Assisting self-represented litigants with Judicial Review proceedings

A CLE session for volunteers of the Self Representation Service at the State Courts

Tuesday 31 May 2016

Hosted by DLA Piper

Paper presented by Matt Black, Barrister

Introduction

1 The purpose of this paper is to outline some practical considerations for practitioners when assisting self-represented litigants in the QPILCH Self Representation Service. The focus is judicial review: assisting clients who are seeking to overturn or challenge some form of administrative decision. I am using the term "administrative decision" to refer to decisions or actions taken under the authority of some legislative power. Administrative decisions are usually made by government officials or public officers, but they might also be made by private contractors under delegated powers.

1. Many administrative decisions can be reviewed, on their merits, through the tribunals: particularly the Commonwealth Administrative Appeals Tribunal and the Queensland Civil and Administrative Tribunal. However, 'merits review' is available only where specific provision is made within the relevant legislation. In the absence of 'merits review', judicial review might be the only viable option.

Grounds of review

2. The process of "judicial review" is limited to reviewing the legality of a decision, rather than its merits. As far as describing judicial review, the (modern) classic is Brennan J's summary:[1]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

3. This is sometimes a difficult proposition for clients to accept. The proposition indicates the limits of judicial review. It underscores the following basic principles:

(a) Judicial review is not concerned with whether the decision-maker got the facts right or wrong.

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1 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

(b) Judicial review is not concerned with whether the decision-maker exercised or refused to exercise a discretion in any particular way.

4. Brennan J's proposition also cuts both ways: the Court will not grant relief merely because the client has a good case on the merits; but nor will it refuse relief merely because the client does not look so good.[2] The proposition also points us towards those matters which will engage the interest of the Court on judicial review; in short:

(a) The meaning and application of the law.

(b) The duties or obligations of the decision-maker.

5. These are the general ideas which will lead us to the grounds of review. However, before embarking on that task it is generally a good idea to identify with particularity the specific decision or conduct that needs to be challenged. Similarly, the empowering legislation should be reviewed at an early stage to identify the source (or purported source) of the decision-maker's power to make the decision in question. That process should also identify the *who?* of the equation, because as always it is important to sue the right person.

6. Consider the following questions:

(a) What is it, exactly, that has been decided?

(b) Under what section of the legislation – or even better, sub-section or paragraph – was the decision made?

(c) Who was entitled to make the decision?

(d) Who actually made the decision?

(e) When was the decision made?

(f) When was the decision communicated to the client?

(g) Have written reasons for the decision been provided to the client?

(h) What does the client want the decision-maker to do?

7. Answering these questions sets the framework for then pleading the grounds of review. In Queensland, that generally requires reference to the *Judicial Review Act 1991* (the **JR Act**). Part 3 of the JR Act enables a person to apply for a "statutory order of review" in respect of "a decision of an administrative character made, proposed to be made, or required to be made, under an enactment". For the purposes of Part 3, the available grounds of review appear in s 20(2):

> (2) The application may be made on any 1 or more of the following grounds—
>
> (a) that a breach of the rules of natural justice happened in relation to the making of the decision;
>
> (b) that procedures that were required by law to be observed in relation to the making of the decision were not observed;

2 Unless, perhaps, the client would have no prospect whatsoever on a re-hearing.

> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
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> (d) that the decision was not authorised by the enactment under 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 under 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);
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> (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;
>
> (i) that the decision was otherwise contrary to law.

8. I do not often find it necessary to stray too far beyond the trifecta of:

   (a) Breach of the rules of natural justice (or procedural fairness).

   (b) Improper exercise of power (which includes relevant / irrelevant considerations).

   (c) Error of law.

9. The grounds of review set out in s 20 are derived from common law concepts, and so (with some qualifications) they are also relevant for judicial review under Part 5 of the JR Act.

10. It is important, I think, to ensure that the grounds for review set out in s 20 do not become a distraction. It will often be the case that any particular judicial review challenge might be capable of falling within more than one of the s 20 grounds. What matters is that some error in the law or the process must be identified, and the s 20 grounds should be a guide and facilitator in that process; not a straight-jacket.

Review under Part 3 and Part 5 of the JR Act

11. Part 3 of the JR Act provides for an application for a "statutory order of review". Such an application is entirely statutory in its nature, and it can only be brought against "a decision of an administrative character" that has been made "under an enactment".[3] Notwithstanding the various criticisms of this type of judicial review legislation that have been made over the years, Part 3 of the JR Act remains a reasonably convenient option for attacking most decisions that have clearly been made under some statutory power.

12. Review under Part 5 of the JR Act essentially replicates the former common law judicial review. To my mind, the main differences between Part 5 and Part 3 are that:[4]

    (a) Part 5 review not need be in relation to an administrative decision made under an enactment. This means that decisions that are not administrative, such as some decisions made by Magistrates or the Industrial Court, can be reviewed. It also means that administrative decisions made by public officials that are not "under an enactment" may be reviewed.

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3 See *Griffith University v Tang* (2005) 221 CLR 99. Part 3 of the JR Act also applies to administrative decisions made by government officers or employees under non-statutory schemes involving public funds: JR Act, s 4(b).

4 The other related avenue of review is through an originating application for declaratory relief, which is beyond the scope of this paper.

(b) Part 5 review requires the demonstration of jurisdictional error (whereas Part 3 review does not). In recent years, the perceived difficulty of identifying jurisdictional error has been somewhat ameliorated[5] and the Commonwealth jurisdiction is ripe with examples of jurisdictional error.

13. If there is doubt about whether the decision is of an "administrative character" or is made "under an enactment", the answer will usually be to draw the application as being under Part 3 and alternatively under Part 5.[6] Applications under Part 3 or Part 5 are filed in the Supreme Court: JR Act, s 19.

Drafting an application and supporting affidavit

14. For the purposes of this paper, I will assume we are preparing a Part 3 application under the JR Act (but a Part 5 application should not differ in any material respects). Supreme Court Form 54 is the candidate. Aside from formalities and details, it has the following critical components:

(a) The parties. It is important to have the correct applicant(s), and the correct respondent(s).

(b) The decision. In the opening words of the application, the date and effect of the decision must be identified. If there is more than one decision, use paragraph numbering to separately identify each decision.

(c) Standing. This is the part of the Form which asks for why the applicant is "aggrieved by the decision". It calls for a description of how the decision will affect the applicant as an individual. Unless standing is going to be in issue, it can and should be brief.

(d) The grounds. This will be the main part of the application. Think of it like a statement of claim. I will discuss this further below.

(e) The relief. What do we want the Court to do? Usually, we will be claiming an order setting aside the decision, ordering a reconsideration, and costs. However, also consider whether any declaratory relief is appropriate in addition, or as an alternative, to those usual forms of relief.

15. Drawing the grounds of review is usually the most difficult part of preparing an application for judicial review. Ideally, one would only draw the grounds of review after perusing all of the relevant material and forming an opinion on the prospects of success of any potential grounds that have been identified. Aside from that ideal position, the key is to have enough material to allow for a sensible identification and articulation of reasonably arguable grounds.

16. When preparing grounds for review, the relevant documents to have available (in order of importance) are:

(a) The decision-maker's written decision and statement of reasons (if there is one).

(b) Any written submissions that were made to the decision-maker, and any correspondence that passed between the client and the decision-maker.

5 Eg, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

6 See UCPR, r 568.

(c) Any other material (particularly 'evidence') that was before the decision-maker.

17. There is no single right way to draft the grounds of review, but there is a wrong way. The grounds of review should not simply replicate the terms of s 20 of the JR Act. That would be like drafting a statement of claim in a negligence case by pleading that there was a duty of care, a breach of that duty, damage caused by that breach, etc. At the other end of the spectrum, the grounds do not need to (and should not) amount to detailed submissions of all the law and facts that might possibly be relevant to the case. A reasonable middle ground must be found.

18. One possible framework for drawing the grounds of review is as follows:

Ground One: The decision involved a breach of the rules of natural justice, in that:

1.The Applicant applied to the Respondent for X under Y Act.

2. Proposition of fact one.

3. Proposition of fact two.

4. On [date], the Respondent decided to refuse the Applicant's application.

5. In the circumstances, the Respondent failed to give the Applicant any (or any reasonable) opportunity to be heard before making the decision.

19. That framework can then be repeated for each ground of review.

20. Attached to this paper is a sample Application for a Statutory Order of Review based on the *Prostitution Act 1999* scenario prepared by QPILCH. Again, it is just one example of how the scenario might be approached.

21. Under the *Uniform Civil Procedure Rules 1999* (the **UCPR**), r 570 requires that an applicant under the JR Act must file a copy of the relevant decision and statement of reasons as soon as practicable after filling the application. This will usually be done by filing an affidavit exhibiting the decision and reasons for decision. It will generally be convenient to include in that affidavit any other relevant documents, such as correspondence that passed between the applicant and the decision-maker or documents relied upon by the applicant before the decision-maker. As might be expected, the issues are defined by the pleadings so the grounds of review will suggest what documents are relevant.

What directions to seek, and how to progress an application

22. Procedurally, applications under the JR Act are governed by Part 4 of Chapter 14 of the UCPR. Relevantly:

(a) Rule 571 requires the registrar, upon the filing of an application, to set a time and date for a “directions hearing”.

(b) Rule 572 requires service of the application, and documents filed under rule 570 (ie, the statement of reasons), at least 14 days before the directions hearing.

(c) Rule 573 allows the Court to make such orders as it considers appropriate at the directions hearing, including orders regarding the filing of affidavits etc.

(d) Rule 574 provides that the Court may hear and decide the application at the directions hearing "if the parties agree".

(e) Rule 578 allows a party to seek an order under s 49 of the JR Act (a 'protective costs order') at the directions hearing, provided the application is filed at least 3 business days before the directions hearing.

23. In practice, the directions hearing is listed in the 'applications list'. In my experience, some Judges tend to be reluctant to conduct a final hearing at the directions hearing. However, it can be done if both parties agree to that approach and if the matter can be determined within the 2 hour limit that is imposed on 'applications list' matters.

24. In order to properly manage an application under the JR Act, an applicant ought to liaise with the respondent prior to the directions hearing with a view to either:

(a) Agreeing that the matter can be heard on the first Court date, within the 2 hour limit. This might be possible if there are no factual disputes, if all relevant material is before the Court, and the arguments are relatively confined. This would not be my preferred approach.

(b) Agreeing upon directions to be made for the further progress of the matter. If the parties are able to agree upon directions, then those directions may be made by the Registrar by the filing of a request for consent orders prior to the date of the directions hearing. That may avoid an unnecessary appearance. Otherwise, the parties may attend before a Judge in the applications list and obtain directions by consent (or, by arguing about what directions should be made).

25. There is no single, correct set of directions that should be made. However, I have attached to this paper a sample consent order that might be appropriate in some cases. The orders should, of course, be designed to suit the individual case. Sometimes, disclosure of documents by the respondent might be needed (although most respondents tend to happily file a large affidavit exhibiting all documents that were before the decision-maker). Other times, it might be necessary to include orders for provision of particulars by the applicant, or for the filing of an amended application.

26. It is worth noting, I think, that if there is a requirement for any admissions of fact or documents, or any disclosure, that should be dealt with by directions (UCPR r 573(2)). The usual UCPR disclosure rules only apply to proceedings started by application if the Court directs (r 209(1)(c)), and the rules about notices to admit do not apply to proceedings started by application (r 186).

27. I also note that the JR Act does provide considerable flexibility to applicants whose grounds of review might evolve. Under s 27 (applicable to review under Part 3), an applicant "is not limited to the grounds set out in the application". That section also provides, however, that the Court may direct an applicant to amend the application to specify any ground which is to be relied upon. My reading of the UCPR is that an applicant is generally entitled to amend the grounds (ie, the pleadings) in the application in the same way that a statement of claim might be amended (see rr 377, 378).

28. Finally, the other matter worth considering is interlocutory relief. Section 20 of the JR Act gives the Court a specific power to suspend the decision under review, or to stay any proceedings under that decision. The Court also has its general jurisdiction to grant interlocutory injunctions where that is appropriate.[7] If interlocutory relief is required, an application should be brought as early as possible and the applicant should be prepared to expedite the final hearing of the matter.

Costs

29. Section 49 of the JR Act displaces the ordinary rule that costs follow the event.[8] Section 49 can be used in two main ways:

    (a) First, s 49 can be used as the source of a power to make a 'protective costs order'. That is, an applicant may apply to the Court at an early stage of the proceeding for an order that the applicant is to bear only his or her own costs regardless of the outcome. Alternatively, the applicant may apply at an early stage for an order that the respondent is to pay his or her costs regardless of the outcome. The factors which the Court must consider include the applicant's financial situation, whether the matter involves the public interest, and whether the proceeding discloses a reasonable basis (s 49(2)).

    (b) Secondly (and more commonly), s 49 can be relied upon by an applicant who is ultimately unsuccessful in the judicial review application. Thus, instead of costs following the event, the unsuccessful applicant may seek an order under s 49 that each party bear its own costs regardless of the outcome,[9] or even that the respondent pay the applicant's costs despite the applicant being unsuccessful.[10]

30. However, the onus is on the applicant to raise and rely on s 49. Accordingly, care should always be taken to ensure that at the end of the hearing, leave is sought to make submissions on the question of costs regardless of the outcome.

Matt Black
31 May 2016

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7 Eg, *Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade of the State of Qld (No 2)* [2014] QSC 197, [6].

8 See s 49(4) and *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454, 458-459 per McPherson JA.

9 Such orders are fairly common if the applicant is impecunious; for example: *Gilchrist v Queensland Parole Board* [2011] QCS 328.

10 Such orders are not common, but see for example *Meizer v Chief Executive, Dept of Corrective Services* [2005] QCS 351.

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER:

Applicant: **MICHELLE WHITE**

AND

Respondent: **PROSTITUTION LICENSING AUTHORITY**

APPLICATION FOR A STATUTORY ORDER OF REVIEW

Application to review the decision of the Respondent made on 12 May 2016 to refuse to grant the Applicant's application for an approved manager's certificate under s 43 of the *Prostitution Act 1999*.

The applicant is aggrieved by the decision because –

1. The Applicant requires an approved manager's certificate in order to maintain her employment.

2. The Respondent's decision may lead to the Applicant's employment being terminated.

The grounds of the application are –

1. A breach of the rules of natural justice happened in relation to the making of the decision within the meaning of s 20(2(a) of the *Judicial Review Act 1991*, in that:

   (a) Under s 35(1) of the *Prostitution Act 1999* (the **Act**), the Applicant made an application to the Respondent for an approved manager's certificate.

   (b) Under s 39 of the Act, the Respondent referred the application to the commissioner of police and obtained a report from the commissioner of police (the **Report**).

   (c) The Report included or constituted adverse information that was credible, relevant and significant to the decision to be made by the Respondent.

   (d) The Respondent interviewed the Applicant on 12 May 2016 (the **Interview**), and provided a copy of the Report to the Applicant at the time of the Interview.

Michelle White
100 Jones Road
Carina Qld 4152
Telephone: 0413 456 789

(e) The Respondent failed to disclose the Report or its contents to the Applicant at any time prior to the Interview.

(f) The Respondent failed to give the Applicant any (or any reasonable) opportunity to respond to or be heard in relation to the contents of the Report.

(g) The Respondent had the Report before it and relied on or had regard to the Report when making its decision.

(h) In the circumstances, the Respondent denied the Applicant natural justice in the making of the decision.

2. Further, or alternatively, a breach of the rules of natural justice happened in relation to the making of the decision within the meaning of s 20(2(a) of the *Judicial Review Act 1991*, in that:

(a) The Respondent refused to permit the Applicant to have a support person attend the Interview with her.

(b) During the Interview, the members of the Respondent questioned the Applicant in an overbearing manner and berated her for crying.

(c) During the Interview, one member of the Respondent (Dr Jan Johansson) asked the Applicant irrelevant questions; expressed firm adverse opinions about the Applicant; and stated that the Respondent had no choice but to refuse the application.

(d) One member of the Respondent (Dr Jan Johansson) is a former member of the Australian Christian Women's Lobby Group, who has expressed firm opinions (both individually and through that Group) to the effect that no prostitution should be legal in Queensland and no licences or authorities should be granted under the Act.

(e) In the circumstances, the making of the Respondent's decision created a reasonable apprehension of bias.

3. The making of the decision involved an error of law within the meaning of s 20(2)(f) of the *Judicial Review Act 1991*, in that:

(a) Pursuant to s 42(1)(e) of the Act, the Respondent was required to consider "whether the applicant is an associate of a person who has been convicted of a disqualifying offence or an indictable offence".

(b) The Respondent found that one Mr John Black was a person who had been convicted of a disqualifying offence or an indictable offence.

(c) The Respondent found that the Applicant was an associate of Mr Black, and relied on that finding in making its decision.

(d) On the facts as found by the Respondent, Mr Black (in relation to the Applicant) was not within any of the limbs of the definition of "associate" found in s 6 of the Act.

(e) The Respondent erred in law by misconstruing the meaning of "associate" or by making a finding of fact that the Applicant was an associate of Mr Black when there was no evidence to support that finding.

4. The decision was otherwise contrary to law.

The applicant claims –

1. An order quashing or setting aside the Respondent's decision of 12 May 2016 refusing to grant the Applicant's application for an approved manager's certificate.

2. An order referring the Applicant's application for an approved manager's certificate to the Respondent for further consideration.

3. Such further order as the Court considers necessary to do justice between the parties.

4. An order that the Respondent pay the Applicant's costs.

TO THE RESPONDENT:

A directions hearing in this application (and any claim by the applicant for an interlocutory order) will be heard by the Court at the time, date and place specified below. If there is no attendance before the Court by you or by your counsel or solicitor, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you may file and serve a notice of address for service

APPOINTMENT FOR DIRECTIONS HEARING

Time and date:

Place: QEII Courts of Law Complex, 415 George Street, Brisbane

Signed:

Dated:

PARTICULARS OF THE APPLICANT:
Name: Michelle White
Residential or Business Address:

Applicant's solicitor's name:
And firm name:
Solicitor's Business address:

Address for Service:	As Above
Signed:	
Description:	Solicitor for the Applicant
Dated:	
This application is to be served on:	Prostitution Licensing Authority

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS???/16

Applicant **NAME OF APPLICANT**

AND

Respondent **STATE OF QUEENSLAND**

ORDER

Before: The Honourable Justice _____

Date: 31 May 2016

Initiating document: Application filed 3 May 2016

BY CONSENT, THE ORDER OF THE COURT IS THAT:

1. [If necessary (probably not): The respondent is to provide to the applicant a copy of all documents which were before the decision-maker or relied upon by the decision-maker when making the decision under review by no later than 14 June 2016.]

2. The applicant is to file and serve any affidavit material intended to be relied upon at the hearing by no later than 28 June 2016.

3. The respondent is to file and serve any affidavit material intended to be relied upon at the hearing by no later than 26 July 2016.

4. The applicant is to file and serve any affidavit material in reply by no later than 9 August 2016.

5. Upon compliance with paragraphs 1 to 4 above, the parties are to take steps to sign and file a Request for Trial Date form.

6. The applicant is to file and serve an outline of argument by no later than ten (10) business days before the hearing of the application.

7. The respondent is to file and serve an outline of argument by no later than five (5) business days before the hearing of the application.

Order
Filed on behalf of the applicant
Form 59 R. 661

SOLICITORS
Top Floor, 1 Law Street
Brisbane Qld 4000
Telephone 07 3123 4567
Facsimile 07 3123 4567

8. The applicant is to file and serve an outline of argument in reply, if any, by no later than three (3) business days before the hearing of the application.

9. Liberty to apply on the parties giving two (2) clear days notice in writing.

10. Costs of and incidental to the application to be reserved.

11. The application be adjourned to a date to be fixed.

Signed: