

# Looking Over Your Shoulder

## Tribunals in Australia

A paper by Mark Robinson SC given to the Council of Australasian Tribunals  
(COAT) National Conference on 10 June 2016 in Hobart

I have a paper to present. It is in written form, able to be uploaded from some website, somewhere in a few days' time.

Before I take you to it, while I stand before an esteemed group of tribunal heads and members, may I take this opportunity to explain some tribunal issues that I have?

As to bowing before a tribunal, please understand that most barristers ordinarily do not bow to any person or body unless that person or body possesses at least some judicial power. We will nod or tilt the head, as an acknowledgement and as a sign of respect, but we will not normally bow upon you entering the hearing room or on me leaving or entering the room while a hearing is on. One Senior Member of the Administrative Appeals Tribunal (or former member) routinely arrived at the hearing room and gave the practitioners (and anyone present) a full tilt – from the hip. It was hard to resist making even a partial tilt in return. There are no fixed rules here.

I normally refer to a tribunal member as “your Honour”, if the tribunal is constituted as by justice or magistrate, or as “Deputy President”, “Senior Member” and so on. However, apart from a judge or justice, for me personally, it always comes back to “Tribunal” or “Tribunal Member”. That way, the transcript is preserved and I do not have to remember which tribunal I am appearing in or what is the member’s name and designation.

Bear in mind, that the rules of procedural fairness or natural justice have two limbs. The bias rule and the hearing rule. I will speak about the hearing rule today. But you should remember that there is a special bias rule for tribunals, particularly for tribunals where there is no contradictor appearing, which are heard in private, and which are more inquisitorial than adversarial – such as the former Refugee Review Tribunal, See: *Muin v RRT* (2002) 76 ALJR 966 at [98] (per McHugh J) and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR

82 at 115 [76] per Gaudron and Gummow JJ.

The principle of apprehension of bias has its justification in the concept that judges, tribunal and statutory decision-makers should be independent and impartial. The essential question is whether there is a *possibility* (real and not remote) and not a *probability* that a decision-maker *might* not bring an impartial mind to the question to be determined (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7]-[8]). The question is answered by reference to whether the fair-minded lay observer *might* reasonably apprehend that the decision-maker *might* not bring an impartial mind to the resolution of the issue to be decided (*ibid*, at [33]).

The High Court has stated that the apprehension of bias principle “admits of the possibility of human frailty” and “its application is as diverse as human frailty” (*Ebner, ibid*, at [7]).

In the case of administrative proceedings conducted in private (such a Refugee Review Tribunal hearings) the appropriate apprehended bias rule might now be stated in the following terms (from the High Court in *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at [28]):

“Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a ***hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias.***” (my emphasis)

As to just how much information a court can cram into the head of a hypothetical observer of alleged tribunal bias (in order for a supervising court to test it and determine it), the answer is – a lot. See, *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 which concerned the NSW Dust Diseases Tribunal.

This paper deals with the obligations of a tribunal to take into account relevant considerations (or to not take into account irrelevant considerations) and to afford procedural fairness to a

party and in what circumstances those obligations might require positive action by the tribunal before it hands down its determination. The content of these obligations change according to the nature of the task at hand. If the proceedings are more investigative or inquisitorial (rather than, say, a contest between parties on identified issues) the content of procedural fairness will be minimal. In other cases it will be higher. Tribunals in Australia either have someone looking over their shoulder at some point or, when a determination is to be made on judicial review, the tribunal's interest is to look over the shoulder of the justice or court exercising its judicial review powers in its supervisory jurisdiction to either set aside or uphold the tribunal's determination.

Submitting appearances can be so frustrating in this regard. The tribunal itself must so often want to defend itself from attack and the applicant so wants to address the decision-maker direct on a challenge in court on judicial review. Ordinarily, a tribunal would not seek to participate in court as an active party where there is an active contradictor based on the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35–36. The rationale is that there is a risk that such participation might endanger the important perception of impartiality of the tribunal or its members if and when the subject matter of the impugned decision comes before it again upon remittal. In judicial review proceedings, *Hardiman* only permits a tribunal to make submissions in relation to the tribunal's powers, functions, guidelines and procedures.

Relevant considerations and procedural fairness are only but two of a number of available grounds of judicial review at general law. The grounds each overlap on occasion (see, *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [82]). As tribunals, you need to be alive to each of the grounds and how they have the potential to undo all your good work – sometimes only temporarily. These grounds of review not only overlap, they are capable of “running together” so as to establish vitiating error of law or jurisdictional error or a constructive failure to exercise jurisdiction – see: *El-Kazzi v Allianz Australia Insurance Limited* (2014) 67 MVR 312 at [40] and the cases cited there.

The general law grounds for judicial review have been refined in recent years. They also change and some come in and out of favour with the courts. They include:

- “ultra vires” – lack of jurisdiction;
- lack of procedural fairness;
- acting under dictation;
- real or apprehended bias;
- inflexible application of a policy;
- taking into account irrelevant considerations;
- failing to take into account relevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;
- bad faith;
- failure to afford proper, genuine and realistic consideration to a relevant matter;
- duty to inquire;
- duty to record lawful reasons for decisions; and
- legal unreasonableness.

The starting point is the rules of procedural fairness.

In fact-finding inquiries, it is of the very nature of an investigation that “*the investigator gathers relevant information from as wide a range of sources as possible without the suspect looking over his or her shoulder all the time to see how the inquiry is going*”. - *National Companies & Securities Commission v News Corp Ltd* (1984) 156 CLR 296 at 323.

For investigators to disclose their hand prematurely will not only alert the suspect to the progress of the investigation, but it might well close off other sources of inquiry - *National Companies & Securities Commission v News Corp Ltd* (1984) 156 CLR 296 at 323–324.

In many administrative forums, adversary procedures are inappropriate. In true investigative proceedings, it may frustrate the purpose of the investigation if persons under suspicion could be present throughout the proceedings, “looking over the shoulder” of the investigative body

and cross-examining witnesses - *National Companies & Securities Commission v News Corp Ltd* (1984) 156 CLR 296 at 322.

For both tribunals and statutory decision-makers, while the existence of and content of an obligation to accord procedural fairness is a matter of statutory construction, it is generally assumed that Parliament intended to provide for it unless a clear intention appears to the contrary - *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [22] – [23].

In general, what procedural fairness requires is that decision-makers give a party who will be affected by a decision the opportunity to comment on any adverse information held and/or seen by the decision-maker which is “*credible, relevant, and significant*” to that party (personally) or that party’s case - *Kioa v West* (1985) 159 CLR 550 at 629.4 (per Brennan J) and, eg: *Muin v RRT* (2002) 76 ALJR 966 at [63]-[66] (per Gaudron J).

In the context of tribunal and administrative decision making, the common law imposes:

" .... a duty to act fairly in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."

See *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J.

In applying the duty to act fairly, careful attention must be paid to the statutory power in question. As Mason J said in *Kioa* at 585:

"The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual concerned in the light of the statutory requirements, the interests of the individual and the interest and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations ... "

The content of an obligation for procedural fairness has a flexible quality which varies according to the circumstances in which the power is to be exercised: see *Kioa* per Brennan J at 612. At page 628, Brennan J went on to point out that a person whose

interests were likely to be affected by an exercise of a power:

"... must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise ... "

However, his Honour noted that such an obligation did not involve the affected person having an opportunity to comment on every adverse piece of information. He explained that administrative decision-making was not to be clogged by inquiries into allegations of no credence or which were irrelevant. He said (at 629):

"Nevertheless, in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made."

As Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ put it in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 discussing what must be put by the decision-maker to the person affected (at [17]);

*"... "Credible, relevant and significant" must...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 decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached."*

However, the tribunal or decision-maker does not need to provide a party a running commentary before handing down its decision. The Court in *VEAL* at [25] said that the application of the principles of procedural fairness in a particular case "*... must always be moulded to the particular circumstances of that case*". It drew attention to what it had earlier said in *Re Minister for Immigration, Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1 at [37] (per Gleeson CJ) and at [48] (per McHugh and Gummow JJ). In *Lam* at [47] the Chief Justice said:

“Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”

To this day, I am not too sure what the real import of that statement is. It is relied on by applicants and government agencies alike, so I am not alone.

In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (at [48]), the joint judgment approved a statement by Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369 that:

“... the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.”

The Court further observed (at [48]) that procedural fairness did not require the then Refugee Review Tribunal, a decision of which was under challenge:

“to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment”.

In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 where the High Court (at [29]) applied the decision of the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576. The Full Court (Northrop, Miles and French JJ) there said (26):

“Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker.

*It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any*

*adverse conclusion which has been arrived at which would not obviously be open on the known material.* Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.” (Emphasis added by HC)

The High Court said (at [32]) that in *Alphaone* the Full Court “rightly” said (27):

“It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.*” (Emphasis added by HC)

In *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [9], French CJ and Kiefel J said:

“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***”. (my emphasis)

The High Court cited the following cases in support of this passage: *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592; and see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-162 [29]-[32] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 219 [22] per Gleeson CJ, Gummow and Heydon JJ and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 117-118 [194] per Kirby J.

It is important to note that evidence that is relevant to a party’s case is not necessarily to be equated with a relevant consideration for judicial review purposes.

Other less commonly known rules of procedural fairness include the following:

A decision-maker should not mislead a party as to the importance of a factor to the decision-maker (either actively or impliedly) (*Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966.



A decision-maker should have regard to any promise (express or implied) or regular practice adopted by the decision-maker in the making of particular decisions when a failure to do so may result in some unfairness in the procedure now adopted (*Re Minister for Immigration & Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; 77 ALJR 699 at [48] and [105] per McHugh and Gummow JJ).

A decision-maker should ordinarily continue to comply with any procedural promise, representation (express or implied), regular practice or treaty entered into by Australia unless the proposed change is first put to the affected person and an opportunity for that person to put a response as to that proposed change is allowed (*Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648; *Attorney General (NSW) v Quin* (1990) 170 CLR 1; *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273; and *Re Minister for Immigration & Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1).

In inquiries or in matters where there is no fixed issue, a decision-maker should first notify affected parties of defined relevant issues in respect of which there is a possibility that he or she might make findings adverse to them and permit an opportunity for them to respond (*Annetts v McCann* (1990) 170 CLR 596 at 601 and *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at [254]).

A decision-maker might have a duty to undertake inquiries in certain cases depending on the seriousness of the matter and the circumstances (*Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289–290).

Before challenging a tribunal decision in the Federal or Supreme Court in judicial review on the grounds of relevant considerations, an applicant must first identify that there exists a legal obligation for the tribunal to take into account the alleged specific consideration. How those considerations are to be taken into account and the weight they are to be accorded are matters for the tribunal (see, for example, *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443 at [15], [16]).

The ground contends that a decision-maker must take into account only relevant considerations and must not take into account irrelevant considerations. In terms of section

5(1)(e) read with s 5(2)(a) and (b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) state the relevant common law rules which provide:

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 [in that there was a] taking an irrelevant consideration into account in the exercise of a power [and a] failing to take a relevant consideration into account in the exercise of a power.

The common law principles are that the relevant (and therefore the irrelevant) considerations can be derived from the power by implication from consideration of:

- (1) the subject matter of the function;
- (2) the scope of the statute/power; and
- (3) the purpose of the statute/power.

The leading case in Australia is *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–42 where Mason J (as he then was) stated:

“The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action. That ground now appears in s 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977* which, in this regard, is substantially declaratory of the common law. Together with the related ground of taking into account irrelevant considerations, it has been discussed in a number of decided cases, which have established the following propositions:

(a) The 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 ... The statement of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228, that a decision-maker must take into account those matters which he “ought to have regard to” should not be understood in any different sense in view of his Lordship’s statement on the following page that a person entrusted with a discretion “must call his own attention to the matters which he is bound to consider”.

(b) What factor a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are

exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard ... By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.

(c) Not every consideration that a decision-maker is bound to take into account, but fails to take into account, will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision ... A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision.

(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned ... It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power ... I say “generally” because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is “manifestly unreasonable”. This ground of review was considered by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 230, 233–234, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. This ground is now expressed in ss 5(2)(g) and 6(2)(g) of the *Administrative Decisions (Judicial Review) Act* in these terms. The test has been embraced in both Australia and England ... However, in its application, there has been considerable diversity in the readiness with which courts have found the test to be satisfied ... But guidance may be found in the

close analogy between judicial review of administrative action and appellate review of a judicial discretion. In the context of the latter, it has been held that an appellate court may review a discretionary judgment that has failed to give proper weight to a particular matter, but it will be slow to do so because a mere preference for a different result will not suffice ... So too in the context of administrative law, a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.

(e) The principles stated above apply to an administrative decision made by a minister of the Crown ... However, in conformity with the principle expressed in (b) above, namely that relevant considerations may be gleaned from the subject-matter, scope and purpose of the Act, where the decision is made by a minister of the Crown, due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion.

In *Dar v State Transit Authority (NSW)* (2007) 69 NSWLR 468, Bell J (at [71]) held that the Appeal Panel of the Workers Compensation Commission fell into jurisdictional error by failing to take into account the submission of the worker that he would like the Appeal Panel to conduct an oral hearing so that he could appeal with his legal representatives. It was held that the Appeal Panel was bound to take the submission into account as it was relevant to the decision whether to determine the matter on the papers or after an oral hearing.

In *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council* (2009) 168 LGERA 71 (Hodgson and McColl JA - Basten JA dissenting) the Court of Appeal held that the Land and Environment Court had taken into account irrelevant considerations in addressing a “distorted question” as to whether a fact was established “at an appropriate government level”. This was an error of law and vitiated the decision on appeal.

In *ID v Department of Juvenile Justice* (2008) 73 NSWLR 158 (Johnson J) the Supreme Court quashed a decision relating to the transfer of juvenile prisoners because (at [262]) it considered the decision maker was bound to have regard to the objects sections in the relevant legislation and he had failed to do so.

In *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443, Justice Basten considered an applicant’s argument that the “tribunal” there (a claims assessor, making an

assessment of motor accident personal injury damages in NSW) has failed to have regard to an asserted important piece of evidence. His Honour said (at [15]):

“First, to describe evidence as “relevant” to the case of one party is not to identify a “relevant consideration” for judicial review purposes. All evidence is (or should be) “relevant” in the broad sense identified in s 55 of the *Evidence Act 1995* (NSW), namely that, if accepted, it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue.

The reference to a “relevant consideration” in judicial review is a reference to a factor which, by law, the decision-maker is bound to take into account: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 (*Peko-Wallsend*) per Mason J. This ground required that the appellant identify the legal obligation on which it relied to identify what were mandatory factors to be taken into account for the purposes of the assessment.”

His Honour then said (at [16] & [17]):

“Second, the obligation is, as stated in *Peko-Wallsend*, to take a consideration “into account”. How it is to be taken into account and what weight it is to be accorded in all the circumstances are matters within the authority of the decision-maker. Thus, assuming for present purposes that the assessor was bound” to take into account the particular statement set out above, he could do so by dismissing it, by giving it little weight, or by giving it decisive weight.

Third, the appellant needed to establish on the balance of probabilities that the assessor did not take the identified material into account. Given that, in the course of his reasons, the assessor referred expressly to [the subject medical report] in summarising the medical evidence and stated expressly that he accepted “the opinions and diagnoses of the subject doctor”, the appellant faced an apparently insuperable obstacle in this respect. The mere fact that the specific statement relied upon by the appellant was not identified by the assessor in his reasons was, of itself, neutral. The assessor, as noted above, had more than 600 pages of material before him and could not possibly be expected to refer to the whole of it in reasons which were permissibly brief.

As to identifying the legal obligation to take a particular piece of evidence into account, his Honour referred to *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24] where the High Court stated that:

“To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice”

In support of this was cited *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [81] (per Gaudron J) where the Court characterised a failure to consider the substance of an applicant's case to be a "clear case of constructive failure to exercise jurisdiction".

Justice Basten then said (at [21] and [22]):

"First, although not articulated in these terms, a constructive failure to exercise jurisdiction may arise because the statutory conferral of power has not been exercised according to its terms. Thus, in the present case, s 94 of the *Compensation Act* requires that a claims assessor "is, in respect of a claim referred to the assessor for assessment, to make an assessment of ... the amount of damages": s 94(1)(b). It is, therefore, mandatory that the assessor address the claim and carry out the statutory function.

The second point is that neither *Dranichnikov* nor *Miah* went so far as to imply an obligation to consider every piece of evidence presented. Further, to refer to a report, but not to a particular passage in the report, may indicate an implicit preference for some other material which (in the absence of any no evidence ground) must be accepted as existing to support a particular conclusion. Such a course cannot constitute a failure to take into account a relevant consideration nor a failure to respond to a substantial argument: *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [35]."

The theme of an applicant seeking to identify legal error in the tribunal's decision by the tribunal failing to refer to every single piece of evidence that was put into evidence before it is a common theme in judicial review. In *Reece v Webber* (2011) 192 FCR 254 at [65] (Jacobson, Flick and Reeves JJ) the Full Federal Court said:

"[A] failure to expressly mention particular material is not conclusive that it has not been taken into account. A decision-maker is not normally required in its reasons for decision to refer to "every item of evidence that was before it" and an "omission to refer to a piece of evidence does not necessarily require a conclusion that it has been overlooked": cf. *SZEHN v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1389 at [58] per Lindgren J. See also: *SZHPI v Minister for Immigration and Citizenship* [2008] FCA 306 at [15] per Branson J; *Australian Postal Corporation v Sellick* [2008] FCA 236 at [64], 101 ALD 245 at 259 per Bennett J."

The tribunal is afforded some latitude in judicial review proceedings as to this. However, while a tribunal's statement that it had "considered all the material provided by the applicant" it is not conclusive on the question whether it in fact had regard to everything (in particular,

the documents identified by the applicant in judicial review), but it is not to be ignored either. In some cases, the question might well be: Was the tribunal required in all the circumstances to say more in relation to those documents? See, *SZEHN v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1389 at [59](Lindgren J).

Findings of fact remain the exclusive province of the tribunal or an administrative decision-maker. The applicant might not agree with particular factual findings of a tribunal. However, it generally was for the tribunal to make this factual finding. It was open on the evidence, from the way the application was presented, and from the material provided in support, for the proper officer to make the finding that she did (see, for instance, *Minister for Immigration & Citizenship v SZMDS* (2010) 266 ALR 367 at 397).

The Court guards so jealously the role of the administrative decision-maker as finder of fact, that it goes as far as to say that there is no error of law in making a wrong finding of fact; *Waterford v Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J.

A more recent take on the relevant considerations ground is that of the requirement for there to be manifest that the tribunal or decision-maker to have demonstrated there was “active intellectual engagement” with a relevant matter or consideration. It is not sufficient in law for the tribunal to have merely considered it.

In *Willis v State of Queensland* [2016] QSC 80 (Bond J), the Queensland Supreme Court held:

“In *Mentink v Minister for Home Affairs* [2013] FCAFC 113, the Full Court of the Federal Court observed, at [44]:

“...that, where a decision-maker has provided reasons for a decision and the decision-maker is obliged to have regard to mandatory criteria (or, in some cases, a submission or representation), the relevant question is whether or not there has been an active intellectual engagement with the mandatory criteria (or the submission or representation) (see, for example, *Tickner v Chapman* (1995) 57 FCR 451 at [39]; *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1 at [47] and, see generally, *Minister for Immigration and Citizenship v Khadji* (2010) 190 FCR 248 at [63]-[66]).

The Court held that it could not see any there had been any active intellectual engagement by the General Medical Assessment Tribunal – Psychiatric and it quashed its decision.

This could well be an expanding area.

### **A Duty for a Tribunal to Inquire?**

From time to time, the courts have asserted that a tribunal or statutory decision-maker has, in certain cases, a positive duty to make inquiries as to an issue that has come before it. Where it exists, failure to perform this “duty to inquire” may result in invalidity of a decision by application of principles of natural justice or procedural fairness or by reference to the “unreasonableness” of the decision. While there is no general duty in the common law upon a decision-maker to undertake inquiries of his or her own accord in relation to an application, in some circumstances due to the:

- (1) serious nature of the inquiry;
- (2) importance of the decision;
- (3) ready availability of the information; and,
- (4) significant consequences for the applicant;

the courts will, in effect, impose a requirement that there exists a positive duty on the decision-maker to inquire. An important analysis of this duty is in the decision of Wilcox J in *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 at 167–170. That decision set out the jurisprudential foundation for the ground of judicial review known as “Wednesbury unreasonableness” and how such failures to inquire can sometimes render a decision void.

In *Minister for Immigration & Citizenship v SZIAI* (2009) 83 ALJR 1123; [2009] HCA 39 the High Court of Australia considered Wilcox J’s analysis (at [21]) and said it might well be the



correct position at common law. However, the High Court has not yet had to consider it directly. The Court said (at [25]) that the following proposition (as to a tribunal exercising a review power) would be able to be supported on the authorities (particularly in light of *Prasad's* case):

“It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction (see authorities collected in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 453 [189], n 214). It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.”

Thank you