A Brave New World: surviving and thriving under the new work capacity assessment regime: techniques of administrative decision-making and review

Adapted from a paper given at an NSW Self Insurers' Association Education Session 9 September 2014

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Introduction

Thank you very much for inviting me to talk with you today. I plan to talk about two things.

First, I want to discuss with you, in simple terms, what is involved in judicial review. I want you to know how to look for error reviewable by the Supreme Court in decisions you don't like made under workers' compensation legislation.

Second, I want to offer a few thoughts about the new regime with respect to assessment of weekly payments. This involves consideration both of how to write a decision less likely to be subject to procedural appeal or merits review, as well as what sort of challenges you might make of a WIRO decision.

What is judicial review?

Understanding judicial review requires you to understand two very simple concepts.

The first concept is usually referred to as the separation of powers doctrine.

The parliament makes laws conferring powers and duties upon government ministers, delegates, and other government decision-making bodies. The ministers, delegates, and other decision-makers make the decisions that the parliament empowers and requires them to make.

The courts make sure that the decision-makers make their decisions within the boundaries of the power that has been conferred upon them.

In other words, judicial review is the process by which the courts determine whether or not an administrative decision-maker has acted within the power conferred upon him or her by Parliament.

The second concept follows from the first, which is that the categories of jurisdictional error are simply ways of describing what a decision-maker has done when they have gone beyond the power conferred upon them by the statute (exceeded their jurisdiction), or when they have failed to exercise a power conferred upon them by the statute (failed to exercise their jurisdiction).

In *Kirk v IRC*[1], the Court said;

"It is neither necessary, nor possible, to attempt to mark out the metes and bounds of jurisdictional error".

The categories of error are not closed, because there could always be another way of describing what a statute requires or forbids and how that obligation or restriction has not been complied with.

Those are the two most fundamental conceptual building blocks of judicial review.

What are the grounds of judicial review?

ADJR Act and State equivalents.

In Australia, the *Administrative Decisions (Judicial Review) Act* 1977, with its codified grounds of review, remains available as a means of review of most decisions at Commonwealth level (with similar schemes in several states[2]).

[1] *Kirk v IRC* (2010) 239 CLR 521
[2] Judicial Review Act 1991 (Qld), Judicial Review Act 2000 (Tas), Administrative Decisions (Judicial Review) Act 1989 (ACT).

The *ADJR Act* was the product of the *Commonwealth Administrative Review Committee Report* of 1971[3], "the Kerr Report" (yes, the very Sir John Kerr better popularly remembered for his performance as Governor General).

The grounds of review found in the *ADJR Act* reflect an attempt to simplify and reform the common law grounds of review as they were at that time.

I've attached a copy of section 5 of the *ADJR Act* to this paper. The grounds listed there remain broadly similar to the common law grounds of review, and represent the simplest short-cut to the categories of judicial review for you to consider.

Jurisdictional error.

In New South Wales, there are no codified grounds of review, but any administrative decision in NSW can be reviewed by the Supreme Court if you can establish "jurisdictional error".

The grounds are very similar to the grounds in the ADJR Act. They are all just different ways of saying that the decision-maker acted beyond the power given to them by the statute which allowed them to make the decision.

Next, let's look at some of the main categories of jurisdictional error likely to crop up in workers compensation decisions.

In practice, there is a fair bit of overlap between the different grounds, and errors might be characterised in more than one way.

The main errors to look for with respect to decisions in the workers compensation area

(1) Inadequate reasons.

There is no general common law duty to give reasons for administrative decisions. However, most of the time, the statute or regulations require it, either expressly, or by implication.

This is true of most decisions in the workers' compensation area.

[3] Commonwealth Administrative Review Committee Report, Parl Paper No 144 (1971)

What is required and how detailed the reasons need to be will depend upon the particular statute or regulation, however, the general purpose of reasons is to allow the parties to understand why and how a particular decision has been reached.

In *Vegan*[4], the Court of Appeal discussed what reasons were required of a workers compensation medical appeal panel (at [121] – [122]);

Where it is necessary for the Panel to make findings of primary fact, in order to reach a particular conclusion as to the existence, nature and extent of any physical impairment, it may be expected that the findings of material facts will be set out in its reasons. Where facts are in dispute, it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. More importantly, where more than one conclusion is open, it will be necessary for the Panel to give some explanation of its preference for one conclusion over another. That aspect may have particular significance in circumstances where the medical members of a Panel have made their own assessment of the applicant's condition and have come to a different conclusion from that reached by other medical practitioners, as set out in reports provided to the Panel.

On the other hand, to fulfil a minimum legal standard, the reasons need not be extensive or provide detailed explanation of the criteria applied by medical specialists in reaching a professional judgment: see ***Soulemezis*** *at 273-274 (Mahoney JA) and 281-282 (McHugh JA). At least, that will be so where the medical science is not controversial: if it is, a more expansive explanation may be required.*

Vegan has been referred to and applied in many cases in the worker's compensation area.
An example of where the insurer successfully challenged a medical appeal panel decision because the reasons were inadequate is *Workers Compensation Nominal Insurer v Bui*[5].

In that case, the employer had obtained surveillance evidence which suggested that the worker had given dishonest histories to the AMS and the other psychiatrists she had seen.

[4] (2006) 67 NSWLR 372
[5] [2014] NSWSC 832

The employer contended that the fresh evidence called into question the history taken by the AMS, and thus a further medical examination was required. Further, the fresh evidence was not consistent with the rated impairment, and a lower impairment should be substituted.

The medical appeal panel refused that request because they said it would not assist them.

The medical appeal panel also said that the surveillance evidence was "not inconsistent" with the impairment level assessed by the AMS.

The Court said that there may have been good reasons for making those professional judgments, but the appeal panel did not explain what those reasons were, and were therefore inadequate (at [81]).

The reasons were inadequate, because they did not allow the losing party to understand the reason why those conclusions had been reached (at [78]).

(2) Misconstruing the relevant statute in such a way that the exercise of power is affected, leading the decision-maker to identify a wrong issue, or ask a wrong question[6].

For instance, a medical appeal panel might believe it's job is simply to conduct its own assessment, when, in fact, its job is simply to correct errors which the insurer or worker has complained of in the original assessment (see *Siddik*[7] and *McKee*[8]).

Another way that an appeal panel might go wrong is that it might simply misunderstand the task that it is supposed to perform.

In *Diamond Formwork*[9], a medical appeal panel, that was asked to review the way that the Approved Medical Specialist had worked out a deduction for a pre-existing condition, simply said that "they agreed with the approach taken by the Approved Medical Specialist".

[6] *Craig v South Australia* (1995) 184 CLR 162, at p179
[7] [2008] NSWCA 116; (2008) 6 DDCR 228
[8] (2008) 71 NSWLR 609
[9] [2013] NSWSC 365

The Approved Medical Specialist had applied a deduction of 50% because the worker had a pre-existing disease in his back, and did not expressly followed the steps outlined in the leading case of *Cole and Wenaline*.

I argued that the AMS was simply exercising his clinical judgment, and that the appeal panel was entitled simply to agree with him.

The Supreme Court disagreed. The Supreme Court found that the Appeal Panel misunderstand its task when it was applying a deduction for a pre-existing condition, and it misunderstand it in multiple ways.

The appeal panel misunderstood and misapplied the section of the Act dealing with deductions for pre-existing conditions, and misunderstood and misapplied the Guidelines for Assessment of Permanent Impairment.

Equally, the Court could have found that the appeal panel's reasons for agreeing with the Approved Medical Specialist were inadequate.

(3) Failing to take into account a matter that the Act implicitly or explicitly *requires* the decision-maker to take into account

What the Act implicitly (as opposed to expressly) *requires* the decision-maker to take into account is determined with reference to the subject-matter, scope and purpose of the Act[10].

An interesting example of this is *Ah-Dah v State Rail Authority*[11].

In that case, which I ran for the worker, the Appeal Panel thought that the worker did not want a hearing, and did not hold a hearing. The worker's lawyers had (mistakenly, as they admitted to me afterwards) ticked the box which said that they wanted a hearing.

The Supreme Court held that the wishes of the parties was a relevant consideration when deciding whether or not to hold a hearing, and that the Appeal Panel's mistake about the worker's wishes meant that they had not been taken into account.

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[10] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 2, per Mason J, at p39; per Brennan J, at p56

[11] (2007) 69 NSWLR 468

(4) Taking into account a matter which the decision-maker is not permitted to take into account

This too is a matter of statutory construction. It is not used that commonly.

An example is *White v Overland*[12]. In that case, the decision-maker, Mr White took into account information given by Mr White to Mr Overland during confidential settlement discussions, to make a fresh decision unfavourable to Mr White.

The Court held that as a matter of public policy, Mr Overland should not be allowed to make use of that information, and thus, taking it into account was to take into account an irrelevant consideration.

There are not a lot of successful examples, because the decision-maker must be *forbidden* from taking that information into account, as a matter of statutory construction.

For instance, there was no error in a Court taking into account the fact that an asylum-seeker chose to take an affirmation rather than an oath in deciding that his evidence that he had converted to Christianity was false, even though, in ordinary circumstances, whether a witness gives evidence on oath or by way of affirmation is not a relevant factor in deciding whether they are telling the truth (*SZROK v Minister for Immigration & Anor* [2012] FMCA 1043).

(5) Exercising a discretionary power in a way which can be characterised as legally unreasonable[13]

The law in Australia has undergone what might prove to be a radical transformation following the High Court's decision in *Li*'s case.

Traditionally, a decision could not be challenged on this ground unless it was so unreasonable, no reasonable decision-maker could have made it.

[12] (2002) 67 ALD 731
[13] *Minister for Immigration and Citizenship v Xiujuan Li* [2013] HCA 18 (2013) 297 ALR 225, an important case; departing from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

However, this was rarely successful. Li's case has reformed this area of the law in Australia, providing a new test of "legal unreasonableness". It is very controversial, because it seems to focus on the merits.

A decision will be legally unreasonable if:

1.) A particular error was committed in reasoning, suggestive of unreasonableness;
2.) Great weight was given to a matter of little importance.
3.) Little weight is given to a matter of great importance.
4.) The reasoning is illogical or irrational.
5.) The result is unreasonable or plainly unjust.

Expect some challenges of particularly unreasonable WIRO decisions on this ground.

(6) Failing to accord procedural fairness, either by acting in a manner giving rise to a reasonable apprehension of bias, or by failing to afford a party personally affected by a decision a reasonable opportunity to deal with adverse material where procedural fairness is required

Procedural fairness is now generally required with respect to all decisions[14]. Indeed, the Courts will now go to great lengths to avoid finding a parliamentary intention to exclude it[15].

Ex parte H (2001) 179 ALR 425 outlines the now generally accepted test in administrative law for "apprehended bias", which is "Whether a fair-minded lay-person, properly informed about the nature of proceedings, the matters in issue, and the conduct said to give rise to an apprehension of bias" might apprehend bias (at [28]).

This is how you should particularise it.

In *Siddik*, the Court of Appeal said that the worker had not been accorded procedural fairness. The Court of Appeal said that the worker should have been warned that the appeal panel intended to travel beyond the errors complained of by the employer, and let them make further submissions on the matters which the appeal panel wanted to address.

[14] *Teoh* (1995) 183 CLR 273; Kioa v West (2001) 206 CLR 57.
[15] *Saeed* (2010) 241 CLR 252 at [22] – [23].

Some thoughts about possible challenges to WIRO decisions

Now let's consider the recent reforms which allow you, as self-insurers, to make your own decisions with respect to work capacity, the new sections 43 - 44B of the Workers Compensation Act 1987 (NSW).

The good thing is that you have the opportunity to take control of the decision-making process. The bad news is that the worker's multiple, complex, and frankly peculiar avenues of review take that control away from you.

The oddest aspect of this scheme is the fact that the worker has so many ways of undoing your work as insurers, *and, does not have to choose between them*.

The Act provides *both* independent merits review *and* what it calls "procedural review", and the worker can do both. Even more bizarrely, the worker has an independent merits review, and then he can choose "procedural review" *of the insurer's decision*, which, if successful starts the whole painstaking process again.

This is very unusual. In most schemes which allow for merits review (Commonwealth workers compensation and migration decisions are examples), once the merits decision is made, any error in the original decision becomes irrelevant, and unchallengable.

Under that sort of scheme, the only thing that the worker could do would be to seek judicial review of *the merits decision*.

However, there is no point in complaining about it. What do you do to minimise the pain?

The answer is that you have to bullet-proof your decisions. The more carefully you draft your reasons, and the more you explain why you have made the decision you have, the more likely that the decision will be maintained when WorkCover review the matter on its merits.

Very careful consideration should be given to the legislative regime, and demonstrating you have followed it.

Merits review

While a "merits review" is a fresh decision, if you provide compelling reasons for the decision which you made, it will be much more likely that the result will be the same on review.

Procedural review

Now for the "procedural review". The relevant provision of the Act states:

(44) (1) An injured worker may refer a work capacity decision of an insurer for review:

(c) to the Independent Review Officer (as a review of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision)….

It is a very peculiar provision, and it is not at all clear what it means. Yes, we can observe that it seems to focus on process not outcome, but beyond that, it is a little difficult to say.

Many questions are raised; is it meant to refer only to technical breaches of procedure, or does it extend to the reasoning process, or the explanation of the reasoning process? To what extent does it overlap with the grounds of judicial review?

Is the review a review of the original insurer's decision, a review of the insurer's internal review decision, or some combination of both?

Regardless of what it actually means, a quick survey of WIRO decisions make it clear that WIRO is taking a very broad view of what is meant by "a review of the insurer's procedures", and seems mainly to find that the insurer's decisions are invalid.

It is well captured in this paragraph from a recent decision:

"The procedures to be followed by the Insurer are set out in the WorkCover Work Capacity Guidelines and WorkCover Review Guidelines. Both sets of Guidelines should be complied with in order for a work capacity decision to be validly made. Given the overall beneficial nature of the 1987 Act and the serious consequences to workers if decisions are made incorrectly, strict compliance with the Guidelines is required."

To this, other decisions have made it clear that compliance with the principal legislation is also required.

This is being used by WIRO to go far beyond mere *process*, and arguably into the judgments themselves.

Perplexingly, in one case, one of the supposed failures of the insurer was a failure to follow "through no fault of their own" the insurer did not follow the "Best Practice Decision-Making Guide" which the WorkCover Work Capacity Guidelines required the insurer to follow.

The reason it was "through no fault of their own" was that WorkCover had not published any such Guide.

Such an approach by the WIRO delegate cannot be right.

Other common errors WIRO delegates have referred to include "not adequately explaining the line of reasoning to the worker", failing to refer to the right legislative provision (even though the approach taken to making the calculation is correct), and accidentally faxing a copy of a section 54 notification which was missing two pages.

My advice is to consider challenging some of these decisions in the Supreme Court. The precise nature of the WIRO "procedural" review is unclear. However, I am confident it does not extend to finding decisions invalid because of non-compliance with a non-existent Best Practice Decision-Making Guide.

In addition, consideration should be given to challenging merits review decisions which you are not happy with. All the grounds of review which we discussed earlier would be applicable to review of these decisions.

Attachment "A".

Administrative Decisions (Judicial Review) Act (Cth), section 5.

5 Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no

evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

Attachment 'B'.

Supreme Court Act, section 69

Proceedings in lieu of writs

(1) Where formerly:

(a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
(b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

then, after the commencement of this Act:

(c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
(d) shall not issue any such writ, and
(e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
(f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to:
(a) the writ of habeas corpus ad subjiciendum,
(b) any writ of execution for the enforcement of a judgment or order of the Court, or
(c) any writ in aid of any such writ of execution.

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

By the way, don't worry about section 69(5); since *Kirk*, no such provision is likely to be effective.