Tribunals and Administrative Law

- Times They are A'Changing

By Robin Creyke

Tribunals and Administrative Law

*'In a speech last year, the new head of the Independent Commission Against Corruption (ICACC), Megan Latham, said: 'Can I just say, if any of you get tired of adversarial litigation, inquisitorial litigation is **fantastic** (Latham's emphasis). You are not confined by the rules of evidence. You have a free kick. You can go anywhere you want to go and **it's a lot of fun** (Latham's emphasis)'.*

- Cited by Janel Albrechsten, *The Australian* 21 April 2015, 14.

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- **Objectives of tribunals**
- 'Facultative, not restrictive'
  - *Minister for Immigration and Multicultural Affairs (MIMA) v Eshetu* (1999) 197 CLR 611 at 628; *MIAC v SZGUR* (2011) 273 ALR 233
- No sanctions for breach
  - *Minister for Immigration and Citizenship (MIAC) v Li* (2013) 249 332 at [12];
    - confirms earlier statements

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Reasons

- Standards for reasons:
  - Discernible path of reasoning
  - Sufficient detail to show error; and
  - '[E]vident and intelligible justification'
  - Standards relate to issues, fact-finding, reasoning process and conclusions

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- **Standards, cont'd**

<[55]> *The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law*.

(Wingfoot Australia Partners Pty Ltd v Kocak (2013) 303 ALR 64)

- See also *MIAC v Li* (2013) 249 CLR 332 at [76].

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Rules of evidence

- Do tribunals have to apply *Briginshaw/Brown v Dunne*
  - No longer!
  - Failure cannot be grounds for error of law
- *Sullivan v Civil Aviation Safety* Authority (2014) 141 ALD 540
  - Tribunals generally ‘not bound by rules of evidence’
  - Except to extent rules embody principles of fairness

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- **Must evidence be probative?**
- If not, is it breach of natural justice/ jurisdictional error?
  - Only if failure significant AND decision depends on it: *TCL Air Condition (Zhongshan) v Castel Electronics Pty Ltd* (2014) 311 ALR 387; *MIMIA v VOAO* [2005] FCAFC 50 at [5], [13]
- **Danger**: probative evidence can become requirement for logically probative reasoning
  - Resisted by FFC in *Dunghutti Elders Council v Registrar of ATSI Corporations* (2011) 195 FCR 318; cf *Li*

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Other evidentiary issues:

- Decisions based on **no evidence** invalid
  - But 'no evidence' not 'insufficient evidence'
  - '*a decision based on no information at all, or based on findings of fact which are not open on information before the tribunal, is not compatible with a rational process*'

  Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390 per French CJ at [16]

- **Inference v conjecture**
  - *No inference without objective facts:*

  'A conjecture may be plausible but it … is a mere guess; An inference is a deduction from the evidence': Rawson Finances Pty Ltd v Commissioner of Taxation (2013) 296 ALR 307 at [87]

- **Evidence on remittal**
  - *Re Woodall and Repatriation Commission* [2015] AATA 163 at [15]; *MIMA v Wang* (2003) 215 CLR 518 at [45], [68].

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Consent terms

- Should only be agreed by tribunal if within power: eg AATA s 35D(d).

'It is well established that in making a consent order or indeed in accepting undertakings the Court must have regard to the limits of its power. The parties cannot, by consent, confer power on the Court to make orders which the Court lacks power to make': per French J in *Kovalev v MIMA* (1999) 100 FCR 323.

- Recent citings:
  - *Mackey v CIC Allianz Aust Insurance Ltd* [2015] NSWSC 505; *Millington v Waste Wise Environmental Pty Ltd* [2015] VSC 167; *Swanton v Resource Management and Planning Appeal Tribunal* [2015] TASSC 6.

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Review task

- 'de novo'
- Appeal 'stricto senso'
- Rehearing
  - Without new evidence
  - With new evidence
- Distinction: 'Delphic'
  - Requires careful analysis of statute
  - *The Pilbara Infrastructure Pty Ltd v ACT [*2012] HCA 36.

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- **What to disclose during hearing?**
- Credibility of witness?
  - Ask witness why account acceptable:

    SZBEL v MIMIA (2006) 228 CLR 152
- "Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. *However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision.* (*MIAC v SZGUR* (2011) 241 CLR 594 at [9], French CJ & Kiefel J

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Information that is confidential?

- Strategies
  - *Jaffarie v DG of Security* (2014) 313 ALR 593;
  - *Coutts v Close* [2014] FCA 19
  - *Re Pochi and MIEA* (1979) 26 ALR 247
  - *MIC v Maman* (2012) 200 FCR 30.

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- **Duty to assist** (AAT Act s 33(1AA), (1AB)
  - Now requires **both parties** and their representatives to use best endeavours to fulfil statutory objectives
  - Sanctions for breach:
    - Indications likely to be enforced more rigorously in line with Productivity Commission *Access to Justice Arrangements* report (2014) rec 12.1
    - Added weight by s 33(2A((d)-(g) – directions power
    - Eg breach of provision when agency without notice withdrew concessions as to facts:
      - *Re Robinson and Repatriation Commission* [2010] AATA 617; *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90; *Re Phung and Minister for Immigration and Citizenship* [2007] AATA 1319 per Jarvis DP; *ACCC v ANZ (No 2*) [2010] FCA 567.

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Conclusions?

- Conflicting pressures and indications from courts
- Increased need for flexibility v courts becoming more critical
- Evidentiary issues increasing

  v
- *Rec'ns of Access to Justice Arrangements* report

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- *Rec'ns of Access to Justice Arrangements* report: emphasis on
  - Less formality,
  - More case management prior to and at hearing
  - More use of ADR
  - Plain language in documents
  - Better assistance to self-reps
  - Differential fees
  - Better use of technology
  - Better statistics
  - MORE cooperation between courts and tribunals eg court/tribunal agencies set up Little indication likely to be embraced

- Little indication likely to be embraced
  - JCA does open some of its seminars to both judicial/tribunal members
  - Limited opportunities for tribunal members to 'educate' judiciary

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- **Final conclusions?**
- Outcomes in report likely to take generation
- Depend on strong leadership in ‘New AAT’ and CATS and other tribunals

BUT

- Achievement must be attempted
- To turn ‘dreams’ into ‘Realities’
  - Establish distinctive profile of tribunals as ‘coal-face of justice system
  - To mitigate cost pressures.

Tribunals Amalgamation

Tribunals Amalgamation Act 2015 (Cth)

Tribunals Amalgamation

- '**New AAT'** combines
  - 'Old AAT'
  - SSAT
  - MRT
  - RRT
    - Not VRB
    - Not Classification Review Board
    - Not a number of other national tribunals

Tribunals Amalgamation

- **Changes**?
  - mostly architectural
- AAT post 1 July 2015 will have 8 divisions:
  - Formerly 6, but only 5 in practice
    - Medical and Compensation Valuation division is moribund
- New major divisions:
  - Migration and Refugee Division
  - Social Services and Child Support Division

Tribunals Amalgamation

- **Objectives** (s 2A)?
- Review is to be:
  - **Accessible**
  - Fair, just, economical, informal and quick
  - **Proportionate to importance and complexity of matter**
  - **Promotes public trust and confidence**
- **Management**
  - Heads of Divisions
  - Deputy Heads of Divisions
    - Ministerial appointments in consultation with President
  - Cross appointments of members
    - Requires approval of two Ministers

Tribunals Amalgamation

- **Effective**?
- **Aims**:
  - Savings from reduction in duplication of back office functions
  - Avoid confusion for litigants
  - Better management
  - Improve quality and reputation of national merits review system

Tribunals Amalgamation

- **Savings**?
  - Only $7.2m over next 3 years
  - Achievable?
- **Avoid confusion** for litigants?
  - Multiple locations to continue
  - Unlikely in medium term in Brisbane, Melbourne, and Hobart
  - Changes in shorter term foreshadowed for Adelaide, Perth
  - Co-location in place in ACT

Tribunals Amalgamation

- **Management**?
- Likely to be more cumbersome
- Number of executive DPs to increase from 8 to 15
- Commensurate increase in size of policy-making body

BUT

- Delegations to increase

Tribunals Amalgamation

- **Law firm's questions:**
  - Level of formality?
  - Representation?
  - Costs?
  - Waiting times?
    - Loss of members

Tribunals Amalgamation

- **Concerns in 2000**
  - Appointment and removal of members?
  - Open, transparent process for appointments?
  - Approvals?
  - Qualifications of President?
  - Quotas of members for divisions?
  - Representation by leave?

Tribunals Amalgamation

- **Concerns in 2000**, cont'd
  - One-size-fits-all approach?
  - Funding?
  - AAT part of executive?
  - What happens if new evidence?
  - Directions by Minister trumps directions by President?
  - Second tier review on limited grounds?

Tribunals Amalgamation

John Chaney, Pres't SAT:

'The establishment of a super-tribunal inevitably creates concerns about a loss of specialist expertise, an increased level of formality or legality, and the application of a 'one size fits all' approach to procedures which is unsuited to the wide range of jurisdiction that super-tribunals exercise. Those concerns have not been borne out in practice. Rather the benefits which have been identified in the way of accessibility, efficiency, flexibility, accountability, consistency, and quality have all come to pass'.

Tribunals Amalgamation

- **Conclusions?**
- Much less controversial than 2000
- Independence assured
- Amalgamation/cluster?
- Opportunities for cross-fertilisation and changes of culture?
  - Will depend on President and Division Heads agreeing

Tribunals Amalgamation

- **Conclusions?**
- Much less controversial than 2000
- Independence assured
- Amalgamation/cluster?
- Opportunities for cross-fertilisation and changes of culture?
  - Will depend on President and Division Heads agreeing and Directions being developed and enforced
  - Differential categories of members limiting

Tribunals Amalgamation

- **Conclusions, cont'd**
- If best practice adopted throughout will be ++
  - 'Wait and see
  - Considerable good will
  - Continuity of membership
  - Opportunity to create distinctive profile of tribunals
    - Will opportunity be achieved?

  'Only criterion for judgment of courts and tribunals is the measure of success they have in ensuring public confidence in their independence, integrity and impartiality' (Murray Gleeson)