter (Barrister) is interviewed by Ian Benson (Solicitor) on the topic of judicial review with reference to the recent NSW Supreme Court (Adams J) decision in *Hoyn v NRMA Insurance Limited* [2015] NSWSC 814 in which Mr Barter acted as counsel for the successful appellant, John Hoyn.

What Does Judicial Review Involve?

2. Mr Barter notes that judicial review is probably the most exciting area of law to practice in at the moment as it involves competing interests between the executive arm of government, responsible for quickly processing a myriad of individual claims to ensure the efficient running of the State, and individual claimants with unique circumstances. Given these competing interests, the rights of individual claimants are often subordinated to the executive's interest in smoothly and efficiently running the State. This particularly occurs where the individuals have unique facts and circumstances not accounted for by the policies, rules, and/or guidelines set by government executives, such as Ministers and departmental staff. In these situations, individuals can seek judicial review of executive decisions in the Courts. However, as it is costly and time-consuming for the government to have their executive decisions and regulations challenged through judicial review, the government tries to limit this as much as possible by introducing statutory provisions limiting judicial review, known as privative clauses, or by failing to specify avenues for decision review in the statute.
3. Under s 23 of the *Supreme Court Act 1970* (NSW), the NSW Supreme Court has an inherent jurisdiction to review matters "necessary for the administration of justice" in NSW, thereby establishing the Court's right to pursue judicial review functions. Furthermore, under s 69 of the Act, the Supreme Court has jurisdiction to grant relief in court proceedings in the form of the prerogative writs. Similarly, at the federal level, the High Court's original jurisdiction concerning judicial review is enshrined in s 75 of the Australian Constitution.
4. In order to seek judicial review of an administrative decision, individuals must establish that the initial executive decision-maker either made a jurisdictional error or an error of law on the face of the record. The *Hoyn* case is a good example for demonstrating the issues associated with judicial review concerning a jurisdictional error.

5. Mr Hoyn had injured himself in a car accident. In order to obtain damages for non-economic loss arising from the accident, Hoyn needed to demonstrate permanent impairment of greater than 10%, under s 131 of the *Motor Accidents Compensation Act 1999* (NSW) ('MACA'). The degree of permanent impairment is assessed by a medical assessor rather than a Court.

SECTION 131:

Impairment thresholds for award of damages for non-economic loss

No damages may be awarded for non-economic loss unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%.

6. In this case, Hoyn was sent to a medical assessor. In undertaking the assessment, the assessor noticed an injury to Hoyn's right shoulder which had not been referred to him for consideration as part of the assessment of Hoyn's permanent impairment. Whilst the assessor noted this omission in his report, he found that without taking into account the injury to Hoyn's right shoulder, Hoyn had only suffered permanent impairment of 10%. Therefore, based on this assessment, Hoyn would not be entitled to non-economic loss damages.
7. Following the assessment, Hoyn successfully made an application under s 62 of MACA to refer the matter for further assessment by the medical assessor. After accounting for the right shoulder injury, the assessor determined Hoyn's permanent impairment to be 12%, thereby entitling Hoyn to non-economic loss damages worth approximately \$100,000.

SECTION 62:

Referral of matter for further medical assessment

- (1) *A matter referred for assessment under this Part may be referred again on one or more further occasions in accordance with this Part:*
 - (a) *by any party to the medical dispute, but only on the grounds of the deterioration of the injury or additional relevant information about the injury, or*
 - (b) *by a court or claims assessor.*
- (1A) *A matter may not be referred again for assessment by a party to the medical dispute on the grounds of deterioration of the injury or additional relevant information about the injury unless the deterioration or additional information is such as to be capable of having a material effect on the outcome of the previous assessment.*

- (1B) *Referral of a matter under this section is to be by referral to the member of staff of the Authority who is designated by the Authority for the purpose (in this Part referred to as the "proper officer of the Authority").*
- (2) *A certificate as to a matter referred again for assessment prevails over any previous certificate as to the matter to the extent of any inconsistency.*
8. In order for a matter to be referred for further assessment under s 62, there must be "additional" and "relevant" information which is "capable of having a material effect on the outcome of the previous assessment". These three requirements were clearly satisfied in Hoyn's application as the medical assessor's report itself suggested that assessment of the right shoulder injury was additional, relevant information which would have a material effect on the percentage of permanent impairment, and therefore Hoyn's ability to claim non-economic loss damages.
9. Following the second assessment, NRMA Insurance similarly made an application under s 62 of MACA to refer the matter back to the medical assessor for further assessment based on the existence of another medical practitioner's report commissioned by NRMA. This report assessed Hoyn's permanent impairment at 10% and was not seen by the medical assessor in either his first or second assessment.
10. The "proper officer" of the State Insurance Regulatory Authority agreed that this report constituted "additional relevant information" capable of having a "material effect" on the outcome of the medical assessor's previous assessment. Therefore, the proper officer accepted NRMA's application and decided to refer the matter back to the medical assessor for further assessment based on this new medical report. However, Hoyn strongly opposed this decision of the proper officer as he feared that the medical assessor's assessment of his permanent impairment may return to 10%, below the non-economic loss threshold.

Statutory Interpretation of MACA

11. In order to determine the legality of the proper officer's decision, the Court must engage in statutory interpretation to determine the meaning of "additional reliable information" and "capable of having a material effect" under ss 62(1)(a) and 62(1)(A). When undertaking statutory interpretation, the case of *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 requires the Court to consider the context of the statutory provisions by looking to the objects of the Act. Where the objects suggest the Act is "beneficial legislation", then the Act will generally be interpreted in favour of the party intended to benefit from the legislation. The objects of MACA are stipulated in s 5 of the Act.

SECTION 5:

Objects of Act

- (1) *The objects of this Act are as follows:*
- (a) *to encourage early and appropriate treatment and rehabilitation to achieve optimum recovery from injuries sustained in motor accidents, and to provide appropriately for the future needs of those with ongoing disabilities,*
 - (b) *to provide compensation for compensable injuries sustained in motor accidents, and to encourage the early resolution of compensation claims,*
 - (c) *to promote competition in the setting of premiums for third-party policies, and to provide the Authority with a prudential role to ensure against market failure,*
 - (d) *to keep premiums affordable, recognising that third-party bodily insurance is compulsory for all owners of motor vehicles registered in New South Wales,*
 - (e) *to keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities,*
 - (f) *to ensure that insurers charge premiums that fully fund their anticipated liability,*
 - (g) *to deter fraud in connection with compulsory third-party insurance.*

12. Under s 5, there are some objectives, such as under ss 5(1)(a) and 5(1)(b), which are clearly intended to benefit people who have suffered injuries in motor accidents. However, there are also objectives, such as under s 5(1)(e), which are not beneficial to injured people as they specify the need to keep premiums affordable by limiting the amount of compensation payable for non-economic loss. This objective is reflected in s 131 of MACA, detailed above, and more broadly in Chapter 5 of the Act which is aimed at restricting the Court's ability to award damages.

Arguments: Jurisdictional Fact and Irrationality/Illogicality

13. A jurisdictional fact is a fact whose objective existence, as determined by the reviewing court, is a pre-condition to the exercise of power, or jurisdiction, by the executive officer. Thus, this fact must be established before an executive officer can make any decision concerning a matter. As an error in jurisdictional fact is a type of jurisdictional error, the existence of this fact may be determined by the Court as part of its judicial review process.
14. On review of the proper officer's decision in the NSW Supreme Court, Mr Barter principally argued that the proper officer had made an error in jurisdictional fact as she made a decision without the existence of "additional relevant information about the injury". Mr Barter asserted that the objective existence of "additional" and "relevant" information were jurisdictional facts.

In doing so, he contrasted these requirements with the requirement in s 62(1)(A), that the information must be "capable of having a material effect", which he conceded was a subjective decision within the proper officer's discretion.

15. Mr Barter argued that the content of the new medical report cannot objectively be considered "additional relevant information" with reference to the decision in *Singh v Motor Accidents Authority of NSW (No2)* [2010] NSWSC 1143. In that case, Rothman J held at [47] that "an opinion on an issue already canvassed is not, of itself, additional relevant information" under s 62(1)(a) of the MACA.
16. Although the executive officer considered this case in her reasoning, she nonetheless decided that the opinion in the new medical report was 'additional relevant information', contrary to Rothman J's decision. Therefore, in addition to the jurisdictional fact ground, Mr Barter also briefly argued in his written submissions that the executive officer's decision was "irrational, illogical and not based on findings or inferences of fact supported by logical grounds": *QBE Insurance (Australia) v Miller* [2013] NSWCA 442 quoting *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, [38]. The High Court has upheld irrational and illogical decisions as a separate ground of judicial review where the decision was "one at which no rational or logical decision maker could arrive": *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16. This is similar to the Wednesbury standard of unreasonableness from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Judgment of Justice Adams

17. In his judgment, Justice Adams did not rule on whether the requirement for "additional relevant information" was a jurisdictional fact. However, he found that the new medical report did not contain "additional relevant information", as per Justice Rothman's decision in *Singh (No 2)*, as the report did not raise issues different to those already considered by the medical assessor. Therefore, Justice Adams held that the executive officer's decision was not rational or logical. Consequently, he quashed the executive officer's decision and returned NRMA's application to the State Insurance Regulatory Authority for a new decision in accordance with his judgment.
18. Although Mr Barter was satisfied with the outcome and deemed it to be reasonable, he would have preferred to steer clear of the irrational and illogical grounds of judicial review as these grounds are "dangerously close" to a merits review which the Courts are very careful to avoid.

BIOGRAPHY

Graham Barter

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Mr Barter was called to the Bar in 1981. He has been a Lieutenant Colonel in the Australian Army Legal Corps since 1985 and a consultant to the Military Law Centre since 2009. He was the inaugural Legal Officer for the Australian Defence Force Investigative Service in 2007 and a Member of the Veterans' Review Board from 2007 to 2010. He was a Member of the Australian Government Independent Protection Assessment Office and has been a Member of the International Humanitarian Law Committee of the Australian Red Cross (NSW) since 2012.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

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Focus Case

John Hoyn v NRMA Insurance Limited [2015] NSWSC 814

Benchmark Link

http://benchmarkinc.com.au/newslettercms/webversion/benchmark_30-06-2015_insurance_banking_construction_government.html

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/558a2e5be4b06e6egf0f6eac>

Cases

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

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QBE Insurance (Australia) v Miller [2013] NSWCA 442

Singh v Motor Accidents Authority of NSW (No2) [2010] NSWSC 1143

Legislation

Motor Accidents Compensation Act 1999 (NSW)

Supreme Court Act 1970 (NSW)