Recent Developments in Administrative Law

A paper delivered by Mark Robinson SC to a NSW Legal Aid Civil Law Conference held in Sydney on 22 August 2014

I am asked to speak to you today about recent developments in administrative law.
I will not limit myself to NSW, as there are a number of federal developments worth noting.
I will address you on the following topics:

1. The Civil and Administrative Tribunal of New South Wales (NCAT)
2. The New Rule 59 of the *Uniform Civil Procedure Rules 2005* (NSW)
3. *Roads and Maritime Services v Porret* [2014] NSWCA 30
4. *Twaddell v New South Wales Land and Housing Corporation* [2014] NSWSC 7
5. *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93
6. The proposed Federal Tribunal Merger

The Civil and Administrative Tribunal of New South Wales (NCAT)

The *Civil and Administrative Tribunal Act 2013* (NSW) ("**NCAT Act**") was passed by the NSW Parliament and assented to and commenced on 4 March 2013. The practical effect of this Act is that it provided for the State's first true Super Tribunal, in the form of the Civil and Administrative Tribunal of New South Wales (also officially known as NCAT). NCAT commenced operation on the "*establishment day*" which was 1 January 2014.

Cognate Acts introduced months later include the *Civil and Administrative Tribunal Amendment Act 2013* (NSW) (Act No 94 of 2013) which was assented to on 20 November 2013. Schedule 1, which commenced on that day, extensively amended the *Civil and Administrative Tribunal Act 2013* (NSW). The NCAT Act is fully operative and the consolidated version is published by Parliamentary Counsel at www.legislation.nsw.gov.au.

Schedule 2 of the NCAT Act, which began operation on 1 January 2014, extensively amended the "*Administrative Decisions Tribunal Act 1997*" and renamed it the "*Administrative Decisions Review Act 1997*" ("**Review Act**"). It conferred on NCAT

exclusive jurisdiction for the review of "*administratively reviewable decisions*" (formerly known as, "*reviewable decisions*").

In addition to this, Parliament passed the *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* (NSW)(Act No 95 of 2013). It was assented on 20 November 2013. It commenced on the "*establishment day*" and effectively transferred the functions of the existing tribunals to NCAT, and repeals and amends legislation, consequent on the establishment of the new tribunal.

So we are now left with the NCAT Act and the *Administrative Decisions Review Act 1997.*

The Super Tribunal

The super tribunal is headed by a Supreme Court judge (as per section 13). The first appointment of President was Justice Robertson Wright. Ms Sian Leathem was appointed as the first "principal registrar of the tribunal" (section 4(1)).

The tribunal operates from three different locations. The NCAT Principal Registry is located at Level 9, John Maddison Tower, 86-90 Goulburn Street, Sydney NSW 2000.

The Administrative and Equal Opportunity Division and the Occupational Division operate from Level 10 John Maddison Tower. The Consumer and Commercial Division operate from Level 12, 175 Castlereagh Street, Sydney NSW 2000. The Guardianship Division operates from Level 3, 2a Rowntree Street, Balmain NSW 2041. Health professional matters continue to be heard in at the Health Professional Councils Authority premises at Level 6, North Wing, 477 Pitt Street, Sydney.

The contact details for NCAT are as follows - phone: 1300 006228 and the web site will be: www.ncat.nsw.gov.au. Some details are now available at:
http://www.ncat.nsw.gov.au/ncat/index.html
And some background is available at:
http://www.tribunals.lawlink.nsw.gov.au/tribunals/index.html

Civil and Administrative Tribunal Regulations 2013 have been promulgated which deal with filing fees and fee waiver; allowances and expenses payable to witness; to prescribe members of the Guardian Ad Litem Panel, constituted by the Director-General of the Department of Attorney General and Justice, who are appointed by the tribunal to represent parties to proceedings in the tribunal; the procedure for referral by the tribunal of parties to mediation, and there are the *Civil and Administrative Tribunal Rules 2014* which constitute procedural rules for the tribunal.

NCAT took over the jurisdiction and work of 22 existing State tribunals, including the Administrative Decisions Tribunal of NSW (ADT) – which itself was formed from a number of different State tribunals (including the Equal Opportunity Tribunal, the Legal Services Tribunal and the Community Services Appeals Tribunal).

The new tribunal also includes tribunals such as the Consumer, Trader and Tenancy Tribunal, the Medical Tribunal and the Local Government Pecuniary Interest and Disciplinary Tribunal.

The first thing to notice about the NCAT Act is that understanding it is complex.

The Act must be read together with and, often, subject to its many Schedules (which are also complex). Further, there are many dozens of other Acts, styled as enabling Acts, that also give or augment the NCAT's power, functions and procedure in particular matters or for particular administrative decisions.

If you like working in 3D, the NCAT world is in 4D.

This complexity was always to be, since the NCAT is structured as an amalgam of both:

1. the classic external independent administrative review tribunals, such as the Commonwealth's Administrative Appeals Tribunal; and also,

2. the jurisdiction of State courts or quasi-judicial tribunals, such as the Consumer, Trader and Tenancy Tribunal.

Parliament's intention was to attempt to maintain, as far as possible, each former tribunal's

practice, procedure and diversity.

To this end, there are extensive savings and transitional provisions and provisions that caused all members of the existing tribunals to become members of the new tribunal on the establishment day (NCAT Act, Schedule 2, clauses 3 & 4). As well, all matters that were current in 2013 in the various existing tribunals were be deemed to have been "*duly commenced*" in the new tribunal (Schedule 2, clause 7)).

In all, the new President of NCAT is be responsible for about 270 tribunal members who originated from about 29 former tribunals.

The objects of the NCAT Act

Section 3, the objects provision, sets out an overview of the tribunal. It provides

> The objects of this Act are:
>
> (a) *to establish an independent Civil and Administrative Tribunal of New South Wales to provide a single point of access for most tribunal services in the State, and*
> *(b) to enable the Tribunal:*
> *(i) to make decisions as the primary decision-maker in relation to certain matters, and*
> *(ii) to review decisions made by certain persons and bodies, and*
> *(iii) to determine appeals against decisions made by certain persons and bodies, and*
> *(iv) to exercise such other functions as are conferred or imposed on it, and*
> *(c) to ensure that the Tribunal is accessible and responsive to the needs of all of its users, and*
> *(d) to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and*
> *(e) to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality, and*
> *(f) to ensure that the Tribunal is accountable and has processes that are open and transparent, and*
> *(g) to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.*

These are high ideals indeed.

The Membership of the Tribunal

The membership of the tribunal consists of the President, Deputy Presidents, principal members, senior members, and general members. There are a number of other different descriptions.

The notion of judicial and non-judicial members from the former ADT has gone.

The President and the Deputy Presidents are referred to in the Act as "*presidential members*" and the others are referred to as "*non-presidential members*" (section 9). Occasional members may be appointed pursuant to section 11 and members may be appointed for a limited period pursuant to section 12.

To be appointed, the President must be a judge of the Supreme Court of NSW, and the Deputy Presidents, Principal members, and senior members must be Australian lawyers of at least seven years' experience or with special knowledge, skill or expertise in the relevant tribunal matters [or be a former judicial officer (in the case of the deputy presidents)]. General members are lay members who have necessary skills or those who represent relevant public or community groups concerned in the work of the tribunal (section 13).

Divisions and Structure of the Tribunal

There are four divisions of the tribunal (section 16(1)). They are the:

1. Administrative and Equal Opportunity Division,
2. Consumer and Commercial Division,
3. Occupational Division, and,
4. Guardianship Division.

The Appeal Panel functions of the tribunal are not allocated to any particular division (section 16(4)). Each division has its own schedule in the Act (section 17) dealing with the requirements for each appointment including the division head, division members and procedure. The Act also deals with the allocation of functions from the relevant enabling

legislation (giving the tribunal its jurisdiction), and any "*special requirements*" in its practice, procedure and appeals. Section 17(4) of the regulations permits changes to the name of a division or to the division schedules in the NCAT Act.

The functions of the President are set out in section 20. He must make rules for use on establishment and he must manage the members. There is a Rule Committee of the tribunal (section 24) constituted by the President, the Division Heads and appointed members. The President is given extensive power to issue "*procedural directions*" (section 26). These directions may relate to the practice and procedures to be followed or the conduct of proceedings in the tribunal. Members, parties to proceedings, and their representatives, "*must*" comply with any applicable procedural directions (section 26(4)).

At the moment, there are four NCAT-wide Procedural Directions that have been issued:

http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/service_and_giving_notice.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/summonses.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/expert_witnesses.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/registrars_powers_directions.pdf

The President has also issued a Guideline on Internal Appeals:

http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l29/ncat_guideline_internal_appeals.pdf

There are also some Divisional Procedural Directions that can be found at:

http://www.cc.ncat.nsw.gov.au/cc/Resources/Procedural_directions_and_guidelines.page?
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l8/procedural%20direction%20costs.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l8/procedural%20direction%20representation.pdf

Rules and procedural directions (in particular) are being used to essentially reflect the practice and procedure of the former tribunals as far as possible. This will be so initially. Whether they will be substantially modified in time remains to be seen.

The former ADT used "*practice notes/guidelines*" in the general conduct of the tribunal to

great effect, instead of relying on regulations and rules.

The Tribunal's Jurisdiction

Part 3 of the NCAT Act (section 28) sets out the jurisdiction of the tribunal as follows:

1. General jurisdiction (section 29(1)),
2. Administrative review jurisdiction (the ADR Act and Schedule 3),
3. Appeal jurisdiction (external and internal appeals)- sections 31, 32 and Part 6 of the NCAT Act, sections 79-81, and
4. Enforcement jurisdiction (section 33 and Part 5 of the Act, sections 71 to 78).

The general jurisdiction deals with matters acquired by way of enabling legislation (other than the NCAT Act or the procedural rules). It allows the tribunal to make decisions, or exercise other functions, of a kind specified in the legislation either by a party's application, or of its own motion. The tribunal can make interlocutory or ancillary decisions and exercise the functions conferred by the enabling Act.

The administrative review jurisdiction is the jurisdiction as provided by the *Administrative Decisions Review Act 1997,* and that Act provides for circumstances in which the tribunal has administrative review jurisdiction over a decision of an administrator. Schedule 3 applies. External and internal appeals are provided for in section 31 and 32.

The enforcement jurisdiction is provided for in section 33 and Part 5 of the Act, sections 71 to 78. It deals with alleged or apparent contempt of the tribunal, and applications under section 77 of the NCAT Act for a contravention of a civil penalty provision.

The Tribunal and the Supreme Court

Section 34 of the NCAT Act provides that on an application for judicial review of an "*administratively reviewable decision*", the Supreme Court may refuse to hear the matter if it is satisfied that adequate provision has been made for an internal review of the decision (by an administrator), or an administrative review of the decision by the tribunal is available under the *Administrative Decisions Review Act 1997*. The Court can refuse to hear such an

application if an external or an internal appeal is available under the NCAT legislation (cf: former 123 of the old *ADT Act*).

Practice and Procedure

Part 4 of the NCAT Act provides for the tribunal's practice and procedure. It is subject to particular provisions in the enabling legislation and the "*procedural rules*" (defined in section 4(1) to be the tribunal rules and the regulations) (section 35). See also the schedules for each division of the tribunal. Note that these schedules actually override any general provisions as to practice and procedure in the NCAT Act.

Section 36(1) provides the "*guiding principle*" for the Act and the procedural rules namely to facilitate the "*just, quick and cheap resolution of the real issues in the proceedings*". These same principles apply to the Supreme Court of NSW by virtue of section 56(1) of the *Civil Procedure Act 2005* (NSW).

NCAT is required to give effect to this guiding principle when it exercises any power given to it by the NCAT Act or the procedural rules, or when it interprets any provision of the Act, or the procedural rules (section 36(2)). Each party to NCAT proceedings and each barrister or solicitor representing them is also "*under a duty to co-operate with the tribunal*". Their duty to give effect to the guiding principle includes participating in the processes of the tribunal and complying with directions and orders of the tribunal (section 36(3)).

In addition, the practice and procedure of NCAT is to facilitate the resolution of the issues so that the cost to the parties and the tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings (section 36(4)). This provision will be particularly important in privacy and freedom of information cases, which are often conducted by self-represented litigants.

Mediation and other forms of alternative dispute resolution processes are provided for in section 37. The tribunal may, where it considers it appropriate, use (or require parties to proceedings to use) any one or more resolution processes. "Resolution processes" are defined

as any process in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings.

Section 38 sets out the general procedure of the tribunal. The tribunal may determine its own procedure in relation to any matter for which the NCAT Act or the procedural rules do not otherwise make provision (section 38(1)).

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 (section 38(2)). It is important to note, that the rules of evidence do apply in the tribunal's enforcement jurisdiction and section 128 (Privilege in respect of self-incrimination) of the *Evidence Act 1995* applies to all proceedings – section 38(3) and in disciplinary matters under the *Legal Profession Act* 2004.

In addition to this, the tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (section 38(4)).

By section 38(5), the tribunal is to take such measures as are reasonably practicable:

1. to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
2. if requested to do so—to explain to the parties any aspect of the procedure of the tribunal, or any decision or ruling made by the tribunal, that relates to the proceedings, and
3. to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

Further, by section 38(6) the tribunal:

1. 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, and
2. may require evidence or argument to be presented orally or in writing, and
3. in the case of a hearing—may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases.

These provisions are the standard provisions applicable to independent external merits appeals tribunals in Australia – see, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [140]-[141], Kiefel J stated (with Crennan J agreeing (at [117]); at [96] to [100] (per Hayne and Heydon JJ); at [30] to [32], [33] to [38],[39] to [42] (per Kirby J). Note, some of the divisions are not quite merits review jurisdiction. For example, the Occupational division and the work of the former CTTT are original jurisdiction matters, more amenable to the work of quasi-judicial tribunals or courts. How this will square with section 38 remains to be seen.

Commencing proceedings in NCAT

An application may be made to the tribunal including a complaint, referral or other mechanism as provided in the enabling legislation for a matter to be brought to the tribunal for a decision (section 30). An application or an appeal is to be made in the time and manner prescribed by the enabling legislation or the procedural rules (section 40). The tribunal is empowered to extend time, even if the time has expired and in spite of what the enabling legislation might provide (section 41).

Pending applications or appeals do not stay the operation or effect of the original decision (section 42). However, the tribunal is empowered to make "*such orders (whether with or without conditions) staying or otherwise affecting the operation of a decision to which a pending general application or appeal relates as it considers appropriate to secure the effectiveness of the determination of the application or appeal*" (section 43(3)) (cf: ss 60 to 62 of the former ADT Act).

Participation in Proceedings

The tribunal may order that a person be joined as a party to proceedings if the tribunal considers that the person should be joined as a party (section 44(1)). This is a very wide joinder test. See, the limited test in s 67(1) of the former ADT Act (parties to proceedings before tribunal).

There is a right to intervene in proceedings and to "*be heard*" for the Attorney General, the Minister who administers the relevant legislation, and any other person who is authorised by the NCAT Act, enabling legislation or the procedural rules to intervene in the proceedings (section 44(4)). If a Minister intervenes in proceedings, costs may be paid by the Minister to a party where the costs to the party have increased as a result of the intervention as per section 44(5).

The general rule is that legal representation of parties is not permitted in NCAT except by leave. Section 45(1) provides a party has the carriage of the party's own case and is not entitled to be represented by any person unless the tribunal grants leave. Legal representation is permitted without leave in an internal appeal to the Appeal Panel if the party had a right to representation below (section 45(2)). Exceptions exist to this rule in the division schedules for particular matters (see below, including for health professionals in the Occupational Division).

The tribunal may call any witness of its own motion, and examine them on oath, or affirmation, or require evidence to be verified by a statutory declaration, and compel any witness to answer questions which the tribunal considers to be relevant in any proceedings (section 46(1)). It can issue a summons (or direct a registrar to issue a summons) (section 46(2) and 48). Witness allowances and expenses can be paid if the regulations permit it (section 47).

Conduct of proceedings

Pursuant to section 49, a tribunal hearing is to be open to the public unless the tribunal orders otherwise. It may (of its own motion or on the application of a party) order that a hearing be conducted wholly or partly in private if satisfied by reason of the confidential nature of the evidence, or subject matter, or for any other reason.

The Tribunal may dispense with a hearing if written submissions or any other documents or material lodged permit it to adequately determine the matter in the absence of the parties

(section 50(2)and (3)). This is a change from the former ADT Act, where consent of the parties was necessary.

By section 54, if the president consents, the tribunal (including when constituted as an Appeal Panel) may, of its own motion or at the request of a party, refer a question of law arising in the proceedings to the Supreme Court for the opinion of the Court (cf: s 789A of the former *ADT Ac*t).

As to the costs of proceedings in the tribunal – section 60 – the primary position is that each party to proceedings in the tribunal is to pay the party's own costs. Costs may be awarded but only if the tribunal is "*satisfied*" that there are "*special circumstances*" warranting such an order (cf: section 88 of the former ADT Act, where the test started off as special circumstances, but was later amended to a test of fairness). In determining whether there are special circumstances, the tribunal may have regard to the following:

1. whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
2. whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
3. the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
4. the nature and complexity of the proceedings,
5. whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
6. whether a party has refused or failed to comply with the duty imposed by section 36(3), the guiding principle and whether the party facilitated the just, quick and cheap resolution of the real issues in the proceedings, and
7. any other matter that the tribunal considers relevant.

The Division Schedules provide exceptions to the general position on costs.

Reasons for the Decision

The tribunal and the appeal panel must give notice of any decision made on the proceedings (section 62(1)). If no reasons are provided, any party may, within 28 days of being given notice of a decision, request the tribunal to provide a written statement of reasons for its

decision. The statement must be provided within 28 days after the request is made (section 62(2). Written reasons must include the following:

1. the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
2. the tribunal's understanding of the applicable law,
3. the reasoning processes that lead the tribunal to the conclusions it made.

(cf section 49(3) and 89 of the former ADT Act). The tribunal also has the power to correct obvious errors on the face of decisions (section 63).

Enforcement

Unlike the former ADT, the tribunal has its own enforcement regime – sections 71 to 78. For contempt committed in the face of the tribunal or in a hearing, the tribunal has the same powers as the District Court – section 73. It can also refer a contempt matter to the Supreme Court for determination (section 73(5)).

There are detailed provisions dealing with contraventions of civil penalty provisions of the NCAT Act (section 77). There are also provisions for civil enforcement of monetary decisions of the tribunal (section 78), which allow a certificate to be filed in a court of competent jurisdiction for further recovery proceedings to continue.

Appeals

An external appeal may be made to the tribunal by a person entitled to do so under enabling legislation on any basis or grounds provided for in that legislation (section 79). There are lots of provisions for external appeals in the regulation of health professionals. A normal layer of tribunal review is usually skipped and the first time the tribunal hears the matter here is as an external appeal.

An internal appeal may be made to an Appeal Panel by a party to a tribunal decision from an "*internally appealable decision*" (section 80). Interlocutory decisions may be appealed with leave. Other appeals are heard "*as of right*" on any question of law, or with the leave of the Appeal Panel, on any other grounds (section 80(2)). There are few, if any, such appeals

available to health professionals. The intention is to by-pass them – to go straight to the Supreme Court from a single layer tribunal hearing..

The Appeal Panel has wide powers to deal with an internal appeal. The Appeal Panel may decide to deal with it by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and, it can permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the tribunal at first instance, to be given in the new hearing as it considers appropriate (section 80(3)).

In determining an internal appeal (section 81), the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:

(a) the appeal to be allowed or dismissed,
(b) the decision under appeal to be confirmed, affirmed or varied,
(c) the decision under appeal to be quashed or set aside,
(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
(e) the whole or any part of the case to be reconsidered by the tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

On appeals, the Appeal Panel may exercise all the functions that are conferred or imposed by the Act or other legislation on the tribunal at first instance when varying, or making a decision in substitution for, the decision under appeal. The tribunal, will be able to stand in the shoes of the tribunal below, which itself, could stand in the shoes of the original administrative decision-maker - *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

Appeals to Courts

Subject to what is provided for in the division schedules or an enabling Act, the NCAT Act provides for limited appeals *with leave* to the Supreme Court (if the tribunal was constituted by one or more senior judicial officers) and for similar appeals to the District Court in civil penalty matters (but only if the tribunal or appeal panel was <u>not</u> constituted, by or with, any

senior judicial officers) (section 83(1) & (2)). The tribunal or its members cannot be made a party to an appeal (section 84(3)).

A party may appeal:

1. any decision made by an Appeal Panel in an internal appeal,
2. any decision made by the tribunal in an external appeal, and
3. any decision made by the tribunal in proceedings in which a civil penalty has been imposed by the tribunal in exercise of its enforcement or general jurisdiction (section 82(1).

A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the tribunal in the proceedings (section 83(1)). A civil penalty matter may be appealed to an appropriate appeal court for the appeal (without leave) on a question of law (section 83(2)) (*ie;* The Supreme Court or the District Court, depending on whether the tribunal was constituted by "*senior judicial officers*" – defined in section 82(3)).

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

1. an order affirming, varying or setting aside the decision of the tribunal,
2. an order remitting the case to be heard and decided again by the tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.

In civil penalty matters, the appellate court may substitute its own decision for the decision of the tribunal that is under appeal (section 83(4)).

There is no automatic stay of the operation of a decision of the Appeal Panel. It must be obtained at NCAT or from the appellate court (section 83(5)).

These limited appeal provisions to the Supreme Court are new. There was a right of appeal to the Supreme Court in the ADT Act (section 119 of the ADT Act) as of right "*on a question of law*" (but with leave on interlocutory and consent and costs decisions). Now, leave to appeal

is required in all cases from NCAT's Appeal Panel and external appeals.

Judicial review (as of right) is unaffected by these provisions. Section 69 of the *Supreme Court Act (NSW)* 1970 and Part 59 of the *Uniform Civil Procedure Rules 2005* would apply to such matters.

The Division Schedules

The particular work and jurisdiction of the divisions is set out in the schedules to the NCAT Act. Each schedule deals broadly with special provisions regarding composition of the division (usually a division head and appointed members), functions of the division, special NCAT constitution requirements, special practice and procedure requirements (including any special rights of legal representation); appeal rights – both to the Appeal Panel and/or the Supreme Court or other courts.

Schedule 3 Administrative and Equal Opportunity Division

This schedule sets out the functions of the Administrative and Equal Opportunity Division. Broadly speaking, this division covers:

1. Freedom of Information (GIPPA)
2. Privacy
3. Community services
4. Equal opportunity
5. Discrimination
6. Victims services
7. Job and firearm licensing
8. State revenue
9. Working with children checks
10. Charity referees
11. Land matters

Thirteen Acts are listed there as giving jurisdiction to this division. However, Schedule 3, clause 3(1)(b) provides that the division's work includes "*any other function of the Tribunal in relation to legislation that is not specifically allocated to any other Division of the Tribunal by another Division Schedule for a Division*".

The tribunal is constituted differently in Schedule 3 for different matters (Schedule 3, clauses 4-8). There is a general right of legal representation in the division, no leave is required (Schedule 3, clause 9 – cf section 45) except for matters under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*).

There are provisions as to who may be a party in some jurisdictions and special provisions about appeal rights. Direct appeal to the Supreme Court on a question of law is provided for regarding decisions under the *Child Protection (Working with Children) Act 2012* and the *Commission for Children and Young People Act 1998* (Schedule 3 clause 17). An appeal direct to the Land and Environment Court is provided for regarding "*lands legislation*" matters (Schedule 3, 18).

Schedule 4 Consumer and Commercial Division

This division deals with the following types of matters:

1. Consumer claims
2. Commercial matters
3. Home building
4. Motor vehicles
5. Residential parks
6. Retirement villages
7. Social housing
8. Strata & community schemes
9. Residential tenancies
10. Retail leases
11. Dividing fences

There is no right of legal representation for this division, except for *Retail Leases Act 1994* matters and for those granted legal assistance under Division 2 of Part 2 of the *Fair Trading Act 1987* (Schedule 4, clause 7). Everyone else is subject to section 45, with no right of representation except by leave.

Schedule 4, clause 12 outlines complicated appeals provisions for this division. An internal appeal is available as of right (section 80(2)(b)) on a question of law or (with leave) on any

other grounds. However, an appeal from this division may only be made with leave from the Appeal Panel if the Appeal Panel is "*satisfied*" that the appellant has suffered a substantial miscarriage of justice because the decision of the tribunal under appeal:

1. was not fair and equitable, or
2. was against the weight of evidence, or
3. significant new evidence has arisen (being evidence that was not reasonably available earlier).

An internal appeal may only be made on a question of law and not on any other ground for a corporation where the first instance jurisdiction was Schedule 3 of the *Credit (Commonwealth Powers) Act 2010*, or the appeal is an appeal against an order of the tribunal for the termination of a tenancy under the *Residential Tenancies Act 2010* and a warrant of possession has been executed in relation to that order (Schedule 4, clause 12).

Schedule 6 Guardianship Division

This division hears matters concerning:

1. Appointment of a guardian
2. Appointment of a financial manager
3. Review of enduring guardianship
4. Review of power of attorney and revocation
5. Medical or dental treatment
6. Clinical trials
7. Review of orders

This division, when exercising substantive functions, must be constituted as a three-member tribunal, comprising a lawyer, a member with professional qualifications and a member with community based qualifications (Schedule 6, clause 4(1)).

Legal representation is granted without leave, but only in respect of matters under section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (carrying out special medical treatment on a child). Everyone else must seek leave if representation is desired, section 45.

There are complex appeal provisions both to the Appeal Panel and the Supreme Court, in clause 12-14.

Amendments to the *Administrative Decisions Tribunal Act 1997*

As mentioned, on the establishment day, this Act became known as the *Administrative Decisions Review Act 1997*. The long title was replaced and it became an Act "*to provide for the administrative review by the Civil and Administrative Tribunal of certain decisions of administrators*".

A new objects section is provided in section 3 of the ADR Act as follows:

> "The objects of this Act are as follows:
>
> (a) to provide a preliminary process for the internal review of administratively reviewable decisions before the administrative review of such decisions by the Tribunal under this Act,
> (b) to require administrators making administratively reviewable decisions to notify persons of decisions affecting them and of any review rights they might have and to provide reasons for decisions of administrators on request,
> (c) to foster an atmosphere in which administrative review by the Tribunal is viewed positively as a means of enhancing the delivery of services and programs,
> (d) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales."

The main new concept is that of an "*administratively reviewable decision*" which is defined in section 7 to mean a decision of an administrator over which, the tribunal has administrative review jurisdiction (in the Administrative and Equal Opportunity Division). The tribunal has such jurisdiction if "*enabling legislation*" gives it to the tribunal (section 9). An application for review to the tribunal can only be made by an interested person (section 55). Subject to changes in terminology, there remains provision for formal internal reviews and reasons to be provided.

The administrator still has a duty to lodge with the tribunal the relevant documents relating to the decision under review (section 58).

The regulations are renamed the *Administrative Decisions Review Regulation 2009* and amended. The *Administrative Decisions Tribunal Rules 1998* are repealed. The remainder of the old ADT Act is largely omitted, rendering the new amended version as merely support for the jurisdiction and work of the NCAT's Administrative and Equal Opportunity Division.

Schedule 5 - The Occupational Division - Framework

This division deals with:

1. Legal practitioners
2. Health practitioners
3. Architects
4. Local Government pecuniary interests and discipline
5. Taxi licences
6. Veterinarians
7. Surveyors
8. Building professionals

"Health practitioners" are defined in the NCAT Act (Schedule 5, Division 3, clause 8) to have the same meaning as in the *Health Practitioner Regulation National Law (NSW)(2009)* (NSW) (the National Law), and includes a student within the meaning of that Law. They are defined in section 3 of the National Law as:

"an individual who practises a "health profession"".

"health profession" means the following professions, and includes a recognised specialty in any of the following professions—

(a) Aboriginal and Torres Strait Islander health practice;
(b) Chinese medicine;
(c) chiropractic;
(d) dental (including the profession of a dentist, dental therapist, dental hygienist, dental prosthetist and oral health therapist);
(e) medical;
(f) medical radiation practice;
(g) nursing and midwifery;

(h) occupational therapy;
(i) optometry;
(j) osteopathy;
(k) pharmacy;
(l) physiotherapy;
(m) podiatry;
(n) psychology.

In all matters in this division, legal representation is permitted without leave of the tribunal (Schedule 5, clause 27 – *cf* section 45).

Schedule 5 contains numerous special provisions specific to the individual occupations concerned. I will concentrate on the health profession here only.

Some particular matters in this division for health professionals to note are as follows:

By clause 13 of Schedule 5 of the NCAT Act, the tribunal must be constituted with members according to the National Law. Those provisions are principally in section 165B (read with clauses 12 and 13 of the NCAT Act). In essence, if a complaint is referred to the tribunal or there is an application or appeal to it under the National Law, the tribunal must first inform the relevant professional council (e.g. the Medical Council of NSW) and that council must select three persons (whether they are division members or not) to sit as members of the tribunal in the proceedings. In ordinary cases the tribunal is to be constituted by one division member, a lawyer of seven years standing or, if the matter involves a doctor, one division member who is a senior judicial officer, two health practitioners and one lay person.

In matters involving appeals restricted to points of law, the tribunal is to be constituted by a Division member who is a senior judicial officer (if the matter involves a doctor) or, a lawyer of seven years standing.

The rules of evidence do not apply in the Occupational Division (except in relation to legal practitioners).

There is a complicated provision for appeals from the tribunal in the occupational division relating to health professionals. Most matters, including the legal profession and health practitioners, appear to go on appeal to the Supreme Court (bypassing the NCAT's Appeal Panel) (Schedule 5, clause 29). There is also provision for "external appeals" to go direct to the appeal panel of NCAT in some matters. Such an appeal bypasses the bottom layer of the tribunal's ordinary structure.

In all cases, the Supreme Court's judicial review or administrative law jurisdiction is untouched and therefore unaffected by the legislative regime relating to health practitioners – section 69 of the *Supreme Court Act 1970* (NSW).

NCAT Conclusion

These are all significant changes. The new tribunal creates a whole new landscape for administrative review and quasi-judicial civil matters in New South Wales. The potential benefits are enormous, to the parties and to the legal profession and the tribunal members themselves. In time, the tribunal will develop a learned culture based on shared experience, skill and expertise. The ADT developed in this fashion over many years and soon operated as an identifiable single entity, rather than as a collection of members hearing diverse matters in different places. Whatever "club" culture existed in NSW within the many varied tribunals and boards should now disappear and the benefits of amalgamation will become manifest.

Whether it will become "*a new era of accessible justice*" in NSW, as opined by the then NSW Attorney General in his second reading speech (30 October 2013 LA, Hansard page64) it is too early to tell.

If the tribunal is provided with sufficient resources and afforded sufficient support and encouragement from government, the parties and the legal profession, it is set to become Australia's pre-eminent super tribunal over the next few years.

The New Rule 59 of the Uniform Civil Procedure Rules 2005 (NSW)

Another important development concerns the conduct of a judicial review case in NSW and outlines Rule 59 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) which took effect on 15 March 2013.

The rule dictates the practice and procedure of judicial review cases in the Supreme Court of NSW, Common Law Division.

It covers wide ranging matters, such as the time for commencement of judicial review proceedings, the evidence permitted, limited discovery and it permits the court to order a statement of reasons to be produced from a public authority decision-maker.
It also contains machinery provisions for submissions and the production of a Court Book before the hearing.

The introduction of Part 59 with effect from 15 March 2013 has brought enormous and far-reaching changes to the conduct of judicial review proceedings in NSW.
It has codified many difficult to find practices and procedures and it serves as a stable process for such matters.

It applies to proceedings commenced on or after 15 March 2013 and it applies to proceedings made under sections 65 and 69 of the *Supreme Court Act 1970* (NSW) and other proceedings in the supervisory jurisdiction of the Supreme Court (which presumably means where the court's jurisdiction is enlivened by way of a collateral attack on the validity of certain instruments or action) (rule 59.1(1)). It also applies to Class 4 and Class 8 proceedings in the Land and Environment Court.

It provides that judicial review proceedings are to be commenced by summons and has detailed provisions for who must be joined as a party, including each person or body who may be directly affected by the relief sought (rule 59.3).

Time to commence proceedings

The time for commencing proceedings is prescribed in rule 59.10 as being no later than **three months** from the date of the decision. The day of the decision is not counted (section 36(1) of the *Interpretation Act 1987* (NSW)). Any time after that, the court has a discretion to extend the time for commencing proceedings. This rule does not apply where there is a statutory limitation period for commencing judicial review proceedings. It also does not apply when setting aside a decision is not required, in other words, proceedings for prohibition or mandamus, declaratory proceedings or proceedings for equitable relief (rule 59.10(4) & (5)). In considering whether to extend the time the court is to take into account the circumstances of the particular case including the following (at rule 59.10 (3)):

(a) any particular interest of the plaintiff in challenging the decision,
(b) possible prejudice to other persons caused by the passage of time, if the relief were to be granted, including but not limited to prejudice to parties to the proceedings,
(c) the time at which the plaintiff became or, by exercising reasonable diligence, should have become aware of the decision,
(d) any relevant public interest.

Each of these concepts has the potential to involve considerable complexity and may require separate affidavits to address. The main matter to address is to explain why there was a delay in the first place and this often involves an explanation by the solicitor and sometimes by a barrister. It often involves a legal practitioner falling on his or her sword.

The making of rule 59.10 is the first time in NSW that a limit has been fixed for the commencement of judicial review proceedings. Prior to that, the matter was within the discretion of the court and unwarrantable delay, or the plaintiff acquiescing to the validity of the decision would have resulted in the court refusing to hear any judicial review proceedings. As it was put in *Italiano v Carbone* [2005] NSWCA 177 at [117] (per Basten JA):

> "Generally speaking, certiorari may be sought within a reasonable period of the making of a decision, which is not fixed in this State but in other jurisdictions is at periods varying from 60 days to six months, in all cases extendable by leave."

Rule 59.11 provides that a plaintiff is not required to provide security for costs in judicial review proceedings except in "exceptional circumstances". Rule 42.21 (security for costs) therefore does not apply in judicial review proceedings.

The content of any summons filed is mandated by rule 59.4 which provides that the summons must state the orders sought and, if there is an impugned decision, you must state the identity of the decision maker, the terms of the decision and whether you are challenging the whole of the decision or part of the decision. You must also plead "with specificity, the grounds on which the relief is sought".

Setting out the grounds of review with specificity

The requirement to set out the grounds of judicial review with specificity is entirely new. In the past, summonses could be filed that merely challenged the decision under review and set out the relief that was sought. Under Part 59, you must specifically identify each of the grounds of judicial review on which you rely, even if they are overlapping grounds (as many of them are).

Under rule 59.5, a plaintiff has five days to serve the summons. Under rule 59.6 each defendant to the summons must file and serve a "response" stating whether the defendant opposes the relief sought and, if so, on what grounds. This is an important document that is intended to elicit areas of consent and seeks to narrow the issues between the parties.
The procedure at judicial review hearings is also covered by Part 59. In rule 59.7(1) evidence is to be given by affidavit unless the court says otherwise. Under rule 59.7(3) cross examination is permitted only by leave of the court and that leave should, if practicable, be sought prior to the hearing. As I said earlier, cross examination rarely occurs in judicial review proceedings as it is simply not needed in most cases.

Discovery and Interrogatories

By 59.7(4) a party must have leave of the court to seek discovery from or to interrogate another party to the proceedings. Any application for leave must include a draft list of categories of documents or draft interrogatory is that are sought to be administered. The requirement of leave is in addition to the ordinary difficulties of obtaining discovery in judicial review proceedings. Normally, there is a decision and written reasons for decision which defines the scope of any of the decision maker's documents necessary for any hearing.

However, in cases where the issues between the parties have been formalised and identified (as in a summons setting out grounds of judicial review followed by a formal "response") there might be some room for discovery in particular cases. The following cases discuss the former general approach adopted in judicial review proceedings:

(i) *Nestle Australia Ltd v Federal Commissioner of Taxation* (1986) 10 FCR 78 (Wilcox J) esp at p 82.7 & 83.6; and
(ii) *Australian Securities Commission v Somerville* (1994) 51 FCR 38 (Black CJ, Ryan & Olney JJ) esp at 52B to 53B and 55C & E.

As to discovery of documents against the Crown generally, see the good discussion of the principles in *Commonwealth v Northern Land Council* (1991) 30 FCR 1 (Black CJ, Gummow and French JJ) at pages 22 to 24 (per Gummow J) [This discussion was unaffected by the successful High Court appeal in the matter in *Commonwealth v Northern Land Council* (1993) 176 CLR 604].

Rule 59.8 sets out a very detailed procedure for the production by the parties of a "Court Book" to be contained in a white folder with dividers that contains a copy of the summons, the response, the written submissions, the decision under review, and agree chronology and an agreed schedule of relevant correspondence together with any party's list of objections to the evidence. This book must be filed and served by the plaintiff at least seven working days before the hearing.

This means that the rules now provide that the plaintiff must produce written submissions seven working days before the hearing (not exceeding 10 pages) and the defendant must file and serve written submissions at least four working days before the hearing (not exceeding 10 pages). The rule provides for the plaintiff to file and serve reply submissions one working day before the hearing (not exceeding 5 pages).

This rule is subject to any directions given by the court. Accordingly, if you cannot be both succinct and cogent in 10 pages, you will need to ask for more at an early stage at the directions hearing.

Rule 59.9 provides that a plaintiff may within 21 days of commencing proceedings against a public authority or official serve on that body a notice requiring it or the official to provide a copy of the decision and a statement of reasons for decision. The statement of reasons must:

(a) set out findings on material questions of fact, and
(b) refer to the evidence or other material on which those findings were based, and
(c) explain why the decision was made.

If the statement of reasons is not produced by the public authority or official, the plaintiff is entitled to apply to the court for an order that it be provided. Combined with the practice note I mentioned earlier, this is an effective overturning of *Osmond's Case* - *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

The next interesting question is whether, having now received a statement of reasons that was produced possibly several months after the decision under review came down should be tendered into evidence by the plaintiff. If the defendant sought to tender it into evidence, it would be rightly objected to. What a decision maker said about the decision afterwards is often of no consequence and evidence of it might therefore be inadmissible (*eg: Minister for Immigration, Local Government & Ethnic Affairs v Taveli* (1990) 94 ALR 177 where an unverified statement of reasons made after the statutory decision had already been made should not be received into evidence as it could affect the result of the proceedings (per French, Davies and Hill JJ)).

So far, there are very few cases specifically dealing with Part 59 of the UCPRs.
Those that are available, deal with the early operation of the Part, and hold that it is not applicable (directly or by analogy) retrospectively to statutory or executive decisions made before 15 March 2013 – see: *Mauger v Wingecarribee Shire Council* [2013] NSWSC 1587 (Button J); *Regional Express Holdings Ltd v Dubbo City Council (No 2)* [2013] NSWLEC 113 (Biscoe J); *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd* [2013] NSWLEC 122 (Pepper J); and, *Save Little Beach Manly Foreshore Inc v Manly Council* [2013] NSWLEC 155 (Biscoe J) (held no exceptional circumstances and security for costs application refused in public interest litigation).

It will be most interesting to see how the new rule impacts on the conduct of judicial review cases in the longer term.

At least we now have some important practice and procedural principles set out plainly for the first time and gathered in the one place.

Roads and Maritime Services v Porret [2014] NSWCA 30

Principle: Void or voidable laws

In *Porret*, the Court of Appeal was asked to consider whether orders made by a District Court judge setting aside and varying an original sentence operated form the time the orders were made, or from the time the original sentence was made (i.e. retrospectively).

By section 20 of the *Crimes (Appeal and Review) Act 2001* (NSW) ("the Appeal Act"), the District Court, in dealing with an appeal from a local court against sentence, may set aside the sentence, vary the sentence, or dismiss the appeal.

The power to "vary" a sentence includes the power to make an order under s10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Sentencing Act") and for that purpose to set aside the conviction below without affecting the finding of guilt; in effect enabling a decision to be made that the offence is proved but the charge is dismissed such that no conviction is recorded.

In the context of a complex set of circumstances regarding a number of inter-related offences the District Court had set aside a conviction for a driving offence (PCA – low range) following the driver being further charged with driving while disqualified.

The driver was convicted in the Local Court for the disqualification offence, fined and further disqualified from driving for a period of 12 months (she was late for an exam). The driver appealed against her first sentence for the disqualification offence and also appealed the second offence.

She won her first appeal and the original disqualification was set aside. She also received an order under section 10 of the *Sentencing Procedure Act 1999* (NSW) (offence proved, not recorded). On the second appeal, the primary judge in the District Court considered that since the effect of setting aside the PCA offence operated *ab initio*, the driver was never disqualified from driving, the consequence was that the driver could not be convicted for a driving while disqualified.

By way of a judicial review application to the Court of Appeal by the then RTA – as the government authority responsible for the issue of driving licences – it was held that the effect of the District Court order to set aside the PCA offence (in order to substitute a decision under s10 of the Sentencing Act) was to "avoid" or nullify the conviction and sentence for that offence for all purposes.

The Court of Appeal considered that an exercise of a power to set aside or vary a sentence under s 20 *operates prospectively not retrospectively* (at [33] per Bathurst CJ with whom Macfarlan JA agreed [45]). For the primary judge to set aside the primary conviction *ab initio* was "*a misunderstanding of s 20 of the Appeal Act*".

This position is consistent with the English Court of Appeal *Hancock v Prison Commissioners* [1960] 1 QB 117 and more recently, the decision of Gaegler J in *NSW v Kable (No 2)* [2013] 87 ALJR 737.

To succeed on its judicial review application the RTA had to show that this "misunderstanding" was a jurisdictional error.

The Court accepted that the primary judged had erred in his conclusion by reason of a misconstruction of the Appeal Act and, thus, misconceived the extent of his powers [39]-[40].

The Court then considered what was the appropriate form of relief to grant; alternatives being declaration as to the correct position or an order quashing the decision of the primary judge. In the circumstances the Court considered it appropriate to quash the decision of the primary

judge. This was an exercise in the courts supervisory jurisdiction under s 69 of the *Supreme Court Act* 1970.

Twaddell v New South Wales Land and Housing Corporation [2014] NSWSC 7

This case of *Twaddell* concerned judicial review of a public housing decision cancelling the plaintiff's rental rebate and the requirement for her to pay a debt of $12,235.79 (debt is a most precise science) back to the Land and Housing Corporation ("the Corporation"). The Corporation had the power to grant a rental rebate under section 56 of the *Housing Act 2001* (NSW) ("the Act"). The power to vary or cancel a rebate is contained in section 57 of the Act. In order to exercise the power to grant, cancel or vary a rental rebate both sections are expressed to arise after making or conducting "an investigation under section 58." Section 58 provides that the Corporation may undertake an investigation to determine the weekly income of a person who is a) an applicant or recipient of a rental rebate and b) any other resident of the house in which that person resides. Further this section can require the applicant or recipient to produce such evidence as the Corporation sees fit of the person's weekly income etc.

The Corporation was alerted by an anonymous tip off that Mrs Twaddell's ex-husband, Mr Twaddell, had been residing at the premises for four years and that another man had also been living there for between one and four months. Mr Twaddell was alleged to have also been arrested some time earlier for growing cannabis at the premises.

Mrs Twaddell was requested to attend an interview and further to provide evidence and information to confirm both men's addresses as a part of an investigation under s58. The Corporation was provided with information to support Mrs Twaddell's claim that her ex-husband did not reside at the premises but instead visited his children there frequently and babysat them when she worked on Tuesday nights, and that the other alleged resident also lived elsewhere. A memorandum was prepared by an investigator for the tenant fraud squad who found that the evidence provided by the tenant was stronger than the evidence provided by the Corporation.

This advice was ignored, and a memo was prepared that the rebate be cancelled and the debt recovered. This was annotated by the team leader who recommended that no further action was required. This was also ignored and the Corporation went on to inform Mrs Twaddell that her rebate had been cancelled and that she was now 12k in debt.

Mrs Twaddell sought unsuccessful internal and then successful second tier external reviews of the decision, before seeking judicial review. The successful external review decision was also ignored.

The court found that in the original decision there was no bona fide attempt to obtain information about Mr Twaddell's income. The investigation focused, and focused exclusively, on the issue of whether he was resident of the house at any relevant time (see further at [47]). McCallum J found that there was no investigation within the meaning of s58 of the Act, and this meant that there was no power under s57 to cancel the rebate. No other source of power to cancel the rebate was relied upon [41]. It was his honours view that the original decision was invalid and for this reason the second and third tier decisions were also invalid [49]. This was consistent with the basis of the litigation in *New South Wales Land and Housing Corporation v Navazi* [2014] NSWCS 431. Although, pushed to consider grounds for judicial review of the second and third decisions, McCallum J found that the most cursory analysis by the third decision maker showed "no active intellectual process in his endorsement of the original decision" [85].

This case enshrines that while it is wrong to construe the meaning of an investigation for the purposes of s58 of the Act narrowly (Navazi), the purpose identified in s58 needs to have been a part of the purpose of the investigation, not ancillary to proving another fact. It was further noted in this case that the requirement to repay a debt was properly characterised as a discretionary power that the Corporation could exercise, and no consideration of Mrs Twaddell's individual circumstances was contemplated. The original decision maker was found to have erred in law and the decision was quashed.

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93

Sullivan is decision of the Full Court of the Federal Court, dismissing the Mr Sullivan's appeal from a decision of Justice Jago who had dismissed his appeal from the AAT. The AAT had affirmed the decision of the CASA, the Civil Aviation Safety Authority, to cancel the applicant's helicopter pilot licence. The appellant raised two issues to be resolved on the Full Court appeal. First, whether the AAT was bound to apply the test in *Briginshaw (Briginshaw v Briginshaw* [1938] HCA 34) in making factual findings and whether in fact it had applied that test. Second, whether the tribunal was required to comply with the evidentiary rule in *Browne v Dunne* (1894) 6 R 67 in relation to the evidence of one of the applicant's witnesses. That rule is a rule of fairness which restricts the submissions that may be put where the subject matter had not been put to particular witnesses or contradicts them, when they were not challenged while giving evidence.

The Court confirmed that the procedures and rules of evidence applicable in civil litigation cannot "*automatically be transposed to the sphere of administrative decision making*" (at [60]).

At the level of principle, Flick and Perry JJ, decided that:

1) The procedure that the Tribunal decides to follow in any particular case, including the extent to which, if at all, it decides to apply common law rules of evidence is a matter which the legislature has left to the tribunal to determine.
2) There is no "general principle of law" which is to be applied by the Tribunal to some "indeterminate fact findings which may be characterised as 'grave' or 'serious' (at [16]).
3) Within some other principles including principles of procedural fairness, the Tribunal is free to make findings of fact untrammelled by principles that would apply to judicial proceedings.
4) This does not mean that findings of fact by the Tribunal are free of judicial scrutiny; for example, findings must be neither "irrational" nor "illogical" and the Tribunal must in that sense rationally consider probative evidence.
5) When making its findings of fact that have "serious or grave" consequences the Tribunal is free to consider the evidence and other materials before it. (But the more

central a particular fact may be to the decision reached, the Tribunal, "it may be accepted would express greater caution in evaluating the factual foundation for the decision to be reached" [120].

6) Like *Briginshaw*, the rule in *Browne v Dunn* has its origins in the common law and in the judicial resolution of disputes. The Court found that the rule is "also founded in basic common sense and fairness" [140].
7) The Court re-emphasised that while not bound by the rules of evidence, the Tribunal was bound to carry out its review function in accordance with the *Administrative Appeals Tribunal Act 1975* (Cth) (including section 39 of that Act which required the parties to be given a "reasonable opportunity to present (their) case". Subject to those requirements the procedure of the Tribunal is within its own discretion [164].

Proposed Federal Tribunal Merger

In its most recent budget, the Federal Government announced its intention to amalgamate the Commonwealth merits review tribunals. Legislation looks set to be introduced to the Parliament shortly.

Informed by the National Commission of Audit, the proposed amalgamation encompasses the AAT, the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal as well as the Classification Review Board. As a side note the Veteran's Review Board was not included as it was deemed to operate essentially as a division of the Department of Veteran's Affairs.

In pursuing the proposal the Attorney General has pointed to success of the "super-tribunals" for merits review in the states and territories including NCAT here in NSW.

The Law Council of Australia in July 2014 has expressed some concerns about the proposed amalgamation, in particular in relation to MRT and RRT matters. In a submission to the Minister for the Department of Immigration and Border Protection (DIBP), the Law Council noted that "it was difficult to provide a definitive response prior to the release of the legislation" and "of concern that the legislation giving effect to the proposed amalgamation

would not be released for public consultation prior to its introduction to Parliament". The Law Council asserted (a weary and worthy) warning not to let the desire for stream lining and cost cutting – the magic words to aid in the closing of a bureaucrats swaddled ears – occur at the expense of the users of the Tribunal(s) or indeed, at the expense of procedural fairness.

The Law Council is of the view that in the event of the amalgamation it would be of great benefit to have specialist divisions across the different areas.

Matters that require further investigation include the importance of effectively removing a two tier merits review system for specific areas such as Social Security Appeals Tribunal matters, as well as the need to ensure that Tribunal Members feel free to make their decisions unfettered by legislative injunctions or constraints, and that transparency is preserved.

Thank you