NSW Administrative Law Update

A paper by Mark A Robinson to the NSW Bar Association Seminar
“Administrative Law Update” on 28 September 2009 in Sydney

In this paper I propose to outline and discuss some of the more interesting and recent developments that have occurred in judicial review in New South Wales and in the High Court of Australia's "constitutional writ" jurisdiction under section 75(v) of the Commonwealth *Constitution*.

The decisions I have identified to discuss today relate to and affect administrative decision-makers, tribunals, Governors, Premiers and Ministers - and one Lebanese family.

I also wish to say a word about a recent success of the NSW Ombudsman’s Office.

Justiciability, Politics and the “Governor’s Pleasure”

One of the more significant decisions this year, one that raises a number of large issues is *Stewart v Ronalds* [2009] NSWCA 277 (Allsop P, Hodgson JA, Handley AJA). The facts are notorious in NSW. The plaintiff, Mr Tony Stewart, was a member of the Legislative Assembly of the Parliament of the State of New South Wales. In September 2008, the plaintiff was appointed by the NSW Governor as a member of the Executive Council of the State of New South Wales and the Minister for Small Business, Minister for Science and Medical Research and Minister Assisting the Minister for Health (Cancer). In October 2008, the plaintiff attended a fund raising dinner in Sydney accompanied by his then policy advisor for cancer, Ms Tina Sanger. A few weeks later Ms Sanger lodged a complaint with the Department of the Premier and Cabinet of New South Wales. She alleged misconduct by the plaintiff towards her. The Director General of the Department (Mr John Lee) retained the first defendant, a Senior Counsel experienced in industrial, employment and discrimination matters to urgently investigate and report on the truth of the allegations contained in the complaint. The investigation took place and the first defendant found, in effect, that the complaint was proved and that the plaintiff had told Ms Sanger at the function that she was “*not up to the job*” and then he placed his hand on his staff officer’s leg for a few seconds to prevent her from standing up to leave while asking her not to be upset and telling her that she would be happier in another job. The Senior Counsel found that the conversation and the physical touching was “*entirely inappropriate*” and that Ms Sanger felt distressed, humiliated and embarrassed.

On 11 November 2008, the Premier tabled the investigation report in Parliament and recommended to the Lieutenant-Governor of the State of NSW (in the Governor’s absence) that the plaintiff be removed from his position as a Minister by withdrawing his commissions as such and that his membership of the Executive Council be withdrawn.

The plaintiff then was duly sacked with immediate effect.

The sources of power relied upon to sack the Minister were sections 35C and 35E of the *Constitution Act 1902* (NSW) which provide that members of the Executive Council and appointed Ministers "*shall hold office during the Governor's pleasure*".

The Executive Council is a long-standing institution comprised of members who advise the Governor in the government of the State - section 35B of the *Constitution Act 1902* (NSW). It is presently comprised of all the Ministers of State from time to time.

The Lieutenant-Governor of the State of NSW (and also the Administrator of the State) at the relevant time was the Hon J. J. Spigelman AC, Chief Justice of the Supreme Court of New South Wales. By section 9C(1)(b) of the *Constitution Act 1902* (NSW), the Lieutenant-Governor or Administrator assumes the administration of the government of the State if the Governor (Professor Marie Bashir AC, CVO) is unavailable (and the Governor was out of the State at the relevant time).

The plaintiff commenced proceedings in the Supreme Court of NSW seeking public law relief based on denial procedural fairness (he sought declarations of invalidity) and private law relief for breach of a duty of care (he sought damages for negligence). At the trial, Justice Fullerton referred some preliminary questions of law to the Court of Appeal. Certain facts were agreed for this purpose.

By its decision, the Court of Appeal effectively struck out the plaintiff's claims against the Governor's representative and against the Premier of NSW. It was held there was no duty of care held by the Senior Counsel to the plaintiff and accordingly, damages were not available. The Court left open the question whether the claim might continue for denial of procedural fairness by the Senior Counsel and whether Ms Sanger should be joined as a necessary party (to hear whether she had something to say).

The decision raises as many interesting issues as it finally determines. The Court of Appeal tackled such fascinating topics as:

1. The source and nature of "*responsible government*" in New South Wales (*Stewart's case* at [34]-[36]). The Court considered that the notion of responsible government (which is not spelled out in terms in the State Constitution) is not amenable to precise definition. It is a concept based on a combination of law, convention and political practice and is not immutable. It is only alluded to and is obliquely referred to in the NSW Constitution documents made in 1855 and 1902. An essential attribute of it is set out in the Act, namely, the responsibility of the Executive to Parliament and "*save for reserve powers, no executive power could be exercised without receiving the advice of the government responsible to the legislature ... and by convention recognised by the Courts*" (*ibid* at [36]);

2. The true meaning of the "*Governor's pleasure*" is determined in the case (*Stewart's case* at [38], [46] and [63]) – it was held to be very wide. The Court held that (at [46]) "*the phrase in this context means that the Minister has no right to be heard before he or she is dismissed; no reasons are needed; the office is terminable for good or bad or no reasons*". It means that Ministers

must subject their fate to "*the ebb and flow of politics*" (at [63]);

3. Whether a decision by the Governor of NSW or the Premier to terminate or revoke the appointment of a Minister and a member of the Executive Council (pursuant to sections 35C and 35E of the *Constitution Act 1902* (NSW)) was, for any reason, amenable to judicial review (ie: was it justiciable)? – The Court held unanimously it ***was*** immune from such review and therefore not justiciable (*Stewart's case* at [41]-[47]). Until 1981, the prevailing view was that the exercise of any power by the Governor (as representative of the Crown) was not justiciable. However, after 1981 courts held that in some cases, the court could examine the exercise of the Governor's statutory and non-statutory (prerogative) powers (see: *R v Toohey; Ex parte Northern Land Council* (1981)151 CLR 170; *FAI Insurances Limited v Winneke* [1982] HCA 26; 151 CLR 342; and, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). In *Stewart's case*, the Court of Appeal held (at [42]) that the touchstone for determining the justiciability of such decisions was the political aspect of it. It was determined by reference to "*the suitability of the subject for judicial assessment and ... whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations*";

4. Whether the rules of procedural fairness or natural justice were "*sourced*" or found in statute or in the common law? There is high authority going either way. On this occasion, the Court held it was sourced in the common law (*Stewart's case* at [67]-[70]) However, the Court regarded it as "*relevant and important*" (*ibid* at [70] & [78]);

5. Whether the rules of procedural fairness or natural justice applied to the Governor or the Premier or the Senior Counsel in the circumstances – the Court held unanimously that the rules of procedural fairness did <u>not</u> apply to the Governor or the Premier in making such determinations but that it <u>might</u> apply to the Senior Counsel. Allsop P (at [73]-[74]) inclined towards the tentative view that procedural fairness might be capable of applying to the Senior Counsel, since she was engaged as an independent and skilled practitioner (and not as a Labour party elder) and review of her work was "*well suited to a court*" in judicial review. Hodgson JA also held that it might apply (at [108]-[114]) and that "*... the existence of the duty can arise from the nature of the decision and its potential to affect rights, without the necessity to imply the existence of the duty by some exercise of interpretation of the statutory provisions or rules pursuant to which the decision is made*" (at [113]). Handley AJA (at [131]-[137]) had "*serious doubts*" as to "*the existence of any freestanding legal duty to accord procedural fairness where a person has been given the task of investigation and report under a bilateral retainer without any authority in statute, prerogative, or consensual compact and without any legally recognised power*".

6. Whether public law (procedural fairness) principles <u>could</u> apply to a private individual (the Senior Counsel) conducting an investigation on a retainer in the absence of any public power or statute or contractual obligation to or relationship with the person whose reputation could be harmed? Was the law

of defamation sufficient?

7. Whether the plaintiff's claims impermissibly seek to call into question the contents of the report of the first defendant in a manner inconsistent with parliamentary privilege and Article 9 of the *Bill of Rights 1688*(Imp)? The Court did not answer this question. However, Hodgson JA explored the notion of parliamentary privilege and (at [121] and [124]) considered that it was arguable to him that "*this role of Parliament is not itself business of Parliament or a committee of Parliament, and that the tabling of a report prepared at the request of the Executive and provided to the Executive for the purposes of the Executive is not itself Parliamentary business that makes the report itself immune to criticism in the courts*"; Allsop P and Handley AJA agreed with this tentative view.

In *Stewart's case*, the Court of Appeal also considered principles of private tort law and found that no duty of care in negligence (and therefore damages) existed on the facts of the case between anyone. The Court set out the detailed analysis that one must undertake in seeking to identify whether a duty of care exists at all. Allsop P accepted Hodgson JA's analysis and held that a barrister asked to undertake such an important investigation task might be "*inhibited*" by exposure to damages by operation of the tort of negligence (at [50]to [57]). Hodgson JA undertook the primary analysis here as to each of the accepted factors in the context of the Senior Counsel and the plaintiff (at [85] to [106]). The accepted factors (the salient features of which must be assessed closely) in identifying whether a duty of care exists in tort are:

1. foreseeability;
2. degree of harm;
3. vulnerability;
4. reliance;
5. assumption of responsibility;
6. control;
7. conformity of a duty of care with other duties or legal obligations; and,
8. coherence with other legal principles.

These factors are not closed. There might be many more. A recent example is *Western Districts Developments Pty Limited and Turnpike Lane Pty Limited v Baulkham Hills Shire Council* [2009] NSWCA 283 (Giles & Campbell JA and Preston CJ of LEC) where the Court of Appeal found that a Local Council owed a duty of care to a purchaser of land as the certifying authority for a land subdivision.

One other example of possible factors in the *Stewart case* was the availability of the tort of misfeasance in public office. If it was available, it could have been a ground for excluding a duty of care in negligence. The Court accepted this (*Stewart* at [106]). However, misfeasance in public office was held not to apply to a person who does not himself or herself hold a public office, but is merely contracted by a public official to carry out some task (*ibid*, citing *Leerdam v Noori* [2009] NSWCA 90).

In the context of the government's involvement in the engagement of a Senior Counsel investigator to report on the conduct of a Minister, the analysis in *Stewart v*

Ronalds brings to mind the lengthy consideration given by the High Court to identifying a "*public law*" or "*administrative law*" "*tort*" or cause of action that started its life known as the *Beaudesert principle*. In *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 the High Court held that independently of the law of trespass, negligence and nuisance, and by an action on the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another was entitled to recover damages. The Northern Territory Court of Appeal extended this principle (in *Northern Territory v Mengel* (1994) 95 NTR 8 (1994) 83 LGERA 371 [1994] NTSC 37) to include recovery of damages for unlawful or unauthorised "*governmental action*".

A kind of government tort was born.

It was short lived. It did not survive the appeal to the High Court. In *Northern Territory v Mengel* (1995) 185 CLR 307, not only was the new government "tort" killed off, but the High Court killed off all remaining actions on the case, including the *Beaudesert principle* itself.

Justiciability and Cabinet or Political Decisions

Generally speaking, decisions of the Cabinet of the NSW Government are not amenable to challenge by way of judicial review if the decisions do not relate to individuals and are policy based (and therefore of general application and are "legislative" in intent). This was the subject of some discussion in *State of South Australia v O'Shea* (1987) 163 CLR 378 by Mason CJ (at 386-387).

In *McGuinness v State of New South Wales* [2009] NSWSC 40 (Hall J) the Supreme Court of NSW considered a case where the NSW Cabinet had determined to include the plaintiff's hotel in a list of hotels to be made subject by statute and by regulation to new stringent "anti-violence" conditions tacked onto the plaintiff's existing liquor licence. The Supreme Court held that Cabinet did <u>not</u> owe a duty of procedural fairness to the hotel licensee to first seek submissions about such a decision. The Court stated (at [90]-[91]):

> "The fact of Cabinet participation in the decision-making process is also a matter that may, depending upon the facts, point against the existence of a duty to act fairly in relation to it. Mason CJ observed in *O'Shea* (supra), that if the decision is within an area that falls within the ambit or scope of Cabinet concern and decision-making, then procedural fairness may not apply. Certainly, decisions that truly involve political judgments are in a special category and, generally speaking, will not be amenable to challenge on grounds of procedural fairness considerations.
>
> On the other hand, the fact that a particular decision is made by Cabinet may not preclude procedural fairness. This is so where the decision in question is concerned or is related to justice to the individual."

The Court also accepted (at [98]) that generally speaking, where a decision is a policy decision designed to serve the public interest, the relevant Minister or other decision

maker is not bound to hear an individual who will be affected adversely by it (citing *O'Shea* (supra) per Brennan J at page 411).

Appeal By Way Of Review

In *Sapina v Coles Myer Limited* [2009] NSWCA 71(Allsop P, Beazley& Hoeben JJA) the NSW Court of Appeal considered the true nature of an "appeal ... by way of review" in section s 352 of the *Work Place Injury Management and Workers Compensation Act 1998* (NSW) (the "Act"). That provided for an appeal to a Presidential member of the Workers Compensation Commission from an Arbitrator (in certain circumstances and, with leave of the Presidential member). The Court of Appeal exhaustively reviewed the authorities on the meaning of the expressions "appeal" and "review" in New South Wales legislation. The Court accepted (at [49]) that the starting point is as was explained by the High Court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261, (by Mason CJ, Brennan and Toohey JJ):

> '...[W]hat emerges from the judicial decisions and, for that matter, from statutes is that 'review' has no settled pre-determined meaning; it takes its meaning from the context in which it appears.'

The Court of Appeal ruled unanimously that the fact that the legislation used the term "appeal" to be one "by way of review" when used in circumstances with largely unlimited discretion conferred on the Presidential member as to the manner in which the appeal will be conducted and broad powers of the Presidential member to conduct a fresh hearing meant that the Presidential member is not constrained to intervene only if satisfied that the decision of the arbitrator below was affected by identifiable error. The Presidential member must decide for himself or herself the "*true and correct view*" of the appeal or, make the "*correct or preferable decision*" as understood in relation to normal merits review decision-making (see at [56]). It is wrong to simply decide whether or not the arbitrator's decision below was wrong. The Presidential member must make his or her own decision (at [68]).

Reviews of CTTT Decisions - A Troubling Tripartite Taxonomy

In *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292 (Spigelman CJ, Allsop P, Basten JA)(16 September 2009) the NSW Court of Appeal made a significant decision as to the nature of a statutory appeal from the Consumer, Trader and Tenancy Tribunal to Supreme Court pursuant to section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001*(NSW). Such appeals must now be commenced in the District Court of NSW. It was held in *Kostas* (at [103]) that section 67 appeals are limited to "*any decision of a question with respect to a matter of law which affects the ultimate outcome* ". Accordingly, it is now imperative that in commencing such appeals to the District Court, practitioners identify in the proceedings "***with a degree of precision*** *the decision with respect to a matter of law which is sought to be challenged on the appeal*" (*ibid* at [104]).

In the case, Basten JA (at [84] to [86]) set out his survey of statutory appeal provisions that were restricted in some way to legal error. He found that there were

(at least) three broad categories that can be identified by reference to different forms of statutory language. He said:

> "The first and broadest category of appeal arises where the right of appeal is given from a decision that "*involves a question of law*", being language which permits "the whole case, and not merely the question of law" to be the subject of the appeal: see *Brown v The Repatriation Commission* (1985) 7 FCR 302 at 303 (referring to *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; 41 CLR 148 and subsequent authorities).
>
> The second category is exemplified by provisions which permit an appeal "*on a question of law from a decision of*" a tribunal. In such cases, it is the appeal which must be on a question of law, that question being not merely a qualifying condition to ground an appeal but the sole subject matter of the appeal, to which the ambit of the appeal is confined: *Brown v The Repatriation Commission* at 304; *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (1988) 82 ALR 175 at 178.
>
> The third and narrowest category is one restricted to "*a decision of a Tribunal on a question of law*", in which case it is not sufficient to identify some legal error attending the judgment or order of the Tribunal; rather it is necessary to identify a decision by the Tribunal on a question of law, that decision constituting the subject matter of the appeal."

Statutory appeals from the CTTT under section 67 are in that third category. Accordingly, no appeal lies with respect to a matter of fact (at [16] per Spigelman CJ) Such appeals are liable to be the subject of continued scrutiny by the Court of Appeal.

For those who consider that the Court of Appeal was drawing unnecessary distinctions in the *Kostas case*, identification of an appealable "question of law" or "point of law" will become increasingly important in NSW.

In *SAS Trustee Corporation v Pearce* [2009] NSWCA 302 (Beazley, Giles & Basten JJA) (24 September 2009) a member of the police force who was hurt on duty including a psychological injury claimed a lump sum compensation payment under the *Workers Compensation Act 1987* (NSW) styled as a "gratuity" under the *Police Regulation (Superannuation) Act 1906* (NSW). His case in the District Court was to seek a ruling that he had suffered a 17% whole person impairment as a result of his psychological injuries. This was part of the "*residual jurisdiction*" of the District Court was conferred by the *Compensation Court Repeal Act 2002* (NSW). The District Court (Hughes DCJ) found that police officer suffered only whole body impairment of only 15.3%. The "employer" appealed to the Court of Appeal by section 142N of the *District Court Act 1973* (NSW) whereby one can appeal if "*aggrieved by an award of the Court in point of law*". "*Award*" is defined in s 142M to include "*interim award, order, decision, determination, ruling and direction*".

The Court held, *inter alia*, that where on a statutory appeal a decision of the Court below in point of law is said to be erroneous, a ground alleging failure to give reasons must be identified as a decision in point of law (at [121] per Basten JA, Beazley JA agreeing). Accordingly, this ground of appeal (that the reasons given by the trial

judge were inadequate and constituted an error of law) failed because it was not correctly described on the appeal in accordance with the terms of the statutory appeal provision.

Procedural Ultra Vires and Procedural Fairness

As you all know, in judicial review, the doctrine of *ultra vires*, also called the doctrine of "legality" involves an examination of whether an executive decision-maker has exceeded his or her (usually statutory) power. This doctrine applies in relation to decisions of the executive which exercises "*power*", as opposed to decisions of tribunals and courts which exercise power described as "*jurisdiction*". The concept of jurisdictional error is used instead of the doctrine of *ultra vires* in relation to decisions of tribunals and courts.

The doctrine of ultra vires includes three main branches:

- narrow, simple or substantive ultra vires;
- procedural ultra vires; and,
- extended ultra vires.

In *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37 (23 September 2009) (French CJ, Gummow, Hayne, Crennan and Bell JJ) the High Court of Australia again considered the notions of "procedural ultra vires" and natural justice.

By way of background, the ground of judicial review known as procedural ultra vires concerns a situation where there is in an enabling statute or regulation some pre-condition or matter which must be undertaken, decided upon or inquired into or notice given before a statutory decision may be lawfully made. Difficulty can arise if the legislature uses words such as the decision-maker "*shall*" and "*must*" do something before the decision-maker is empowered. Sometimes the courts interpret these provisions as directory only, that is, the decision is not rendered unlawful or void by the decision-maker having failed to first do what was prescribed. Other times, the courts regard these provisions as mandatory, that is, the procedural provision must be complied with before the decision-makers power is enlivened. Any decision made in those circumstances is simply ultra vires. The issue is often decided by answer to the question: what did Parliament intend should be the result of non-compliance with the provision? (Answered by application of the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91]).

The ground of procedural ultra vires was applied by the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294. There, the Court considered s 424A of the *Migration Act 1958* (Cth) which required that the Refugee Review Tribunal "*must*", in determining refugee status, first give to the applicant a statement in writing setting out particulars of information that would be a reason for refusing the refugee visa application. The court held (by majority, per McHugh, Hayne and Kirby JJ) that as the language of the provision was "imperative", compliance with the terms of the provision was "mandatory" (even during the course of an oral hearing) and failure to comply with it vitiated the tribunal's decision (see [70] and [71] per McHugh J).

This can be related to the concept of procedural fairness in that, if a procedural step is properly considered part of a statutory scheme whereby it encapsulates or constitutes a "*core element*" of the duty to accord procedural fairness, failure to take that step renders the decision ultra vires or it is a jurisdictional error: *Italiano v Carbone* [2005] NSWCA 177 at [105] to [106] per Basten JA.

It is all a matter of statutory construction.

In *SZIZO's case*, the High Court considered the validity of a written notification to a refugee applicant family by the Refugee Review Tribunal of an oral hearing under the very detailed notice provisions of the *Migration Act 1958*(Cth). The applicant was an entire Lebanese family claiming Convention persecution in their home country. Under the Act, the Tribunal was required to give (by section 441G(1) - "must give") the applicant's nominated "*authorised recipient*" a written notice of an oral hearing. The Tribunal failed to do this. The failure did not matter on this occasion, as the applicants were each separately notified of the oral hearing and they all turned up at it. The Tribunal's decision affirmed the Minister's delegate decision and the applicants appealed. The Full Federal Court considered that, particularly in light of *SAAP* and section 422B of the Act - where the Tribunal's procedures are described by Parliament as being "*an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with*" that the notice provision and all procedural provisions in that part of the *Migration Act* must be strictly adhered to and each step imposed an "*imperative duty*" and failure to undertake a particular step rendered the Tribunal's decision void.

This conclusion seemed a natural application of *SAAP*. The High Court did not agree and reversed the Full Federal Court's decision.

It held that SAAP was to be distinguished (at [31]) as the power there was of a different character. Here the power concerned "*the obligation imposed on the Tribunal to give notice of a hearing in the* manner *that is prescribed by s 441A*" (at [31]). In considering whether invalidity follows from a particular failure, Parliament intended that one must also consider the "*extent and consequences of the departure*" from the Act (at [35]) and one must look at "*the events that occurred*" (at [36]).

This approach of the High Court brings to mind the idea of "*practical justice*" in judicial review cases as was described by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, where, in discussing the manner in which procedural fairness cases are approached by the courts, he said (at [37]):

> "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."

Tribunals and the Duty to Inquire - (and Natural Justice and Wednesbury Unreasonableness)

From time to time, the courts have asserted that tribunals and statutory decision-makers have, 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 and 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 and Citizenship v SZIAI* [2009] HCA 39 (23 September 2009) 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.

It is common for merits review tribunals in Australia to have a power to enable them to obtain such information as it considers relevant and to permit it to inquire into and inform itself on any matter in such manner as it thinks fit. See, for example, sections 73(2) and 73(5)(b) of the *Administrative Decisions Tribunal Act 1997* (NSW) and section 424 of the *Migration Act 1958* (Cth) in relation to the Refugee Review Tribunal. As to the Refugee Review Tribunal, the High Court has held the existence of this power does not impose upon it a <u>general</u> duty to undertake its own inquiries in addition to information provided to it by the applicant and otherwise received under the Migration Act (*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 999 [43] per Gummow and Hayne JJ, Gleeson CJ agreeing at 992 [1]; 207 ALR 12 at 21-22, 13; [2004] HCA 32.).

In *SZIAI's case*, the High Court considered a refugee matter where the Refugee Review Tribunal had received information from a third party overseas - a Muslim Association in Bangladesh, as to whether the applicant was a member of a particular Muslim faith (a central issue to the claim for refugee status). The third party wrote that the certificate that applicant had submitted to the Tribunal was a "*fake and forged*" document and he was <u>not</u> a member of their particular Muslim faith. The Tribunal sent this letter to the applicant and he simply denied it was correct. In judicial review proceedings, the applicant asserted that the Tribunal had a duty to and should have made inquiry of the authors of the overseas certificate. Reliance was placed on the "inquisitorial" nature of the Tribunal's proceedings and is was contended that the decision was "manifestly unreasonable".

The High Court said the "inquisitorial" power of the Tribunal was not as important as its "core function", which was to "review" the original decision of the Minister's

delegate (at [18]). The Court said (at [25]) that the following proposition 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." (my emphasis)

However, on the facts of the case, the Court held (at [26]) there was no vitiating error because:

(a) There was nothing to indicate that any further inquiry by the Tribunal could have yielded a useful result; and

(b) The applicant's own response to the Tribunal's letter was a bare denial and more was needed to enliven a duty in such circumstances.

The NSW Ombudsman's office

I must acknowledge the recent success of the NSW Ombudsman's Office. On 5 February 2009, the Ombudsman published a comprehensive review of the NSW *Freedom of Information Act*, titled "*Opening up government: Review of the Freedom of Information Act 1989*".

This is a report of a comprehensive review of the FOI Act 1989 and it provided a blueprint for accessing government information in the future. The Ombudsman's recommendations were built around three key elements:

- a greater level of proactive disclosure of information;
- the drafting of a new, more clearly worded Act; and,
- the appointment of an independent Information Commissioner.

Happily, these recommendations were the foundation of wholesale legislative reform in NSW resulting in the enactment of the *Government Information (Public Access) Act* 2009 and the *Government Information (Information Commissioner) Act 2009.*

The entire new regime comes into effect in 2010. See - http://www.dpc.nsw.gov.au/prem/foi_reform_-_open_government_information

Anina Johnson, of the NSW Crown Solicitor's Office will speak about these developments later in the seminar.

Thank You