When is it OK to ask a decision maker to change their mind?

The curious tale of Casey Miles and section 63 of the *Motor Accidents Compensation Act*.

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Introduction.

A decision-maker considers certain documents which you advance in support of an application and rejects them. You think that they are wrong. Is it OK to submit those documents again in a further application and ask them to change their mind?

Every person involved in personal injury or commercial litigation to whom I pose this question has the same reaction: of course not, either because the application is *res judicata* or because you are estopped from making the further application.

This is not the answer you will get from someone steeped in the dark (and flexible) arts of administrative law.

In administrative law, there is no *res judicata*, and no estoppel (*Kurtovic*[1]). Instead, the only question is whether the statute shows an intention, either expressly or by implication, that the decision-maker is empowered to make a further decision in the circumstances of the case, or whether they are *functus officio*, in which case their power is spent.

At the heart of this paper is the tale of Casey Miles, and the proper officer who changed her mind. In telling this tale, we will consider three things.

[1] (1990) 21 FCR 193

First, if your application for further assessment fails a first time, you do not necessarily have to go down the complex, expensive, and uncertain path of judicial review in the Supreme Court order to ask the proper officer to reconsider.

Second, in considering the approach taken on the further application in *Miles*[2], we will see the way in which you can maximise your chances of obtaining a further assessment.

Finally, we will consider whether there might be other types of decision where you could simply make a further application, or ask a decision-maker to revisit their decision, and in what circumstances.

<u>The tale of Casey Miles.</u>

Casey Miles was knocked off his motorbike when NRMA's insured executed a U-Turn across his path. NRMA conceded fault. Amongst other injuries, Casey Miles alleged a brain injury causing epilepsy as a result of the accident.

NRMA disputed these injuries, and Mr Miles' physical injuries were referred to Dr Wan for assessment pursuant to section 58 of the *MAC* Act.

On the material before him, Dr Wan rather tentatively concluded that Mr Miles did have epilepsy induced as a result of traumatic brain injury attributable to the accident. Dr Wan concluded that his diagnosis *"was subject to change if there is new evidence regarding the diagnosis of epilepsy"*[3].

Because of the epilepsy, the brain injury accounted for 17% of the total physical WPI of 22%.

Following the assessment, NRMA managed to secure a large volume of material from Mr Miles' related workers' compensation proceedings. Encouraged by this formidable bundle, NRMA applied for a further assessment pursuant to section 62 of the Act, on the grounds

[2] *Miles v MAA* [2013] NSWSC 927
[3] See *Miles*, at [10]. A detailed factual background to the case, including the critical parts of Assessor Wan's reasons, is included in Hoeben CJ at CL's judgment, from [2] – [22].

that they had obtained additional relevant information capable of altering the result of the previous assessment.

Lurking amongst these documents were reports of Dr Loiselle and Associate Professor Boyce.

Dr Loiselle, a neurologist who had treated Mr Miles, stated that Mr Miles' reported epilepsy was *"highly unlikely to have been caused by the motorbike accident"* and that an EEG which he performed was normal.

Associate Professor Boyce, another treating doctor, said, amongst other things, that he could not confirm a diagnosis of epilepsy.

All 154 documents were submitted in support of the application, together with a 150 paragraph summary of those documents, and extensive submissions (as Hoeben CJ at CL pointedly noted, at [11]).

The proper officer rejected the application for a further assessment.

I was briefed to consider the possibility of judicial review of the proper officer's decision.

I was not confident that judicial review was a good option. In dealing with the application, the proper officer had had to consider a large volume of material and submissions, including material which had been before the original assessor, much of which was not capable of affecting the outcome.

Satisfaction of the criteria for referral for further assessment is a subjective question for the proper officer, which simply has to be reached lawfully and reasonably; as long as it was open for the proper officer to reach the decision she did, a Court would not quash her decision.

It is not to the point that, from an objective point of view, some of that material, if characterised in a particular way, might support a referral.

A Court might well accept that it was reasonable of her not to be satisfied that the statutory criteria for referral were made out and to reject the application, given the volume of material she had to consider, much of it clearly falling outside the statutory criteria, and the numerous arguments she had to deal with.

As most of you will be aware, the journey down the judicial review path is lengthy, expensive, and ultimately uncertain; absent jurisdictional error in the decision made, the application will not be successful. It is not enough that the proper officer might reasonably have reached a different conclusion.

Even if the judicial review application is successful, there is no guarantee that the proper officer, upon remittal, will make a decision in your favour.

What if we simply made a further application for further assessment, on select material within the bundle, with concise submissions, identifying precisely what information we said was contained within that select material, identifying precisely how it could affect the result, and thus make it as easy as possible for the proper officer to answer the question posed by section 62 in the insurer's favour?

It may have been open to the proper officer to observe that we did not "demonstrate" that the material provided could alter the result, but it was equally open to us to demonstrate that it could, and open to *her* to find that it could.

We picked out the report of Dr Loiselle and the report of Associate Professor Boyce, and set about demonstrating, with reference to the reasoning of Dr Wan where necessary, how relevant information within them could affect the outcome of a further assessment.

Mr Miles opposed the application on the basis that the proper officer did not have the power to because the reports had already been before the proper officer in the application which had been rejected.

The proper officer accepted that she could consider the application, and she accepted that the information that Associate Professor Boyce had performed an ECG which was normal was additional, and capable of affecting the result.

She therefore referred the matter for further assessment. This time, the result was very different.

In the light of the further material, Dr Wan found that the seizures either were not epileptic, of if they were, it was unlikely that they were due to post-traumatic epilepsy, and hence were not related to the accident.

The result was that Mr Miles was no longer assessed as suffering from a whole person impairment of above 10%, and therefore, he was not entitled to general damages.

The decision in the Supreme Court.

Mr Miles applied for judicial review in the Supreme Court. The first two of the three grounds argued are relevant for our purposes. First, he argued that the information was not *"**additional** relevant information"* because it was not additional to the proper officer; the two reports had been before the proper officer before, and were thus not *"additional"* for the purposes of section 62.

Second, and in the alternative, he argued that because the proper officer had already considered the two reports in an earlier application and made a decision with respect to that application, the proper officer was *functus officio*; her power to consider whether those reports constituted *"additional relevant information"* was spent.

His Honour, Justice Hoeben, rejected both arguments. With respect to the first argument, His Honour said that it was clear that the reference to *"additional relevant information"*, when considered in the context of the section, was a reference to material which was additional to that which was before the medical assessor when the previous medical assessment took place.

It does not refer to the proper officer, and does not impose a requirement that material be *"additional"* to that considered by a proper officer on a previous application for further assessment.

His Honour also rejected the second argument. His Honour observed that the doctrine of *functus officio* may apply where an application is made to re-open or reconsider a final and operative decision.

Here, the decision whether to refer a matter for further assessment is not the ultimate step in the relevant process, that being the further assessment itself.

The section itself clearly entertains the possibility of multiple applications for further assessment. The power is invoked whenever an application is made.

The further application, although it relied upon material previously considered by the proper officer, was not an application to re-open or reconsider a final decision.

Rather, it was a separate and distinct application, a different and further application, enlivening the proper officer's power to make a determination under section 62.

This did not mean that endless applications could be made with no justification, based upon the same material and the same arguments.

In an appropriate case, the proper officer could summarily dismiss such an application because it was frivolous or vexatious[4], or because it was being used for an improper purpose or was otherwise an abuse of process[5].

Lessons from Casey Miles.

Miles is important for several reasons.

I - not all roads lead to judicial review.

First, it establishes that if you are faced with a rejected application for further assessment, then the cost and uncertainty of judicial review is not your only option; you could, instead,

4 MAA Medical Assessment Guidelines, clause 10.1.5
5 MAA Medical Assessment Guidelines, clause 10.1.6

consider how to refine and reframe your application in the light of the reasons given for rejecting it, and simply make a further application.

Whether this is the appropriate course will require careful consideration of the reasons given for rejecting the application. In some cases, the proper officer will have based his or her decision upon some understanding of the law which you may need to test in the Supreme Court.

In other cases, it will be clear that without some authoritative statement from the Court, the proper officer will not be persuaded that the matter should be referred.

However, I would suggest that when you are unhappy with a decision not to refer a matter, you ask your legal team to advise on the merits of making a further application as well as the prospects of success in judicial review proceedings.

II - if you make the proper officer's life easy, they are more likely to find in your favour.

Second, the fact that the second application was successful based on two documents which were a subset of the first application, and submissions which were a small fraction of the length of the original submissions illustrates that often, in applications of this kind, it is not the volume or even quality of the material you put up, but the extent to which you direct your attention to the statutory task which the decision-maker has to perform.

Often, less will be more. It is easy to succumb to the understandable anxiety that you will leave out a document, which the decision-maker may have found persuasive, for reasons which you don't yourself understand, or that they would have accepted an argument which you discarded because you thought it weak.

Neither of these possibilities is at all likely! Decision-makers are invariably time-pressured, and have had far less of an opportunity to consider the case than you have. What will help them is a select group of documents, and short submissions which go to the heart of the statutory task which they have to perform; your aim is to make it easy for them to write their decision, using your arguments.

The case of Miles' can be used as an illustration of the approach most calculated to persuade.

The first task is to analysis the relevant power, which starts with the section itself, and requires an understanding of how the section has been understood by the courts.

Section 62 of the *MAC* Act is, relevantly, as follows:

Referral of matter for further medical assessment

A matter referred for assessment under this Part may be referred again on one or more further occasions in accordance with this Part:

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…

(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"*** *).*

In the case of *Miles*, the ground was that there was "additional relevant information" which could affect the assessment of permanent impairment.

Thus, for the proper officer to be satisfied that the matter should be referred for a further assessment, she needed to be satisfied that there was *"additional relevant information"*, and that the *"additional relevant information"* was *"capable of affecting the result"*.

So what does *"additional"* mean? As we saw earlier, it must be *"additional"* to that which was before the assessor at the time of the previous assessment.

The first time an application for further assessment was made, documents which had been before the original assessor were included, therefore any information contained within them was not *"additional"*, and was not relevant to the proper officer's determination.

This made the proper officer's task difficult; she had to identify these documents and remove them from her consideration, and when she considered the submissions, she had to try to work out what submissions were relevant only to documents which did not satisfy the statutory criteria.

As well as being *"additional"* in that sense, it must be *"additional"* to the party relying upon it, in the sense that it must be material which was not available to the party who relies upon it at the time of the earlier application.

Further, if it is an expert opinion, then the opinion will not be *"additional"* if it does no more than express an opinion on an aspect of the claimant's injury which has previously been the subject of an expert opinion, even if it expresses a different opinion in a different way[6].

On the other hand, if it is not *just* another medical opinion, but is significant for some other reason, then it may be *"additional"*; see, for instance, *QBE Insurance Ltd v Henderson*[7].

Finally, it is necessary to explain why that information is *"capable of affecting the outcome"* with respect to a matter which had been certified in the previous assessment, which in the case of *Miles* (and indeed, most cases from the perspective of insurers), means that the information must be capable of leading to a finding that the degree of impairment is *"not greater than 10%"* (section 58(1)(d), and section 61(1) of the MAC Act).

This leads to an important observation; what is critical is to identify and characterise the *information* you say is relevant and additional in a manner best calculated to persuade the proper officer that the information satisfies the statutory test.

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6 *Alavanja* [2010] NSWSC 1182, at [35] and [43].
7 [2012] NSWSC 1607

The first application for further assessment contained plenty of good arguments and detailed analysis of the forensic significance of a large volume of documents, and might well have assisted the insurer in a personal injury action in court, however, the task of persuading the proper officer to refer the matter for a further assessment was of a different nature.

The volume of documents and submissions, including documents incapable of satisfying the statutory test and submissions not focused on the statutory test, made it more difficult for the proper officer to find in the insurer's favour.

This despite the fact that the two documents which we relied upon in the second, successful application were identified in the first application, and were the subject of submissions.

In the case of *Miles*, we focused solely on those two documents. They had not been before the original assessor, and had not been available to the insurer. They contained information which could change the assessor's opinion as to first, whether Mr Miles actually suffered from epilepsy at all (the basis of the finding of whole person impairment), and second, whether any condition which he did suffer from was as a result of the accident.

Either an alteration of diagnosis, or a finding that any condition was not related to the accident, would be capable of altering the finding in a material way, because the result could be that the degree of impairment as a result of the accident was *"not greater than 10%"*.

We characterised the information within the two documents as follows;

Associate Professor Boyce performed an EEG, and it was normal. It was capable of affecting the result because Assessor Wan had said that the absence of an EEG ***either normal or otherwise*** *was a factor in his earlier conclusion, and was subject to review if new evidence regarding the diagnosis of epilepsy came to light (Associate Professor Boyce's report).*

That Associate Professor Boyce, who treated Mr Miles, who Assessor Wan believed had diagnosed Mr Miles with epilepsy, and who Assessor Wan deferred to when making his assessment, was not prepared or able to confirm a diagnosis of epilepsy.

Dr Loiselle, Mr Miles' own treating specialist (not a medico-legal expert) did not consider it likely that any epilepsy from which Mr Miles was suffering was related to the accident.

The capacity of the first two pieces of information to change the outcome was reinforced by reference to the reasons of the assessor on the previous assessment.

With respect to the third piece of information, it was important to characterise the information in a way which took it beyond being *"just another expert opinion"* of a kind which had been before the previous assessor.

In the result, despite reducing the number of documents from 500 pages to about 10, there was still more provided than was necessary; the proper officer based her decision on one piece of information only; the normal EEG.

III - Some other circumstances in which you may be able to call upon a decision-maker to revisit a decision.

Now you are aware of the possibility that you may be able to make a fresh application under section 62 of the *MAC Act* on material already relied upon and previously rejected in a previous application, without the uncertainty and expense of judicial review proceedings, you might wonder in what other circumstances such an option may be available.

You are already aware that the question is not one of *res judicata* or issue estoppel.

Rather, it is simply a question of construing the relevant grant of power in the statute to determine whether the decision-maker is empowered to make a further decision, or whether that power was spent when it was earlier exercised[8].

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[8] *Kurtovic*, *op. cit.*, at p211. And see section 48 of the *Interpretation Act* 1987 (NSW).

In the case of *Miles*, the section itself expressly envisages more than one application, and that the power is enlivened upon the making of an application. No limit is placed upon the number of applications.

As there is no issue estoppel or *res judicata*, the fact that the particular *content* has previously been before the proper officer is irrelevant, though it may be relevant to the discretion to dismiss the application as an abuse of process.

Where the power concerned is an intermediate step towards a final and operative decision as it is in *Miles*, it is much more likely that the power can be re-exercised as the occasion requires.

Alternatively, there may be some other aspect of the wording, or statutory context which suggest that the power is revived in various circumstances, or it may be a type of decision where changing circumstances may require a different result.

Section 92 of the *MAC Act*, the power to exempt matters from CARS assessment, is a type of power which might reasonably be enlivened from time to time, for two of the reasons discussed.

First, it is an intermediate step towards a final and operative decision.

Second, additional information may come to light or circumstances may change in such a way as to affect the exercise of the power to exempt.

By contrast, the certificates of medical assessors and appeal panels are expressly stated to be *"conclusive evidence"* in relation to the matters certified[9], with the manner in which they may be challenged or revisited (other than by way of judicial review) clearly spelt out within the Act itself.

[9] Section 61(2) of the *MAC* Act.

Further, as a matter of statutory construction, it would not be open to a party to apply for a further referral for CARS assessment pursuant to section 90 of the *MAC Act*, in circumstances where a CARS assessment has already been made.

Section 95 clearly sets out the circumstances in which a CARS assessment is binding, and in those circumstances, it must be taken to be final and operative, if it has been validly made.

That caveat ("if it is validly made"), however, leads to consideration of an exception to this general principle.

In certain, limited circumstances, a medical assessor, appeal panel, or CARS assessor may be able to revisit their decision (indeed *any* administrative decision-maker may be able to do so) without an order of the Supreme Court quashing that decision.

That is because, in some circumstances, a decision-maker may revisit a decision which is affected by jurisdictional error, because such a decision is, in effect, no decision at all, which means that the power has not been effectively exercised, therefore it is still open to exercise it; the power has not been spent.

The authority for this proposition is a High Court decision of *Bhardwaj*. The precise limits of its application have not been determined, and it is beyond the scope of this paper to consider that question (which is a paper in itself).

However, you may be confronted with a glaring error, such as where a medical assessor has not been provided with the expert medical reports of the insurer, thus leading to a breach of procedural fairness, where it would be well worth drawing the assessor's attention to *Bhardwaj*'s case, and the principle it stands for, and asking the medical assessor to remake their decision, rather than seek leave to appeal to an appeal panel.

Similarly, if a clear breach of procedural fairness occurred in a CARS assessment, or with respect to an appeal panel's decision, you may consider this alternative course.

Conclusion.

Miles alerts us to an important facet of administrative law, which is that where the construction of a statute supports it, a person affected by an administrative decision may have the right to seek the review, revisiting, or correction of an administrative decision without the inconvenience and uncertainty of court proceedings.

It also demonstrates the importance of paying careful attention to the statutory grant of power when determining the best way of securing an outcome in your favour; identifying the nature and scope of the statutory grant of power is the first step in persuading the decision-maker to make a decision which is to your advantage.