Administrative Law Update

A paper by Mark A Robinson, barrister, for the ADT Annual Members Conference on 5 November 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 also that have occurred in the High Court of Australia's "*constitutional writ*" jurisdiction under section 75(v) of the Commonwealth *Constitution*.

The decisions and issues I have identified to discuss today relate to:

1. The Model Litigant in NSW;
2. The Use of "Criminal Intelligence Reports" and "Criminal Information" and that Elusive Distinction between the Provision of Particulars and Evidence;
3. Tribunals and the Duty to Inquire - (and Natural Justice and Wednesbury Unreasonableness)
4. The Meaning of an Appeal By Way Of Review; and,
5. Reviewing Decisions on Questions of Law - A Troubling Tripartite Taxonomy.

The Model Litigant in NSW

The concept of the "*model litigant*" in Tribunal proceedings is, at one level, both self-contradictory and amorphous. Part of the *raison d'être* for the establishment of tribunals as merits review bodies is to draw a distinction between the role of tribunals and the role of courts; only the latter being involved in the "litigation" process. That distinction notwithstanding, both evolving policy and jurisprudence seem to readily demand that "model litigant" principles are to be applied and observed in proceedings generally whether they involve courts, tribunals, inquiries, arbitration or other alternative dispute resolution processes.

It is viewed by the High Court as a "*truism*" that statutory bodies of a State should be model litigants - see: *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [298] per Heydon J; also see *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104; [2005] HCA 27 at [84] per Callinan J:"*Governments and their emanations should be model litigants*". It is a "*tradition of the Crown*" to do so: see *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33 at [260] per Kirby J, who also viewed it as "*long-established convention and practice*", and, in the context of criminal prosecutions, considered the model litigant principles to be a "*feature*" of the common law system of criminal procedure: *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11 [162] per Kirby J.

In New South Wales, the development of a Model Litigant Policy was endorsed by Cabinet for adoption by all government agencies on 8 July 2008 and provides guidelines for the conduct of "*litigation*" by government agencies in this widest sense. The policy "*outlines expected models of behaviour and processes for lawyers working for government agencies*".

The Government's "*Model Litigant Policy for Civil Litigation*" is published at http://www.lawlink.nsw.gov.au/lawlink/lms/ll_lms.nsf/pages/lms_important_rules.

The policy provides plainly that "*the State and its agencies must act as a model litigant in the conduct of litigation*". The nature of the obligations referred to in the policy is set out (at [3.3] and [3.4]) as follows:

3.1 The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.

3.2 The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:

a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;

c) acting consistently in the handling of claims and litigation;

d) endeavouring to avoid litigation, wherever possible. In particular regard should be had to Premier's Memorandum 94-25 Use of Alternative Dispute Resolution Services By Government Agencies and Premier's Memorandum 97-26 Litigation Involving Government agencies;

e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

i) not requiring the other party to prove a matter which the State or an agency knows to be true; and

ii) not contesting liability if the State or an agency knows that the dispute is really about quantum;

f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;

g) not relying on technical defences unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum 97-26;

h) not undertaking and pursuing appeals unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an

> appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable; and
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> i) apologising where the State or an agency is aware that it or its lawyers have acted wrongfully or improperly.

As to the common law obligation for the Crown to act as a model litigant, this was identified and discussed by the New South Wales Court of Appeal in *Mahenthirarasa v State Rail Authority of NSW (No 2)* (2008) 72 NSWLR 273. In that case, the state agency had actively opposed an application in the Workers Compensation Commission. On judicial review proceedings in the Supreme Court, that same agency put on a submitting appearance and thereby it neither consented to nor opposed the orders sought. It also appeared by its legal representative in the Supreme Court and on the appeal in the Court of Appeal. However, it's legal representative simply sat at the Bar table throughout and made no submissions one way or the other, even upon direct invitation from the Court of Appeal for assistance in the case. The decision under review was set aside for legal error. In a separate decision on the question of costs, the Court of Appeal ordered the agency to pay the applicant's costs in the Common Law Division and in the Court of Appeal on the usual basis. In doing so, Basten JA said (at [16]-[20])(with Giles and Bell JJA agreeing):

> 16 In this State, the relevant principles as to the proper role of the executive government were succinctly stated by Mahoney J in *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383 in the following terms:
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> > "The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result."
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> 17 As his Honour noted, that principle was not novel, but was to be derived from long-standing authority applied to the Crown in the United Kingdom and reflected in this country in the remarks of Griffiths CJ in *The Melbourne Steamship Company Ltd v Moorehead* [1912] HCA 69; 15 CLR 333 at 342. In more recent years, the obligation of the government has been described as an expectation that it will act and be seen to act as a "model litigant": see *Yong v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 at 166E (Beaumont, Burchett and Goldberg JJ). ...
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> 20 These principles have for some years been recognised by express statements of the executive government. At the Commonwealth they are to be found in Legal Service Directions issued by the Attorney-General issued under s 55ZF of the *Judiciary Act* 1903 (Cth). Similar principles were promulgated by the Government in this State in 2004. As

> explained by Mahoney JA in *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537, the principles apply to a statutory corporation. Although in dissent as to the outcome, his Honour considered the approach adopted by the respondent Council in seeking to uphold a compulsory sale of property to recover unpaid rates, pursuant to a defective notice. His Honour noted that, "the council is a corporation constituted by statute, and discharging public functions": at 558F. He continued at 558-559:
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> > "It is well settled that there is expected of the Crown the highest standards in dealing with its subjects: see *Melbourne Steamship Co Ltd v Moorehead* …, per Griffiths CJ. What might be expected from others would not been seen as in full accord with the principles of equity and good conscience to be expected in the case of the Crown: see *P & C Cantarella* …. In my opinion, a standard of conduct not significantly different should be expected of a statutory corporation of the present kind."

The Court of Appeal held (at [21]) that if the agency had been of the view that the Commission's order could not fairly be defended, it should have advised the Court of that fact and its of reasons for reaching that conclusion. It was inappropriate for the agency (a statutory corporation) to stand by and in effect require the appellant to persuade the Court of the correctness of his position.

The Court ordered that the agency pay the plaintiff's costs, notwithstanding the submitting appearance.

In *Director-General, Department of Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102, the Court of Appeal considered proceedings that were commenced by the Director-General, initially by way of a statutory appeal. He succeeded on a number of the grounds set out there. However, he also commenced further proceedings by way of judicial review which Basten JA described (at [96]) as "*not an abuse of process, but the proceedings were otiose*". In addition, Basten JA said (*ibid*):

> ... all but two of the grounds of appeal were insubstantial. In support of the various grounds and the summons for judicial review, extensive and repetitive written submissions were filed. These factors imposed on the respondent an unnecessary burden. Particularly in the case of a Government officer pursuing statutory remedies, a failure to tailor claims with some care to the precise needs of the case, so as to avoid imposing unnecessary burdens on the other party, will usually mean that the officer will not have acted as a model litigant and will not recover the full costs of the proceedings, even if successful."

As an aside, you are aware that in the ADT, the "default" position on awarding costs in relation to reviewable decisions in Tribunal matters is in section 88(1) - that each party must bear that party's own costs of the proceedings. Since the 2008 amendments, the Tribunal has power to award costs based on "*fairness*" generally or fairness having regard to a number of specified criteria in section 88(1A). In *BE v University of Technology, Sydney (GD)* [2009] NSWADTAP 22, the Tribunal held

that an applicant who waited almost 5 months longer than the 28 days allowed to commence an appeal to the Appeal Panel (pursuant to section 113(3)(a)) should not be permitted to commence proceedings in relation to a privacy matter in the absence of an acceptable explanation for the delay. The Tribunal awarded costs against the applicant holding (at [29]) that filing an appeal well out of time "*provides a strong basis for a costs application*". In any event, the appeal bordered on the vexations and the Tribunal applied section 88(1A) factor (a)(vi) on costs.

In *Corrigan & Gibson v Watson* [2009] NSWADT 110, the Tribunal also discussed the new s 88 of the ADT Act. The Tribunal there pointed out that s 88:

- begins with a general statement of principle that each party to proceedings is to bear his or her own costs and that principle is different from the principle that applies in courts;
- gives the tribunal a discretion to award costs '*but only if it is satisfied that it is fair to do so*' having regard to certain matters which are listed at (a) to (e);
- those matters include '*any other matter that the tribunal considers relevant*'.

The Tribunal held in that case (at [11]) that cases on section 109 of *Victorian Civil and Administrative Tribunal Act 1998*(VIC) (on which s 88 was modelled) and which has been in operation for more than 10 years, were relevant in construing section 88 of the ADT Act.

While it is probably not permissible for an agency to be exposed to costs solely because it did not live up to the high standard of it being a model litigant, it cannot be considered irrelevant in Tribunal costs decisions. It would be most desirable (from the Tribunal's perspective) to have inserted into the ADT Act a provision that is based on section 33(1AA) of the *Administrative Appeals Tribunal Act 1975*(Cth) which provides:

> "**Decision-maker must assist Tribunal**
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> (1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding."

In one sense, such an amendment should not be necessary in NSW if the model litigant policy of the government is fully embraced and implemented by government agencies. However, it may be suggested that the role of the primary decision maker in assisting the Tribunal has not yet been fully explored.

One thing is for sure and that is in their dealings with the Tribunal, New South Wales government agencies should bear in mind that the objects and purpose of the ADT in s 3(f)&(g) of the ADT Act includes the following:

> "(f) to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs,

> (g) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales."

The Use of "Criminal Intelligence Reports" and "Criminal Information" and that Elusive Distinction between the Provision of Particulars and Evidence

In *Commissioner of Police New South Wales v Gray* [2009] NSWCA 49 the NSW Court of Appeal (McColl JA with Giles and Tobias JJA agreeing) considered the recent spate in New South Wales of Parliament requiring total secrecy in the use of what is described as "criminal intelligence reports" and "other criminal information".

The issue has placed the Administrative Decisions Tribunal at the centre of some disturbing controversies in the security industry licence area. In short, recent amendments to section 15(6) and section 29(3) of the *Security Industry Act 1997* (NSW) provide that the Commissioner for Police may determine an application of an applicant for a security industry licence by reference to criminal intelligence reports that do not have to be disclosed to the applicant. On internal review, and then appeal to the Administrative Decisions Tribunal, the legislation provides that the tribunal is not to disclose in its reasons for decision "*or otherwise*" the existence of or content of any criminal intelligence report or other criminal information within the meaning of the said provisions.

The Court of Appeal set out a detailed survey of the tribunal's general division jurisdiction and recorded the legislative history of the provisions and noted the similarity of the provisions to those that have also been recently introduced to licensing decisions made under the *Firearms Act 1996* (NSW). The Court of Appeal also surveyed developments in other States in related areas that ultimately made their way to the High Court of Australia in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 and *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 252 ALR 471.

The Court ultimately held that in ordering the provision of particulars below, the tribunal member, and the Associate Justice of the Supreme Court of New South Wales, impermissibly drew a distinction between the provision to an applicant of particulars of the alleged bad conduct he is said to have engaged in (such as to disqualify him from being a security industry guard) and the provision of the very content of the criminal intelligence reports intended to be fully protected by the legislation.

The Court held, in essence, that the legislative provisions constituted a form of statutory public interest immunity that overrode any duty to afford an applicant natural justice or procedural fairness. Specifically, the Court held (at [112]) that section 29(3) of the *Security Industry Act* impliedly repealed section 73 of the ADT Act (which requires the tribunal to afford procedural fairness).

This decision places the tribunal in a real quandary, both legal and practical. It also goes to perceptions of fairness and of the independence of the tribunal.

The Commissioner of Police will know the reason why an applicant is not suitable to be a security guard. The review legislation requires the tribunal to take this material into account. The applicant can never know what it is all about and why he or she is regarded as unsuitable.

The only consolation left for the tribunal by the Court of Appeal is that the question of classification of the information as properly being "criminal intelligence immune from scrutiny"*is a matter for the tribunal to be satisfied, perhaps by questioning in closed session*" (see at [92] to [96]).

In *Gray*, the Court of Appeal simply permitted the judicial review proceedings and the appeal to be conducted as against a single member of the ADT in spite of section 123 of the ADT Act (where, in judicial review proceedings, there is a discretion to refuse relief when an avenue of appeal is available in the tribunal below). The Court held that the matter was one in respect of a very important evidentiary issue, namely, the tender of confidential information which was not to be supplied to the applicant by reason of special legislation. In addition to the importance of the question, there were a number of conflicting decisions of the tribunal as to the proper construction of the legislation (at [6]). McColl JA (at [27]) made note of Barrett J's "*helpful*" discussion of section 123 in *NSW Breeding & Racing v Administrative Decisions Tribunal* (NSW) (2001) 53 NSWLR 559 and said (at [128])(Giles and Tobias JJA agreeing):

> "[T]his Court must also consider whether, having found error of law, it should grant relief having regard to the alternative avenue for appeal which was open to the appellant. In my view it should. While there is a sensible rule, reflected in s 123 of the ADT Act, not to grant discretionary relief in the nature of the prerogative writs where the facility of internal appeal has not been utilised, “the rule is neither inflexible nor universal [but] simply a sensible principle of restraint, allowing for the efficient and proper use of judicial time and of the remedies involved”: *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 (at 248) per Kirby P; approved *Lloyds v Veterinary Surgeons Investigating Committee & Anor* [1999] NSWCA 68 (at [13]) per Priestley JA (with whom Mason P and Stein JA agreed)."

The whole question of the use of confidential information and secret information in tribunal proceedings must always be controversial. One party may always regard the withholding of evidence before the tribunal as a denial of natural justice or as otherwise legally impermissible.

In 2005 in *QJ v Public Guardian* [2005] NSWADTAP 45,the Appeal Panel determined an appeal from the Guardianship Tribunal in its protective jurisdiction. Evidence was given before the tribunal below about an amount of money given as a gift to an elderly woman the subject of guardianship and financial management orders. That evidence was withheld from the applicant (the subject woman's daughter) and, on appeal to the Appeal Panel it was held to be permissible for the tribunal below to receive "*secret evidence*" but that it should be "*an exception rather than a routine event*" and that it should be a matter determined on a case-by-case basis (at [20]). The Appeal Panel determined that it was not beyond doubt, however, because the tribunal was not bound by the rules of evidence, it had power to admit evidence and ruled that this evidence not be disclosed to a particular party or parties (at [19]). The Appeal

Panel noted that courts have inherent jurisdiction to admit evidence and yet withhold it from an affected party, citing the decision of Smart J in *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R 74; [2004] NSWSC 502.

In *Nicopoulos*, the Supreme Court considered the validity of a decision of the Commissioner for Corrective Services in New South Wales to prohibit a solicitor practising in criminal law from attending any correctional centre in New South Wales by reason of certain contraventions of the prison regulations and also based on "*confidential intelligence information*" alleging other misconduct which was not given to the solicitor. In the judicial review proceedings in the Supreme Court, which were unsuccessful, confidential evidence was permitted to be tendered and considered by the court notwithstanding that it was damaging evidence and put the plaintiff in an "*impossible position*" (see [59] to [92]).

A number of lawyers are waiting for the opportunity to test the correctness of that decision in the Court of Appeal or the High Court of Australia.

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) ["*The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of*

natural justice."] and 73(5)(b) ["*The Tribunal ... is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings*"] 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 general 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 not 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.

I should add by way of caution that some care should be taken in considering and applying High Court decisions on "jurisdictional error" based on or founded on section 75(v) of the *Constitution* in New South Wales. While it is generally correct to say that that if they are not directly binding on the State courts (because of, for example our different constitutional structures), they are generally "*instructive by way*

of analogy" - See: *Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales* [2009] NSWCA 83 at [78] (Per Spigelman CJ, Allsop P and Tobias JA agreeing).

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 handed down 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).
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> 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.
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> 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.

At the Commonwealth level, and interesting consideration of the need for an appellant to find specifically a "question of law" on an appeal to the Federal Court from a decision of the AAT, see Perram J in *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 108 ALD 329; [2009] FCA 49 (which was overturned by the Full Court in *Civil Aviation Safety Authority v Central Aviation Pty Limited* [2009] FCAFC 137.

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.

Thank You