ADMINISTRATIVE LAW CONCEPTS IN QCAT

[based on a paper presented at the 2013 BSA conference]

Litigation Lawyers

INTRODUCTION

1. This paper aims to review a number of aspects of administrative law and how they can be, and are, applied in Queensland Civil and Administrative Tribunal ("QCAT") matters.

2. It is not intended to examine the law relating to administrative review, but rather to make observations about some aspects of the administrative process as it operates in QCAT.

3. It also does not seek to cover judicial review in the Supreme Court, nor the interplay as to when it is appropriate to seek judicial review as apart from administrative review.

CONSIDERATIONS FOR THE DECISION BY THE "DECISION-MAKER"

Must a decision-maker comply with administrative law concepts?

4. Government employees entrusted with making decisions should clearly make such decisions appropriately, and in accordance with statute and policy.

5. To lawyers, that means making a decision correctly in accordance with the law.

6. All Administrative Law texts cover standard requirements of judicial review of administrative decisions such as:

   - Procedural fairness (i.e. natural justice);
   - Consideration grounds; and
   - Decision grounds.

7. The "rules of procedural fairness" raise concepts of:

   - The rules against bias – which requires that the decision-maker neither be, nor appear to be, biased; and
   - The fair hearing rule which requires that a person who may be affected adversely by a decision be given an opportunity to "put their case" prior to the decision being made.

8. The "consideration grounds" raise concepts of:

   - Taking into account relevant considerations; and
   - Not taking into account irrelevant considerations.

9. The "decision grounds" raise concepts of:

   - Jurisdictional error;
   - Error of law; and
   - Unreasonableness of the decision (i.e. *Wednesbury* case[1]).

10. If a person is aggrieved by a decision made which does not comply with the above, they have a right of review in QCAT. As a result the applicant does not need to demonstrate a breach of natural justice – or any other administrative law requirement.

11. However, failure by a decision-maker to provide natural justice can be a basis to an award of costs, in accordance with s 102 of the *Queensland Civil and Administrative Tribunal Act 2009 ("QCAT Act*"). Hence this is triggered by the procedural fairness ground of judicial review, not specifically by the other grounds of judicial review.

What is the significance of policy and procedure?

12. A decision-maker must apply the law - that is, statute and regulations. Policy cannot change the statute, and in fact would be unlawful if it purported to do so.[2]

13. Policies of the Queensland Building and Construction Commission ("QBCC") are provided for under regulation.[3]

14. However, it is a fundamental matter of administrative law that a decision-maker must not blindly apply policy ignoring the merits of a particular case. Of course, the merits would have to be such that departure from policy is warranted.

15. QBCC, like any entity, has procedures for various tasks undertaken by staff. Those procedures are internal matters guiding the form of internal documents and communications. Such procedures clearly assist in consistency and standards.

16. However, merely because QBCC routinely applies internal procedures does not elevate such procedures to become mandatory. They do not receive statutory force. This is clearly illustrated in *JM Kelly Project Builders v QBCC.*[4]

Must a decision-maker make findings of "jurisdictional facts" before having the standing to make a decision?

17. As a matter of common sense, before making a decision, a decision-maker must satisfy themselves that there is a lawful basis for the decision being made.

18. If there is a lack of jurisdiction, the decision would be *ultra vires*. However, regardless of that fact, a purported decision is still a decision, and therefore could be reviewed in QCAT.

What if a decision-maker makes a decision which breaches administrative laws?

19. If, for example, a decision-maker fails to provide natural justice, or is biased, this raises a ground of judicial review – hence by way of Application for Review to the Supreme Court pursuant to the *Judicial Review Act 1991.*

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[1] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[2] *Green v Daniels* (1977) 13 ALR 1.
[3] *Queensland Building and Construction Commission Act 1991* s 9A.
[4] Unreported (9 May 2013) GAR375-10 QCAT at [74] – [79].

20. Technically, if a decision purports to make decision which is, say, in breach of procedural fairness, then the decision is unlawful.

21. If there is a review application filed in QCAT, then there is jurisdiction to review the decision (or purported decision) on its merits. Therefore, there is no benefit, or need, to identify the breach of administrative law procedures.

22. Further, this would not ground a basis to strike out QCAT review proceedings.[5]

Must a decision-maker follow QCAT decisions?

23. Justice requires consistency between decisions and this clearly applies to decision-makers.[6] Therefore, decisions should aim to be consistent both with government policies and QCAT decisions.

24. If policy conflicts with QCAT decisions, it would be appropriate to review the policy and/or appeal the QCAT decision.

25. Having said that, the prime function is to make a correct decision on the merits of the material.

THE REVIEW JURISDICTION OF QCAT

Documents Required to be filed in QCAT by the decision-maker

26. Section 21 of the *QCAT Act* provides:

> "*(1) In a proceeding for the review of a reviewable decision, the decision-maker for the reviewable decision must use his or her best endeavours to help the tribunal so that it can make its decision on the review.*
>
> *(2) Without limiting subsection (1), the decision-maker must provide the following to the tribunal within a reasonable period of not more than 28 days after the decision-maker is given a copy of the application for the review under section 37—*
>
> *(a) a written statement of the reasons for the decision;*
>
> *(b) any document or thing in the decision-maker's possession or control that may be relevant to the tribunal's review of the decision."*

27. In the normal circumstances, "*any document or thing in the decision-maker's possession or control that may be relevant to the Tribunal's review of the decision*" is relatively easy to identify. However, there are times when information is conveyed to a decision-maker on a confidential basis. What duties does the decision-maker have to provide such documents to QCAT?

28. In *Applicant VEAL of 2002 v Minister for Immigration& Multicultural & Indigenous Affairs,*[7] the issue was whether a "dob-in" letter must be disclosed, notwithstanding the author had requested it be kept confidential. Prior to this case, the established law was that an adverse allegation must be disclosed only if it is "credible, relevant and significant" (per *Kioa v West*[8]). In *VEAL*[9] it was held that it was beside the point that the Tribunal (or therefore a decision-maker) purported to ignore the letter, as the allegations were clearly relevant to the veracity of the applicant's claim and could not be dismissed as completely lacking credibility.

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[5] *JM Kelly Project Builders v QBSA* Unreported (9 May 2013) GAR375-10 QCAT at [73].
[6] *Drake No 2* (1979) 2 ALD 634.
[7] (2005) 225 CLR 88.
[8] (1985) 159 CLR 440.
[9] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88.

The necessity to disclose adverse allegations "is not based on answering a causal question as to whether the material did in fact play a part in influencing the decision". Fairness required that the substance of the allegations be revealed, but the applicant was not entitled to know the identity of his accuser, as there was public interest in allowing the tribunal to access information provided in confidence.

29. This suggests that information that is "credible, relevant and significant" should be included in the documents provided pursuant to s 21(2). However, in appropriate cases, it may be appropriate to redact confidential parts of a document.

Obligation of QCAT to determine its jurisdiction

30. The review jurisdiction of QCAT is triggered where there is a reviewable decision which the applicant seeks to review. That is the only jurisdictional fact that QCAT is required to identify.[10]

31. In that case, the Judge went to some lengths to explain why a decision, even if made totally erroneously by the decision-maker is still a decision. This is the case, even if the decision was baseless and the necessary "jurisdictional facts" upon which such decision should be made do not exist. The important issue is that there is a decision which purports to have been made in accordance with the statute.

32. To put another way, jurisdiction is not ousted by the fact that an original decision-maker's error is such that the decision would be declared a nullity if challenged before a court.

33. Therefore, in relation to the QBCC, a "reviewable decision" is a decision which falls within, or at least purports to do so, s 86(1) of the *Queensland Building and Construction Commission Act ("QBCC Act")*. If that occurs, then QCAT has jurisdiction.

34. Importantly, a letter indicating QBCC is investigating a matter, and might in the future make a decision, clearly does not constitute the making of a decision.

35. In deciding whether there is jurisdiction to a review a decision under s 86(1) of the *QBCC Act*, consideration must be given to s 86(2), which provides circumstances when the Tribunal must not review a decision.

36. There has been contention recently regarding the ability to extend time pursuant to s 61 to bring such a decision within time and therefore technically reinstate its status as "reviewable".

37. Decisions on this point include:

    (a) *Manwin v QBSA*[11] in the District Court;

    (b) *QBSA v Watkins*[12] in the District Court;

    (c) *Watkins v QBSA*[13] in QCAT; and

    (d) *QBSA v Robuild.*[14]

[10] *JM Kelly Project Builders v QBSA* Unreported (9 May 2013) GAR375-10 QCAT.
[11] [2005] CCT QR147-05.
[12] [2013] QDC 198.
[13] Unreported (20 September 2013) QCAT GAR265-13.
[14] Currently under appeal in the Supreme Court of Queensland, APL226-13.

To obtain clear decision on the point, the Watkins matter is presently pending in the Court of Appeal.

What constitutes the "record" of the QCAT hearing

38. There may be a breach of natural justice if a decision-maker bases a decision on evidence, findings or reasons not disclosed to the party, thus necessarily depriving them of the opportunity to address on the matter.

39. A party may well be surprised if a Member chose to consider the entire QCAT file, without identifying what was actually contained within that file. It is likely that a party will not have inspected the QCAT file, and will not know precisely what is contained therein.

40. As a result, it is clearly appropriate from a procedural perspective, for documents to be identified during the course of the hearing as documents to be considered. The way this has been done in the past is by marking them as exhibits.

41. The result is that the parties are clearly apprised of the documents which are to be considered when the QCAT Member makes the decision.

Cross Examination of the decision-maker?

42. Paragraph 5 (d) of the QCAT Practice Direction 3 of 2013 effective as from 6 May 2013 provides that:

> "*Because the Tribunal's role in merits review is to make the decision afresh, the decision make shall not give evidence or be cross-examined about why it made the decision. However depending on the nature of the particular review, the decision-maker may have other evidence to present. For example in a review of a decision by the Queensland Building Services Authority, a building inspector or engineer's evidence which was relied upon in the making of the decision…"*

43. Clearly, as a general rule, the decision-maker should not be cross-examined. In what circumstances might an applicant seek to cross-examine the decision-maker?

44. Unless a decision-maker has given evidence of primary factual finding, the only reason to cross-examine a decision-maker is an attempt to seek costs - that is, aiming to trigger s 102 *QCAT Act*. That would probably be best undertaken in a costs application after the QCAT decision is obtained.

Merits Review

45. Pursuant to s 20(2) of the *QCAT Act*, QCAT is to decide a review matter by way of fresh hearing on the merits.

46. The role of QCAT therefore is to reconsider the original decision and make the correct and preferable decision.[15]

47. As stated above, QCAT has jurisdiction whether or not the decision being reviewed was properly made. That is, even if a decision was made beyond jurisdictional limits, as there has in fact been a decision, the purported decision is capable of review and cannot be struck out.

48. Even if there has been an error in the decision process, it is QCAT's job to make a fresh decision, and the Tribunal is not required to identify error in either process or reasoning that

[15] *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58 [9]; *JM Kelly (Project Builders) Pty Ltd v QBSA* QCAT GAR375-10 20 September 2013 at [62].

lead to the decision being made. As stated by Kiefel J in *Shia v Migration Agents Registration Authority*:[16]

> *"The argument put by the respondent on this appeal, that the Tribunal's exercise of power is dependent upon the existence of error in the original decision, Smithers J denied that the Tribunal was limited to something of a supervisory role. As his Honour said, the Tribunal is authorised and required to review the actual decision, not the reasons for it…"*

49. Conversely, if in fact no decision had been made, then QCAT would lack jurisdiction and an Application to Review could be struck out.

Correct and preferable

50. The meaning of this phrase was discussed by Wilson J in *QBSA v Meredith*:[17]

> "The term commonly used in similar legislation touching administrative review and, I think, the better expression is "the correct or preferable" decision – for reasons explained by Kiefel J in *Shia v Migration Agents Registration Authority*."

51. In *Shia*[18] Kiefel J stated at [140]:

> *"The object of the review undertaken by the Tribunal has been said to be to determine what is the "correct or preferable decision". "Preferable" is apt to refer to a decision which involves discretionary considerations. A "correct" decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the Tribunal agrees. Smithers J, in Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd, said that it is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration."*

52. Therefore:

- "Correct" is taken to refer to situations in which the Tribunal considers there is only one acceptable decision.
- "Preferable" refers to situations where it considers there to be more than one correct decision.[19]

53. This also raises the procedural point. What if, very late in the review process, a party identifies a fresh document which is said to be critical? Must the Tribunal always adjourn to allow time to get such document in a quest for the perfect decision? Clearly, where further delay is unacceptable, there comes a time when it is preferable to proceed on the existing material, rather than further adjournment. Basically, this raises a balancing of the objects of the *QCAT Act* as listed in s 3.

54. The Tribunal is not bound by any concessions that the parties make in respect of any issues – particularly where a question of law is involved.[20]

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[16] [2008] HCA 31 at at [141].
[17] [2010] QCATA 50.
[18] *Shia v Migration Agents Registration Authority* [2008] HCA 31 at at [141].
[19] Also see the text *Principles of Administrative Law* at paragraph 8.6.1.
[20] *Re Martin and Commonwealth of Australia* (1982) 5 ALD 277; *Kuswardana v Minister for immigration & Ethnic Affairs* (1981) 35 ALR 186.

What previous decisions bind QCAT?

55. The doctrine of precedent as it applies to judicial decisions is that:

    (a) Decisions from a court in direct line of authority must be followed; and

    (b) Decisions from a court outside line of appeal are persuasive, but technically not binding (per Lord Denning in the *High Trees House*[21] case from the 1940s).

56. Prior to the enactment of the *QCAT Act*, appeals from decisions of the Commercial & Consumer Tribunal ("CCT") were to the District Court, and from there to the Court of Appeal.

57. Since QCAT, appeals are at the first instance to the Appeal Tribunal (ignoring instances where there is a direct right of appeal to the Court of Appeal from decisions of judicial members).

58. Appeals from the Appeal Tribunal are to the Court of Appeal.

59. The above suggests that:

    (a) Decisions of the Court of Appeal are binding;

    (b) Decisions of the District Court from prior to enactment of the *QCAT Act* are binding; and

    (c) Decisions of the District Court since enactment of the *QCAT Act* are not binding.

60. The recent District decision in *QBSA v Watkins*[22] is inconsistent with the District Court decision in *QBSA v Manwin*[23] as well as various Tribunal cases.

61. This suggests that:

    (a) As *Manwin*[24] was a District Court decision upon appeal from the Commercial & Consumer Tribunal and there is no substantial change of relevant law since, it is submitted it should be considered binding; and

    (b) The District Court decision in *Watkins*[25] was not an appeal and has been given recently, namely at a time when the District Court is not the avenue of appeal from the Tribunal. Being inconsistent with binding authority, it is submitted it cannot be followed by QCAT. In the recent QCAT decision in *Watkins v QBSA*[26], Dr Forbes considered the District Court decision in Watkins to be incorrect, and refused to follow it.

THE APPEAL TRIBUNAL

Nature of the Appeal

62. The orders that the Appeal Tribunal can make depend upon whether the appeal is on a question of law only, or involves a question of fact.

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[21] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
[22] [2013] QDC 198.
[23] [2005] CCT QR147-05.
[24] *QBSA v Manwin* [2005] CCT QR147-05.
[25] *QBSA v Watkins* [2013] QDC 198.
[26] [2013] QDC 198.

63. Where a point on appeal raises a question of law only, by s 146 of the *QCAT Act* provides for appeals.

64. In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

    (a) confirm or amend the decision; or

    (b) set aside the decision and substitute its own decision; or

    (c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—

        (i) with or without the hearing of additional evidence as directed by the appeal tribunal; and

        (ii) with the other directions the appeal tribunal considers appropriate; or

    (d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

65. Where a point on appeal involves a question of fact, by s 147 of the *QCAT Act* provides for appeals. This requires the appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the appeal tribunal.

66. In deciding the appeal on a question of fact, the appeal tribunal may—

    (a) confirm or amend the decision; or

    (b) set aside the decision and substitute its own decision.

67. As to what constitutes a mixed question of law and fact, Wilson J said in *Bradlyn Nominees Pty Ltd v Saikovski*:[27]

> *"[12] The distinction between questions of law and fact is not always clear, and courts have not found it easy to formulate a satisfactory test of universal application. A concise and helpful summary appears, in my view, in this passage from a decision of the Supreme Court of Canada:*
>
> *'Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests."*

68. The importance of whether an appeal is on a point of law or fact was discussed in *Seymour v Racing Queensland*:[28]

> *"[16] The nature of an appeal brought as of right on a question of law is different. The subject matter and the scope of the appeal is limited to the question of law. It does not operate as a rehearing of the whole matter. It is not a general review of the Tribunal's decision.*
>
> *[17] The powers of the Appeal Tribunal in disposing of the appeal are also different in each instance. On an appeal conducted as a rehearing when leave is granted, the Appeal Tribunal may either confirm or amend the decision; or set the decision aside and substitute its own decision. On an appeal on the question of law, the Appeal*

[27] [2012] QCATA 39.
[28] [2013] QCATA 179.

Tribunal can exercise those powers but, in addition, may also set aside the decision and return the matter to the Tribunal for reconsideration, with or without directions, or make any other order the Appeal Tribunal considers appropriate. Those powers are consistent with an appeal which has not proceeded by way of rehearing but which has been restricted to the question of law raised.

[18] In a case in which the grounds of appeal raise both a question (or questions) of law and a question (or questions) of fact or mixed law and fact, and leave to appeal in respect of the latter is granted, then the distinction between the nature of the appeal and the powers exercisable by the Appeal Tribunal will lose significance. However, in a case in which leave to appeal on the grounds involving fact is refused, it is important that the integrity of the appeal as of right on the question of law alone is preserved. That integrity will not be preserved, and the right to appeal on a question of law will be lost, if the Appeal Tribunal impermissibly subjects those grounds to a requirement to obtain leave which the statute does not impose."

69. The difference between appeals solely on a point of law as apart from appeals involving questions of fact was also discussed in *Body Corporate for River City Apartments CTS 31622 v McGarvey*[29] at [11] to [14]:

"[11] An appeal under s 289, as well as being restricted to an appeal on questions of law, is an appeal in the strict sense rather than an appeal by way of rehearing. As Mr Carrigan says in his submissions, when an appeal is permitted only on a question of law, that question is not merely a qualifying condition to ground the appeal, but is the sole subject matter of the appeal, to which the ambit of the appeal is confined.

[12] In Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172, at 180-181 [23], in the joint judgment of the High Court discussing the differences between an appeal by way of rehearing, an appeal by way of hearing de novo and an appeal in the strict sense, the justices said that:

(a) in an appeal by way of rehearing, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appeal court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in an appeal de novo, those powers may be exercised regardless of error;

(b) this is so unless, in a rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance;

(c) a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance;

(d) on an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and the law as they then stand.

[13] Paragraphs (a) and (b) indicate that, unless there was error in the judgment at first instance, or there is an express power to overturn the judgment even if it was made without error, the appellate court cannot exercise its powers. It is only when there was error that it can exercise its powers and then, when doing so, it must apply the facts and law now in existence. In contrast, and as is made clear in paragraph (c), an appeal in the strict sense is decided on the basis of the facts before the tribunal below and the law as it was at the time of the decision.

[14] That an appeal under s 289 is an appeal in the strict sense is confirmed, in my view, by a comparison of ss146 and 147 of the Queensland Civil and Administrative Tribunal Act 2009.

[29] [2012] QCATA 47.

> ***Section 146 makes it clear that, in an appeal on a question of law, the appeal tribunal must make its decision upon the basis of the material that was before the tribunal below and the findings of fact by that tribunal and, if any further evidence is required, the appeal tribunal may set aside the decision and return the matter to the tribunal below for the hearing of additional evidence.***
> ***In contrast, s147 deals with an appeal on questions of fact or mixed fact and law. In such an appeal, the section expressly states that the appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the appeal tribunal****."*
>
> *[note emphasis added]*

70. Therefore, for appeals on a point of law only:

(a) Leave is not required;

(b) The appeal must proceed upon the evidence at the original hearing; and

(c) Fresh evidence cannot be adduced. If further evidence is required, the matter must be remitted for re-hearing.

71. Therefore, for appeals involving questions of fact:

(a) Leave is required;

(b) The appeal proceeds by way of rehearing; and

(c) It is possible for fresh evidence cannot be adduced.

Malcolm Robinson