STATE OF PLAY – ADMINISTRATIVE LAW IN REVIEW – STATE AND TERRITORY PERSPECTIVES

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In this article, I identify some of the developments that have occurred recently in judicial review at the state and territory levels.

Life after *Kirk*

The first development worthy of note is not a judgment but an extra-judicial paper given by the Chief Justice of New South Wales, Hon JJ Spigelman AC, on 25 March 2010 in Sydney. It was called "*The centrality of jurisdictional error*" and has been published in the Public Law Review at (2010) 21 PLR 77.

The focus of the Chief Justice's paper relates to *Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531 ('*Kirk*') and he confesses in it that as the Chief Justice of an appellate court, he was never so happy to be overturned as he was to be overturned in *Kirk*. The reason for his "*unmitigated admiration*" for the High Court's decision is in the finding that State Supreme Courts in Australia are protected by fundamental constitutional concepts and any attempt to limit their supervisory jurisdiction, in relation to judicial review of inferior courts and tribunals and in relation to administrative action, is likely to be invalid by virtue of being unconstitutional.

Accordingly, by reason of *Kirk*, there is now by operation of section 73 of the Commonwealth *Constitution* an entrenched minimum provision of judicial review at the state level, probably of the same character as exists in relation to the Commonwealth and as was discussed in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and which is derived from section 75(v) of the *Constitution*.

In addition, in his paper the Chief Justice declared that the *Hickman* principle is effectively dead in that it now has little work to do at state level and it had already been killed at the Commonwealth level (*R v Hickman; Ex parte Fox* (1945) 70 CLR 598 esp at 614-619; see also Chris Finn "*Constitutionalising supervisory review at State level: The end of Hickman?*" (2010) 21 PLR 92). Just three days before giving this speech, the Chief Justice had formally killed the *Hickman* principle in NSW in a Court of Appeal decision in *Director General, NSW Department of Health v Industrial Relations Commission of NSW* [2010] NSWCA 47 at [15] (per Spigelman CJ, with Tobias JA and Handley AJA agreeing) where it was held that in the post-*Kirk* world, it is no longer necessary for an applicant to come within the *Hickman* principle. In supervisory jurisdiction matters, the issue for determination is whether or not the impugned decision manifests a jurisdictional error or an error of law on the face of the record. This is a much "*lower level test*" (*ibid* at [15]) which must now be applied. Previously, the mother of all privative clauses, section 179 of the *Industrial Relations Act 1996* (NSW) (see Keith Mason's paper "*The New South Wales Landscape: Judicial Review at State Level*" in AIAL 3rd National Lecture Series (Australian Institute of Administrative Law, Canberra, 2006) p 79) operated to require that not merely jurisdictional or other error needs to be established, but some other more onerous concept such as a breach of an

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"*inviolable restriction*" or breaches of "*essential*" or "*imperative*" provisions before setting them aside (see e.g. *Powercoal Pty Ltd v Industrial Relations Commission (NSW)* (2005) 145 IR 327 at [56]–[57]; *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212; *Uniting Church in Australia Property Trust (NSW) v Industrial Relations Commission* (NSW) (2004) 60 NSWLR 602, and *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 at [42]–[44]; cf *Tsimpinos v Allianz (Aust) Workers' Compensation (SA) Pty Ltd* (2004) 88 SASR 311).

The Chief Justice also spoke in his paper about the impact of the *Kirk* decision on the doctrine of jurisdictional error and on the doctrine of jurisdictional fact. While the High Court in *Kirk* discussed long established notions of jurisdictional error, the Court made it clear that additional developments might arise with the march of the French court. In my view, for the present, it is still the case that one needs an administrative law lawyer solely so that an administrative law issue can be properly identified and articulated.

The void/voidable distinction

The void/voidable distinction in administrative law was the subject of much discussion in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. Not much has been said on it since. In *Downey v Acting District Court Judge Boulton (No 3)* [2010] NSWCA 50 (Beazley, Basten and Macfarlan JJA) the Court dealt with a matter that had come from the NSW District Court. Before that Court there had been a part-heard statutory appeal from a woman's criminal conviction for her failure to provide proper and sufficient food for her cattle and for aggravated cruelty in keeping animals in poor nutrition and in an emaciated condition. Her appeal was being heard by Acting Judge Boulton. It was alleged in the Court of Appeal that his commission as an acting judge expired on 13 November 2009 and the proceedings had not then been finally heard by him for the purposes of s 18(3A) of the *District Court Act 1973* (NSW). Under the provision, there was a need for his appointment to be driven by a "*pressing necessity*" and it was said this was said to be absent. It was also said that he resided in Queensland and therefore he could not sit as a NSW judge. An injunction was sought to prevent him from completing the hearing.

The Court of Appeal rejected the arguments relied upon and said (at [24]-[25]):

> A further argument in favour of an order prohibiting the District Court from proceeding to hear and determine the matter was based on the proposition that anything which his Honour undertook would be a nullity. Reliance was placed on the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597.
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> Reliance on that authority was misconceived. *Bhardwaj* was concerned with a decision by an administrative tribunal, the Refugee Review Tribunal, not a decision of a court of record. The District Court undoubtedly has jurisdiction to determine whether it is properly constituted to hear a particular matter, whether the matter itself falls within the scope of its jurisdiction and whether the relief sought is within the scope of its powers: *District Court Ac*t, s 8. A decision by the District Court that it has jurisdiction will be valid until set aside. Any order made by the Court in the exercise of a jurisdiction which it does not have will also be valid until set aside: *Cameron v Cole* [1944] HCA 5; 68 CLR 571 at 590 (Rich J, Latham CJ agreeing); *Re Macks; Ex parte Saint* [2000] HCA 62; 204 CLR 158 at [20] (Gleeson CJ), [49] (Gaudron J, the orders not being made in the exercise of federal jurisdiction), [135] (McHugh J, on the same basis), [232] (Gummow J), [255]-[256] (Kirby J) and [328] (Hayne and Callinan JJ).

Statutory appeals "on a question of law"

In *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292 (Spigelman CJ, Allsop P, Basten JA) ('*Kostas*') the NSW Court of Appeal handed down a significant decision as to the nature of a statutory appeal from the NSW Consumer, Trader and Tenancy Tribunal to the Supreme Court pursuant to section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW). Such appeals must now be commenced in the District Court of NSW. It was

held in *Kostas* (at [103]) that section 67 appeals are limited to "*any decision of a question with respect to a matter of law which affects the ultimate outcome*". Accordingly, it is now imperative that in commencing such appeals to the District Court, practitioners identify in the proceedings "***with a degree of precision*** *the decision with respect to a matter of law which is sought to be challenged on the appeal*" (*ibid* at [104]).

In the case, Basten JA (at [84] to [86]) set out his survey of statutory appeal provisions that were restricted in some way to legal error. He found that there were (at least) three broad categories that can be identified by reference to different forms of statutory language. He said:

> The first and broadest category of appeal arises where the right of appeal is given from a decision that "*involves a question of law*", being language which permits "the whole case, and not merely the question of law" to be the subject of the appeal: see *Brown v The Repatriation Commission* (1985) 7 FCR 302 at 303 (referring to *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; 41 CLR 148 and subsequent authorities).
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> The second category is exemplified by provisions which permit an appeal "*on a question of law from a decision of*" a tribunal. In such cases, it is the appeal which must be on a question of law, that question being not merely a qualifying condition to ground an appeal but the sole subject matter of the appeal, to which the ambit of the appeal is confined: *Brown v The Repatriation Commission* at 304; *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (1988) 82 ALR 175 at 178.
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> The third and narrowest category is one restricted to "*a decision of a Tribunal on a question of law*", in which case it is not sufficient to identify some legal error attending the judgment or order of the Tribunal; rather it is necessary to identify a decision by the Tribunal on a question of law, that decision constituting the subject matter of the appeal.

Statutory appeals from the CTTT under section 67 are in that third category. Accordingly, no appeal lies with respect to a matter of fact (at [16] per Spigelman CJ). Such appeals are liable to be the subject of continued scrutiny by the Court of Appeal.

For those who consider that the Court of Appeal was drawing unnecessary distinctions in the *Kostas* case, identification of an appealable "question of law" or "point of law" will become increasingly important in NSW.

At the Commonwealth level, for an interesting consideration of the need for an appellant to find specifically a "question of law" on an appeal to the Federal Court from a decision of the AAT (see the judgment of Perram J in *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263 (which was overturned by the Full Court in *Civil Aviation Safety Authority v Central Aviation Pty Limited* (2009) 179 FCR 554).

In *SAS Trustee Corporation v Pearce* [2009] NSWCA 302 (Beazley, Giles & Basten JJA) (24 September 2009) a member of the police force who was hurt on duty and also sustained a psychological injury, claimed a lump sum compensation payment under the *Workers Compensation Act 1987* (NSW) styled as a "gratuity" under the *Police Regulation (Superannuation) Act 1906* (NSW). His case in the District Court was to seek a ruling that he had suffered a 17% whole person impairment as a result of his psychological injuries. This was part of the "*residual jurisdiction*" of the District Court which was conferred by the *Compensation Court Repeal Act 2002* (NSW). The District Court (Hughes DCJ) found that the police officer suffered whole body impairment of only 15.3%. The "employer" appealed to the Court of Appeal by section 142N of the *District Court Act 1973* (NSW) whereby one can appeal if "*aggrieved by an award of the Court in point of law*". "*Award*" is defined in s 142M to include "*interim award, order, decision, determination, ruling and direction*".

The Court held, *inter alia*, that where on a statutory appeal a decision of the Court below in point of law is said to be erroneous, a ground alleging failure to give reasons must be identified as a decision in point of law (at [121] per Basten JA, Beazley JA agreeing).

Accordingly, this ground of appeal (that the reasons given by the trial judge were inadequate and constituted an error of law) failed because it was not correctly described on the appeal in accordance with the terms of the statutory appeal provision.

In *Osland v Secretary to the Department of Justice* [2010] HCA 24 at [18] to [20] the High Court of Australia determined the case of an unsuccessful Freedom of Information ('FOI') applicant who applied to the Victorian Court of Appeal, under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the *VCAT Act*') for leave to appeal on questions of law from the order of the Tribunal refusing access to the particular FOI documents. Section 148 provides for an appeal from the Tribunal on a question of law and it was modelled in part on section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (which deals with appeals from the AAT to the Federal Court of Australia on a question of law). The High Court said (at [18]):

> Section 148 confers "judicial power to examine for legal error what has been done in an administrative tribunal" [Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict) (2001) 207 CLR 72 at 79 [15] per Gaudron, Gummow, Hayne and Callinan JJ]. Despite the description of proceedings under the section as an "appeal", it confers original not appellate jurisdiction; the proceedings are "in the nature of judicial review"(ibid).

Importantly, the High Court said (at [19]) that section 148(7) of the *VCAT Act*, which grants the Supreme Court its powers on the appeal did "*not enlarge that jurisdiction. It confers powers on the court in aid of its exercise*". The Court pointed out that one must appreciate the distinction between jurisdiction and power (at footnote 42 and the cases cited there).

Even though these appeal powers may be wide, the High Court said (at [19]) that the Court "*should not usurp the fact-finding function of the [tribunal]*" (see the cases at footnote 43).

The Federal Court of Australia agrees; in *Hood v Secretary, Department of Education, Employment and Workplace Relations* [2010] FCA 555 (Ryan J) the Court stated that (at [1]):

> Section 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the *AAT Act*") provides a mechanism by which an appeal may be brought from a decision of the Administrative Appeals Tribunal ("the Tribunal"), "*on a question of law*". The "*appeal*" for which that section provides is an application in the original jurisdiction of this Court on an extremely limited basis. All that s 44 contemplates is the resolution by this Court of a question "*stated with precision as a pure question of law*": *Birdseye v Australian Securities and Investments Commission* (2003) 76 ALD 321, per Branson and Stone JJ, at 325. A so-called appeal is therefore quite distinct from an appeal by way of re-hearing (as to which see, for example, *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, at 533), or an appeal *stricto sensu* as exemplified by *Mickelberg v The Queen* (1989) 167 CLR 259, per Mason CJ, at 267ff. The distinction is not merely one of form; it exists; as the High Court pointed out in *Repatriation Commission v Owens* (1996) 70 ALJR 904, at 904 because s 44(1) is concerned to ensure that the merits of the case are dealt with, not by this Court, but by the AAT, a "*distribution of function [which] is critical to the correct operation of the administrative review process*" *MacDonald v Secretary, Department of Family and Health and Community Services and Indigenous Affairs* (2009) 180 FCR 378, at 382 [14].

To sum up, the State appellate courts, the Federal Court of Australia and the High Court of Australia are unanimous in trying to improve the drafting skills of all administrative law lawyers so that appeals on questions of law can be properly determined.

Recently, the NSW Court of Appeal has sounded a related and familiar warning to Supreme Court judges hearing judicial review matters (not appeals in the nature of a re-hearing, such as are heard in the Court of Appeal itself). In *Sydney Ferries v Morton* [2010] NSWCA 156 (Allsop P, Basten and Campbell JJA) the Court considered the case of a physical fight between the Master of a government owned ferry and his engineer. The Master was sacked and his appeal to the Transport Appeals Board was dismissed. He successfully applied to

the Supreme Court which quashed the decision and the matter was remitted to the Board. It refused to allow a further appeal. In the Supreme Court for a second time, the Master won again and the State appealed to the Court of Appeal. The appeal was dismissed with costs. One of the matters NSW complained of on the appeal was that the trial judge made findings of fact that he was not permitted to make and that he conducted the second judicial review hearing as if it were a "*rehearing*" or an appeal to which s 75A of the *Supreme Court Act 1970* (NSW) was applicable. Basten JA (not in dissent on this point) said (at [72]):

> Such an approach would not be consistent with the limited scope of judicial review which required the identification of jurisdictional error or error of law on the face of the record. It may be difficult, and indeed undesirable, to seek a bright line distinction between errors of fact and errors of law in identifying the permissible grounds of judicial review (see McHugh and Gummow JJ in *Applicant S20/2002* at [54]). Nevertheless, there is an uncontroversial distinction to be drawn between the powers of a court on a rehearing and the powers of the court exercising jurisdiction under s 69 of the *Supreme Court Ac*t. To the extent that the primary judge appears to have made findings of fact with respect to matters which fell squarely within the purview and jurisdiction of the Board, the complaint is justified. Nevertheless, it is important for present purposes to identify findings which were material to his Honour's conclusion. Otherwise, it is sufficient to note that the Board which conducts the rehearing will be entitled to form its own view as to the relevant facts on the material before it.

One matter that is yet to be resolved in the states and which may take on a different light or significance after *Kirk's* case is the extent to which one may seek to commence a statutory appeal and <u>also</u> seek to invoke (constitutionally protected) judicial review - perhaps in the same pleading or summons.

It is not uncommon to do this in the Federal Court, where applicants appealing from the AAT "*on a question of law*" routinely seek to invoke three jurisdictions:

(a) s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth);
(b) ss 5 & 6 of the *Administrative Decisions (Judicial Review) Act 1975* (Cth); and,
(c) s 39B(1A) of the *Judiciary Act 1903* (Cth).

See, for example, *Comcare v Etheridge* (2006) 149 FCR 522 at [29]-[31] (Spender, Branson and Nicholson JJ).

The "proper, genuine and realistic consideration" ground of judicial review

The popularity of some grounds of judicial review ebbs and flows. This ground of review first came to attention as a separate ground in *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 ALD 291 (Gummow J). It was given further definition in *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 (at 11-15) (Sheppard J).

While it is appropriate to consider it as a proper and separate ground of judicial review, it was soundly criticised in the Federal Court in *Minister for Immigration & Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 441-442 and in the NSW Court of Appeal in *Anderson v Director General of the Department of Environmental and Climate Change* (2008) 163 LGERA 400; [2008] NSWCA 337 at [51]-[60] (Tobias JA, with Spigelman CJ and Macfarlan JA agreeing) ('*Anderson*').

The criticisms of the ground relate to its vague or imprecise nature and that it is often used as the platform for an impermissible merits-based attack under the guise of judicial review. Notwithstanding, the ground has been accepted and applied in NSW since 1987. The arguments are set out in detail in *Anderson*.

The same criticisms may be made of the *Wednesbury* unreasonableness ground and other grounds. The Court is always vigilant to keep the parties to the question of legality in judicial review proceedings. Review on the merits is not permissible in such proceedings.

In *The Village McEvoy Pty Ltd v Council of the City of Sydney (No 2)*, [2010] NSWLEC 17 at [74]-[81] (Pepper J), the Land and Environment Court of NSW considered the application of this ground of judicial review and set out the history of the ground in some detail. While the ground was not established on the facts of the case, there is a very useful discussion and summary of the legal position.

In *Zentai v Honourable Brendan O'Connor (No 3)* [2010] FCA 691 at [396] (McKerracher J), the Federal Court set out many of the federal cases that applied the principle in setting aside the decision of a federal Minister to effect the deportation of the applicant. The Court said, at [398]:

> In the present unusual situation the advice to the Minister did not inform him adequately or at all as to the alternative steps open to him to comply with [Article 3 paragraph] 2(a) of the [Extradition Treaty Between Australia and Hungary] by refusing surrender but complying with any request from Hungary to submit Mr Zentai for prosecution in Australia. The advice to the Minister did not give genuine, realistic and proper consideration to the [Article 3 paragraph] 2(a) option when considering the [Article 3 paragraph] 2(f) argument as to humanitarian considerations. The more humane solution, still within the bounds of the Treaty was dismissed on the basis of 'longstanding' policy.

The Article 3 paragraph 2(f) option provided that extradition may be refused in particular circumstances including the age, health or other personal circumstances of the person whose extradition is sought, if the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

Another (at times related) ground or formulation of a judicial review point is that a decision-maker might be said to have failed to "*have regard to*" a number of listed statutory matters as required by the terms of the section. The statutory requirement that a decision maker should "*have regard to*" listed matters is a serious one. The legal requirements were set out in *Commissioner of Police for New South Wales v Industrial Relations Commission of New South Wales & Raymond Sewell* (2009) 185 IR 458; [2009] NSWCA 198 at [73] (per Spigelman CJ) in the following terms:

> A statutory requirement to "*have regard to*" a specific matter, requires the Court to give the matter weight as a fundamental element in the decision-making process. (*R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333, 337-338; *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 at [71]-[73]). An equivalent formulation is that the matter so identified must be the focal point of the decision-making process. (See *Evans v Marmont* (1997) 42 NSWLR 70 at 79-80; *Zhang* supra at [73].)

In *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1; [2009] FCAFC 140, the Full Federal Court held that a decision of the Commonwealth Administrative Appeals Tribunal had not given genuine consideration to a prescribed factor of "*general deterrence*" in a deportation decision. This was so notwithstanding that the tribunal made express reference to general deterrence and its meaning in its reasons for decision. The Court said (at [47]) that jurisdictional error would be established if the AAT did not genuinely take into account the question of general deterrence, citing the discussion by Rares J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at 181–182 [105]-[107], and by the Full Court in *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at 242 [267]. The tribunal's decision was set aside because (at [49]) it "*did not show an active intellectual engagement with the question how the factor or consideration of general deterrence was taken into account, and therefore whether it was taken into account at all, in the exercise of a discretion to cancel. Mr Lafu*

would be left to guess what role, if any, the issue of general deterrence had played". The Full Court further stated (at [54]):

> Apart from reciting the requirement that that factor be taken into account, the AAT's reasons do not indicate whether the AAT was influenced, and if so by what process of reasoning, by the factor of general deterrence, in deciding that Mr Lafu's visa was to be cancelled. We conclude that the AAT did not give real consideration to the factor of general deterrence as it related to the individual circumstances of Mr Lafu's case.

Victorian developments - statutory interpretation and the *Charter*

In *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 (Maxwell P, Ashley & Neave JJA) the Victorian Court of Appeal considered the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*the Charter*') and how it sat with a deeming provision in s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('*the Drugs Act*').

Methamphetamine was found in the applicant's apartment. Under the Act it was a trafficable amount with a maximum penalty of 15 years imprisonment. The applicant's partner Mr Markovski, admitted that he was involved in drug trafficking and that the drugs were in his possession. He denied that the applicant knew anything about it. Notwithstanding this, section 5 of the Drugs Act provided that the applicant was deemed to be in possession of the drugs unless she "satisfied the court to the contrary" - a reverse onus. After some significant exercises in statutory construction taking into account the human rights charter, the Court of Appeal held that section 5 imposed a legal burden, rather than an evidentiary burden upon the accused to establish that he or she was not in possession of the impugned substance.

The Court also made significant rulings on the correct methodology of making statutory interpretations involving the Charter. Accordingly, the Court held that section 5 of the Drugs Act could not be interpreted consistently with the presumption of innocence set out in section 25(1) of the Charter. Notwithstanding this inconsistent interpretation, it did not affect the validity of section 5. Accordingly, the Court did not quash the applicant's conviction that it could reduce her sentence significantly.

The matter is likely to go to the High Court. That court would be interested in both the statutory interpretation challenges and in considering an Australian human rights act.

Reviewing inadequate statements of reasons as a ground of judicial review - the new Victorian position

There have been some radical changes to the common law in Victoria recently. Prior to these changes, the majority of single instance decisions in the Supreme Court of Victoria favoured the view that a failure of a decision maker to provide adequate reasons constituted an error of law on the face of the record and rendered the decision amenable to prerogative relief.

In *Sherlock v Lloyd* [2008] VSC 450, Kyrou J considered a worker's compensation case where a County Court judge had made an order pursuant to s 45(1)(b) of the *Accident Compensation Act 1985* (Vic) referring a number of medical questions to a medical panel constituted under the Act. It was a psychiatric case and the medical panel held, *inter alia*, that her employment was in fact a significant contributing factor to the development of her psychiatric injury. Unfortunately for the plaintiff worker, the panel also found that she could now work as a book-keeper or as an administrative assistant with another employer and the panel asserted from its own knowledge that these jobs existed near her place of residence. The panel handed down reasons for its decision.

The plaintiff commenced proceedings in the Supreme Court of Victoria seeking prerogative relief and claiming, *inter-alia*, that the reasons for the panel's opinion were inadequate and that this, in and of itself, constituted an error of law.

The Court considered the underlying principles as to reasons starting with *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. Medical panels were not required to provide reasons under any statute. However, they were required to provide reasons if asked or ordered to do so pursuant to section 8 of the *Administrative Law Act 1978* (Vic) ('*ALA*') (which applies to tribunals generally). The Court held (at [25]) that the *ALA* reformed the procedures for seeking judicial review but it did not expand or alter the common law grounds of review. The Court then proceeded to distinguish a number of authorities that had held that the provision of inadequate reasons was capable of constituting a ground of judicial review. The Court also considered the many judgments for and against the proposition in other States and in the Commonwealth (at [34] esp footnote 27), including *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 377 [31] (Handley JA), 377 [33] (McColl JA, agreeing with Basten and Handley JJA), 399 [130] (Basten JA); and *Dornan v Riordan* (1990) 95 ALR 451, 460.

The Court analysed the panel's statement of reasons and held that as a matter of fact they were inadequate. In many important places, the panel simply stated its conclusions without any reasoning whatsoever. The Court held that the plaintiff could seek the provision of further reasons if she wanted but nothing more.

On appeal in *Sherlock v Lloyd* [2010] VSCA 122 (Maxwell P, Ashley JA, Byrne AJA) the Court of Appeal of Victoria affirmed the decision of Kyrou J and it held that there was no such ground of judicial review as the provision of inadequate reasons. The Court of Appeal said (at [54]) that the ALA "*was not enacted to create new grounds of review or to make substantive changes to the general law. Instead, it was machinery legislation, intended to facilitate the prosecution of conventional judicial review proceedings on conventional grounds*."

The Court of Appeal formally overruled (at [6]) the contrary line of decisions listed by the trial judge. At the appeal stage, the worker attempted to argue that the requirement for reasons was implied from the "*judicial nature of the task undertaken by the medical panel*" (at [9]). Reliance was placed on *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 esp at [109] (per Basten JA) to establish the proposition that because the medical panel was undertaking a judicial task in making a decision that involved a statutory test that determined legal rights, it was the case that *Osmond's case* did not apply. The Court of Appeal flatly rejected this contention and refused to follow the New South Wales position saying (at [22]):

> With respect to Basten JA, we are not convinced that it is correct to describe as the hallmark of the judicial function '*the application of a statutory test, by which legal rights are determined*'. We accept, of course, that this is an important aspect of the judicial function. But judges are not the only decision-makers who perform this task. We would have thought that this criterion would apply to decisions of a variety of public officials whose functions would not ordinarily be thought of as judicial.

Another adequacy of reasons case was handed down by the Court of Appeal of Victoria recently in *Byrne v Legal Services Commissioner* [2010] VSCA 162 (Ashley JA, Hansen and Emerton AJJA). That Court also held that an administrative decision maker, in this case, the Legal Services Commissioner, was "*not a person exercising a function which could be described as quasi-judicial*" and it cited *Vegan*'s case in contradistinction. The court analysed in some detail the common law position in relation to error of law for sufficiency of reasons (at [51] on). The Court of Appeal held that in this particular case the written reasons that were provided by the Commissioner to the solicitor involved were inadequate. However, inadequate reasons do not provide an affected party with a right to prerogative relief and accordingly the Commissioner's decision was not amenable to *certiorari* (at [86]). The case

concerned a dispute between solicitors and some correspondence that the Commissioner considered might have breached rule 21 of the *Professional Conduct Rules (Vic)*, which requires that practitioners' dealings with other practitioners must involve the maintenance of integrity and good repute and practitioners must ensure such communications are courteous and that offensive or provocative language or conduct is avoided. In considering as a matter of its discretion what the Court of Appeal would do with the matter (it ultimately dismissed it) the Court said (at [96]):

> [T]his whole matter has taken on a life of its own, unrelated to what might be thought to be the relative lack of seriousness of the allegations raised by the complaint. It appears to me that no participant – the Commissioner included, but particularly the appellant – has distinguished himself or herself by signs of balance.

As a result of these cases, in Victoria the only possible consequence of a deficiency in a statement of reasons is to make a claim for a further and better statement of reasons pursuant to section 8(4) of the *ALA* - if this is permitted out of time (see *Chubb Security Pty Ltd v Kotzman* [2010] VSC 242 at [51] (Cavanough J) and the narrow interpretation given to that subsection in *Chubb Security Pty Ltd v Kotzman (No 2)* [2010] VSC 281 (Cavanough J).

A month or two after *Sherlock* was handed down, the NSW Court of Appeal had cause to reconsider aspects of *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372. In *Sydney Ferries v Morton* [2010] NSWCA 156 (Allsop P, Basten and Campbell JJA), discussed earlier, the State agency conceded before the Court of Appeal that the Transport Appeals Board had a common law duty to provide reasons (as there was no statutory duty) in part relying on *Vegan's* case. An issue on the appeal was the adequacy of the reasons of the Board.

In his (partly dissenting) judgment, Basten JA expressed the view that perhaps it is not a good idea to rely on notions of judicial or quasi-judicial power when identifying whether a decision-maker has a common law duty to provide reasons. This had been the primary basis for him deciding there was such a duty in *Vegan's case* at [109]. Instead, he said (at [78]-[79]):

> Apart from express statutory direction, to the extent that administrative decision-makers are required to give reasons, the obligation derives from the requirements of procedural fairness. Like other elements of procedural fairness, the content of the obligation may vary depending on the nature of the power and the circumstances in which it is exercised. However, unlike other elements of procedural fairness, there is no general law assumption that there is any obligation for an administrative decision-maker to give reasons. It follows that authorities dealing with an exercise of judicial power provide little assistance.
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> Although the exercise of classifying the nature of the power was one which I adopted in *Vegan*, distinguishing *Osmond* at [105]–[109], there are risks in approaching this question by an a priori classification of a power as judicial, quasi-judicial or administrative. This would reflect the language of an earlier age conditioning the availability of certiorari on the existence of a duty to act "judicially": see *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 (Atkin LJ). This approach can deflect attention from the analysis necessary by allowing the appropriate answer to follow, as a matter of apparent logic, from the label. The better course is to consider the specific issue, namely the obligation to give reasons, by reference to the characteristics of the power and the circumstances of its exercise.

Allsop P (with Campbell JA agreeing) was of the view that (at [4]):

> As to any obligation to give reasons, I would leave to an appropriate occasion, should it arise, the question whether a tribunal of the character of the Board was obliged to give reasons. I agree with Basten JA that there may be a tension between *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 and *Public Service Board of NSW v Osmond* (1986) 159 CLR 656. Implicit in this reservation of the question as to the duty to give reasons is the source or sources of that obligation. The extent to which the principles of procedural fairness play a role in that analysis may depend on, amongst other things, the statutory context: see for example *Minister for Immigration and Multicultural*

Affairs v W157/00A (2002) 125 FCR 433 at 456-457 [90]-[93]; and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212.

Justiciability, politics and the "governor's pleasure"

In *Stewart v Ronalds* (2009) 232 FLR 331, (2009) 259 ALR 86, [2009] NSWCA 277 (Allsop P, Hodgson JA, Handley AJA) the plaintiff, Mr Tony Stewart, was a member of the Legislative Assembly of the Parliament of the State of New South Wales. In November 2008, the plaintiff was removed from his offices by the NSW Governor as a member of the Executive Council of the State of New South Wales and a Minister with a number of portfolios. In short, an allegation of harassment had been made against him by a staff member. It was investigated by a Senior Counsel at the request of the Department of the Premier and Cabinet. The factual findings went against the Minister and he was dismissed by the Governor's representative (the Lieutenant-Governor). The Court of Appeal held, *inter alia*, a decision by the Governor of NSW or the Premier to terminate or revoke the appointment of a Minister and a member of the Executive Council (pursuant to sections 35C and 35E of the *Constitution Act 1902* (NSW)) for any reason, was not amenable to judicial review (and was therefore not justiciable) (at [41]-[47]). In *Stewart's case*, the Court of Appeal held (at [42]) that the touchstone for determining the justiciability of such decisions was the political aspect of it. It was determined by reference to "*the suitability of the subject for judicial assessment and ... whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations*";

The decision raised as many interesting issues as it determined. The Court of Appeal addressed topics such as:

1. The source and nature of "*responsible government*" in New South Wales (*Stewart's case* at [34]-[36]). The Court considered that the notion of responsible government (which is not spelled out in terms in the State Constitution) is not amenable to precise definition. It is a concept based on a combination of law, convention and political practice and is not immutable. It is only alluded to and is obliquely referred to in the NSW *Constitution* documents made in 1855 and 1902. An essential attribute of it is set out in the current Act, namely, the responsibility of the Executive to Parliament and "*save for reserve powers, no executive power could be exercised without receiving the advice of the government responsible to the legislature ... and by convention recognised by the Courts*" (*ibid* at [36]);

2. The true meaning of the "*Governor's pleasure*" is determined in the case (*Stewart's case* at [38], [46] and [63]) – it was held to be very wide. The Court held that (at [46]) "*the phrase in this context means that the Minister has no right to be heard before he or she is dismissed; no reasons are needed; the office is terminable for good or bad or no reasons*". It means that Ministers must subject their fate to "*the ebb and flow of politics*" (at [63]);

3. Whether a decision by the Governor of NSW or the Premier to terminate or revoke the appointment of a Minister and a member of the Executive Council (pursuant to sections 35C and 35E of the *Constitution Act 1902* (NSW)) was, for any reason, amenable to judicial review (i.e. was it justiciable)? – The Court held unanimously that it ***was*** immune from such review and therefore not justiciable (*Stewart's* case at [41]-[47]). Until 1981, the prevailing view was that the exercise of any power by the Governor (as representative of the Crown) was not justiciable. However, after 1981 courts held that in some cases, the court could examine the exercise of the Governor's statutory and non-statutory (prerogative) powers (see *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Limited v Winneke* [1982] HCA 26; 151 CLR 342; and *Council of Civil Service Unions v Minister for the*

Civil Service [1985] AC 374). In *Stewart's* case, the Court of Appeal held (at [42]) that the touchstone for determining the justiciability of such decisions was the political aspect of it. It was determined by reference to "*the suitability of the subject for judicial assessment and ... whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations*";

4. Whether the rules of procedural fairness or natural justice were "*sourced*" or found in statute or in the common law? There is high authority going either way. On this occasion, the Court held it was sourced in the common law (*Stewart's* case at [67]-[70]). However, the Court regarded it as "*relevant and important*" (*ibid* at [70] & [78]);

5. Whether the rules of procedural fairness or natural justice applied to the Governor or the Premier or the Senior Counsel in the circumstances – the Court held unanimously that the rules of procedural fairness did not apply to the Governor or the Premier in making such determinations but that it might apply to the Senior Counsel. Allsop P (at [73]-[74]) inclined towards the tentative view that procedural fairness might be capable of applying to the Senior Counsel, since she was engaged as an independent and skilled practitioner (and not as a Labor party elder) and review of her work was "*well suited to a court*" in judicial review. Hodgson JA also held that it might apply (at [108]-[114]) and that "... *the existence of the duty can arise from the nature of the decision and its potential to affect rights, without the necessity to imply the existence of the duty by some exercise of interpretation of the statutory provisions or rules pursuant to which the decision is made*" (at [113]). Handley AJA (at [131]-[137]) had "*serious doubts*" as to "*the existence of any freestanding legal duty to accord procedural fairness where a person has been given the task of investigation and report under a bilateral retainer without any authority in statute, prerogative, or consensual compact and without any legally recognised power*".

6. Whether public law (procedural fairness) principles could apply to a private individual (the Senior Counsel) conducting an investigation on a retainer in the absence of any public power or statute or contractual obligation to or relationship with the person whose reputation could be harmed? Was the law of defamation sufficient?

7. Whether the plaintiff's claims impermissibly seek to call into question the contents of the report of the first defendant in a manner inconsistent with parliamentary privilege and Article 9 of the *Bill of Rights 1688*, 1 Wm & M Sess 2 c 2. The Court did not answer this question. However, Hodgson JA explored the notion of parliamentary privilege and (at [121] and [124]) considered that it was arguable to him that "*this role of Parliament is not itself business of Parliament or a committee of Parliament, and that the tabling of a report prepared at the request of the Executive and provided to the Executive for the purposes of the Executive is not itself Parliamentary business that makes the report itself immune to criticism in the courts*"; Allsop P and Handley AJA agreed with this tentative view.

The Court threw out the case against the Governor and the Premier. It remitted the remaining tort/public law matters against the Senior Counsel to the Court and it was later dismissed or discontinued by consent.

Natural justice and tennis

In *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 (Biscoe J), the New South Wales Land and Environment Court (in its judicial review jurisdiction) considered the case where an applicant, a business that was next door to a "*bulky goods retail centre*" at Penrith in Sydney, challenged the validity of a development consent granted by the Council to the retail centre for alterations and additions to the centre. The applicant argued that the

Council acted *ultra vires* in determining the development application because under the State Environmental Planning Policy the power to determine the application was vested solely in a regional planning panel by reason of the capital investment value of the development being more than $10 million. It was held that on the proper construction of the policy, a capital investment value of a development that exceeds $10 million is a criterion the satisfaction of which enlivens the exercise of a regional panel's function of determining the development application. Accordingly, while it might be said to be able to be resolved by reference to the concept of "*jurisdictional fact*" (at [38]-[47]), it was held to be simply the case that the council or the panel's power is not enlivened until the capital investment value amount is achieved. If the criterion is satisfied, then the Council's determination of the consent was made without the necessary statutory authority. In this case, the capital investment value did not exceed $10 million, or at least it was not proved that it did. Therefore, the council was the correct decision-maker and not the panel.

The applicant also contended (at [162]) that the council denied it procedural fairness in processing the development application by failing to provide it with the opportunity to consider and comment upon amended plans lodged by the developer after the close of the formal objection period. The Court found that the amended plans were made *in response to* the applicant's formal submissions and objections and under the planning statute, the council had determined there was no need to re-advertise as there was no prejudice to anyone. The Court held at [180]:

> The logical consequence of Calardu's argument is that the council had to keep providing it with the responses to all Calardu's submissions indefinitely. This is "*an infinite regression of counter-disputation*" that has been criticised as "*making a statutory scheme unworkable*": *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at [267]; *Harvey and Tubbo v Minister Administering the Water Management Act 2000* (2008) 160 LGERA 50 at [84]. Procedural fairness is not like a potentially endless game of tennis where every submission or ball Calardu hit over the net had to be returned with the proponent's response until Calardu stopped – even if Calardu hit a winner, as it did when its submission was met. Nor is procedural fairness to be equated with a duty of unlimited discovery to an objector. No new issue had arisen. On receipt of the final material, the council was entitled to evaluate it and make a determination.

For my part, I do not see anything wrong with an endless game of tennis. One can never get enough procedural fairness.