Crown Solicitor's Office

# Tribunal law update

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# Tribunal Law update

In some respects, the High Court's decisions over the last twelve months have been of limited broader practical relevance for administrative lawyers and Tribunal members and practitioners alike. Many are highly dependent on the specific statutory scheme or circumstances under consideration. An obvious example is *Independent Commission Against Corruption v Cunneen* (2015) 318 ALR 391 which significantly reduced the jurisdiction of the Independent Commission Against Corruption ("ICAC"), or at least its understanding of its jurisdiction.[2]

Consequently, I will start by providing a snapshot of relevant High Court decisions, then spend some more time considering High Court and intermediate appellate authority covering the areas of: appeal on a question of law, procedural fairness and the relevancy grounds.

## 1. Snapshot of High Court administrative law cases

### *Independent Commission Against Corruption v Cunneen* (2015) 318 ALR 391

This addressed the jurisdiction of the ICAC in the context of its investigation into an allegation that Ms Cunneen gave advice to a third party to pretend to have chest pains to prevent investigating police officers from obtaining evidence of blood alcohol level at the scene of a motor vehicle accident. The principal question was the meaning of the expression "adversely affects, or that could adversely affect…the exercise of official functions by any public official" in the definition of "corrupt conduct" in s. 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW). The majority (French CJ, Hayne, Kiefel and Nettle JJ) held that, construed in context, this meant adversely affect the "probity" of the exercise of the function, as opposed to its efficaciousness (402-406, 408).

### *Isbester v Knox City Council* (2015) 320 ALR 432

The High Court upheld Ms Isbester's appeal finding that a decision of a panel of the Council to destroy her Staffordshire terrier, "Izzy", was affected by apprehended bias by reason of the involvement of a Council employee (Ms Hughes) in both Ms Isbester's prosecution for an offence under the *Domestic Animals Act 1994* (Vic) and the panel's consequential decision to destroy the dog. Izzy attacked and seriously injured a person. Ms Hughes' duties involved the regulation of domestic animals and she directed the investigation into the attack, arranged for the charges to be laid and gave instructions to Council's solicitors in the prosecution. She also decided to convene a panel to determine the dog's fate and was one of the three panel members. She participated fully in the decision-making process, although another panel member provided the instruction that the dog should be destroyed.

For Kiefel, Bell, Keane and Nettle JJ, Ms Hughes' prior involvement in the matter antecedent to the decision to destroy Izzy was *incompatible* with her participation in the decision (at [34]). This is because it is "generally expected" that a person bringing charges, whether as a prosecutor or other accuser, "may have an interest" in the outcome of the hearing of those charges "which would conflict with the objectivity required of a person deciding the charges and any consequential matters, whether that person be a judge or a member of some other decision-making body" (at [34]). The absence of a suggestion that she did anything other than diligently carry out her responsibility was irrelevant for apprehended bias (at [48]). Gageler J reached a similar conclusion in separate judgment (at [70]), considering an

[2] Although note the subsequent enactment of the *Independent Commission Against Corruption Amendment (Validation) Act 2015*, the validity of which is also being considered by the High Court.

administrative context where the "accuser" is also the "judge" to "almost inevitably" give rise to an appearance of bias (at [63]).

***Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 315 ALR 44**

The High Court considered whether the appellants had standing to seek judicial review of the Minister's decision to approve a proposal for a new commercial development (including a supermarket) under the *Administrative Decisions (Judicial Review) Act 1989* (ACT) ("*ACT ADJR Act*"). Like the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("*Cth ADJR Act*"), a "person aggrieved", defined inclusively as a person "whose interests are adversely affected by the decision", has standing under the *ACT ADJR Act* (ss. 3B, 5(1)). The appellants carried on businesses at premises located near the site of the new approved development. A majority accepted that the owner of a business who is likely to suffer a (not insignificant) loss of profitability from a greater exposure to commercial competition as a result of the Minister's decision is a person aggrieved for the purpose of the *ACT ADJR Act* (at [4], [40] per French CJ and Keane J). This applied to the second and third appellants which operated supermarkets under a sub-lease and would earn less profit by reason of the new development, but not the first appellant which held one of the head leases and only might earn less profit if the sub-lessee ceased trading (at [35]-[36] per French CJ and Keane J; [58] per Hayne and Bell JJ).

In so concluding, the majority rejected the suggestion by the Court of Appeal of the Supreme Court of the ACT of a "general rule" that "mere detriment to the economic interests of a business will not give rise to standing" (at [16] per French CJ and Keane J; [60] per Hayne and Bell JJ). The majority's analysis drew primarily, although not exclusively, on authorities considering the *Cth ADJR Act* (at [27]-[33] per French CJ and Keane J; [59] per Hayne and Bell JJ), emphasising that the general language of the definition of "person aggrieved" should not be artificially narrowed (at [48] per French CJ and Keane J; also [60] per Hayne and Bell JJ). Gageler J undertook similar reasoning, but was in dissent insofar as he found that the first appellant should also have had standing because of the potential adverse effect on its profits (at [91]).

***Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 316 ALR 161**

The High Court addressed whether the Minister had complied with a writ of mandamus previously issued by the High Court[3] directing him to consider and determine the plaintiff's application for a protection visa according to law and the appropriate relief. In relation to the first, the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) prescribed criteria for the grant of a protection (class XA) visa, including that the Minister be satisfied the grant of the visa "is in the national interest". In purported satisfaction of the mandamus, the Minister decided he was not satisfied it was in the national interest because the plaintiff was an unauthorised maritime arrival. The Court concluded that the *Migration Act* exhaustively prescribed the visa consequences that follow from the status of being an unauthorised maritime arrival (the inability to make a valid application for a visa unless the Minister determines this is in the public interest) and it was not permissible for the Minister to attach an additional consequence (at 163, 166). This meant that the return to the writ was insufficient and the duty imposed by the writ remained unperformed (at 169). In the circumstances, it was appropriate that a peremptory mandamus be issued commanding the Minister to grant the plaintiff the visa that he seeks (at 169, 170). Significantly, the Court declined to give the Minister a further opportunity to identify some reason for not granting the plaintiff the visa sought (at 169). The Minister's identified basis was legally wrong and,

[3] Issued by consent following *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209.

as no other basis for the decision was identified, the Minister "cannot, and should not, now be given any further opportunity to consider the matter afresh" (at 169-170).

***Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279**

The case arose out of a finding by the Australian Communications and Media Authority ("ACMA") that Today FM, in broadcasting the recording of a conversation between two radio broadcasters and two members of the staff of the King Edward VII hospital in London, at which the Duchess of Cambridge was an in-patient, contravened s. 11(1) of the *Surveillance Devices Act 2007* (NSW) and therefore breached the condition of its commercial radio broadcasting licence in cl. 8(1)(g) of Sch. 2 to the *Broadcasting Services Act 1992* (Cth) ("*Broadcasting Services Act*") that it would not use the broadcasting service in "the commission of an offence". Today FM sought declaratory relief arguing that ACMA was not authorised to find that it had breached the licence condition unless and until a competent court adjudicated that it had committed an offence. The Full Court of the Federal Court accepted this holding that, absent clear language, "[a]s a matter of general principle it is not normally to be expected that an administrative body such as…[ACMA] will determine whether or not particular conduct constitutes the commission of a relevant offence".[4]

French CJ, Hayne, Kiefel, Bell and Keane JJ rejected this "general principle" stating that, "[m]ore generally…it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action" (at 288). There was no warrant for holding that the words "the commission of an offence" in cl. 8(1)(g) require the licensee to have been convicted of an offence (or that a court exercising criminal jurisdiction has found the offence proven) (at 289). The plurality also distinguished, on the basis of their different statutory functions, *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, which held that the ICAC was not authorised to include in its report of an investigation a finding that a person was or may have been guilty of a criminal offence or criminal conduct (at 290).

Gageler J agreed with the result in a separate judgment (at 294, 299). His Honour considered that the common law principle of legality employed in *Balog* "does operate to insist on the manifestation of unmistakable legislative intention for a statute to be interpreted as empowering an administrative body publicly to inquire into and determine whether or not a person has committed a criminal offence" (at 296). However, this principle did not assist in the construction of cl. 8(1)(g) as it was not directed to defining the scope of the functions of ACMA, but was instead prescribing a norm of conduct to which the licensee must adhere (at 297). If compliance or otherwise with this norm of conduct were incapable of objective determination from time to time, it would be deprived of much of its force, having regard to the enforcement provisions in the *Broadcasting Services Act* (at 297).

## 2. Appeal on a question of law

It is common for legislation to couch a right of appeal from a decision of a statutory tribunal (whether to an appellate level within the tribunal or to a court) as being "on a question of law".[5] The meaning of this phrase, including the extent to which it applies to a mixed question of law or fact, and associated procedural issues were the subject of recent detailed analysis by a 5 bench Full Federal Court in ***Haritos v Commissioner of Taxation* [2015] FCAFC 92**. The statutory context was s. 44(1) of the *Administrative Appeals Tribunal Act*

[4] *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2014) 218 FCR 461 at [76].

[5] Eg., ss. 80(2)(b) (appeal to Appeal Panel) and 83(1) (appeal to Supreme Court), *Civil and Administrative Tribunal Act 2013* (NSW).

*1975* (Cth) ("*AAT Act*") which provides that "[a] party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding".

### *(i) Haritos v Commissioner of Taxation*

Mr Haritos and Mr Kyritsis were directors of two cleaning companies which were liquidated and placed under administration. They sought review in the Administrative Appeals Tribunal ("AAT") in relation to various income tax assessments made by the Commissioner of Taxation ("Commissioner"). The key issue was the taxation implications of the use of amounts paid from a company account to the appellants' accounts. The AAT affirmed the assessments and the appellants appealed to the Federal Court under s. 44(1) of the *AAT Act*.

Before the Federal Court, the Commissioner argued that the questions in the notice of appeal were not "questions of law" for the purposes of s. 44(1) and leave was given to recast the questions. The Federal Court nonetheless dismissed the appeal as incompetent for failing to disclose a question of law, identifying a number of issues with the purported questions of law, including that these attempted to re-agitate the dispute on the merits, sought to challenge factual conclusions open to the AAT on the evidence and were too generalised (*Haritos v Commissioner of Taxation* (2014) 141 ALD 369).

The Full Federal Court's lengthy decision helpfully contains a summary of its conclusions (*Haritos v Commissioner of Taxation* [2015] FCAFC 92 at [62]). I have set these out below in italics, with some additional discussion of the decision where relevant.

*(1) The subject-matter of the court's jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.*

*(2) The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.*

*(3) The court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.*

> The Full Court clarified that the Court's jurisdiction to determine whether it has jurisdiction "carries with it authority to decide whether a notice of appeal states a question of law and does so with sufficient precision and, if it does not, whether an appellant should have leave to amend the notice of appeal to remedy the defect" ([97]).

*(4) Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the court by s 44(3) to hear and determine appeals instituted in the court in accordance with s 44(1), but to the exercise of that jurisdiction.*

> Although a notice of appeal can be struck out where the notice does not state a question of law, the Full Court stated that this does not mean there is an absence of jurisdiction unless the notice of appeal contains one or more questions of law, and nor does it mean "that the great importance of the question or questions of law being stated with precision goes to the jurisdiction of the court" ([97]).

*(5) In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.*

The Full Court gave the example of *Federal Commissioner of Taxation v Raptis* (1989) 89 ATC 4994, where it became apparent during argument that the taxpayer's objection as to the competency of the proceedings as not raising question of law "could be determined satisfactorily only by a degree of examination of the materials approximating to the examination which would be required if the proceedings were treated as competent and to be finally determined" ([97]). Gummow J proceeded to deal with the whole of the matter, found no error of law had been demonstrated and dismissed the appeal.

*(6) Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.*

The Full Court stated that, where there is doubt, the Court should satisfy itself as to whether there is a question of law by considering "the notice of appeal, the alleged question or questions of law, the grounds raised, the statutory context, and the Tribunal's reasons for its decision" ([94]). It seems the Full Court was particularly concerned about the position of self-represented litigants, approving (at [103]) the following statement of Wigney J in *P v Child Support Registrar* (2013) 138 ALD 563 at [53]:

> "A question which is inelegantly drafted may nonetheless be a question of law which attracts the jurisdiction of this court if its purport is tolerably clear having regard to the context in which it appears…In an appropriate case the Court itself may be 'prepared to frame questions in order to found its jurisdiction'. An appropriate case may arise where, as here, an applicant is unrepresented and where it is possible to discern a question which, if properly framed, could found the jurisdiction of the Court…"

Their Honours also approved (at [104]) Mortimer J in *Avetmiss Easy Pty Ltd v Australian Skills Qualifications Authority* [2014] FCA 314 (at [75]-[77]), where her Honour observed, among other things: "many lawyers never master the art of articulating a question of law, so to expect a person who is not legally trained to be able to do so is generally unrealistic".

*(7) A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.*

[See comments following point (8).]

*(8) The expression "may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal" in s 44 should not be read as if the words "pure" or "only" qualified "question of law". Not all so-called "mixed questions of fact and law" stand outside an appeal on a question of law.*

The Full Court's decision spends some time considering the meaning of "question of law" in the context of s. 44 of the *AAT Act*, noting that "no satisfactory test of universal application has yet been formulated" ([111]), but "…the scope, purpose and subject matter of the statute may affect the construction of the words 'question of law'" ([112]).

Their Honours were unsurprisingly clear that the right of appeal in s. 44 "does not extend to mere questions of fact" ([192], also [167]). However, contrary to previous

Federal Court authority, the Full Court held that s. 44 should not be construed as meaning that it "may never extend to a mixed question of fact and law or as requiring that the question of law be a 'pure' question" ([192]).

It all depends on what is meant by "a mixed question of fact and law". If it means a question "which can only be answered by both determining the facts of a case and determining what the relevant law means" then that does not fall within s. 44; however, "the phrase is by no means always used in that sense" ([169]). The Full Court said that, rather than asking whether an appeal raises a mixed question of fact and law, "[t]he correct approach… is to ask directly the question whether the appeal is on a question of law" ([194]). It is "necessary to identify whether the administrative decision-maker is alleged to have made an error of law or an error of fact" (at [200]).

It is because the Federal Court is not to "usurp" the AAT's fact-finding function, that s. 44 does not extend to the situation "where, in order to decide the question of law, the court must positively determine a question of fact itself, rather than judicially review the Tribunal's fact-finding" ([192]). The Court "does not consider whether the Tribunal should have made a particular finding of fact but whether it may lawfully have done so" ([201]). Accordingly, "…legally erroneous fact-finding may found an appeal on a question of law within s 44" ([192]). This might occur, for example, "where a finding of fact is based on a misdirection of law" ([197]) or "if the facts inferred from the evidence are necessarily within the description of a word or phrase in a statute or necessarily outside that description" ([196]). However, "a broad and hypothetical enquiry as to the construction and operation of statutory provisions" will not be a question of law ([93]).

While s. 44 extends to non-jurisdictional error, as one of the functions of s. 44 is to ensure the Tribunal stays within its jurisdiction, "jurisdictional error would found a question of law under s 44", meaning that "[a]n appeal on the question of whether the Tribunal made a jurisdictional error in a specified respect, such as denying a party procedural fairness…would be…an appeal on a question of law" ([202]). Answering this "may require factual evaluation and determination of what occurred before the Tribunal", however, this is not to "usurp the function of the Tribunal of fact finding, but to ensure that the Tribunal acts lawfully and with authority" ([202]).

*(9) In certain circumstances, a new question of law may be raised on appeal to a Full Court. The exercise of the Court's discretion will be affected not only by Coulton v Holcombe [1986] HCA 33 ; 162 CLR 1 considerations, but also by considerations specific to the limited nature of the appeal from the Tribunal on a question of law, for example the consideration referred to by Gummow J in Federal Cmr of Taxation v Raptis [1989] FCA 557 ; 89 ATC 4994 that there is difficulty in finding an "error of law" in the failure in the Tribunal to make a finding first urged in this court.*

Accordingly, the Full Court considered a new question of law (not before the Court at first instance) concerning the AAT's failure to apply a wrong provision in the tax legislation which was not in force at the time of the relevant assessments ([63]). This was not an attempt "to support or attack the decision of the Tribunal on an entirely different and discrete legal and factual basis" but rather "to point to a legal error on the part of the Tribunal in applying a particular provision…in its amended form when it did not take that form at the relevant time" ([69]).

*(10) Earlier decisions of this court to the extent to which they hold contrary to these conclusions, especially to conclusions (3), (4), (6) and (8), should not be followed to that extent and are overruled. Those cases include Birdseye v Australian Securities and Investments Commission [2003] FCA 232 ; 76 ALD 321; Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd [2003] FCAFC 244 ; 133 FCR 290, Etheridge, HBF Health Funds and Hussain v Minister for Foreign Affairs [2008] FCAFC 128 ; 169 FCR 241.*

Applying these principles, the Full Court concluded that the AAT's approach did involve errors of law. The most substantive arose from the AAT's failure to place any weight on the evidence of potentially corroborating witnesses because it said this was based on conclusions reached by another person and those conclusions were, to a significant extent, in turn based on the appellants' assertions or on material that could not be verified ([216]). The Full Court accepted the appellants' argument that this was irrational, illogical and not based on findings or inferences supported by logical grounds because there was an independent basis for the witnesses' evidence, namely, industry standards ([210]-[211], [217]).

The Full Court said that the AAT ([218]):

> "…cannot, at least in relation to central and important evidence, say that material cannot be considered as of any weight because it derives from a tainted source, when an examination of that material (without the need for any weighing of that evidence or choosing between available inferences or findings) reveals that it does not derive from the source said to be tainted."

This was not entry into "merits review of fact finding", but supervision of "the legality of the fact finding processes of the Tribunal" ([218]). The AAT had failed to deal with "possibly significant evidence for a reason that has no evidential foundation or for a reason that is sufficiently irrational or illogical as to be legally unreasonable" ([218]). This meant the AAT's review function was left incomplete insofar as the extent to which Mr Haritos' evidence could be accepted had yet to be assessed ([219]). (His evidence was left as unreliable, subject to corroboration.) It also led to an error of law in the conclusion that the relevant payments were income, as potentially corroborative evidence could have affected this finding ([254]).

### *(ii) Luck v Secretary, Department of Human Services*

At first instance, the Federal Court dismissed Ms Luck's appeal from a decision of the AAT under s. 44 on the basis of lack of competency because her notice of appeal failed to identify a "pure question of law" (*Luck v Secretary, Department of Human Services (No 2)* [2014] FCA 798).

The Full Federal Court last week upheld Ms Luck's appeal against this decision in ***Luck v Secretary, Department of Human Services* [2015] FCAFC 111**. The Court explained (at [47]) that, in *Haritos*:

> "The Full Court is emphasising that, if in substance, a question of law is raised by an applicant (a matter to be decided by looking more broadly than just at the notice of appeal…), then any necessary amendments or refinements to ensure the question is properly stated are to be dealt with as matters of practice and procedure, but do not affect the jurisdiction of the Court. In that sense, they are not matters to be decided by way of upholding an objection to competency."

The Full Court held that the Federal Court's jurisdiction was regularly invoked and any lack of clarity could and should have been dealt with by way of practice and procedure. In any event, "[t]heir import was plain enough: whether they were ultimately questions which would be answered favourably to Ms Luck was an entirely distinct question, and one for trial"

([49]). In this respect, the Full Court considered the respondent's submissions to have confused jurisdiction and prospects of success ([49]).

## 3. Procedural fairness

Assuming procedural fairness is not excluded by the relevant statutory scheme, the oft-cited threshold test for whether an obligation to accord procedural fairness arises in a particular circumstance is that given by Mason J in *Kioa v West* (1985) 159 CLR 550 at 582:

> "…generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he [or she] is entitled to know the case sought to be made against him [or her] and to be given an opportunity of replying to it… The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests."

In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 the High Court referred to a person having a "sufficient interest" in a decision to attract procedural fairness, confirming that the decision did *not* have to impact upon a person's legal rights (at 658-9 per Gummow, Hayne, Crennan and Bell JJ). This rule is readily explicable in the context of that case, which was about whether the plaintiffs should have been afforded procedural fairness in respect of a decision to let them apply for visas even though, if they were to be allowed to apply, there would be no guarantee of eventually receiving those visas. However, the High Court's decision did not clarify the outer limits of what would be a "sufficient interest". (Earlier cases such as *Kioa v West* referred to the same point, but did so in terms of the directness or otherwise of the effect of a decision on a person.)

### *(i) Kong v Minister for Health – determining who must be accorded procedural fairness*

In *Kong v Minister for Health* (2014) 227 FCR 215,[6] the Full Federal Court clarified that, whatever a "sufficient interest" is, it must be closely tied to the statutory scheme in question, meaning that commercial interests not recognised by the scheme will not be sufficient. The Minister had given approval, under the *National Health Act 1953* (Cth), to two pharmacists to supply pharmaceutical benefits from premises located in a "catchment area" that already had approved premises. This power to grant approval for additional premises created an exception to the applicable Rules, which stated that there should only be one approved premises in each catchment area. The competitors who owned the original approved premises sought judicial review of the approval, arguing that they should have been afforded procedural fairness before the approval was given.

The Full Court dismissed the application for review. Justice Jacobson, in the majority, said that "the question is one of construction of the statutory framework in order to determine whether the affected party has a sufficiently direct, or 'real' interest" (at 224). In the present case, his Honour characterised the competitors' "interest" as "merely an economic or commercial interest" (at 228), namely to avoid competition, and not one protected by the legislation (at 228). His Honour also gave weight to the "serious practical difficulties" that would arise if the decision-maker was "required to give notice to all persons whose commercial interests might be adversely affected by an exercise of the discretion" (at 229). Justice Pagone, also in the majority, defined the competitors' interest in a somewhat

[6] Special leave to appeal to the High Court was refused on 17 April 2015, suggesting the High Court saw no inconsistency between its decision in *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 315 ALR 44 and the Full Federal Court's reasoning.

different way. For his Honour, that interest was really "the authorisation to supply pharmaceutical benefits" which the competitors had previously been given (at 243). That authorisation was not affected by the parallel authorisation that had been given without consulting the competitors.

Justice Logan dissented based on a different construction of the legislation. His Honour referred to the legislative history in order to interpret an authorisation to supply pharmaceutical benefits as, in truth, creating "a valuable right, exercisable to the exclusion of others, at or from a particular location" (at 235 [155]). In other words, for his Honour, the Act really did recognise the importance of economic interests and, accordingly, procedural fairness applied in respect of those interests. His dissent reinforces the importance of what the Act says when determining whether any interests in question attract an obligation to afford procedural fairness.

***(ii) WZARH v Minister for Immigration and Border Protection – changing procedure***

If there is an obligation to afford procedural fairness, the question shifts to what this obligation entails in the particular case, that is, its content. The complexities about the content of procedural fairness only deepen when an allegation about a lack of procedural fairness is made in respect of a change of decision-making procedure.

In *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 the appellant was an asylum seeker from Sri Lanka who had applied for refugee status. An independent merits reviewer initially gave him an oral hearing but became unavailable to complete the review. A second reviewer stepped in. That reviewer did not give the appellant another hearing but, instead, relied on the recording and transcript of the hearing with the first reviewer. The second reviewer made a decision that the appellant was not a refugee to whom Australia owed protection obligations. The appellant was not told about the change of reviewer until the decision was made.

The Full Federal Court held that the decision was invalid for lack of procedural fairness. The problem was not that the appellant had a *right* to have an oral hearing – the Court said it did not need to decide if he had such a right (at [9] per Flick and Gleeson JJ, [48] per Nicholas J). Rather, Flick and Gleeson JJ said that the problem was that, having *already* been given an oral hearing, the appellant had a "legitimate expectation" either that the first reviewer would complete the decision-making process or, if another reviewer made the decision, that the other reviewer would give the appellant an oral hearing (at [17]). Their Honours said (at [24]-[25]):

> "If for whatever reason a person conducting an Independent Merits Review becomes unavailable, a claimant is at the very least entitled to be heard before his legitimate expectation is defeated, by being given an opportunity to make submissions as to how the review process should continue.
>
> … In the circumstances of the present case, the Appellant was put in the position whereby he justifiably thought he was participating in a review process involving him being extended an opportunity to put his claims in person. But he was thereafter stripped of the benefit of that process and without warning. … That was unfair because the Appellant received a different and inferior review from the review that he had been led to expect would be conducted."

Their Honours also said (at [27]):

> "Assurances as to the procedure to be followed, once given, should not be lightly departed from. An unexplained departure from such assurances only encourages disquiet by those who thereafter experience an adverse outcome."

Justice Nicholas reasoned similarly. For his Honour, "the appellant was deprived of the opportunity *to apply* for an oral hearing before the [second interviewer]" (at [57]) (emphasis added).

The case has now gone to the High Court, where it will be heard in September. Based on the special leave transcript[7], it seems the Minister will argue that what the Full Federal Court's judgment in fact decides is that, where a decision-maker adopts a procedure different to what the affected person expected, that by itself is a breach of procedural fairness. It seems likely the Minister will also question the Full Federal Court's use of the concept of "legitimate expectations", which was significantly pared back in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 658 [65], four judges said the term legitimate expectations "is an unfortunate expression which should be disregarded". It is hard to reconcile this with how, in the present case, two judges of the Full Federal Court said that the idea of legitimate expectations "remains a useful concept" (at [18]).

There is well-established authority that, if a procedure is changed and, as a result, an affected person loses an opportunity to say something they would have wanted to say to advance his or her case, that will constitute a breach of procedural fairness (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* 1 at 13-14 per Gleeson CJ). However, the overall concern of that decision was with avoiding unfairness (or practical injustice), and that will not necessarily follow from a change in procedure. The effect of the Full Federal Court's decision would appear to go further in saying that an affected person needs to be given an opportunity to comment on whether or how a decision-making procedure should be changed to accord procedural fairness.

## 4. The relevancy grounds

In a well-known statement in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39, Mason J said that "[t]he ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision". And similarly, his Honour went on to say that a consideration is only irrelevant if there is some "limitation on the factors to which the decision-maker may legitimately have regard" (at 40). In other words, a "relevant" consideration is a *mandatory* consideration and an "irrelevant" consideration is an *impermissible* consideration.

### *(i) Uelese v Minister for Immigration and Border Protection*

The High Court in *Uelese v Minister for Immigration and Border Protection* (2015) 319 ALR 181 considered a failure by the AAT to take a relevant consideration into account in affirming the Minister's decision to cancel his visa on character grounds, namely, the interests of the appellant's two youngest children. Section 499 of the *Migration Act* required the AAT to have regard to the best interests of any minor children. It considered it was forbidden from taking into account evidence given under cross-examination about the two children because

[7] [2015] HCATrans 92.

of s. 500(6H) of the *Migration Act*. This prevented the AAT from having regard to any information presented orally in support of an application for review unless provided in a written statement to the Minister at least two days before the hearing.

The High Court concluded that the AAT had misconstrued the effect of s. 500(6H), as it was not directed to information elicited under cross-examination as occurred here (at [44], [53], [104]). It was also inappropriate, given the inquisitorial nature of the review function performed by the AAT in the statutory context, to suggest that the AAT was not required to take into account the interests of the appellant's two youngest children because he had not sought to advance their interests as a positive part of his case (at [61]-[63]).

Although the AAT failed "to make even the most cursory inquiry to follow up on this information" (at [66]), it was not necessary "to seek to chart the boundaries of the [AAT's] obligation to inquire after the best interests of the children" (at [67]) as the issue was not whether the AAT failed to go far enough to discharge its obligation to conduct its review having regard to the interests of all the appellant's children (at [68]). Rather, it "failed to address one of the primary considerations affecting the decision required of it" (at [68], [117]) and so acted beyond its jurisdiction by not conducting the review required by the Act (at [5], [68]).

***(ii) Failure to take into account evidence***

In ***Rodger v De Gelder* (2015) 71 MVR 514**; [2015] NSWCA 211, the New South Wales Court of Appeal considered an assessment of degree of impairment by a medical review panel constituted under the *Motor Accidents Compensation Act 1999* (NSW). At first instance, the Supreme Court held that the panel failed to take into account a relevant consideration, namely, a body of evidence relevant to whether Mr De Gelder made a contemporaneous complaint of pain in his thoracic region after the motor vehicle accident.

The Court of Appeal (Gleeson JA, with whom Macfarlan and Leeming JJA agreed) found that the panel's failure to take account of certain evidence advanced by Mr De Gelder was not a failure to take into account a relevant consideration. This ground of review required Mr De Gelder "to identify the legal obligation on which he relied to identify what were mandatory factors to be taken into account for the purposes of the panel's decision" (at [85]). Importantly, determining what considerations are relevant and irrelevant depends upon the statute empowering the decision-maker to act rather than the particular facts of the case that the decision-maker is called on to consider ([85]). In this case, neither party identified any mandatory considerations the panel was bound to take into account ([86]). Citing *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443; [2012] NSWCA 244 at [15]), the Court said (at [86]) the error was that "to describe evidence as 'relevant' to the case of one party is not to identify a 'relevant consideration' for judicial review purposes".

(The Court of Appeal did, however, hold (at [97]-[110]) that the panel fell into error by failing to respond to a substantial argument based on evidence relied upon by Mr De Gelder and therefore denied him procedural fairness, applying *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389. The Court considered it may also be inferred that the panel failed to apply itself to the real question to be decided in carrying out its statutory function because it misunderstood a significant body of evidence relevant to its determination.)

The NSW Court of Appeal has been relatively consistent in contrasting a mandatory relevant consideration with the evidence that has simply been advanced by a party. In addition to *Allianz Australia Insurance Ltd v Cervantes*, to which *Rodger v De Gelder* referred; a decision handed down this week is to the same effect: ***La La Land Byron Bay Pty Limited v The Independent Liquor and Gaming Authority*** **[2015] NSWCA 254** ([35]).