DEVELOPMENTS IN JUDICIAL REVIEW

A Paper Delivered by Mark A Robinson, Barrister,
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The last Public Sector In-House Counsel Forum was held in late August 2006. I will outline some of the developments in judicial review since then. I do not propose to be comprehensive. I will discuss those developments that might be of particular interest or relevance to government lawyers.

I will discuss developments in the following areas:

1 Post *Bhardwaj* – Revisiting Government Decisions;

2 Legal Professional Privilege and Administrative Law;

3 Bad Faith and Fraud;

4 Natural Justice – Procedural Fairness;

5 Privative Clauses; and,

6 Public Law and Dogs.

Post *Bhardwaj* – Revisiting Government Decisions

You might recall that at last year's forum, I spoke at length on the topic: "*What is Jurisdictional Error and Why is Everyone Talking About it*?" I also spoke of the issue that had many government lawyers captivated since *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, namely "*Re-visiting or Re-Opening Government Decisions*". Under the *Bhardwaj* principle, executive decision-makers may lawfully revisit decisions that can properly be considered as wholly invalid without a court order subject to the proviso that the decision must have involved a "*jurisdictional error*". Indeed, they may well have a duty to revisit a decision in an appropriate case - *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 esp at [51] to [53] (per Gaudron & Gummow JJ). The difficult question posed and discussed in my paper was - what is jurisdictional error?

In *Allianz Australia Insurance Limited v Crazzi* (2006) 47 MVA 74 ([2006] NSWSC 1090) (Johnson J) the Supreme Court of NSW considered an assessment of damages for a motor vehicle accident made by a "claims assessor". The State motor accidents compensation legislation gives an executive decision maker (a legal practitioner) power to hold a non-curial hearing and make an assessment of damages that is binding on the insurer if the claimant accepts it. If it is not accepted, the parties may then go on to court proceedings. After the hearing, three separate decisions were purportedly made in succession by the claims assessor. The first decision was an unsigned draft, mistakenly sent to the parties; the second decision looked like a final decision but it omitted consideration of the question of monetary interest on the quantum of damages to be awarded (which had not been argued but which was foreshadowed at the hearing and agreed it would be dealt with later), so, the assessor held a further hearing many months later and then made a third decision.

The final decision was held to be valid as the second decision was infected with jurisdictional error in that the assessor had denied the claimant procedural fairness by failing to determine the interest question (at [101][180]-[182]) and/or or the assessor's statutory function had remained undischarged and needed to be completed (at [183]).

The Court explained and applied the concept of "jurisdictional error" and discussed in detail the effect of the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 in this regard (at [162]-[169]). The Full Court of the Federal Court decision in *Jadwan Pty Limited v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 was also discussed (at [170]-[175]). That decision had sought to explain and significantly narrow or confine the *Bhardwaj* decision to apply to cases of denial of procedural fairness alone. The Supreme Court distinguished *Jadwan* (at [176]) and said (at [177]):

> "It is noteworthy that the High Court has restated the *Bhardwaj* principle, without qualification, in two cases decided since *Jadwan*. In *Plaintiff S157/2002 v Commonwealth of Australia*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ said at 506 [76] that "this Court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'." This passage was applied in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* at 997 [29]"

Accordingly, considerable care must be exercised when considering whether *Jadwan* represents a significant exception to *Bhardwaj*. It may be that a return to first principles regarding consequential "validity" and the proper approach to the interpretation of statutes as expressed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 will be called for in dealing with the many tricky decision–making situations that arise.

More recently, the nature and operation of jurisdictional error and the distinction between an ordinary error of law and a jurisdictional error was well explained by the NSW Court of Appeal in *Rockdale Beef Pty Limited v Industrial Relations Commission of NSW* [2007] NSWCA 128 at [80]-[82] and [85]-[86] (per Basten JA with Mason P agreeing). These passages are well worth reviewing when considering this difficult issue. It is an excellent and succinct summary.

Legal Professional Privilege and Administrative Law

Client legal privilege is an important and controversial issue for government lawyers. Such was evident from the robust discussion that followed Justice Ken Crispin's fascinating paper given at this Forum in 2006 – "*Privilege in the Public Sector*".

In *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 (Lander, Graham and Rares JJ) client legal privilege finally came to hold hands with administrative law.

In this case, an Egyptian national was claiming refugee status in Australia and seeking a protection visa. He said he had converted from Islam to Christianity and he was homosexual and that this was bad news in Egypt and he would suffer persecution if he went home. The Minister's delegate refused the visa. At the review hearing in the Refugee Review Tribunal, where the Minister is not represented and there is no contradictor, the Tribunal member asked the applicant in the witness box a number of directly questions about the legal advice the applicant had received about his refugee claim. The applicant answered and disclosed privileged communications. The *Evidence Act 1995* (Cth) did not apply and the *Migration Act 1958* (Cth) (s 433)

provided that a person giving evidence must not fail to give an answer except for reasonable excuse. The *Migration Act* does not provide for legal representation at the Tribunal. Natural justice or procedural fairness outside the Act's "practice code" is effectively abolished (s 422B) and the code made no provision at all for client privilege to be claimed. Rares J refers to procedural fairness as having been otherwise "abrogated" under the Act (at [190]).

The majority of the Full Court (Lander and Rares JJ) held that legal professional privilege applies to Tribunal proceedings and it is a common law right separate from procedural fairness obligations. To ask questions about an applicant's legal advice to an unrepresented person is to breach the common law and this vitiates the decision (per Lander J) and is a jurisdictional error in any event (per Rares J).

Lander J reasoned (at [12]) that as the privilege was such a "*substantive and fundamental common law principle*" and it is "*a practical guarantee of fundamental, constitutional or human rights*" and "*bulwark against tyranny and oppression*" (all citing High Court authority) and, as privilege has long been held to apply to non-judicial proceedings, in that it applied to prevent administrators from compulsorily requiring the production of documents the subject of privilege (at [35]), it follows, that privilege would apply to oral evidence given at inquisitive proceedings. The Tribunal is simply not empowered to "destroy a freedom of communication which the law seeks to protect" (at [76]) and to do so is plainly jurisdictional error in that it is:

1 a failure to exercise jurisdiction,
2 something done in excess of jurisdiction, or
3 it exceeds the authority or power given under the Act (at [73]-[74]. See also Rares J at [189])).

Lander J said (at [76]-[77]):

> "The Tribunal was in the same position as an administrative decision maker who has the power to require documents to be produced. The decision maker should not exercise the power to require a party to produce documents which are subject to legal professional privilege: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 537; *Arno v Forsyth* (1986) 9 FCR 576. A decision maker should not purport to exercise a

> power to require a person to answer a question which the law would excuse that person from answering.
>
> In my opinion, the Tribunal, when conducting its inquiry and in the exercise of its inquisitorial function, should advise a person of their right to claim privilege against self-incrimination or legal professional privilege if it appears that a question asked of the person may give rise to a legitimate claim of that privilege."

Lander J held this had nothing whatsoever to do with procedural fairness and, if it did, he would accept the Minister's submission that natural justice had, in effect been abolished outside the statutory "practice code" and the applicant would not have succeeded on this ground (see also Rares J at [189]).

The Minister has not appealed this decision. Accordingly, legal professional privilege not only arises when dealing with the compulsory production of documents, it applies to government questioning in inquisitive proceedings. The Tribunal member was not legally trained and the applicant's migration agent was not legally trained (at [173]). The decision places an onus on state and federal inquisitors to first warn investigation subjects of their common law rights as to privilege.

Client legal privilege in the context of freedom of information law was considered by the Victorian Court of Appeal in *Secretary, Department of Justice v Osland* (2007) ALD 380 ([2007] VSCA 96). The decision directly challenges accepted general law of the Federal Court that disclosing the conclusion or gist of a privileged communication waives that privilege and the communication is no longer protected.

The new rule of waiver is more faithful to the High Court's position in *Mann v Carnell* (1999) 201 CLR 1, the leading case.

In *Osland*, a convicted murderer, Mrs Osland, made an application for access to documents under the Victorian freedom of information legislation. There had been a controversial application for a petition of mercy made by the prisoner. She murdered her husband. However, her son actually wielded the murder weapon – an iron bar – and she had pleaded self defence and provocation. He was not convicted. She relied on new evidence to support her mercy application. It was sent to a number of senior

legal practitioners, including Susan Crennan QC (as she was then) and was ultimately rejected by the Governor. A new Attorney General (Mr Hulls) announced the decision and issued a press release explaining the decision in the following terms:

> "On July 5, 1999, Mrs Osland submitted a petition for mercy to the then Attorney-General Jan Wade. That petition set out six grounds on which the petition should be granted.
>
> Following consultation with the State Opposition, I appointed a panel of three senior counsel, Susan Crennan QC, Jack Rush QC and Paul Holdenson QC, to consider Mrs Osland's petition.
>
> This week I received a memorandum of joint advice from the panel in relation to the petition. The joint advice recommends on every ground that the petition should be denied.
>
> After carefully considering the joint advice, I have recommended to the Premier that the Governor be advised to deny the petition.
>
> The Governor has accepted this advice and denied the petition"

The Department of Justice refused the FOI application seeking the legal advice, citing exemption on the ground of legal professional privilege. The Victorian Civil and Administrative Tribunal ("VCAT") accepted the documents were privileged, but released them on "public interest override" grounds. In the Court of Appeal, the question of waiver became the central issue. The Court found there was no waiver, the Federal Court authority on the issue was wrong, and the VCAT's decision on the public interest override had miscarried. The documents could therefore not be released.

The Court of Appeal held, in essence (Maxwell P, with Ashley JA and Bongiorno AJA agreeing) at [49]), that disclosure of the conclusion or the gist, substance or effect of legal advice may, or may not, amount to a waiver of privilege in respect of the advice as a whole. Whether it does in a particular case will depend on whether, in the circumstances of the case, the requisite inconsistency exists, between the disclosure on the one hand and the maintenance of confidentiality on the other. The touchstone - inconsistency - is expressed in the decision in terms of "fairness" and "appropriateness". Whether privilege is waived also depends on the purpose of the disclosure of the said conclusion, gist, substance or effect of the advice.

The Court said (at [51]):

> "As *Carnell* demonstrates, the inconsistency test readily accommodates the notion that, in appropriate circumstances, the privilege-holder may disclose the content of legal advice to a third party for a particular purpose without being held to have waived privilege in the advice (see also *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* [2006] VSCA 201). Likewise, in my opinion, the test of inconsistency is well capable of accommodating the notion that, in appropriate circumstances, the privilege-holder should be able to disclose publicly that it is acting on advice and what the substance of that advice is, without being at risk of having to disclose the confidential content of the advice."

Of course, those "appropriate circumstances" will be determined by the court by reference to the touchstones mentioned above.

Bad Faith and Fraud

The High Court of Australia considered the concept of fraud and bad faith in public law in *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35 in the particular context of federal executive decisions and federal constitutional law. The Refugee Review Tribunal was held to have made a decision affected by a third party fraud, in that the refugee applicant's former migration advisor had fraudulently advised the applicant to not turn up at the Tribunal's oral hearing. Needless to say, after not turning up, the applicant lost his Tribunal review application. The High Court set aside the Tribunal's decision even though the Tribunal itself was blameless.

The Court held that under its Chapter III constitutional writ jurisdiction, the Court was able to deal with matters concerning "*due administration of federal law*" (at [21] & [27]). A fraud on a party to proceedings that causes a tribunal to fail to afford procedural fairness (or to "*subverts its processes*" (at [32])) is a matter that sufficiently affects the due administration of federal law and vitiates the Tribunal's decision made as a consequence. The jurisdiction remains "*constructively unexercised*" (at [52]).

This decision has the potential to open up a whole new category of judicial review challenges. The most interesting aspect of the decision is the lengthy discussion by the Court of the very close link between public law and equity concepts.

Natural Justice Developments

In response to Federal Parliament seeking to restrict the grounds of judicial review in the migration area, first by way of an ouster or privative clause (s 474 of the *Migration Act* 1958(Cth)) and second, by abolishing procedural fairness (s 422B), the High Court's approach to modern statutory interpretation has noticeably become more broad and creative. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592 esp at [35], the Court unanimously determined that the Refugee Review Tribunal has a positive duty to inform a refugee applicant of what it considered to be real issues in the matter (if they were any different from the issues that emerged from the decision of the Minister's delegate below).

The case concerned an Iranian national who was a seaman who jumped ship at Port Kembla. He claimed refugee status and sought a protection visa. He said he feared for his safety because the Captain of his ship knew he was interested in the Christian religion. At the Minister's delegate level, only one significant issue was determined (namely the return of the applicant to his vessel on one day).

However, at the Tribunal level, the knowledge of the ship's Captain became the "key issue" that turned the Tribunal against the applicant's claims.

The High Court held (at [35]) that the Tribunal must <u>first</u> identify the key issues if they were any different from the delegate's identified issues below.

While the decision turned on the particular provisions of the Migration Act, the case still holds important lessons for executive decision-makers in that the High Court accepted (at [49]) that generally, there would exist cases where procedural fairness would require:

1 There is a positive duty to notify an applicant of any issue critical to the decision which is not apparent from the nature of the issue or the terms of the statute; and,

2 A decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

These two particular aspects of procedural fairness (among others) were accepted to exist by the Full Court of the Federal Court *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Limited* (1994) 49 FCR 576 at 591-592 (and cited in *SZBEL* at [29]).

In the *SZBEL* case, notwithstanding that the parties had accepted that procedural fairness relevantly applied to the issues before the High Court (in effect, at [29]) the High Court was moved to very strictly construe provisions of the Migration Act so that a the nature of a "review" of a delegate's decision by the Tribunal was held to be both partly de novo review and partly an acceptance of the issues as they were identified by the delegate below (because the Act styled it a "*review*" and the applicant was to give oral evidence on the "*issues in relation to the decision under review*" – see [33]). Accordingly, any deviation by the Tribunal from those issues as fixed *below* must <u>first</u> be flagged with the applicant.

The decision therefore sets a higher standard for the Tribunal and a new positive duty.

As for other decision-makers, the High Court has signalled that it is also prepared to contemplate the imposition of such positive duties when it is procedurally fair to do so.

Privative Clauses

The High Court of Australia made a robust response to Commonwealth's privative clause – ss 474 of the *Migration Act 1958* - and provisions that seek to restrict access to judicial review (and 486A of that Act) in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 234 ALR 114 (18 April 2007). The case followed on from *Plaintiff S157 /2002 v Commonwealth* (2003) 211 CLR 476 where the High

Court declared valid the mother of all Commonwealth privative clauses (s 474) and went on the say it would simply step over it if it found jurisdictional error.

In *Bodruddaza*, the High Court held that the time limits in s 486A of the Act (up to 28 and then, possibly up to 84 days from actual notice of the adverse decision) were too restrictive in a legal and practical sense and were invalid under the *Constitution*. The Court also discussed the traditional prerogative writ (now, constutional writ) remedies.

Most interesting was that the Court demonstrated that the difference between a jurisdictional error and an error within jurisdiction (a "non-jurisdictional error") truly matters in Australian law whenever there is a privative clause to contend with.

The case concerned the Australian migration points system. To migrate to Australia as a "skilled migrant" one must achieve a certain amount of "points" in the class of visa provided for in the Migration Regulations.

The applicant was a man from Bangladesh who needed 20 more points to so qualify. The Regulation awarded 20 points if the "applicant provides evidence of having achieved an [International English Language Testing System] test score ***of at least 6 for each of the 4 test components*** of speaking, reading, writing and listening ***in a test*** conducted [in a specified period]" (my emphasis).

He sat for two tests in the specified period and did not achieve a score of 6 in either of them. However, when taken together, he did. The Minister's delegate would not take them together and determined they must be obtained in the <u>one</u> test. As a matter of statutory construction, the High Court agreed (at [71]-[74]) holding the presumption in ss 23 and 46(1) of the *Acts Interpretation Act 1901* (Cth) that the singular includes the plural "must yield to the particular text involved". Significantly, the Court added (at [70]):

> "[I]t is not immediately apparent that this had the consequence of vitiating the decision for jurisdictional error, rather than representing an error within jurisdiction which would not attract prohibition and mandamus under s 75(v) [of the *Constitution*]. The differential treatment of errors on the face of the

> record with respect to certiorari has often been noted (see, for example, *Craig v South Australia* (1995) 184 CLR 163 at 175-176.), but here certiorari can only be ancillary to relief under s 75(v) for jurisdictional error."

As to privative clauses at the State level, in *Rockdale Beef Pty Limited v Industrial Relations Commission of NSW* [2007] NSWCA 128 at [85] (per Basten JA with Mason P agreeing), the NSW Court of Appeal held that all that was needed to overcome the privative clause, s 179 of the *Industrial Relations Act 1996* (NSW) was that there must be a jurisdictional error or a want of jurisdiction (at [84]) or, the error must amount to a decision beyond jurisdiction or, perhaps, a constructive failure to exercise the jurisdiction conferred on the Industrial Court (at [85]). Further, a breach of an "an inviolable restriction" will also overcome a privative clause (at [86]).

As noted earlier, there is also an excellent contemporary discussion of the nature of jurisdictional error in the case - see *Rockdale Beef Pty Limited v Industrial Relations Commission of NSW* [2007] NSWCA 128 at [80]-[82] and [85]-[86] (per Basten JA with Mason P agreeing).

Public Law and Dogs

Since the last Public Sector Forum, a number of cases have come to my attention relating to the public law interaction with dogs.

Buddy and Knuckles

The first is a Commonwealth disability discrimination case - *Forest v Queensland Health* (2007) 95 ALD 638 ([2007] FCA 936) (Collier J).

The applicant had a mental illness. He was suffering from a schizo-typal personality disorder and accordingly, his social and interpersonal skills were bad. He was the owner of two dogs that were said to be his trained assistance animals and that they helped him in his condition. Buddy was an 8 year old border collie/kelpie cross breed – fully trained. Knuckles was an about 9 months old boxer dog and was in the process of being trained by the applicant to replace the ageing Buddy.

The applicant (together with one of his dogs) was refused entry to the Cairns Base Hospital on one occasion (to pick up a document) and also refused access to a Community Health Centre (for dental treatment) on a number of occasions. The applicant successfully sued the Queensland government for disability discrimination and was awarded the sum of $8,000 plus interest plus costs (see: *Forest v Queensland Health* [2007] FCA 1236 (14 August 2007)).

It would appear that the applicant might have been a bit of a public interest activist in that he had established and was President of an organisation known as "Partners AWARE Australia Inc" which ran programs involving the use of assistance dogs for people with mental illness. It would also appear that the Queensland Health Department became a test subject for the Commonwealth disability discrimination laws.

Section 6 of the *Disability Discrimination Act 1992*(Cth) ("**DD Act**") relates to indirect disability discrimination and provided:

> "6 ..... a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:
>
> (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply."

Section 9 relates to guide dogs, hearing assistance dogs and "trained animals". It provides that a person discriminates against a person with a disability if the discriminator treats the aggrieved person less favourably because the aggrieved person possesses or is accompanied by a guide dog, a hearing assistance trained dog, or (s 9(1)(f)) "any other animal trained to assist the aggrieved person to alleviate the effect of the disability, or because of any matter related to that fact".

The Court held that the applicant suffered relevant disability under the DD Act, the two dogs were relevantly "trained" and that the Department lacked the appropriate policies for dealing with assistance animals under the Act.

The most significant finding was that the Court held that no formal training or training to a particular standard was required by the DD Act and that section 9(1)(f) "*contemplates an animal which has been "trained" in the sense of having been disciplined and instructed to perform specified actions, but not by any particular person or organisation, nor to any standard of accreditation by any organisation*" (at [100].

It is probably the first case in the common law world where the demeanour of a witness's dog was an important factor in the Court's determination. The Court found that observing the applicant's dog (Knuckles) over several days in Court, enabled fact findings to be made about significant past events the subject of contested oral evidence. The Court also found (at [168]) that Knuckles was "*well trained*".

There are a significant number of lessons to be garnered from this decision for government (and private) entities that have regular dealings with the public and its assistance, companion or comfort animals.

It is an opportune time for government to re-visit those policies concerning the public's access to premises and services in light of the decision.

Jacko and Ruffy

I conclude with a heart-rending story highlighting a dubious development in what has come to be styled "elder law" in NSW judicial review. It is an emerging area there.

In *Allkins v Consumer Trader and Tenancy Tribunal* [2006] NSWSC 1093(Associate Justice Malpass) (19 October 2006), Jacko, a dog, was allowed to be kept at a mobile home by a couple at a residential park at a seaside town in NSW. The park rules were made pursuant to s62 of the *Residential Parks Act 1998* (NSW). Jacko died. The couple sought to replace him with another dog, Ruffy. Ruffy was brought into the

village without prior approval by management. Subsequent applications for approval were not granted. The couple's merits challenge in the NSW Consumer Trader and Tenancy Tribunal failed as the park had a policy and it in fact had amended the rules so as not to allow such pets in future. In the Supreme Court of NSW the couple, now the plaintiffs, alleged there had been a denial of procedural fairness and that the new park rules were invalid.

The summons was given short shrift by the Court and was dismissed with costs.

The decision was a bit harsh - for the plaintiffs, one might even say - the plaintiffs were barking up the wrong tree. Alternatively, one might say that the plaintiffs had bitten off more than they could chew. However, I would not say that. I would say - the decision was a bit - "ruff".

Thank You