

## **Judicial Review of NCAT decisions**

**11 March 2015**

**Cameron Jackson**

**Second Floor**

**Selborne Chambers**

**Ph 9223 0925**

[cjackson@selbornechambers.com.au](mailto:cjackson@selbornechambers.com.au)

### **Introduction**

NCAT is a complex beast, pulling together 23 different and diverse tribunals in an heroic attempt to create one “super-tribunal”. In keeping with that complexity, its mechanisms for appeal to the Courts are similarly Byzantine, and are to be found both within the Act and its schedules, and in legislation from which decisions are referred to it.

In the following paper, I will briefly discuss the mechanisms by which you obtain review. However, the focus on this paper is not so much the mechanisms of review as the principal grounds of review available to you.

In other words, this paper is not primarily about how to get to Court, but what to do when you get there.

The focus will be upon jurisdictional error, and the categories of error you are most likely to identify in NCAT decisions.

### **The statutory mechanisms of review**

#### **Part 6, Division 3 of the Civil and Administrative Tribunal Act 2013 (NSW)**

#### **(“the NCAT Act”)**

But first to the statutory appeal provisions. The principal appeal provisions are found in Part 6, Division 3 of the NCAT Act (sections 82-84).

### **What type of decisions may be appealed?**

Any of the following decisions may be appealed “*on a question of law*”, with the leave of the court to which you are appealing (section 82):

- 1.) Any decision made by an Appeal Panel, other than a review of a decision of a registrar:
- 2.) Any decision made by the Tribunal in its external appeal capacity (that is, where it is reviewing a decision of another government agency):
- 3.) Any decision made by the Tribunal in proceedings in which a civil penalty has been imposed by the Tribunal in exercise of its enforcement or general jurisdiction.

The provisions do not apply to decisions made by the Tribunal in contempt proceedings.

### **To what court do you appeal (section 82(3))?**

The appeal with respect to Appeal Panel and external appeal decisions is to the Supreme Court.

Decisions where a civil penalty has been imposed are to the Supreme Court if the decision was made by a judge of the Supreme, District or Land and Environment Court, or a judicial member of the Industrial Relations Commission.

Otherwise, they are to the District Court.

The Court’s power on appeal are found in section 83. Section 83(3) reflects the standard orders made in administrative proceedings for judicial review. In deference to the Tribunal’s role as the finder of fact and maker of the decision, the court does not, as a general rule, substitute its own decision, but identifies the error and remits the matter for the Tribunal to determine according to law.

Section 83(4) explicitly gives the Court the additional power to substitute its own decision with respect to “civil penalty” cases.

### **The grounds of review under section 83: What is a question of law?**

As I have said, the appeal is “*on a question of law*”. Much ink has been spilled over what this expression means, much of it in the State and Commonwealth intermediate appellate courts.

Let me give you some comfort.

First, while it has been suggested that a question of law is not simply an allegation of error dressed up as a question, it is not at all clear what this means, and turning an allegation of error into a question is the most practical way to draft a question of law.

Second, all these words arguably boil down to this simple restriction: the question of law which has been incorrectly understood by the decision-maker must be one which has caused the decision-maker to go wrong. In other words, the error the decision-maker has made must be material.

Putting it this way, it sounds a lot like standard error going to jurisdiction, which is what most of this paper will be about. In other words, if you can identify jurisdictional error, you have identified a question of law, and you just have to phrase it as one.

Third, and this is related to the point above, you can avoid both the requirement for leave and any argument about whether you have properly raised a question of law by seeking the relief provided for in section 69 of the *Supreme Court Act* 1970 (NSW).

### **Not all of the statutory appeal rights are found in Part 3, Division 6**

**Look in the schedules of the NCAT Act, and look in the legislation which provides for the application to NCAT**

We will return to section 69 of the Supreme Court Act and judicial review shortly. Before we do so, however, I should point out that the schedules of the NCAT Act dealing with specific divisions of the Act also include appeal provisions.

These may provide powers of review which extend beyond legal error, and may differ in other respects.

For instance, clause 14 of Schedule 6 provides for appeals to the Supreme Court on a question of law as of right with respect to certain decisions, and appeals with leave, on any grounds (which would include error of fact, and possibly simply the merits of the decision).

The same is true of clause 29(4)(b) of the Schedule 5, which deals with appeals from the Occupational Division to the Supreme Court.

### **Mehajer v Chief Executive of the Office of Local Government [2014] NSWSC 1804**

This clause was relied upon, in an appeal to the Supreme Court by a local Court Councillor, Mr Mehajer (*Mehajer v Chief Executive of the Office of Local Government* [2014] NSWSC 1804).

The Tribunal had imposed a one month suspension from the Council following his failure to adequately disclose interests which could conflict with his duties as a Councillor.

Mr Mehajer said, in the Supreme Court, that the penalty was too harsh, and asked the Court to substitute its own penalty.

The Supreme Court applied *House v King*.

The Supreme Court found that the Tribunal had not considered less severe penalties which it could have imposed, and that its discretion had therefore miscarried.

The Supreme Court “resentenced” Mr Mehajer, instead reprimanding him, and ordering that his pay be suspended for three months.

There may be appeal rights contained within the legislation enabling the administrative decision to be made.

### **An alternative avenue of review: invoke the Supreme Court’s constitutionally entrenched jurisdiction to review administrative decisions**

Now let us turn to the avenue of review provided for by section 69 of the Supreme Court Act. Section 69 codifies the Supreme Court's inherent power to ensure that inferior decision-makers, including NCAT, exercise their power lawfully.

In *Kirk*<sup>1</sup>, one of the most significant High Court decisions of the last decade, the High Court stated that this power to police the limits of State administrative power is entrenched; it cannot be removed by the parliament as it is a power inherent in a superior Court, and protected under the Constitution.

If you have identified a question of law, pursuant to section 83 of the NCAT Act, you have also identified a ground of judicial review. Further, you do not require the leave of the court to argue the ground, and it is at least arguable that the review power is broader than that provided by section 83 of the NCAT Act.

As a matter of caution, I would, as a general rule, still invoke the statutory review provisions when seeking section 69 judicial review rather than simply seeking section 69 relief on its own, though it would depend upon the particular case.

The rest of this paper will explore judicial review, and consider some of the more frequent grounds of judicial review.

### **What is judicial review?**

Let's briefly refresh our memories with respect to what we mean when we talk of judicial review and jurisdictional error.

Understanding judicial review requires you to understand two very simple concepts.

The first concept is usually referred to as the separation of powers doctrine.

The parliament makes laws conferring powers and duties upon government ministers, delegates, and other government decision-making bodies. The ministers, delegates, and

---

<sup>1</sup> *Kirk v IRC* (2010) 239 CLR 521

other decision-makers make the decisions that the parliament empowers and requires them to make.

The courts make sure that the decision-makers make their decisions within the boundaries of the power that has been conferred upon them.

In other words, judicial review is the process by which the courts determine whether or not an administrative decision-maker has acted within the power conferred upon him or her by Parliament.

The second concept follows from the first, which is that the categories of jurisdictional error are simply ways of describing what a decision-maker has done when they have gone beyond the power conferred upon them by the statute (exceeded their jurisdiction), or when they have failed to exercise a power conferred upon them by the statute (failed to exercise their jurisdiction).

In *Kirk v IRC*<sup>2</sup>, the Court said;

*“It is neither necessary, nor possible, to attempt to mark out the metes and bounds of jurisdictional error”.*

The categories of error are not closed, because there could always be another way of describing what a statute requires or forbids and how that obligation or restriction has not been complied with.

Those are the two most fundamental conceptual building blocks of judicial review.

### **What are the grounds of judicial review?**

#### ***ADJR Act and State equivalents.***

In Australia, the *Administrative Decisions (Judicial Review) Act* 1977, with its codified grounds of review, remains available as a means of review of most decisions at Commonwealth level (with similar schemes in several states<sup>3</sup>).

---

<sup>2</sup> *Kirk v IRC, op. cit.*

<sup>3</sup> *Judicial Review Act* 1991 (Qld), *Judicial Review Act* 2000 (Tas), *Administrative Decisions (Judicial Review) Act* 1989 (ACT).

The *ADJR Act* was the product of the *Commonwealth Administrative Review Committee Report* of 1971<sup>4</sup>, “the Kerr Report” (yes, the very Sir John Kerr better popularly remembered for his performance as Governor General).

The grounds of review found in the *ADJR Act* reflect an attempt to simplify and reform the common law grounds of review as they were at that time.

I’ve attached a copy of section 5 of the *ADJR Act* to this paper. The grounds listed there remain broadly similar to the common law grounds of review, and represent the simplest short-cut to the categories of judicial review for you to consider.

A long list of grounds are also identified by Aronson<sup>5</sup> in a list accepted by the High Court in *Kirk*<sup>6</sup>, though some of them are a little opaque and require unpacking.

### **Jurisdictional error.**

In New South Wales, there are no codified grounds of review, but any administrative decision in NSW can be reviewed by the Supreme Court if you can establish “jurisdictional error”.

The grounds are very similar to the grounds in the *ADJR Act*. They are all just different ways of saying that the decision-maker acted beyond the power given to them by the statute which allowed them to make the decision.

Before turning to some specific grounds, however, a brief word about the principal implication of the High Court’s emphasis on power, and policing the boundaries of the power granted to decision-makers under the statute.

That is that the starting point in determining whether error has occurred is the section or sections of the statute under which the decision-maker acts. This is, ultimately, the beginning and end of the enquiry, at least from a technical point of view. All power is derived from the statute, thus, ultimately, all error is determined with reference to the statute.

---

<sup>4</sup> Commonwealth Administrative Review Committee Report, Parl Paper No 144 (1971)

<sup>5</sup> *Jurisdictional Error without the Tears*, Mark Aronson, in Australian Administrative Law, Groves and Lee (eds) Cambridge University Press (2007) p330, at p335.

<sup>6</sup> *Kirk*, *op.cit.* at [71]

Now let's look at some of the main categories of jurisdictional error likely to crop up in challenges to NCAT decisions.

In practice, there is a fair bit of overlap between the different grounds, and errors might be characterised in more than one way.

### **The most fruitful categories of error to explore**

#### **(1) Inadequate reasons**

A fruitful argument at State level (not so fruitful at Commonwealth level) in recent times is that the decision-maker's reasons are sufficiently inadequate that the decision is invalid.

Section 62 of the NCAT Act provides that:

*(1) The Tribunal (including when constituted as an Appeal Panel) is to ensure that each party to proceedings is given notice of any decision that it makes in the proceedings.*

*(2) Any party may, within 28 days of being given notice of a decision of the Tribunal, request the Tribunal to provide a written statement of reasons for its decision if a written statement of reasons has not already been provided to the party. The statement must be provided within 28 days after the request is made.*

*(3) A written statement of reasons for the purposes of this section must set out the following:*

*(a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,*

*(b) the Tribunal's understanding of the applicable law,*

*(c) the reasoning processes that lead the Tribunal to the conclusions it made.*

*(4) Nothing in this section prevents the Tribunal from giving oral reasons or a written statement of reasons for a decision it makes even if it has not been requested to do so by a party.*

In practice, in most circumstances, reasons will be provided without the parties having to request them.

The requirements outlined in section 62 closely reflect the requirements which the common law imposes upon judicial officers.

Meagher JA said in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443, that a decision-maker should:

1. Refer to relevant evidence, but there is no need to refer to it in detail;
2. Set out any material findings of fact and any conclusions or ultimate findings of fact reached; and
3. Provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found.

Both section 62 of NCAT Act, and Meagher JA's requirements reflect the underlying purpose of reasons, which is to allow the parties to understand how the decision has been reached<sup>7</sup>, and to satisfy themselves that the decision has been made according to law.

This is particularly important for the losing party. As the NSW Court of Appeal pointed out in *Wiki v Atlantis Relocations*<sup>8</sup>, at p135-136:

*"It is not for nothing that in some bilingual countries the judgment of the court is given in the language of the unsuccessful party."*

It is likely that the court would find a failure to comply with the requirements of section 62 would invalidate the decision, because it would be an error of law on the face of the record.

## **Bui**

A good example of the application of the "inadequate reasons" ground of review in practice at State level is *Workers Compensation Nominal Insurer v Bui*<sup>9</sup>, an appeal from a NSW Workers Compensation medical appeal panel.

Medical appeal panels review decisions of medical specialists about the degree of impairment of injured workers, and have the power to conduct their own medical examinations.

---

<sup>7</sup> *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 303 ALR 64, referred to further below.

<sup>8</sup> (2004) 60 NSWLR 127

<sup>9</sup> [2014] NSWSC 832

In *Bui*, the employer had obtained surveillance evidence which suggested that the worker had given dishonest histories to the assessor and the other psychiatrists she had seen.

The employer contended that the fresh evidence called into question the history taken by the medical specialist, and thus a further medical examination was required. Further, the fresh evidence was not consistent with the rated impairment, and a lower impairment should be substituted.

The medical appeal panel refused that request because first “it would not assist them”, and second, the surveillance evidence was “not inconsistent” with the impairment level assessed by the assessor.

The Court said that there may have been good reasons for making those professional judgments, but the appeal panel did not explain what those reasons were, and were therefore inadequate (at [81]).

The reasons were inadequate, because they did not allow the losing party to understand the reason why those conclusions had been reached (at [78]).

Of course, a paucity of reasons may equally reflect other error, such as a failure to take into account a mandatory consideration or a taking into account an irrelevant consideration<sup>10</sup>, and we will turn to those errors now.

## **(2) Failing to take into account a matter that the Act implicitly or explicitly requires the decision-maker to take into account**

What the Act implicitly (as opposed to explicitly) *requires* the decision-maker to take into account is determined with reference to the subject-matter, scope and purpose of the Act<sup>11</sup>.

### **BCS v NSW Civil and Administrative Tribunal**

A good example, which also illustrates clearly the central role reasons play in determining error, is *BCS v NSW Civil and Administrative Tribunal*<sup>12</sup>.

---

<sup>10</sup> See, for instance, *Yusuf* (2001) 206 CLR 323, per McHugh, Gummow, and Hayne JJ, at [69].

<sup>11</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, per Mason J, at p39; per Brennan J, at p56.

BCS, a dentist, had applied to the Tribunal for orders which would enable him to perform dental work with children, pursuant to the Child Protection Act.

Orders were necessary because he had been convicted of sexually assaulting his (now ex) wife, an offence which, absent the orders sought, would disqualify him from working with children.

Section 30 of the *Child Protection (Working With Children) Act 2012* (NSW) set out a myriad of considerations which the Tribunal had to take into account in deciding whether to make the orders sought.

In refusing to make the orders, the Tribunal referred to one consideration only, which was what the Tribunal saw as the Applicant's lack of full disclosure to the Tribunal.

The Supreme Court referred to *Wingfoot Australia v Kocak*<sup>13</sup>, where the High Court, considering the reasons of a Victorian medical panel, observed that:

*"The statement of reasons must explain the actual path of reasoning by which the Medical Appeal in fact arrived at the opinion the medical opinion 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. If a statement of reasons meeting that standard discloses an error of law in the way the Medical Panel formed its opinion, the legal effect of the opinion can be removed by an order in the nature of certiorari for that error of law on the face of the record of the opinion."*

The Supreme Court observed that the reasons clearly showed that the lack of full disclosure was the only matter which the Tribunal took into account, in circumstances where the Tribunal was bound to consider, as a bare minimum, all the considerations listed in section 30 of the *Child Protection Act*.

The Supreme Court quashed the decision.

---

<sup>12</sup> [2015] NSWSC 126

<sup>13</sup> (2013) 303 ALR 64, at [55]

Interestingly, the Court ordered that the matter should be heard by a differently constituted Tribunal. The Tribunal accepted BCS' argument that he "*might have grounds for an application of bias and may feel that he would not obtain the fresh hearing to which*" the Tribunal had found he was entitled (at [53]).

Such orders are a departure from the normal rule that it is for the Tribunal concerned to determine who should hear the matter on remittal.

### **Ah-Dah v State Rail Authority**

Another example of a failure to take into account a relevant consideration is a case where I appeared for a worker challenging a decision of a medical appeal panel constituted under NSW workers compensation legislation, *Ah-Dah v State Rail Authority*<sup>14</sup>.

The Appeal Panel thought that the worker did not want a hearing, and did not hold a hearing. The worker's lawyers had (mistakenly, as they admitted to me afterwards) ticked the box which said that they wanted a hearing.

The Supreme Court held that the wishes of the parties was a relevant consideration when deciding whether or not to hold a hearing, and that the Appeal Panel's mistake about the worker's wishes meant that they had not been taken into account.

### **(3) Taking into account a matter which the decision-maker is (explicitly or implicitly) not permitted to take into account**

This ground is the converse of the "relevant considerations" ground. As with the "relevant considerations" ground, what the decision-maker is forbidden from taking into account is a matter of statutory construction, and it may be expressly forbidden or implicitly forbidden<sup>15</sup>.

The ground is rarely successful. Much legislation, as for instance, the legislation governing the wayward dentist, BCS, contains a non-exhaustive list of matters which a decision-maker

---

<sup>14</sup> (2007) 69 NSWLR 468

<sup>15</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, per Mason J, at p39; per Brennan J, at p56.

has to take into account. It is uncommon for legislation to contain a list of matters which a decision-maker cannot take into account.

Nor is it common for a court to hold that specific matters may not be taken into account, even if their relevance is marginal: to do so would be to offend the first of our two principles of judicial review, which is that it is for the decision-maker to consider the evidence and its significance, not the court.

### **SZROK**

For instance, there was no error in a Court taking into account the fact that an asylum-seeker chose to take an affirmation rather than an oath in deciding that his evidence that he had converted to Christianity was false, even though, in ordinary circumstances, whether a witness gives evidence on oath or by way of affirmation is not a relevant factor in deciding whether they are telling the truth (*SZROK v Minister for Immigration & Anor* [2012] FMCA 1043).

Ironically, it seems that the asylum-seeker's reluctance to swear on the bible was based on his clear misunderstanding of the intent of the Refugee Review Tribunal's question at the commencement of his evidence:

*"Tribunal: Will you swear on the Bible, or take an affirmation?"*

*Asylum-seeker: No, I would never swear on the Bible."*

### **White v Overland**

A case where the ground was successful is *White v Overland*<sup>16</sup>. Mr White was an officer of the Australian Federal Police. He was about to be promoted to a Senior Executive Service Position. There was an allegation that he was a participant in the exchange of emails which were inappropriate, and the appointment did not proceed. Disciplinary action was also taken against him.

Mr White commenced proceedings in the Federal Court challenging the decision, which were successful, and which meant that Mr Overland had to reconsider what action, if any, should be taken against Mr White.

---

<sup>16</sup> (2002) 67 ALD 731

In the course of those proceedings, settlement discussions were held during which Mr White made some admissions.

Mr Overland took those admissions into account in determining what action he should take.

As a matter of public policy, as you know, information disclosed in settlement discussions is privileged. The court held therefore, that these admissions were privileged (at [97]), that Mr Overland was not entitled to take them into account, and that taking them into account amounted to a failure to take into account a relevant consideration (at [102]).

**(4) Exercising a discretionary power in a way which can be characterised as legally unreasonable<sup>17</sup>**

**Li's case**

The law with respect to unreasonableness has undergone what might prove to be a radical transformation following the High Court's decision in *Li's case*.

Traditionally, a decision could not be challenged on this ground unless it was so unreasonable, no reasonable decision-maker could have made it.

However, this was rarely successful, as it involves passing judgment on the decision-maker. Indeed, Aronson has observed that a decision-maker would need to be "legally certifiable" for this ground to succeed<sup>18</sup>.

*Li's case* has reformed this area of the law in Australia, providing a new test of "legal unreasonableness", which appears to set a significantly lower bar. It is very controversial, because it seems to focus on the merits.

A decision will be legally unreasonable if:

1.) A particular error was committed in reasoning, suggestive of unreasonableness;

---

<sup>17</sup> *Minister for Immigration and Citizenship v Xiujuan Li* [2013] HCA 18 (2013) 297 ALR 225, an important case; departing from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>18</sup> *Judicial Review of Administrative Action*, Fifth Edition (2013), Aronson, Dyer and Groves, at [6.235].

- 2.) Great weight was given to a matter of little importance.
- 3.) Little weight is given to a matter of great importance.
- 4.) The reasoning is illogical or irrational.
- 5.) The result is unreasonable or plainly unjust.

It remains to be seen whether first instance and intermediate courts apply a narrow or a wide approach to the application of the principles articulated by the plurality in *Li*.

In that respect, two cases are worth mentioning, one relating to the exercise of discretionary power, and the other relating to fact-finding.

### **Two cases applying Li's case**

In the first case, *Minister for Immigration and Border Protection v Singh*<sup>19</sup>, the Full Court of the Federal Court considered the MRT's refusal to grant an adjournment in very similar circumstances to the circumstances in *Li*'s case. Their Honours, relying upon *Li*, applied a proportionality analysis to the refusal to adjourn, and concluded that "*the refusal cannot be said to be a legally reasonable exercise of power*"<sup>20</sup>.

In the second case, His Honour, Justice Greenwood, considering a challenge to findings of fact made by the AAT with respect to liability to pay Commonwealth workers' compensation payments, was happy to accept that to give inadequate weight to matters of great importance or excessive weight to a matter of little importance could result in error of law<sup>21</sup>, and he referred to the plurality's judgment in *Li* in the course of his judgment.

**(5) Failing to accord procedural fairness, either by acting in a manner giving rise to a reasonable apprehension of bias, or by failing to afford a party personally affected by a decision a reasonable opportunity to deal with adverse material where procedural fairness is required**

---

<sup>19</sup> [2014] FCAFC 1

<sup>20</sup> At [73].

<sup>21</sup> *Kelk v Australian Postal Corporation* [2014] FCA 147, at [208].

Procedural fairness is now generally required with respect to all administrative decisions<sup>22</sup>. Indeed, the Courts will now go to great lengths to avoid finding a parliamentary intention to exclude it<sup>23</sup>.

### **Apprehended bias**

*Ex parte H* (2001) 179 ALR 425 outlines the now generally accepted test in administrative law for “apprehended bias”, which is “*Whether a fair-minded lay-person, properly informed about the nature of proceedings, the matters in issue, and the conduct said to give rise to an apprehension of bias*” might apprehend bias (at [28]).

This is how you should particularise it. If you are defending a decision, you will focus upon the fact that a mere disposition towards a particular view does not give grounds to a reasonable apprehension of bias, rather, it must be clear that nothing would change the decision-maker’s mind<sup>24</sup>.

On the other hand, if you are making the challenge, you will emphasise that the court need only find that the fair-minded layperson *might apprehend bias*.

In fact, despite the politeness of the test (in that no finding of actual bias need be made), allegations of bias are rarely made out.

### **A reasonable opportunity to deal with adverse material**

From a formal point of view, the Australian position is that procedural fairness arises by implication of the statute<sup>25</sup>. The reality is, however, that it is now almost impossible for parliament to exclude procedural fairness where the exercise of a power affects someone personally<sup>26</sup>.

---

<sup>22</sup> *Teoh* (1995) 183 CLR 273; *Kioa v West* (2001) 206 CLR 57.

<sup>23</sup> See, for instance, *Saeed* (2010) 241 CLR 252 at [22] – [23].

<sup>24</sup> *Vakuata v Kelly* (1989) 167 CLR 288, at p571.

<sup>25</sup> *Kioa v West* (1985) 159 CLR 550, at p613.

<sup>26</sup> See, for instance, *Ex Parte Miah* (2001) 197 ALR 238; *Saeed* (2010) 241 CLR 252.

The *content* of procedural fairness is also informed, *in part*, by the statute<sup>27</sup>. In this respect, you would take into account the objects of the NCAT Act (at section 3), which require the Tribunal, amongst other things:

*(c) to ensure that the Tribunal is accessible and responsive to the needs of all of its users, and*

*(d) to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and*

*(e) to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality, and*

*(f) to ensure that the Tribunal is accountable and has processes that are open and transparent, and*

*(g) to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.*

You would also take into account section 36 of the NCAT Act, which I'll leave you to ponder in your own time.

It is difficult to spell out in advance what procedural fairness will require in any given case. Just how uncertain is the application of the underlying content of procedural fairness is evident from some of the broad judicial statements quoted by His Honour Justice Brennan, in *Kioa v West*<sup>28</sup>:

*"What the law requires is the discharge of a quasi-judicial function is judicial fairness. That is not a label for a fixed body of rules. What is fair in a given situation depends upon the circumstances. And it is not a one-sided business."* (citing Kitto J).

*"Natural justice is but fairness writ large and juridically. It has been described as "fair play in action"."* (citing Lord Morris of Borth-y-Gest).

Nevertheless, the fundamental requirement is that a decision-maker disclose information adverse to a party's case which is "*credible, relevant and significant*"<sup>29</sup>, and hear what they have to say about it.

---

<sup>27</sup> *Kioa v West*, *op. cit.*, per Mason CJ at 583, per Brennan J at p613.

<sup>28</sup> *Kioa v West*, *op. cit.*, at p613

<sup>29</sup> *Kioa v West*, *op. cit.*, at p629

Procedural fairness, as the modern formulation of the expression “natural justice” suggests, focuses on the process, not the outcome.

## VEAL

The consequences of this focus are clear in the High Court case of *VEAL*<sup>30</sup>. In that case, the Tribunal failed to disclose a document which contained highly prejudicial allegations against the Applicant.

The Tribunal found against the Applicant, but stated that they had given the allegations contained in the letter “no weight”. Notwithstanding the fact that the Tribunal did not rely upon the letter, the Court held that it was required to disclose its contents to the Applicant. The High Court stated that (from [17] – [19]):

*“...Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.*

*It follows that what is "credible, relevant and significant" information must be determined by a decision-maker before the final decision is reached. That determination will affect whether the decision-maker must give an opportunity to the person affected to deal with the information. And that is why Brennan J prefaced his statement about a person being given an opportunity to deal with adverse information that is credible, relevant and significant, by pointing out that there may be information, apparently adverse to the interests of a person, which can and should be put aside from consideration by the decision-maker as not credible, not relevant, or of little or no significance to the decision to be made. "Credible, relevant and significant" must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is "credible, relevant and significant" are not to be understood as depending upon whatever characterisation of the information the*

---

<sup>30</sup> Applicant *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88

*decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.*

*It follows that the Tribunal's statement, that it gave no weight in reaching its decision to the letter or its contents, does not demonstrate that there was no obligation to reveal the information to the appellant and to give him an opportunity to respond to it before the Tribunal concluded its review. Deciding that it could reach its conclusion on other bases did not discharge the Tribunal's obligation to give the appellant procedural fairness."*

**AEA Constructions Pty Ltd v NSW Civil and Administrative Tribunal and Ors [2014] NSWSC 911.**

Refusal of an adjournment application: unavailability of witness: miscarriage of the discretion leading to a denial of procedural fairness.

Great example of statutory construction: in this case, failure to consider section 35(a) of the Act which states:

The Tribunal must ensure that each party in any proceedings is given a reasonable opportunity:

(a) to call or give evidence and otherwise present the party's case (whether at a hearing or otherwise)....

### **Conclusion**

In this paper, we have identified both the principal mechanisms of review, and some of the ways in which you might plead either a ground of judicial review, or an error with respect to a question of law.

Of course we have touched on just a few of the myriad ways in which the Tribunal might go beyond the powers granted to them by the statute.

My exhortation to you is to treat the High Court's observation in *Kirk* that it is "neither necessary or possible to mark out the metes and bounds of jurisdictional error" as a challenge.

You could discover a new ground of review. You may say that you would rather discover a new star or comet, as this would likely be named after you, whereas a new ground of review would more likely be named after your victorious client.

Nevertheless, the discovery of a new ground would still be a significant badge of honour!

## **Attachment “A”**

*Administrative Decisions (Judicial Review) Act (Cth), section 5*

### **5 Applications for review of decisions**

- (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:
  - (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
  - (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
  - (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
  - (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
  - (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
  - (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
  - (g) that the decision was induced or affected by fraud;
  - (h) that there was no evidence or other material to justify the making of the decision;
  - (j) that the decision was otherwise contrary to law.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
  - (a) taking an irrelevant consideration into account in the exercise of a power;
  - (b) failing to take a relevant consideration into account in the exercise of a power;
  - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

- (d) an exercise of a discretionary power in bad faith;
  - (e) an exercise of a personal discretionary power at the direction or behest of another person;
  - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
  - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
  - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
  - (j) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
- (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
  - (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

## **Attachment 'B'**

### **Supreme Court Act, section 69**

#### Proceedings in lieu of writs

(1) Where formerly:

- (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
- (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

then, after the commencement of this Act:

- (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
- (d) shall not issue any such writ, and
- (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
- (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to:

- (a) the writ of habeas corpus ad subjiciendum,
- (b) any writ of execution for the enforcement of a judgment or order of the Court, or
- (c) any writ in aid of any such writ of execution.

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

By the way, don't worry about section 69(5); since *Kirk*, no such provision is likely to be effective.

## Attachment 'C'

*Civil and Administrative Tribunal Act 2013 (NSW)*

### Part 6, Division 3

#### Division 3 Appeals from Tribunal to courts

Note. A Division Schedule for a Division of the Tribunal may, in some cases, make special and different provision for appeals to the Supreme Court or another court against certain decisions made by the Tribunal in the Division.

#### s82 Interpretation

(1) Each of the following kinds of decisions of the Tribunal is an *appealable decision* of the Tribunal for the purposes of this Division:

(a) any decision made by an Appeal Panel in an internal appeal,

(b) any decision made by the Tribunal in an external appeal,

(c) any decision made by the Tribunal in proceedings in which a civil penalty has been imposed by the Tribunal in exercise of its enforcement or general jurisdiction.

Note. An appealable decision includes any ancillary or interlocutory decisions of the Tribunal in such proceedings.

(2) However, an appealable decision of the Tribunal does not include:

(a) any decision made by the Tribunal in proceedings for contempt of the Tribunal, or

(b) any decision made by an Appeal Panel in an internal appeal against a decision of a registrar.

Note. Section 201 of the *District Court Act 1973 (NSW)* (as applied by section 73) provides for appeals to the Supreme Court against contempt decisions of the Tribunal under that section.

(3) For the purpose of this Division, the *appropriate appeal court* for an appeal against a decision in proceedings in which a civil penalty has been imposed is:

(a) if the Tribunal was constituted by one or more senior judicial officers—the Supreme Court, or

(b) if the Tribunal was not constituted by or with any senior judicial officers—the District Court.

(4) A reference to the Tribunal in another provision of this Division is to be read as a reference to an Appeal Panel if the appealable decision of the Tribunal concerned is a decision of an Appeal Panel.

(5) In this section:

*senior judicial officer* means any of the following:

(a) a Judge of the District Court,

(b) a judicial member of the Industrial Relations Commission,

(c) a Judge of the Land and Environment Court,

(d) a Judge of the Supreme Court.

### **83 Appeals against appealable decisions**

(1) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.

(2) A person on whom a civil penalty has been imposed by the Tribunal in proceedings in exercise of its enforcement or general jurisdiction may appeal to the appropriate appeal court for the appeal on a question of law against any decision made by the Tribunal in the proceedings.

(3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following:

(a) an order affirming, varying or setting aside the decision of the Tribunal,

(b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.

(4) Without limiting subsection (3), the appropriate appeal court for an appeal against a civil penalty may substitute its own decision for the decision of the Tribunal that is under appeal.

(5) Subject to any interlocutory order made by the court hearing the appeal, an appeal under this section does not affect the operation of the appealable decision of the Tribunal under appeal or prevent the taking of action to implement the decision.

#### **84 Practice and procedure for appeals to courts under this Act**

(1) This section applies in relation to an appeal against a decision of the Tribunal to:

(a) the Supreme Court or District Court under this Division, or

(b) the Supreme Court, the District Court or another court under any other provision of this Act.

(2) An appeal to which this section applies must be made:

(a) within such time and in such manner as is prescribed by the rules of court for the court to which the appeal is made, or

(b) within such further time as the court may allow.

(3) The Tribunal (or any of the members constituting the Tribunal) cannot be made a party to an appeal to which this section applies. The rules of court for a court to which such an appeal may be made may make provision for the parties to any such appeal (including the designation of a respondent where the only party to the proceedings from which the appeal is brought was the appellant).

(4) In this section:

*rules of court* for a court includes the uniform rules under the *Civil Procedure Act 2005* (NSW) the uniform rules apply to proceedings of that court.

**Copyright**

© These materials are subject to copyright which is retained by the author. No part may be reproduced, adapted or communicated without consent except as permitted by copyright law.

**Disclaimer**

This paper is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to render legal advice. Readers should not act on the basis of any matter contained in this paper without first obtaining their own professional advice.

**Liability limited by a scheme approved under professional standards legislation**