Administrative Law: A Year in Review

A paper delivered by Mark Robinson SC to a LegalWise Conference "*Administrative Law in Action*" held in Sydney on 21 November 2012

I am asked to speak to you today on some matters pertaining to a review of administrative law in 2012. I will speak on:

- Recent High Court cases on administrative law
- Some recent NSW cases
- Proposed Reform of Judicial Review in NSW
- Proposed Reform of Judicial Review in Australia
- Reform of the NSW Tribunal System - NUCAT

High Court Cases

In *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372; [2012] HCA 46 (5 October 2012), the plaintiff was a refugee. He was refused a protection visa and placed in detention because the Australian Security Intelligence Organisation (ASIO) assessed him as a risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*(Cth). Because of that assessment the plaintiff did not meet public interest criterion 4002 set out in the *Migration Regulations 1994* and he could not be granted a visa or released from detention. Unsuccessful attempts were made to remove the plaintiff to a safe third country and these failed. He was a refugee from Sri Lanka. As a former member of the Liberation Tigers of Tamil Eelam (**LTTE**) he was at risk of being targeted by the Sri Lankan Government and/or paramilitary groups in Sri Lanka. As a person who had refused to rejoin the LTTE he was at risk of persecution from Tamil separatist groups. He came to Australia by boat to Christmas Island.

He challenged the validity of the public interest criterion 4002, the legality of the refugee status decision and challenged whether section 198 of the *Migration Act 1958* (Cth), authorised his removal.

The High Court held public interest criterion 4002 was invalid and that his application for a visa had not been finally determined and he could lawfully be detained pursuant to section

196. The plaintiff was validly detained for the purposes of the determination of his application for a protection visa.

Public interest criteria 4001 requires that in order to get a visa, one must satisfy the Minister that the person passes or would have passed the character test. Public interest criteria 4002 said that one can get a visa if one is not assessed by ASIO to be directly or indirectly a risk to security.

Chief Justice French held that public interest criteria 4002 and the provisions of ss 500-503 of the *Migration Act* "*spells invalidating inconsistency*" (at [71]). This is because:

> "That is primarily because the condition sufficient to support the assessment referred to in public interest criterion 4002 subsumes the disentitling national security criteria in Art 32 and Art 33(2). It is wider in scope than those criteria and sets no threshold level of threat necessary to enliven its application. The public interest criterion requires the Minister to act upon an assessment which leaves no scope for the Minister to apply the power conferred by the Act to refuse the grant of a visa relying upon those Articles. It has the result that the effective decision-making power with respect to the disentitling condition which reposes in the Minister under the Act is shifted by cl 866.225 of the Regulations into the hands of ASIO. Further, and inconsistently with the scheme for merits review provided in s 500, no merits review is available in respect of an adverse security assessment under the ASIO Act made for the purposes of public interest criterion 4002. Public interest criterion 4002 therefore negates important elements of the statutory scheme relating to decisions concerning protection visas and the application of criteria derived from Arts 32 and 33(2). It is inconsistent with that scheme. In my opinion cl 866.225 of the Regulations is invalid to the extent that it prescribes public interest criterion 4002. "

In other words, the regulation effectively vested in ASIO the power to refuse a visa on security grounds and it was not consistent with the scheme of the Act, including the responsibility it imposes on the Minister and officers, the system of merits review which it establishes and the personal responsibility and accountability of the Minister for decisions precluding review.

Justice Hayne held that public interest criterion 4002 created a hurdle to the grant of a protection visa that circumvents the special review provisions made by the Act. If that criterion were valid, a decision to refuse to grant a protection visa may always be made

relying on that criterion, and not relying on Art 32 or Art 33(2) and applying s 501, thereby giving s 500(1)(c) no work to do. Prescribing public interest criterion 4002 as a criterion for the grant of a protection visa was inconsistent with a statutory scheme in which all of the elements of s 500(1)(c) are given work to do.

Justice Kiefel held that the Migration Regulations established a regime different from that applying under the Act, the clear intention of the latter being that the Minister, or delegate, would consider for him- or herself whether a protection visa should be refused on grounds of national security. Public interest criterion 4002's statement that the non-existence of an adverse security assessment is a criterion, impermissibly cuts across the process intended by the Act. Public interest criterion 4002 has the effect of bringing the consideration by the Minister to a premature end and rendering such decision non-reviewable.

Justice Crennan also found the criterion invalid for similar reasons.

Justice Gummow dissented on this. The power of prescription of criteria conferred by s 31(3) is not foreclosed by the place of Art 1F of the Refugees Convention in the operation of the criterion for protection obligations which is found in s 36(2). The role of assessment given to ASIO is a manifestation of the national interest, being the interest of a sovereign state to scrutinise those aliens seeking admission, even those to whom protection obligations are owed. Justice Bell also dissented holding there was no inconsistency in subjecting applicants for protection visas to the same barrier to entry that is applied to applicants for other classes of entry and residence visas. In issuing an adverse security assessment, ASIO is not interposed as the decision-maker. There is no disconformity arising from the circumstance that ASIO may assess a person as a risk to security (employing a different and lesser threshold) and that the Minister's delegate may find that the person satisfies the character test.

Justice Heydon also dissented.

An important lesson from the case is that on the rules relating to invalidating regulations or delegated statutory instruments.

Here, the instrument was set aside by majority of 4 to 3 justices. Chief Justice French discussed the topic of invalidating regulations in classic terms (from [53]).

He said (at [53]) The source of the regulation-making power was section 504 of the *Migration Act* which authorised the Governor-General to make regulations, "*not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act*."

He then said (at [54]): Regulations made under s 504 must be "*not inconsistent with*" the *Migration Act*. Even without that "*expressed constraint*" delegated legislation cannot be repugnant to the Act which confers the power to make it. Repugnancy or inconsistency may be manifested in various ways. An important consideration in judging inconsistency for present purposes is "*the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.*" A grant of power to make regulations in terms conferred by s 504 does not authorise regulations which will "*extend the scope or general operation of the enactment but [are] strictly ancillary*." In considering whether there has been a valid exercise of the regulation-making power "*[t]he true nature and purpose of the power must be determined*".

This is how his Honour got (ultimately) to his finding of repugnancy.

In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 86 ALJR 1019; 290 ALR 616; [2012] HCA 31 (7 September 2012) there were four plaintiffs, each of them non-citizens who tried and failed to obtain visas to remain in Australia. They applied to the High Court for declaratory relief and the issue of certiorari and constitutional writs against the Minister for Immigration and Citizenship ("the Minister") and the Secretary for the Department of Immigration and Citizenship ("the Secretary").

The challenged involved construction of four provisions of the Migration Act that operate outside the regular statutory process for determination of visa applications and administrative review of such determinations by the Migration Review Tribunal ("the MRT") and the

Refugee Review Tribunal ("the RRT"). Under **s 48B** of the Act, the Minister may grant a protection visa to a person whose application for a protection visa has already been refused. Under **s 195A,** the Minister may grant a visa to a person in immigration detention. Sections **351 and 417** authorise the Minister to substitute for a decision of the MRT or the RRT a decision which is more favourable to the applicant. Each of the sections provides that the Minister is under no duty even to consider the exercise of the discretions they confer.

Ministerial guidelines were published in the form of directions to the Secretary and his or her officers setting out the circumstances in which the Minister may wish to consider exercising the discretionary powers under the four sections.

Sometimes, the applications to the Minister under the sections would not be placed before him or her because they did not first pass the requirements of the guideline.

The High Court held, eg French CJ and Kiefel (at [4]) that:

> "… the consideration by officers of the Department of the requests by the plaintiffs for the Minister to consider exercising non-compellable powers under the Act did not attract the requirements of procedural fairness. Further, the Minister is not obliged to accord procedural fairness, in the form of the so-called hearing rule, in personally considering whether to exercise the Minister's discretion under ss 48B, 195A, 351 or 417. Each of the applications should be dismissed."

Gummow, Hayne, Crennan and Bell JJ and Heydon J agreed.

These "*dispensing provisions*" required the Minister to be personally accountable to the Parliament for decisions to grant visas made under them. The provisions stood apart from the scheme of tightly controlled powers and discretions. They confered upon the Minister a degree of flexibility allowing him or her to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements (at [30]).

Interestingly, the majority judgment of Gummow, Hayne, Crennan and Bell JJ discussed the nature of procedural fairness – something which has never been finally determined. They said (at [97]):

> "The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai*1 was identified as the interaction between the three branches of government established by the Constitution. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that "the common law" usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power2. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive."

As a matter of statutory construction, note what was said in *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [28] per French CJ, Hayne, Kiefel and Bell JJ:

> "The reasoning in the IRC **[**Industrial Relations Court of South Australia**]** was informed by the view that it was desirable that the Minister have flexibility in the appointment of teachers and that Pt III of the Act might be "*unnecessarily prescriptive*"3 in its application to the ad hoc appointments of relief teachers in diverse circumstances. This approach, with respect, emphasised a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose4. The statutory purpose in this case was to be derived from a consideration of the scheme of the Act as a whole, the respective

---

1 (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52. See also *Momcilovic v The Queen* (2011) 85 ALJR 957 at 984 [38], 1009 [146], 1033 [280], 1086 [545]; 280 ALR 221 at 239-240, 274, 306, 378; [2011] HCA 34; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43]-[44].

2 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100-101 [39]-[41].

3 [2009] SAIRC 37 at [40] per Jennings SJ and Gilchrist J.

4 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; [1967] HCA 31; *Baker v Campbell* (1983) 153 CLR 52 at 104 per Brennan J; [1983] HCA 39; *Miller v Miller* (2011) 242 CLR 446 at 459-460 [29] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 9; *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1064-1065 [441] per Heydon J; 280 ALR 221 at 349; [2011] HCA 34; *AB v Western Australia* (2011) 85 ALJR 1233 at 1241 [38]; 281 ALR 694 at 703-704; [2011] HCA 42.

functions of Pts II and III of the Act, and the regulatory requirements of Pt IV of the Act. ”

In *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 86 ALJR 862; 289 ALR 1; [2012] HCA 25 (7 July 2012) the High Court determined the case of an application of its important decision in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

The case was a State industrial case and it concerned the ground of a “*failure to exercise jurisdiction*” and the remedy of mandamus, rather than the ground of jurisdictional error and the remedy or certiorari.

Importantly, for mandamus, what constitutes the “*record*” in a particular case “*may be a matter of debate*” and that “*mandamus is not an adjunct to certiorari*” (at [62] per Gummow, Hayne, Crennan, Kiefel, Bell JJ).

Kirk was held to apply to all this. It was not just limited to jurisdictional error and certiorari.

NSW Decisions

***Allianz Australia Insurance Ltd v Kerr* (2012) 60 MVR 194**

This was an appeal from a decision of Justice Hislop. It concerned the legal validity of a motor accidents claims assessor's award of future economic loss by way of a "*buffer*". The amount of the buffer awarded to the claimant was $200,000 plus $22,000 for superannuation.

The Court of Appeal delivered an important judgment in relation to a number of areas, in particular:

- the evidence needed to be adduced in judicial review cases;
- the award of buffers in motor accidents cases; and
- adequacy of reasons as a ground of judicial review.

Evidence Needed to establish Jurisdictional Error or Error of Law on the Face of the

Record

In *Allianz v Kerr*, the NSW Court of Appeal (Basten JA and Macfarlan JA agreeing) discussed the evidence that was required to establish jurisdictional error or error of law on the face of the record in judicial review proceedings. The court described two administrative law principles of "*restraint*" in this regard (at [15]):

> The first is the "*clear distinction*" still drawn under the general law between "*want of jurisdiction and the manner of its exercise*": *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; 59 CLR 369 at 389 (Dixon J), recently cited with approval in *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; 237 CLR 146 at [5]. The second principle is that, whilst jurisdictional error may be established by any admissible evidence relevant for that purpose, a quashing order based on the broader concept of error of law must identify the relevant error as appearing "*on the face of the record*".

In order to prove the ground of judicial review of error of law on the face of the record, the "record" has been held to be very narrow, limited to the instrument or page that actually records the decision or orders – see, *Craig v State of South Australia* [1995] HCA 58; 184 CLR 163. That decision was in part overturned in NSW by amendments to section 69 of the *Supreme Court Act 1970*(NSW). It now provides that "*the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination*": s 69(4). The court of appeal stated (at [17]) that:

> "Given the procedural history outlined above, it is significant that the amendment did not refer to written evidence (such as affidavits and documentary material), nor did it refer to the transcript, whether of evidence or submissions."

Accordingly, it was considered that (at [18]):

> "[I]t was appropriate for the reviewing court to consider not only the certificate given by the claims assessor, but also his statement of reasons. It was less clear, however, whether the court might properly accept as evidence and scrutinise the reports of medical and other experts and the submissions made by the parties before the assessor. In the present case, such material was admitted by the primary judge, apparently without objection. Nevertheless, if the limits of this Court's jurisdiction preclude it taking such material into account for a particular purpose, it should not do so."

The Court of Appeal said (at [18]) that, for the purposes of evidence, these considerations require an applicant:

> "… to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record. As explained by Tate JA in *Easwaralingam v Director of Public Prosecutions (Vic)* [2010] VSCA 353; 208 A Crim R 122 at [25], a case apparently not involving an allegation of jurisdictional error:
>
> > "[A]n application for certiorari is not the same as a general appeal for error of law, most importantly, because it falls to be determined on the basis of different material. An application for certiorari does not invite a scouring of all the evidence before the inferior court to determine whether the proper inferences were drawn from it or whether an item of evidence was overlooked."

In summary, the Court said (at [62]):

> "… the range of challenges on a judicial review application is limited to errors of law on the face of the record and jurisdictional error. In the case of the latter, the kind of error is more limited, but the scope of inquiry is broader. In principle, in order to go beyond the face of the record, it would be necessary to identify a jurisdictional error."

Economic Loss and Buffers

In *Allianz v Kerr*, the claims assessor's buffer of more than $200,000 was upheld as being lawful. The award was challenged primarily because the reasons of the claims assessor did not comply with or conform to what was required pursuant to section 126 of the Act in that, the determination is necessary to make a decision as required by that provision were not present. The Court did not agree.

Alternatively, it was contended that the claims assessor did not provide adequate reasons for his decision. The Court did not agree.

This occurred in the context of an increasing number of damages determinations of claims assessors of substantial sums determined by way of buffers (*Kerr* at [5]).

Justice Basten wrote primary decision with which the two other judges largely agreed.

Section 126 of the Act provides:

> "126 **Future economic loss—claimant's prospects and adjustments**
>
> (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
>
> (2) When a court determines the amount of any such award of damages it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events concerned might have occurred but for the injury.
>
> (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."

Justice McColl considered that it was appropriate for a claims assessor to award a buffer when the impact of the injury upon the economic benefit from exercising earning incapacity after injury is "*difficult to determine*" (at [6]). Also, (citing Mason P in *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [2]) a buffer is appropriate where there is "*a smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort-related injury, at some distant time in the future.*"

She said (at [7]) the award of a buffer is:

- "difficult to assess" and
- "necessarily impressionistic"

She held that s 126 of the Act was (at [8]):

- intended (by Parliament) to promote intellectual rigour;
- in assessing damages, on occasion "*an element of impression must be involved*".

Most importantly (since it is largely supported by Justice Macfarlan in his judgment) McColl J said at [9]:

> "The foregoing should not be seen as a licence to award buffers indiscriminately. Where the evidence enables a more certain determination of the difference between the economic benefits the plaintiff derived from exercising earning capacity before injury and the economic benefit derived from exercising that capacity after injury, recourse should not ordinarily be had to the award of damages for future economic loss by way of a buffer. Each case must turn on its own facts."

Justice Macfarlan made remarks concerning the buffer for future economic loss awarded by the claims assessor. He held (at [67]) a buffer may be awarded "*to compensate an injured person for the possibility that he or she may suffer economic loss in the future as a result of a loss of capacity to earn income*". He cited the principle cited by McColl JA above from Mason P about a buffer being appropriate where there is "*a smallish risk*" of relevant loss "*at some distant time in the future*".

Mcfarlan JA held that (at [70]) if the claims assessor had calculated a buffer figure by "*allowing a notional sum for each year of the remainder of the claimant's working life, he should have referred to that reasoning process in his reasons*."

His Honour also said (at [71]):

> "*In other cases it may be able to be inferred (from the size of the award or other factors) that a process of reasoning, rather than simple intuition, led to the determination of the size of a buffer*."

He said the outcomes of those cases would be different, namely, the awards would be struck down by the Court as unlawful.

He also said (at [72]):

> "…awards in respect of future economic loss should wherever possible result from evidence-based calculations or estimates that are exposed in the decision-maker's reasons. The award of a buffer that is not supported by an explanation of how and why the amount was arrived at should remain a last resort where no alternative is available."

In the reasons for assessment, under the heading "*Future Economic Loss*" there was only the following findings and reasoning:

> “"In my view she has satisfied me that but for the accident she would have had continual work, albeit that from time to time she would have needed to change jobs and have had time off work. Thus she has satisfied s 126 of the Act. She is entitled to some amount for future economic loss but I accept accept the insurer's submission that it should be by way of a buffer rather than a concise calculation, given the claimant's concession of pre-existing psychological issues, her pre-existing work history and her current capacity for work. An amount of $20,000.00 as submitted by the insurer is clearly inappropriate. I believe the sum of $200,000.00 is the appropriate sum. Again I have allowed a further $22,000.00 on the basis of future superannuation loss.”

On the appeal decision, Justice Basten’s judgment set out the history of the common law use of buffers (at [24] to [29]) and then discussed the Court's consideration of section 126 of the Act (at [30]).

He set out the primary assumptions that would constitute the minimum content of section 126 (at [31]) and held that "*most*” of those factors were discussed by the claims assessor below (at [32]). His Honour did not find those findings or factors were contained under the claims assessor's heading "*future economic loss*". His Honour found those factors throughout the entire reasons for decision including from the statement of issues and in the background notations and in the summary of medical evidence (see at [33]). His Honour held that all these things need to be read together in order to determine whether or not section 126 was complied with.

On the appeal, it was held the buffer was appropriately explained within the terms of the Act.

Adequacy of Reasons as a Ground of Judicial Review

In *Allianz v Kerr*, the Court of Appeal considered the adequacy of the reasons of the claims assessor. The claims assessor was assessing damages in a personal injury claim that was binding, should the claimant have accepted it. The Court held that as the Act (s 94(5)) only required the provision of “*a brief statement*” of reasons, that there was a lesser obligation on the claims assessor than that imposed on the courts (*Kerr* at [53]). The Court also suggested that there was nothing in the language of the Act that imposed a requirement on a claims assessor to make a finding on every question of fact which is regarded by the court, on

judicial review of the decision, as being material - (*Kerr* at [54]-[55]).

As discussed above, the decision in that case concerned a "*buffer*" sum for future economic loss. It was held that when a decision involves an evaluation, or a judgment or is there in inherent imprecision in arriving at it, the court considers it was not to be expected that a decision-maker would be able, at any rate satisfactorily to the litigants or to one of the litigants, to indicate in detail the grounds which have led him to the conclusion (citing High Court authority).

The Court of Appeal set out the following passage on reasons (at [58]) from *Saville v Health Care Complaints Commission* [2006] NSWCA 298 (per Basten JA, Handley and Tobias JJA agreeing):

> "The purpose underlying the obligation to give reasons is in part the discipline of rationality, being the antithesis of arbitrariness, which follows from the exercise of justifying a conclusion, together with the transparency of decision-making, which permits the parties and the public to understand the result reached. However, this purpose must be given practical effect in particular circumstances."

Further, the Court in *Kerr's case* held (at [59]) that when a claims assessor determines a buffer amount, he or she need not explain why some particular amount was chosen as opposed to another. Significantly, the Court also held (at [60]) that an assessor "*was not required to give reasons for findings he did not make, [and] he was not required to give reasons for issues he did not determine*."

***Allianz Australia Insurance Ltd v Sprod* [2012] NSWCA 281**

In this case, Justice Barrett JJA published the decision and Campbell JJA and Sackville AJA agreed. It concerned a motor accident's claims assessor's reasons for decision where he set out his reasoning for awarding future economic loss to the claimant in the amount of $134,300.00.

The claims assessor's entire reasoning for awarding future economic loss to the claimant was as follows:

> "**40. Future economic loss.** The Claimant is concerned about the possibility of losing his job. He explained that he is the only light duties worker in the area of the factory where he works. He is concerned that a pallet system will be introduced at work. This will leave very little for him to do and, I infer, increase his chances of losing his job. The Claimant explained to me in answer to Ms Allan's questions that fork lift driving is not a full time job. Workers driving forklifts have to do physical tasks as well.
> 41. I am satisfied that there is a chance of the Claimant losing his present job, despite his benevolent employer and that he will then be at a disadvantage on the open labour market. His lifting restriction will make it difficult to obtain a manual job, which is all he has ever done.
> 42. Bearing in mind the Claimant's present high earnings I am satisfied that it is appropriate to allow $250.00 net per week for future economic loss. The calculation is $250.00 x 632 (18.3 years) x .85 = $134,300.00.
> 43. Future superannuation at 11% is $14,773.00."

There was also an odd issue not fully resolved at [36] of the reasons where the claims assessor said:

> "His earnings went up by approximately $4,500 net in the year prior to his motor accident and then down by $1,500 in the year of the accident. They went up slightly the next year. In the most recent financial year the Claimant's net income has jumped by about $16,000 to approximately $1,000 net per week."

These very odd movements were not the subject of firm findings by the claims assessor.

In the Supreme Court, the insurer argued that there were a number of significant problems with these paragraphs. The assessor had failed to set out any real explanation or provide any real reasoning for his decision here. More importantly, he failed to make any attempt to comply with the necessary requirements of awarding damages for this head of damage pursuant to section 126 of the MAC Act. Under section 126 of the MAC Act, a claims assessor is bound to disclose certain assumptions about the claimant's most likely future circumstances but for the injury and is required to make adjustments to any amount of damages for future economic loss by reference to a "*percentage possibility*" that future events might occur.

The Court of Appeal agreed. It disagreed with the trial judge that the award of damages could have constituted a buffer and it was therefore no error that it was not properly explained. The Court said that this was not a buffer case. It said (at [25]) "*There was, in this case, resort to a precise figure of $250 net per week and a calculation by reference to that figure, based on a*

stated number of years of expected working life."

Justice Barrett explained succinctly the duties in section 126 of the Act (at [26] and [27]):

> "26 The underlying principle is that the plaintiff should have a sum by way of damages for the difference between earning capacity as it would have been in the absence of the injury and the earning capacity as it is following the injury. Both elements involve uncertainty and conjecture and, therefore, require that assumptions be made, albeit assumptions shaped by the available evidence. The assumptions cover, among other things, remaining expectancy of working life, the impact of the injury on that expectation, the extent to which the ability to function will be curtailed and the earnings that work according to the reduced ability will produce, together with assumptions regarding discounted present value and investment returns and as to vicissitudes or adverse contingencies. Because of s 126(1), ***an assessor has a duty to form an opinion*** that the assumptions to be applied in relation to such matters going to future earning capacity "*accord with the claimant's most likely future circumstances but for the injury*".
>
> 27 ***The duty*** under s 126(1) to be satisfied that the adopted assumptions accord with the most likely future circumstances but for the injury ***is supplemented by the*** s 126(3) ***duty to articulate the assumption*** on which the award is based. This, as has been said in this Court more than once, is to ensure transparency and, at the same time, to inject an element of rigor or method that may be overlooked or simply abandoned if the statutory system did not insist on the identification and articulation of the assumptions employed." (my emphasis)

It was held that the claims assessor had failed to "*engage with and perform the tasks prescribed by s 126*" (at [37]). Once the claims assessor engaged upon a process of calculation, the section 126 duties became apparent and he was obliged to state his assumptions as set out in the Act. Some of the matters identified by the Court that were wrongfully omitted here were:

- There was no statement by the assessor of the assumptions underlying the figure of $250 net per week as lost earnings for the balance of the working life (at [34]);
- Why did the assessor assume that earnings at the higher level $1,000 net per week would be likely to be maintained for the balance of his working life? - Particularly when the assessor expressed an inability to understand how the increase had come about (see [36])?

- There was no explicit explanation of why a residual working life of 18.3 years was chosen or, what assumption was made in that respect; and,
- There was no reference to the assumption that gave rise to the allowance of 15% for vicissitudes (can be brief) (at [33]).

The Court made some final and helpful remarks made in order to assist claims assessors in the exercise of their future decisions. It said (at [42]), in summary:

1. Assessors do not have to prepare elaborate statements of reasons and explanations of assumptions.
2. They must work on the basis of facts.
3. However, an important element of the statutory scheme is the deployment of the expertise and experience of assessors as specialists. They are not meant to act as if they were judges. Their task is only to assess the amount that "*a court would be likely to award*" as damages. The function is no more than to estimate and to predict likelihood.
4. There is a clear place for informed intuition and speculation.
5. The purpose of s 126 is to produce ***a reasonable degree of transparency*** as to assumptions and the reasons for them so that those interested in the assessment may have an insight into the way in which the task of assessment was performed.
6. The section recognises that assumptions are necessary and appropriate. It does not seek to define aspects that may or may not properly be made the subject of assumptions about future earning capacity.
7. Its aim is merely to ensure that an insight can be obtained into the ***content*** of the assumptions and the ***reasons*** for their adoption. (my emphasis)

Proposed Reform of Judicial Review in NSW

In NSW, judicial review of administrative action is available only at common law (which is accessed via section 69 of the *Supreme Court Act 1970* (NSW)).

Some other Australian jurisdictions have established a <u>statutory</u> right to judicial review that

effectively constitutes an entire code (of reasons, standing, grounds of judicial review and relief).

The most recognised of these statutes is the Commonwealth's *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**). [5] It is essentially a codification of the common law judicial review that stripped away most of its historical complexities. It was drawn up after Parliament received the Report of the Kerr Committee in 1971. The Kerr Committee, established on the recommendation of the then Solicitor-General, Sir Anthony Mason, presented an entirely new structure for administrative law in Australia [6].

The ADJR Act celebrated its 30th anniversary in 2010. It commenced operation on 1 October 1980. Sir Anthony Mason presented a paper in 2010 to the Australian Institute of Administrative Law[7] explaining his views as to the success of the "New Administrative Law" as it came to be known (together with the Commonwealth Administrative Appeals Tribunal, the Ombudsman and Freedom of Information legislation).

The success of the ADJR Act (and the adoption of very similar legislation in Queensland, Tasmania and the ACT) raises the question as to whether NSW should establish a similar statutory right to judicial review.

In March 2011, the NSW Attorney General released a discussion paper on this topic titled "Reform of Judicial Review in NSW".

The discussion paper analysed the current operation of judicial review in NSW and reforms in other jurisdictions, with particular focus on the ADJR Act [in this regard the discussion paper also serves as an excellent research paper for busy practitioners]. It asked whether there is a

---

5 Sir Anthony Mason "*Delivering Administrative Justice: Looking Back With Pride, Moving Forward With Concern*" (2010) 64 AIAL Forum 4; see also Sir Anthony Mason's 2001 paper "*Administrative Law reform: The vision and the reality*" Geoffrey Lindell, ed, The Mason Papers, Federation Press, 2007 at page 167.

6 The Kerr Committee and the related Bland and Ellicott Committee Reports are each reproduced in The Making of Commonwealth Administrative Law compiled by Robin Creyke and John McMillan in 1996 and published by the Centre for International and Public Law, Law Faculty Australian National University

7 Sir Anthony Mason "*Delivering Administrative Justice: Looking Back with Pride, Moving Forward with Concern*" (2010) 64 AIAL Forum 4. See also, Sir Anthony Mason's 2001 paper "*Administrative Law reform: The vision and the reality*" in Geoffrey Lindell, ed, The Mason Papers, Federation press, 2007 at page 167.

need for reform of judicial review in NSW and, if so, what are the key issues that should be addressed in any reform measures. Specifically, the discussion paper asked:

* whether a statutory judicial review jurisdiction should be established,
* whether any such statutory jurisdiction should be modelled on the ADJR Act, or
* whether there are alternative options for the reform of common law judicial review in NSW.

The discussion paper also considered how to establish a statutory right to obtain a statement of reasons for decisions that might be subject to judicial review.

Apart from drawing attention to the availability of the grounds of judicial review and bringing into one place both the grounds and all of the available remedies in this area, I consider the major success of the ADJR Act to be that reasons are now provided in almost every Commonwealth decision. If they are not provided, they can be sought in almost every case by reason of section 13 of the ADJR Act. In New South Wales, public sector decision-makers and Ministers still do not provide reasons in a range of circumstances where they are not compelled to do so. The common law does not require a statement of reasons to be provided in the ordinary case (*Public Service Board (NSW) v Osmond* (1986) 159 CLR 656).

Note that the Supreme Court Practice Note CL 3 dated 6 July 2007 which explains the operation of the Administrative Law List and some of the provisions of the *Uniform Civil Procedure Rules 2005* also provides for a party asking the Court for a statement of reasons at directions hearings of administrative law matters. However, this remedy can only be deployed in litigation matters pursuant to section 69 of the *Supreme Court Act 1970* (NSW). It would be convenient to have reasons prior to any such litigation.

Accordingly, the Attorney's discussion of proposed reforms involving statement of reasons and a judicial review act are well worth considering.

Proposed Reform of Judicial Review in Australia

At the federal level, judicial review is governed by the law relating to constitutional writs pursuant to section 75(v) of the Australian *Constitution* and the common law accessed via section 38B of the *Judiciary Act 1903* (Cth). As well, the ADJR Act codifies the common law but does so in such a way that judicial review has become technical and constrained at times.

The Commonwealth Administrative Review Council (**ARC**) has very recently examined in detail the various aspects of the federal judicial review system in Australia. In its Report No 50, titled "*Federal Judicial Review in Australia*", the council makes recommendations for better integration of the review mechanisms and access to judicial review in federal courts.

After examining the current systems, the council concluded two key matters, namely:

- It is undesirable that there is a different ambit for '*constitutional review*' under the *Constitution* and the *Judiciary Act* and '*statutory judicial review*' under the *ADJR Act.*
- The *ADJR Act* continues to play an important role by improving the accessibility of judicial review, as a clear statement of the Parliament's commitment to be legally accountable for its decisions and by guiding administrative decision makers.

The council accepted the strong support expressed to its inquiry for the continuation of the ADJR Act that flowed from:

- a list of available judicial review grounds;
- flexible remedies, all of which are available where a ground of review is established;
- the right to request a written statement of reasons; and
- clear standing rules to initiate judicial review proceedings.

It ultimately recommended adoption of a model that would see the scope of the ADJR Act

expanded to encompass the jurisdiction of the High Court under s 75(v) of the *Constitution*.

It said (at page 11):

> "The Council recommends altering the scope of the ADJR Act, without, however, altering the current ambit of judicial review. The Council would more closely align the two current generalist judicial review jurisdictions, encouraging consistency between constitutional and statutory judicial review. The Council considers that the two review mechanisms should be equally accessible. "

The Reform of the NSW Tribunal System

On 22 March 2012, the NSW Parliament's Legislative Council's Standing Committee on Law and Justice handed down Report No 49 titled "*Inquiry into opportunities to consolidate tribunals in NSW*".

The Committee's task was to look into ways and means of external merits review tribunal consolidation in NSW, bearing in mind there are many and varied tribunals in NSW and a number of approaches could be taken to reducing them.

The current system was described as "*complex and bewildering*".

The Committee received submissions and conducted public hearings and investigated some interstate tribunals, such as the Victorian Civil and Administrative Tribunal (VCAT).

Other Australian jurisdictions including Victoria, Western Australia, the Australian Capital Territory and Queensland all have 'super' tribunals (also called "one-stop shops").

Ultimately, the Committee determined that that the NSW Government should pursue the establishment of a new tribunal that consolidates existing tribunals where appropriate and where promotes access to justice. However, as the task of actually determining what tribunal should go into what body was is immense, highly technical and it involved multiple complexities, the Committee determined that an expert panel should be put together consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders. The Panel would pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, and prepare a detailed plan for implementation, including which tribunals should be consolidated.

The Committee also examined the Consumer, Trader and Tenancy Tribunal of NSW (CTTT) and determined that it should stay separate from the proposed consolidation and that an internal appeal process should be established within it.

There is a range of tribunals operating now in New South Wales.

The larger or more commonly known tribunals include the CTTT, Administrative Decisions Tribunal of NSW (ADT) and the Industrial Relations Commission (IRC).

There are also a number of other tribunals, including the:

- MAS and CARS in the Motor Accidents Compensation Authority of NSW
- Workers Compensation Commission
- Guardianship Tribunal
- Mental Health Review Tribunal
- Local Government Remuneration Tribunal
- Statutory and Other Offices Remuneration Tribunal
- Parliamentary Remuneration Tribunal
- Victims Compensation Tribunal
- Anti-Discrimination Board
- Local Government Pecuniary Interest Tribunal
- Vocational Training Tribunal
- Local Land Boards.

There are also specific health professional disciplinary tribunals functioning in New South Wales including the:

- Medical Tribunal
- Nursing and Midwifery Tribunal
- Chiropractors Tribunal
- Dental Tribunal
- Optometry Tribunal
- Osteopathy Tribunal
- Pharmacy Tribunal
- Physiotherapy Tribunal
- Podiatry Tribunal
- Psychology Tribunal.

All of these tribunals would be up for consideration for consolidation or amalgamation into a new consolidated tribunal, according to the Committee.

On 26 October 2012, the NSW Attorney General released a 7 page document titled "*Government Response to the Standing Committee on Law and Justice Inquiry into Opportunities to consolidate tribunals in NSW*".

He said 23 of the State's tribunals will be integrated into a new overarching tribunal that will provide a "*simple, quick and effective process for resolving disputes, supervising occupations and reviewing executive action*".

He said the NSW Civil and Administrative Tribunal (NCAT) will be a one-stop shop for almost all state tribunals, ranging from relatively small bodies such as the Chinese Medicine Tribunal to the Consumer, Trader and Tenancy Tribunal.

The Industrial Relations Commission is not one of the bodies slated to be consolidated.

The NCAT will be divided into five specialist divisions:

1 Consumer,
2 Administrative and Equal Opportunity,
3 Occupational and Regulatory,
4 Guardianship,
5 Victims.

He said "*The NSW model will be structured to preserve existing specialties rather than taking a one size fits all approach*."

The President of the tribunal will be a Supreme Court judge to "*ensure its independence*" and there will be Deputy Presidents appointed to each of the 5 divisions.

A steering committee has been established to ensure NCAT starts operating in NSW by January 2014.

Some of the inclusions in the proposed NCAT include:

The Aboriginal and Torres Strait Islander Health Practice Tribunal
Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunal
Administrative Decisions Tribunal
Charity Referees
Chinese Medicine Tribunal
Chiropractors Tribunal
Consumer, Trader and Tenancy Tribunal

Dental Tribunal

Guardianship Tribunal

Local Government Pecuniary Interest and Disciplinary Tribunal

Local Land Boards

Medical Radiation Practice Tribunal

Medical Tribunal

Nursing and Midwifery Tribunal

Occupational Therapy Tribunal

Optometry Tribunal

Osteopathy Tribunal

Pharmacy Tribunal

Physiotherapy Tribunal

Podiatry Tribunal

Psychology Tribunal

Vocational Training Appeal Panel

Victims Compensation Tribunal

Thank you