Administrative Law Update

A paper delivered to the annual conference of COAT (NSW) - Council of Australasian Tribunals held in Sydney on 13 May 2011 by Mark Robinson, Barrister

I am asked to update you today on some recent administrative law developments, particularly those that might affect tribunals. I will talk about:

1. Statutory Appeals "*on a Question of Law*"
2. Criminal Intelligence (or lack thereof)
3. Using Wikipedia and Natural Justice
4. Apprehended Bias
5. Bias and the Document "*Retention*" Policy (that Shreds Documents) - *British American Tobacco Australia Services Limited v Laurie* (2011) 85 ALJR 348
6. Administrative Law Reform in NSW - Statutory Judicial Review?

Statutory Appeals "on a Question of Law"

In *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292 (Spigelman CJ, Allsop P, Basten JA) the NSW Court of Appeal handed down a significant decision as to the nature of a statutory appeal from the NSW Consumer, Trader and Tenancy Tribunal to Supreme Court pursuant to section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001*(NSW). Such appeals must now be commenced in the District Court of NSW. It was held in *Kostas* (at [102]) that section 67 appeals are limited to "*any decision on a question with respect to a matter of law which affects the ultimate outcome*". Accordingly, it became imperative that in commencing such appeals in the District Court, practitioners identify in the proceedings "***with a degree of precision*** *the decision with respect to a matter of law which is sought to be challenged on the appeal*" (*ibid* at [103]).

In the case, Basten JA (at [83] to [86]) set out his survey or excursus of statutory appeal provisions that were restricted in some way to legal error. He found that there were (at least) three broad categories that can be identified by reference to different forms of statutory language. He said:

> "The first and broadest category of appeal arises where the right of appeal is given from a decision that "*involves a question of law*", being language which permits "the whole case, and not merely the question of law" to be the subject of the appeal: see *Brown v The Repatriation Commission* (1985) 7 FCR 302 at 303 (referring to *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; 41

CLR 148 and subsequent authorities).

> The second category is exemplified by provisions which permit an appeal "*on a question of law from a decision of*" a tribunal. In such cases, it is the appeal which must be on a question of law, that question being not merely a qualifying condition to ground an appeal but the sole subject matter of the appeal, to which the ambit of the appeal is confined: *Brown v The Repatriation Commission* at 304; *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (1988) 82 ALR 175 at 178.
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> The third and narrowest category is one restricted to "*a decision of a Tribunal on a question of law*", in which case it is not sufficient to identify some legal error attending the judgment or order of the Tribunal; rather it is necessary to identify a decision by the Tribunal on a question of law, that decision constituting the subject matter of the appeal."

Statutory appeals from the CTTT under section 67 are in that third category. Accordingly, no appeal lies with respect to a matter of fact (at [16] per Spigelman CJ). Such appeals are liable to be the subject of continued scrutiny by the Court of Appeal. For those who consider that the Court of Appeal was drawing unnecessary distinctions in the *Kostas case*, identification of an appealable "*question of law*" or "*point of law*" will become increasingly important in NSW.

The applicant Kostas sought to argue a "*no evidence*" ground of judicial review as part of the section 67 appeal. The no evidence rule is that decisions which are based upon findings of fact must be founded upon logically probative evidence and not mere suspicion.

The Court of Appeal refused to allow the applicant to reply on the no evidence ground of appeal holding it did not fall within the section 67 expression "*a decision on a question with respect to a question of law*". It was also held that the applicant tended to confuse matters of law and fact. They made no real attempt to identify decisions of the Tribunal with respect to matters of law.

President Allsop did not join in with the no evidence ruling. He said (at [27]):

> "[T]he question whether a "*no evidence*" ground falls within the expression "*a decision on a question with respect to a question of law*" may depend upon the circumstances. A finding of fact made in the absence of supporting evidence is an error of law. This will usually support judicial review proceedings to the extent that an error of law is a ground for such review. Such a finding may or may not amount to or involve "*a decision on a question with respect to a matter of law*". Whether it does or

> not may depend upon the context of that aspect of the Tribunal's reasoning and approach."

This view of the President was upheld on the appeal by the High Court of Australia in *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390.

The underlying facts were that in proceedings brought before the Tribunal by building owners, the builder claimed to have served two claims for extension of time for the contracted building work before the owners served a letter of termination of the contract. The builder's contention was accepted by the Tribunal. On appeal to the Supreme Court, it was held that there was no evidence before the Tribunal that the builder had served either claim. The Court of Appeal held that this finding was a "no evidence" point and it could not support an appeal with respect to a matter of law.

The High Court held that a Tribunal finding of fact that was made in the absence of supporting evidence raised a question "*with respect to a matter of law*".
Further, that whether there was no evidence to support a factual finding was a question "*with respect to a matter of law*" (per Hayne, Heydon, Crennan and Kiefel JJ).

The Court also held that the words in section 67 "*a question with respect to a matter of law*" in the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) encompassed decisions on questions of mixed law and fact (per French CJ).

Unlike the Basten JA approach as to the necessary precision required to articulate an question with respect to a matter of law, French CJ held (at [34]):

> "It may be accepted that the "*question with respect to a matter of law*", which is the subject of a decision under appeal pursuant to s 67, may be defined with varying degrees of generality. It may be defined as a single question or multiple questions which can be regarded as subsumed in one decision or separately decided."

Accordingly, a significant degree of flexibility was introduced by the High Court in this important area. Justice Basten's taxonomy was criticised (at [89]) with the Court curtly stating:

> "The language of the statute must be the relevant starting point ..."

Finally, what looked like a very complicated case was ruled on by the High Court in the following simple terms (at [92]):

" In this case, the Tribunal made a wrong decision with respect to a question of law "

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

In *Commissioner of Police New South Wales v Gray* (2009) 74 NSWLR 1 the NSW Court of Appeal (McColl JA with Giles and Tobias JJA agreeing) considered the recent spate in New South Wales of Parliament requiring total secrecy in the use of what is described as "*criminal intelligence reports*" and "*other criminal information*".

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

The Court of Appeal set out a detailed survey of the tribunal's general division jurisdiction and recorded the legislative history of the provisions and noted the similarity of the provisions to those that have also been recently introduced to licensing decisions made under the *Firearms Act 1996* (NSW). The Court of Appeal also surveyed developments in other States in related areas that ultimately made their way to the High Court of Australia in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 and *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

The Court of Appeal ultimately held that in ordering the provision of particulars below, the tribunal member, and the Associate Justice of the Supreme Court of New South Wales,

impermissibly drew a distinction between the provision to an applicant of particulars of the alleged bad conduct he is said to have engaged in (such as to disqualify him from being a security industry guard) and the provision of the very content of the criminal intelligence reports intended to be fully protected by the legislation.

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

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

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

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

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

The issue was recently examined again in *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd* [2011] NSWCA 21 (Allsop P, Handley AJA and Sackville AJA) the New South Wales Court of Appeal had occasion to consider the above provisions. In the Supreme Court below, Justice Schmidt had ordered the aggrieved security industry licence applicant

(and his employer company) could have the benefit of a "*special advocate*" to appear at the tribunal proceedings and to make submissions as to the criminal information (even in closed sessions). She had held that the special advocate could be retained and paid for by the employer and he or she would represent the employer's interest. The proposed special advocate for this purpose was Mr Tony Whitlam QC, a former Federal Court Judge (at [171]-[172]). Once exposed to the confidential material, no further instructions could be given to this person.

The Court of Appeal held that the special advocate really was to be characterised as a representative of the applicant (which was forbidden under section 29(3)(b) of the *Security Industry Act 1997* (NSW) without the approval of the Commissioner). Therefore, such an office was forbidden by the legislation.

It was held that when the tribunal was confronted with a case in which the Commissioner of Police relied on relevant criminal intelligence, the tribunal possessed the following powers:

1. It did not have to accept or act upon the criminal intelligence which was to be kept secret. There was considerable scope of the operation of natural justice in this regard (at [178]);
2. The tribunal must satisfy for itself whether the alleged material is truly criminal intelligence of the kind that and defined by the Act (at [180]);
3. The tribunal can ask the Commissioner to approve disclosure of the material. Such a request from the tribunal would carry weight (at [181]);
4. The tribunal is not bound to act on the criminal intelligence and it must form its own view as to its cogency. It can also take into account the fact that the applicant has not been able to test the criminal intelligence or abuse evidence in answer to it (at [182]);
5. The tribunal's powers include power to appoint a legal practitioner to perform a function analogous to those performed by an *amicus curiae* in court proceedings (at 183] to [195]).

The Court of Appeal then provided considerable and detailed guidance as to how the appointment of a practitioner as *amicus curiae* would work in practice. For example, he or she would have no personal or financial interest in the outcome of the proceedings and they would not be selected or appointed by the review applicant.

Wikipedia and Natural Justice

There have been quite a few Supreme Court decisions in the motor accidents area where final determinations of "*claims assessors*" of the Motor Accidents Authority of NSW ("**MAA**") were each set aside by the Court for jurisdictional error or error of law on the face of the record. Claims assessors are personal injury lawyers appointed to sit and conduct non-curial hearings on personal injury damages. They are in effect quasi-judicial tribunals.

In *Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW (re: Kriticos)* (2010) 56 MVR 108; [2010] NSWSC 833 (Barr AJ)(30 July 2010) the insurer challenged the legal validity of a decision of a claims assessor. At a claims assessment hearing, the matter was fully argued and he handed down an assessment of damages in the amount of $336,699. The claimant's right leg was injured in the motor vehicle accident and some of her treating doctors expressed the opinion that she might have suffered from a condition known as Reflex Sympathetic Dystrophy (**RSD**), also known as Complex Regional Pain Syndrome (**CRPS**). In the medical reports that were before the assessor, the Court noted that although CRPS was mentioned a number of times (at [7]):

> "None of the reports that mentioned CRPS, however, said exactly what the condition was, how it might arise, what symptoms it might produce, how it might progress and what the possible ultimate result might be for a person experiencing it."

No expert gave oral evidence before the assessor and the assessor did <u>not</u> ask the parties for assistance in understanding the nature of CRPS.

In his reasons for decision, the claims assessor accepted that the claimant's right leg was injured and that she was suffering from CRPS. The claims assessor said:

> "I obtained information regarding reflex sympathetic dystrophy from Wikipedia. In Wikipedia, it is referred to a Complex Regional Pain Syndrome (CRPS) which is a chronic progressive disease characterised by severe pain, swelling and changes in the skin. The symptoms of CRPS usually manifest near the site of an injury, either major or minor, and usually spread beyond the original area. ***Symptoms may spread to involve the entire limb, and commonly, the opposite limb or other appendages.***

> Furthermore, it is stated the most common symptoms overall are burning and electrical like shooting pains. The patient may also experience muscle spasms, local swelling, increased sweating, changes in skin temperature and colour, ***softening and thinning of bones, joint tenderness or stiffness***, restricted or painful movement, and changes in the nails, dry skin over the complete body, and finally rapid shedding of skin.
>
> The pain of CRPS is continuous and may be heighten by emotional stress. Moving or touching the limb is often intolerable. Eventually the joints become stiff from disuse, and ***the skin, muscles and bone atrophy***. The symptoms of CRPS vary in severity and duration."

The insurer gave evidence which was accepted by the Court to the effect that Wikipedia is a community encyclopaedia which anyone can contribute to. The publishers of Wikipedia do not vouch that it is completely correct and not all the entries are verified. The Court held (at [23]) that there was "*a substantial risk that it contained errors*" and that the claims assessor should have informed the parties that he was informing himself by that means and should have allowed them the opportunity to make submissions or put before him evidence from qualified medical practitioners.

Significantly, the Court accepted that if a tribunal, even one possessed of flexible procedures and not based on the rules of evidence, formed a view which went beyond the opinions expressed by the experts in evidence, fairness required that it be disclosed and the parties be permitted any opportunity to address it (at [18]).

Accordingly it was held that the claims assessor denied the insurer procedural fairness and the Court set aside the assessment decision and remitted the matter to a different claims assessor.

Apprehended Bias Developments

The bias rule of procedural fairness is that a decision maker must not be personally biased (actual bias) or be potentially seen by an informed lay observer to be biased in any way (apprehended or ostensible bias) in the hearing of or dealing with a matter during the course of making of a decision. The rules in this area are broadly the same in respect of courts, tribunals and for executive decision makers (even expert executive decision-makers).

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

Bias may arise from:

1 interest - pecuniary or proprietary;
2 conduct;
3 association;
4 extraneous information; or
5 from some other circumstance (*Ebner*, *ibid*).

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

In the case of administrative proceedings conducted in private, the appropriate apprehended bias rule might in future be stated in the following terms (from the High Court in *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [28]:

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

Normally, if bias becomes an issue, it should be raised or dealt with by an applicant's legal representative immediately upon the issue becoming apparent. In court proceedings this might well occur while proceedings are being conducted. Occurrences of bias can readily, albeit inadvertently, be waived by failing to raise the issue promptly and before the decision maker concerned.

Actual bias cases are rare. They are normally clear cut and rarely become the subject of legal proceedings. Apprehended or ostensible bias is not as straightforward. There is a real potential for litigation where the perception of such bias arises.

Apprehended bias was considered by the High Court in *Vakauta v Kelly* (1989) 167 CLR 568. There, the Court examined comments made by Justice Hunt in the Supreme Court of NSW while he was hearing a personal injuries case. The judge was making some observations about expert doctors in the early part of the proceedings. The High Court determined that these comments amounted to ostensible or apprehended bias because they might lead to the conclusion, in the mind of the reasonable or fair-minded observer, that the judge was heavily influenced by views he had formed on other occasions rather than by an assessment based on the case in hand. In that case, at page 572-3, the High Court said:

> "The learned trial judge's adverse comments about Dr. Lawson, Dr. Revai and Dr. Dyball in the course of the trial of the present case were indeed strong:
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> > *"that unholy trinity"; the G.I.O.'s "usual panel of doctors who think you can do a full week's work without any arms or legs"; whose "views are almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously."*
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> His Honour below had indicated that he regarded those three medical practitioners as falling within a "*particular category of doctors*" to whom he had an adverse attitude. He stated that he expressed his views "*for the benefit of the present parties in the negotiations which were taking place*." The implication of that last comment would seem to have been that the parties should negotiate any settlement on the basis that his Honour would not be influenced by what those three doctors might say in evidence. In the event, only Dr. Lawson was called to give oral evidence. Dr. Revai's written report was received in evidence. No evidence from Dr. Dyball was received."

The High Court held that as counsel had failed to object to these remarks during the course of the hearing, that party had waived its right to complain about it. However, there were further remarks made by the judge after the hearing and in the reserved judgment itself (which came down in favour of the plaintiff) where the High Court held that there was plainly evidence of apprehended bias and it set aside the decision below. For example, his Honour said in the judgment that the evidence of one of the doctors was "*as negative as it always seems to be — and based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints*

of pain".

For an interesting example of how a Commonwealth tribunal (the Administrative Appeals Tribunal) recently dealt with a recusal application for apprehended bias in an administrative decision-making context, see *Avtex Air Services Pty Ltd and Civil Aviation Safety Authority* (2010) 52 AAR 432; [2010] AATA 716 (Egon Fice, Senior Member). There, the Civil Aviation Safety Authority (CASA) had cancelled the applicant's air operators certificate (AOC) and thereby grounded the airline. The airline sought a stay of the cancellation and after a hearing, the Tribunal refused. Upon finding out that the same tribunal member who had refused the stay was to hear the substantive *de novo* merits review hearing, the airline applied to the tribunal member to recuse himself for apprehended bias. The tribunal member refused, giving detailed and thorough reasons conveniently drawing relevant authorities together.

Bias and the Document "Retention" Policy (that Shreds Documents)

In *British American Tobacco Australia Services Limited v Laurie* (2011) 85 ALJR 348; 273 ALR 429; [2011] HCA 2, the High Court considered an apprehended bias case where Judge Jim Curtis of the NSW Dust Diseases Tribunal was asked to recuse himself by one of the parties because he was about to hear a case that involved determination of the very same factual issue that had been decided adversely to the defendant party in an earlier component of the case.

The issue concerned whether or not a cigarette manufacturer had deliberately devised and deployed a policy of selectively destroying pesky documents that might be called for in discovery or on subpoena in legal proceedings one day. The primary witness to be called was to be the same witness called in the earlier interlocutory proceedings. This was also in circumstances where in the earlier interlocutory ruling on discovery, the judge had found actual fraud on the defendant party as to its document retention policy in terms of the high test in section 125(1) of the *Evidence Act 1995*(NSW) (and not the "*reasonable grounds*" test in section 125(2)).

The High Court broadly agreed on the formulation of the correct legal test for ascertaining apprehended bias (for judges). However, there was disagreement as to the attributes to be ascribed to the hypothetical observer. The majority judgment was by Heydon, Kiefel and Bell JJ and the minority judgments were by French CJ and Gummow J.

The Court stated the accepted legal test for apprehended bias as being in the following terms (at [104]):

> "The rule requires that a judge not sit to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide [*Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337]. The apprehension here raised is of pre-judgment; it is an apprehension that, having determined the existence of the policy in the earlier proceeding, Judge Curtis might not be open to persuasion towards a different conclusion in Mrs Laurie's proceeding."

As to the rationale for the apprehended bias rule and as to the correct attributes for the informed lay observer, the High Court majority explained (at [139]-[140]):

> "It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification. Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned. In *Livesey* it was recognised that the lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.
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> Of course judges are equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence. Trial judges are frequently required to make rulings excluding irrelevant and prejudicial material from evidence. Routine rulings of this nature are unlikely to disqualify the judge from further hearing the proceeding. This is not a case of that kind. It does not raise considerations of case management and the active role of the judge in the identification of issues with which Johnson was concerned. ***At issue is not the incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knows that Judge Curtis has found that [the defendant party] engaged in fraud and who has read his Honour's reasons for that finding***." (footnotes omitted) (my emphasis)

The Court of Appeal decision which held that Judge Curtis's decision not to recuse himself was correct was set aside in the High Court which ordered that Judge Curtis be prohibited from further hearing or determining the Dust Diseases Tribunal proceedings.

Proposed Reform of Judicial Review in NSW

You will appreciate that 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 statutory 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**).[1] 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[2].

The ADJR Act celebrated its 30th anniversary last year. It commenced operation on 1 October 1980. Sir Anthony Mason presented a paper in 2010 to the Australian Institute of Administrative Law[3] 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).

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1 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.

2 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

3 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.

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.

Recently, the NSW Attorney General released a discussion paper on this topic titled "Reform of Judicial Review in NSW". It is linked on the front page on the AG's "Lawlink" web site. He is calling for submissions to be made by 14 April 2011.

The discussion paper analyses 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 asks whether there is a 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 asks:

* 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 considers 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 and responding to, even if the deadline has passed.

Thank you.