RECENT DEVELOPMENTS OF INTEREST TO TRIBUNAL MEMBERS

Duty of inquiry and merits review

Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594: The High Court has found that the inquisitorial mode of operations of Tribunals was meant to 'distinguish them from adversarial proceedings' and to characterize their statutory functions.The Court repeated that the statutory injunctions to tribunals *'to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'*, to act *'according to substantial justice and the merits of the case'*, [and that] *'[i]n so doing [the tribunal] is not to be bound by technicalities, legal forms or rules of evidence'*, and *'may get any information that it considers relevant'* ([19]), does not *impose 'a general duty to make such inquiries'* (at [20]).
But the Court went on: '*That is not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries'*([22]). As it said: *'It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.'* [23]

The Court thereby left open the possibilities of finding a failure in meeting the investigative objects of tribunals in cases where the omission was central to the outcome, the inquiry was relatively simple to undertake, and the failure to do so would be a significant error.

Weinstein v Medical Practitioners Board of Victoria (2008) 21 VR 29: Maxwell P (with whom Neave and Weinberg JJA agreed) in relation to the import of the injunction that a tribunal *'may inform itself = on any matter as it sees fit'*:

> *The words 'may inform itself ...' were plainly intended to have work to do. They have a meaning and a purpose quite distinct from the meaning and purpose of the words 'not bound by rules of evidence'. Far from the phrase 'may inform itself' being negated or neutralised by other provisions, these words play a necessary part in defining the character of the formal hearing which the panel conducts. For the purposes of 'determining the matter before it', the panel is authorised to 'inform itself in any way it thinks fit' subject always to the overriding obligation to accord procedural fairness.*

Visa Cancellation Applicant and Minister for Immigration and Citizenship [2011] AATA 690: To complement the High Court's consideration in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 of the meaning of the foundation concept of merit review of *'correct or preferable*', in the *Visa Cancellation* case, the former President of the AAT, Justice Downes (with Senior Member McCabe), has given thought to the meaning of 'preferable' in that expression. As the President said when a decision-maker *'Where the 'alternative obligation to arrive at "the preferable decision" arises, the Tribunal is exercising a general discretion'*. He went on:

> *The essential characteristic of a discretionary decision is that there will be alternatives which will be equally lawful. The decision chosen may not be the best decision, but the decision will have been made without error of law and will accordingly be final. That will be so even if an alternative which is not chosen is, in fact, the preferable decision, or, perhaps more accurately, the decision which another considers to be the preferable decision. That this is so serves to emphasise the importance of the selection of the preferable decision and to emphasise the importance of the selection of the preferable decision and the fundamental importance of addressing the right considerations in making*

the selection. …The test, however, cannot be subjective. … Very often the only clearly applicable measure or touchstone is the public interest … [and] the proper basis of evaluation, of reaching the preferable decision, in these cases, is reference to community standards or community values'.(at 54], [[62]-[64]).

Justice Downes also discusses the views of Sir Anthony Mason on this issue at [72]-[76]. Whatever one's views about this approach, it should raise the issue for discussion.

Jurisdictional facts

Plaintiff M70/2011 v MIAC [2011] 85 ALJR 891; 280 ALR 18: The Minister has a discretion and a power under s198A(3) of the *Migration Act 1958* (Cth) to make declarations as to certain facts concerning circumstances in another country. Those facts may be conditional upon the Minister's opinion or belief as to the existence or satisfaction as to existence of those facts. Even in such cases, the High Court found that declared facts based on opinion or belief were jurisdictional, meaning that the power to issue a declaration is not enlivened without their existence. Any misconstruction of those circumstances and hence of the existence of the declared facts, powers which were not previously thought to be conditioned by jurisdictional facts, are now able to be invalidated.

Illogicality or irrationality in jurisdictional fact finding

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611: The pre- *Plaintiff M70* position was that where a decision under review is found to be illogical or irrational, it is understood that the statute imports a requirement that the decision-maker's satisfaction as to the existence of a jurisdictional fact must be an opinion that could be formed by a reasonable person. However, a decision cannot be said to be illogical or irrational or unreasonable simply because one reasonable conclusion has been preferred to reasonable another possible conclusion. So although it has been accepted by the High Court that the 'irrationality/ illogicality' labels can give rise to jurisdictional facts, in practice the formulation by the Court of test for irrationality/illogicality closely resembles the tests for *Wednesbury* unreasonableness, rather than being a separate and more or less demanding standard.

Evidence

MIAC v SZJSS (2010) 240 CLR 611: The High Court found that weighing of evidence, and the preference for some evidence over other evidence, is a matter for decision-makers, not for the courts exercising supervisory jurisdiction. This relieves tribunal members of the need to be overly careful to explain such findings and implies a limited degree of deference to the expertise and role of tribunal members.

Tisdall v Webber (2011) 122 ALD 49: A Professional Services Review committee came to the conclusion that a doctor who has breached statutory limitations on the quantity of services rendered in a 20 day period was engaged in 'inappropriate practice' on the assumption that other doctors in the area could have serviced his patients. On overturning the decision the FFCA warned that findings of fact should not be made based upon assumptions of likely capacity and likely disposition unsupported by actual evidence, or based on inferences. See also *Plaintiff M13/2011 v Minister for Immigration and Citizenship* [2011] HCA 23.

Questions of law and fact and nature of appeal for 'question/error/issue/review of law'

Rana v Repatriation Commission (2012) 136 ALD 1: Controversies concerning how and which facts should be found are for the Tribunal. An appeal to the Federal Court under s44 of the AAT Act 1975 must be on a question of law. The grounds of appeal should be read as a whole and in the context of the notice of appeal to identify whether an inelegantly specified question of law is concealed within them.
Before the Federal Court in an appeal on a question of law no further evidence may be adduced except where that evidence tends to prove that the specified question of law entitles or disentitles the applicant to the orders sought, e.g. evidence establishing a jurisdictional fact.

Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue [2011] HCA 41; (2011) 85 ALJR 1183: The High Court (French CJ, Gummow, Crennan, Kiefel & Bell JJ) has a useful discussion of the nature of 'an "appeal" from an administrative decision to a court'. The issue arose in the context of the interacting review provisions in the *Taxation Administration Act 1996* (NSW) s 97, the *Administrative Decisions Tribunal Act 1997* (NSW) s 96 and the *Supreme Court Act* 1970 (NSW) s 19(2). Both 'review' and 'appeal' are referred to in the legislation.

Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390: A decision of a tribunal for which there was no evidence should be characterized as a question of law. What amounts to material that could support a finding of fact is ultimately a question of law.

Use of template reasons for decision

Minister for Immigration and Citizenship v SZQHH [2012] FCAFC 45: An administrative decision maker is entitled to repeat reasons (use a template) for rejecting a generic claim where no more new material is submitted and claims are assessed on individual circumstances. Use of the same words to reject two identical claims, 'when there was nothing to distinguish them one from another' does not demonstrate apparent bias.

Interpretation of remedial legislation

Starkey v SA [2011] SASCFC 164: Where there was ambiguity, remedial legislation should be *'construed so as to give the fullest relief which the fair meaning of its language will allow'* (applying the principle from the dissenting judgment of Isaacs J in *Bull v Attorney-General (NSW)).* This was a decision in the context of Aboriginal land rights and native title.

Obligation to make a claim

Re Dyce and Repatriation Commission (2010)118 ALD 681: There are limits to the investigative obligations of the tribunal even in areas of law which are seen as beneficial. A veteran must make a claim for an illness or disease in precise or general terms. The tribunal may make a diagnosis of a different disability in the alternative if it is fairly open on the material. In this case, for example, no claim was made for PTSD, hence there was no decision capable of review and the tribunal had no jurisdiction. Had the applicant made a claim for PTSD, the tribunal could have examined whether the symptoms which existed applied to PTSD or another condition with similar symptoms but a different diagnosis, for example, depressive disorder. However, the Tribunal did not have jurisdiction to investigate whether the person's claim fitted within a particular disorder when there was no claim which corresponded to that or another disorder.

Causation in VEA claims*Bawden v Repatriation Commission* [2012] FCA 345: Generally, diagnosis of a disease is a preliminary issue considered before the application of s120 of the *Veterans' Entitlements Act 1986* (Cth) and the *Deledio* tests. However, where the issue of causation is part of the diagnosis of the asserted disease (as with PTSD), the decision-maker should decide on the balance of probabilities what symptoms the veteran is suffering from and whether they constitute a disease. If PTSD is asserted, the decision maker should consider whether the collection of symptoms found to exist would lead to a diagnosis of PTSD if those symptoms resulted from a traumatic event. The question of causation should be determined by deciding whether there is a reasonable hypothesis connecting the disease with the circumstances of the veteran's operational service. This decision is on appeal to the Full Court of the Federal Court.

The mixed subjective-objective test for a 'life threatening event'

Border v Repatriation Commission (No 2) (2010) 112 ALD 393: Where the Tribunal is assessing whether an event amounts to a 'life threatening event' as included in the definition of a 'category 1A Stressor' at 1A(a), it must assess the effect of the event and not the threat itself. It is the veteran's perception of the event (that it posed a threat of death) that, if reasonable, is critical. The perception will be reasonable if, from the point of view of a reasonable person in the position or, and with the knowledge of, the veteran, it was capable of and did convey the threat of death. The court found that the test should not be applied in an unduly restrictive manner, and as the question is whether the event *might* (not whether it in fact *did*) give rise to the perception of the threat of death, the veteran's conduct after the event is irrelevant.

'Reasonable Administrative Action' in the compensation jurisdiction

Commonwealth Bank of Australia v Reeve [2012] FCAFC 21: This decision narrows the application of the exclusionary provision in section 5A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) in line with a number of preceding decisions of the AAT. Gray J found that 'administrative actions' do not include those which are 'operational' but those which are actions 'with respect to an employee and employment relationship.' Rares and Tracey JJ found that the exclusion applies to action that is 'specific administrative action directed to the person's employment itself,' placing emphasis on the difference between actions 'in respect of' employment under s5A(1) and 'the nature of, and particular tasks involved in, the employment' under s5B(2)(b).

Drenth v Comcare [2012] FCAFC 582: The applicant sought review of a decision rejecting a claim for compensation for certain stressors arising out of employment with the ATO, which had aggravated the employee's pre-existing borderline personality disorder. The Tribunal found that these stressors comprised reasonable administrative action taken in a reasonable manner and applied the *Safety, Rehabilitation and Compensation Act 1988* (Cth) s5A exclusionary provision. The Tribunal found that where reasonable administrative action does not contribute to an ailment or aggravation *to a significant degree*, it is unnecessary to exclude it from the definition of injury, because the aggravation or ailment would not be included in the operative words of the definition of *"disease"* (and therefore the definition of *"injury"*) in the first place. The Full Federal Court which was asked again to rule on the ambit of the exclusionary provisions in s 5A has dismissed the appeal.

See also: *National Australia Bank Limited v KRDV* [2012] FCA 543.