EVIDENCE AND DISCOVERY IN JUDICIAL REVIEW PROCEEDINGS

Presented by:

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Foley's List

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Introduction

- What evidence can you lead in judicial review proceedings?
- When can you lead expert evidence?
- What do you have to do if you want to lead expert evidence?
- What do you do if your opponent wants to rely on irrelevant evidence?
- When can you get orders for discovery?
- What types of documents may be immune from discovery?
- Detailed paper available at jonbaylylawblog.com/papers/ or foleys.com.au/cpdresources.aspx

The General Rule

- As a general rule, the evidence in a judicial review proceeding is limited to:
  - The decision under review.
  - The decision maker's formal statement of reasons.
  - The material that was before the decision maker when it made the decision under review.

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Extrinsic Evidence

- In some cases, a party can lead evidence that falls outside the usual categories.
- 'Extrinsic evidence'.
- Can be lay evidence or expert evidence.

Discovery

- Discovery is very rarely ordered in judicial review proceedings.
- However, there are limited circumstances where discovery is appropriate.

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Grounds of Judicial Review

- Understanding your grounds of review is fundamental.
- Usual grounds of review:
  - Failure to afford natural justice.
  - Misunderstanding or misapplying a statutory criterion for the decision.
  - Taking into account a prohibited consideration/failing to take into account a mandatory consideration.
  - Irrationality.
  - Unreasonableness.
  - Failing to deal with or misinterpreting a claim, submission, issue or item of evidence.
- Some grounds are more conducive to extrinsic evidence and discovery than others.
- If you want a read a paper on grounds of review, I have one at https://jonbaylylawblog.com/papers/

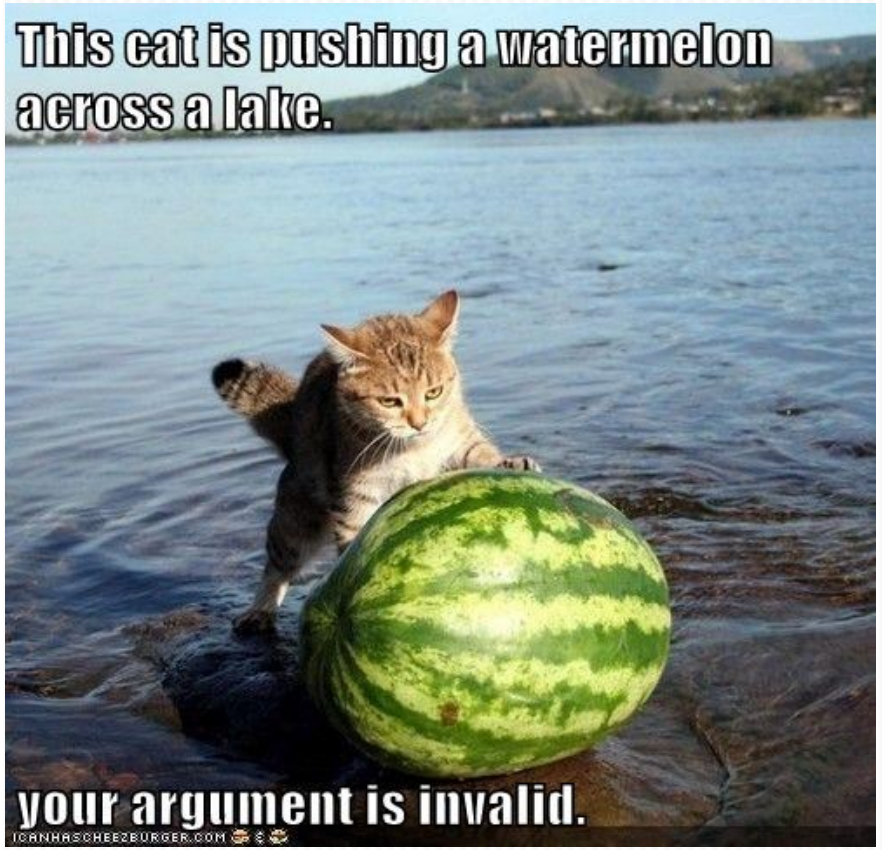
Jurisdictional Facts

- 'Subjective' jurisdictional fact: something the decision maker must be satisfied of before it can exercise a power.
- 'Objective' jurisdictional fact: something that must *actually exist* before the decision maker can exercise a power.
- For a helpful discussion, see *Arnold v Minister Administering the Water Management Act 2000* (No 6) [2013] NSWLEC 73 at [112].
- On judicial review, if an 'objective' jurisdictional fact is involved, the Court can draw its own conclusion about the existence of the jurisdictional fact.
- Where a judicial review proceeding relates to an 'objective' jurisdictional fact, there is more scope for extrinsic evidence and discovery.

Do You Need to Go Outside the Material Before the Decision Maker?

- Is there something that is not recorded in the material that shows an interest on the part of the decision maker?
- Did the decision maker do or say something in the course of the decision that is not in the material?
- Is there some fact (or absence of a fact) outside the material that shows the decision maker lacked power to make the decision?
- Do you say there is something on the face of the material that shows it was not rationally probative, or do you need an expert to demonstrate that?

The Key Consideration is Always Relevance



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Assessment of Relevance

- Deciding what evidence is relevant to a judicial review claim requires:
  - A clear understanding of what the grounds of review are.
  - A clear understanding of the relevant statutory scheme.
  - An originating motion that clearly articulates the grounds on which the decision is said to be affected by error.
- If you have these, it will be much easier to decide whether you need extrinsic evidence and to convince the Court that it is relevant and admissible.
- Don't just go out and get a bunch of evidence in the hope that it will reveal a case!

Lead Evidence on Issues that Actually Matter (not Petty Disputes)

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Admissibility of Extrinsic Evidence

- Extrinsic evidence will often be admissible to show that the plaintiff was not afforded natural justice by the decision maker: see *Percerep v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 483 at 495.
- Extrinsic evidence may show that the decision maker has said something or behaved in way that indicates prejudgment on an issue, antipathy towards the plaintiff, or an interest in the outcome of the decision.
- In *Jones v Fish* [2020] VSC 542, the extrinsic evidence was the plaintiff's account of the decision maker's behaviour, which she said was demeaning and belittling.
- Extrinsic evidence can also consist of evidence of things said or done by the decision maker *after* the decision was made, if they show evidence of bias: *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 139 [29]; *Moodie v Racing Integrity Commissioner* [2017] VSC 693 at [53]-[61].

Admissibility of Extrinsic Evidence (cont'd)

- Where the question is whether an objective jurisdiction fact actually existed at the time the decision under review was made, the Court can receive any evidence that is relevant to the existence or non-existence of the jurisdictional fact: *McCormack v Deputy Commissioner of Taxation* [2001] FCA 1700 at [38]; *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681 at [63].

Admissibility of Extrinsic Evidence (cont'd)

- Where judicial review is sought on the grounds of irrationality or unreasonableness, extrinsic evidence may be led to show that:
  - The information relied on by the decision maker had no probative value.
  - The information relied on by the decision was not rationally capable of supporting the conclusions drawn by the decision maker.

  Curragh Queensland Mining Ltd v Daniel (1992) 34 FCR 212 at 224 (Black CJ).
- However, extrinsic evidence is not admissible merely to show that the decision was wrong: *City of Melbourne v Neppessen* [2019] VSC 84 at [88].

Expert Evidence

- Expert evidence is a form of extrinsic evidence; it is subject to the same limitations as other extrinsic evidence.
- Expert evidence may be admissible in some circumstances:
  - To 'assist in determining whether the decision under review was legally unreasonable because there was no intelligible foundation for it, or because of a failure to make an obvious inquiry about information that was readily available': *Mackenzie v Head, Transport For Victoria* [2020] VSC 328 at [65].
  - If 'it is relevant to the proposition that, on the material before the decision-maker, the decision was manifestly unreasonable' or if 'the technical nature of the material before the decision-maker requiring review is such that it may not be fully understood by the court without expert evidence': *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73 at [124].

How Does a Party Adduce Expert Evidence?

- If a party wishes to adduce expert evidence in a proceeding, it must comply with Pt 4.6 of the *Civil Procedure Act 2010* (Vic) (the CPA).
- In particular, s 65G(1) provides that:

  > Unless rules of court otherwise provide or the court otherwise orders, a party must seek direction from the court as soon as practicable if the party—
  >
  > (a) intends to adduce expert evidence at trial; or
  >
  > (b) becomes aware that the party may adduce expert evidence at trial.

- Because expert evidence is not generally permitted in judicial review proceedings, you will need to explain to the Court what evidence you want to lead and precisely why you say it is relevant to the grounds of review: *Shellharbour City Council v Minister for Planning* (2011) 189 LGERA 348 at 356 [26].

What If My Opponent Is Trying to Adduce Irrelevant Evidence?

- The key procedural feature of judicial review proceedings is that the evidence consists of affidavit material, which has to be filed well in advance of trial.
- This means you will generally get a reasonable amount of warning if your opponent intends to rely on irrelevant and/or inadmissible evidence.
- Usually, at the start of the trial, the parties will go through the affidavit material and make any objections they have to admissibility.
- This is effective if the disputes over admissibility are minor.
- In some cases, it may be appropriate to seek an advance ruling as to the admissibility of affidavit evidence or an expert report (eg if you think it is irrelevant and you don't think your client should have to bear the cost of responding to it).

Evidence Act, Section 192A

- Under s 192A, the Court has a wide discretion to give an advance ruling on admissibility if it 'considers it appropriate to do so'.
- A range of factors have to be taken into account:
  - Can the question be dealt with in isolation from the rest of the evidence? *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2012) 127 ALD 288 at 294 [29].
  - Would refusing to give an advance ruling leave a party in the position of not knowing what evidence it has to respond to? *Sisson v Baiada Poultry Pty Ltd* [2015] NSWSC 1106 at [22].
  - Would refusing to give an advance ruling result in substantial inconvenience, expense or unfairness? *R v TR* (2004) 180 FLR 424 at 426 [7].
- Section 192A is particularly useful where there is a dispute over the admissibility of expert evidence: *Chaina v Presbyterian Church (NSW) Property Trust (No 6)* [2012] NSWSC 1476 at [7]; *Sydney Attractions Group Pty Ltd v Schulman* [2012] NSWSC 951 at [27]-[31]; *Lambert Leasing Inc v QBE Insurance Australia Ltd* [2012] NSWSC 953at [11]-[17].

Discovery

- Discovery is only rarely allowed in judicial review proceedings.
- *Australian Society for Kangaroos Inc v Secretary, Department of Environment, Land, Water and Planning* [2018] VSC 88 at [21]:

> Discovery is often not ordered in judicial review proceedings because the documents evidencing the decision under review are usually before the court including a statement of reasons. But discovery can be ordered if the plaintiff has a good, or at least arguable, case proof of which would be aided by discovery. However, that is subject to any countervailing or discretionary factors, including the nature of the case and the time at which the application is made. It is sometimes said that the same discovery rules that apply in civil cases also apply in judicial review cases. But, in judicial review cases, while any discovery request will be assessed by reference to the issues raised, usually the primary focus will be on the documents that were before the decision-maker and which will have been provided to the plaintiff and be before the court.

Should I Seek an Order for Discovery?

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Sometimes the Answer is 'Yes'

- The principles are set out in *Moreland City Council v Minister for Planning* (2014) 203 LGERA 152:
  - The plaintiff has to show a good prima facie case that would be aided by discovery.
  - Discovery may be appropriate if there is a significant dispute about important, relevant facts.
  - Some grounds of judicial review are more appropriate for discovery – eg, unreasonableness, irrationality, non-existence of objective jurisdictional fact.
  - Discovery may be appropriate if it is unclear what material was before the decision maker when it made the impugned decision (although this will be rare these days).
  - Discovery is less likely to be ordered if the decision maker has given reasons (which it almost always will have).

Immunity from Discovery

- Some decision makers enjoy a limited immunity from discovery under the former s 21A of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).
- Section 21A has been repealed, but it still operates in some cases where it has been incorporated by another Act.
- Extent of immunity is set out in *Moodie v Racing Integrity Commissioner* [2017] VSC 174 at [22]:

  > [T]he authorities establish that a judge, and therefore by analogy in this case the Commissioner, is immune from compulsory disclosure of any aspect of the decision-making process.

- Decision maker to whom s 21A applies cannot be required to produce notes, memoranda or other things that record their decision-making process. However, the decision maker may still be ordered to produce the primary material/evidence on which it based its decision.

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