STATE JUDICIAL REVIEW

A Paper Delivered by Mark A Robinson, Barrister,
To the Eleventh Annual Public Law Weekend
"Perspectives on Accountability"
in Canberra on 4 November 2006

Introduction

I am speaking to you today on a broad topic, namely what has happened in judicial review in 2005 and 2006 in the former colonies, the States, which I interpret, for today's purposes, to include the Territories. Practising predominately in New South Wales, I propose to concentrate on that State, where there is much activity. Accordingly, the scope of the paper is confined. The States are the engine-room of judicial review and they have been very busy of late, particularly in New South Wales. However, a large part of it is catching up, as it were, on identifying and applying more broadly, principles emerging from decisions of the High Court in its "constitutional writ" jurisdiction in recent years.

Some of the more interesting judicial review developments at the State level in NSW concern:

1 Extending the Merits Jurisdiction of the NSW ADT;
2 The many challenges to the decisions of the new Motor Accidents Authority of NSW (MAA) and the new Workers Compensation Commission of NSW (as one door closes - personal injury litigation – another opens – judicial review);
3 Reasons for Executive Decisions;
4 Re-visiting or Re-Opening Government Decisions;
5 Life after *SAAP* – the rise of procedural ultra vires?
6 When to Argue, Intervene or Appear as Amicus for a Government Defendant or Respondent; and
7 State Privative Clauses.

I will review some of the developments in these areas and conclude with a personal wish list for future developments in State (and Federal) administrative law and tell you a little story about two dogs, Jacko and Ruffy.

Leave to appeal on merits – Administrative Decisions Tribunal, NSW

The right to appeal to the Appeal Panel of the NSW Administrative Decisions Tribunal is governed by s 113 of the *Administrative Decisions Tribunal Act 1997* (NSW) which allows (under ss 113(2)(a) and (b)) an appeal "*on any question of law*" and, "*with leave of the Appeal Panel*", an appeal which "*extend(s) to a review of the merits of the appealable decision*". In numerous decisions, the Tribunal interpreted the extension of an appeal to the merits of the case as requiring a party to at least establish an arguable question of law. It is now settled by the NSW Court of Appeal that there is no need for the applicant to first establish an actual or arguable question of law or error of law to enliven the right to a merits based appeal. In *Lloyd v Veterinary Surgeons Investigating Committee* [2005] NSWCA 456, the

NSW Court of Appeal determined that the provisions in section 113(2)(a) and (b) of the ADT Act are not cumulative and are quite distinct sources of power empowering an Appeal Panel to deal with the merits of any appeal. The Court of Appeal held at [14] and [60]-[63] (per Tobias JA, with Spigelman CJ agreeing) that earlier dicta of the ADT Appeal Panels on the construction of the section were "clearly in error" - *Lloyd v Veterinary Surgeons Investigating Committee* [2005] NSWCA 456 at [57]-[59]; see also *Skiwing Pty Ltd v Trust Company of Australia* [2006] NSWCA 276 (9 October 2006) at [48] where the "jurisprudence" of the Appeal Panel in this regard was said to have been "overturned" by the *Lloyd* decision.

Judicial Review from Decisions of the NSW Workers Compensation Commission and the NSW Motor Accidents Authority ("MAA")

There appears to be a "sunrise industry" in New South Wales (as Emilios Kyrou wrote of the then "new administrative law" in the federal area (1987 NSW Law Society Journal 45)) for both personal injury lawyers and administrative law lawyers. After the 1999 amendments to the State motor accidents legislation, a large part of binding decision-making is now undertaken by (expert) statutory "non-curial" decision makers. Doctors (as medical assessors) make binding determinations of causation and extent of injury and experienced personal injury lawyers (as claims and resolution service assessors) make determinations binding on the insurers as to damages (see, the *Motor Accidents Compensation Act 1999*(NSW)). The same is the case in the workers compensation area where the Compensation Court was abolished and entirely replaced by a statutory "Commission" – (see, *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and the *Workers Compensation Act 1987* (NSW)).

There is not a lot left here for the courts to do, when binding executive personal injury decisions are made – apart from judicial review.

Some recent cases (amongst many) are as follows. In *Campbelltown City Council v Vegan* [2004] NSWSC 1129, Wood CJ at CL held that the provisions in the State workers' compensation legislation providing for an appeal to an appeal panel by way of "review" of the original medical assessment (including a review of a medical assessor's binding determination on medical conditions) gave rise, in the context of the relevant legislation, to a hearing "de novo". In *Campbelltown City Council v Vegan* [2006] NSWCA 284, the NSW Court of Appeal effectively overturned that decision (but stopped short of formally doing so). Handley JA (with McColl JA agreeing) equated the nature of the appeal to the Appeal Panel with an appeal "in the strict sense" to a superior court, with the aim being to redress error of the court below. Of the workers compensation medical Appeal Panel, His Honour said (at [17]-[18]):

> "Administrative appeals were unknown, or relatively unknown, in Australia and Britain in 1950, but are now common in both jurisdictions. Parliament by providing for such appeals must be taken to have intended that an appeal to a superior administrative body should be similar to an appeal to a superior court.

> Since an appeal is a means of redressing or correcting an error of the primary decision maker a successful appeal should produce the correct decision, that is the decision the original decision maker should have made. It is therefore an inherent feature of the appellate process that the appellate decision maker exercises, within the limits of the right of appeal, the jurisdiction or power of the original decision maker."

Basten JA (with McColl JA "generally" agreeing with His Honour's reasons) considered (at [76] to [87] and [131] to [137]) that the nature of the appeal to the workers compensation medical Appeal Panel was not entirely clear. His Honour noted the "tendency" of the legislature to identify available grounds for an appeal but without separately determining the scope of the appellate tribunal's powers and that this had "given rise to difficulties in other situations". His Honour considered that the approach adopted by the primary judge may have been erroneous in this respect and suggested, tentatively (without deciding) that the proper approach may be to limit the powers of the Appeal Panel "to addressing, and if thought necessary, correcting, errors identified in the certificate granted by the approved medical specialist…" (at [137]).

In the workers compensation area, the judicial review cases are building up significantly. *Summerfield v Registrar of the Workers Compensation Commission of NSW* [2006] NSWSC 515 (Johnson J)(31 May 2006) at [19] sets out the "long line of cases" (see also, *Massie v Southern NSW Timber and Hardware Pty Limited* [2006] NSWSC 1045 (Sully J)(6 October 2006).

Similarly, in the motor accidents area, the case law is developing. In *Allianz Australia Insurance Limited v Motor Accidents Authority of NSW* [2006] NSWSC 1096 (Sully J) (16 October 2006), the Court considered a determination of a claims assessor of the Claims and Resolution Service of the MAA (CARS) refusing a claim for exemption from assessment. The Court afforded the assessor a wide scope to make decisions, describing the CARS process as "non-curial" and uniquely and purely executive and therefore written reasons provided should not be scrutinised too closely by a Court in judicial review proceedings. The Court dismissed the challenge.

In *Allianz Australia Insurance Limited v Crazzi* [2006] NSWSC 1090 (Johnson J) (18 October 2006) the Court considered another challenge to a CARS assessment of damages for a motor vehicle accident. Three separate decisions were purportedly made in succession by the assessor. The first decision was a draft, mistakenly sent to the parties; the second decision omitted consideration of the question of interest which had not been argued but which was foreshadowed at the hearing, 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 earlier decisions were infected with jurisdictional error. The Court applied and explained jurisdictional error and the effect of the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 in this regard. The Full Federal Court decision in *Jadwan Pty Limited v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1, which had also sought to explain the *Bhardwaj* decision, was distinguished by the Court.

The Right to Reasons – New Duty? Clarification? The Demise of Osmond?

There are three significant recent decisions in this area:

As to the duty for administrative decision-makers to provide proper reasons, the NSW Court of Appeal has considered the duty in the context of a legal costs assessment "panel" (comprised of two legal practitioners) under the *Legal Profession Act 1987* (NSW). In *Frumar v The Owners of Strata Plan 36957* [2006] NSWCA 278 (Beazley, Giles and Ipp JJA) (17 October 2006) the Court held (at [42]) that the statutory duty of a costs assessor and the review panel to provide reasons, identified only the "minimum" extent of the duty at common law. Further (at [43]-[45]), any such statement of reasons should have sufficient content not only to facilitate any right of appeal on questions of law, but also to determine questions of fact. The Court set aside the panel's decision as the reasons were inadequate in that the basis for the approach to costs assessment was not explained and calculations of the final amount of costs allowed were not set out. The Court's remarks also apply to the new, and similar, costs assessment regime under the *Legal Profession Act 2004* (NSW) which is to be part of national model legislation (*Frumar* at [26]).

The importance of fully stated reasons as an essential legal requirement for a quasi-judicial tribunal (the NSW workers compensation medical Appeal Panel) was discussed in *Campbelltown City Council v Vegan* [2006] NSWCA 284 (25 October 2006) where the NSW Court of Appeal held that the Panel members had a duty to give full and proper reasons (at [24] per Handley JA with McColl JA agreeing) even though that was not an express requirement in the relevant legislation. The reasons were held to be inadequate and the Panel's decision was set aside. At common law, *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 held that there is no general law duty for administrators to provide reasons for statutory decisions in the absence of "special or exceptional circumstances" (see the cases on this cited in *Vegan* at [118]-[120]). In *Vegan*, the Court of Appeal held, as a matter of statutory construction and as a matter of principle, as the Panel was a quasi-judicial entity, it was required to provide reasons and indicated (at [106], per Basten JA with McColl JA "generally" agreeing) that the authorities that underpin *Osmond's case* might "no longer be as definitive as they once were".

In *Saville v Health Care Complaints Commission* [2006] NSWCA 298 (2 November 2006) the NSW Court of Appeal considered whether a failure of the NSW Medical Tribunal to provide adequate reasons would constitute a "jurisdictional error" (as had been pleaded in the summons in that case). The Court held that the Tribunal's reasons were brief but sufficient in the circumstances (where consent orders were largely being sought by the parties and the Tribunal added its own orders). As to the consequences of a determination of inadequate reasons, it was considered (at [24] per Basten JA, Handley and Tobias JJA agreeing) that even if the reasons were inadequate, it was entirely another question to be resolved altogether whether the decision would be held to be invalid if subject to jurisdictional error.

Re-visiting or Re-Opening Government Decisions

Increasingly, State statutory decision-makers and tribunals are being asked to reconsider their decisions, or they are doing so of their own motion under the

principles in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

This is occurring at all levels of government as the full implications of *Bhardwaj* are still being worked out by the Courts and the Executive.

There are many reasons why and ways in which a party, the decision maker or even a third-party might seek to have a decision reopened or revisited.

The authorities in this area suggest the following matters are crucial in determining whether a decision may properly or lawfully be revisited:

1. the identity of the applicant;
2. the timing of the application; and
3. the reasons for the application.

The three principal ways in which an executive or tribunal decision may be revisited are where there is:

1. Invalidity - by:

    a. The decision being so affected by fundamental or jurisdictional error that it is not a decision at all (in fact, the exercise of the statutory power remains unperformed – the *Bhardwaj* decision); or

    b. The decision being successfully challenged in a superior court in its supervisory jurisdiction and being set aside or quashed.

2. For "obvious error" or under a "slip rule" in curial proceedings or in some administrative review or external appeal contexts (such as in the Commonwealth AAT) – there must exist statutory or implied power or jurisdiction for this to be available (for example, in the Courts of NSW, rule 36.17 of the *Uniform Civil Procedure Rules 2005* (NSW) provides that "If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error). Provision for dealing with "obvious error" is contained in the NSW workers compensation and motor accidents legislation.

3. By exercising the statutory power from time to time if permissible – for example, by section 33(1) of the *Acts Interpretation Act 1901*(Cth) (also for example, section 48(1) of the *Interpretation Act* 1987 (NSW)) which provides that a person or body which has a statutory function or duty may exercise that function or duty from time to time as occasion requires.

The fundamental principle that has emerged from the case law is that decision-makers may lawfully revisit decisions without a court order where those decisions can properly be considered as wholly invalid by reason of 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 questions are - what is the jurisdictional error and when does that error render a purported decision wholly invalid?

It does not normally matter who first identifies the jurisdictional error. It may be pointed out by one of parties or the applicant, or it may be recognised or identified by the decision-maker himself or herself. Plainly, for the decision-maker to seek to revisit the decision, the decision-maker will need to be quite satisfied that a court would, if presented with the true facts, accept there was jurisdictional error and would (almost as a matter of course) invalidate the decision. The usual discretionary factors would also have to be borne in mind (delay, futility and a party being the source of his or her own problems). The key is, of course, the relevant statutory context – including the constating purpose of the statutory provisions – within which the primary decision was made. But the consequences of jurisdictional error may not always readily be discerned.

As His Honour Justice Kirby stated (in his dissenting judgement in *Bhardwaj, ibid,* at [101]) the issue of invalidity:

> "… presents one of the most vexing puzzles of public law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction."

In *Allianz Australia Insurance Limited v Crazzi* [2006] NSWSC 1090 (Johnson J) the Supreme Court of NSW held that a Claims Assessment and Resolution Service Assessor's assessment of a damages claim (after a non-curial hearing) was not able to be re-visited from time to time as it bound the insurer if the claimant accepted the determination within a fixed 21 days. The assessment could be quashed or held never to have been made on the ground of jurisdictional error (which was established in that case). This does not resolve the void/voidable distinction, which itself was not resolved in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

The Resurgence of Procedural Ultra Vires after *SAAP*?

If a procedural step is properly considered part of a statutory scheme whereby it encapsulates or constitutes a "core element" of the duty to accord procedural fairness, failure to take that step is a jurisdictional error: *Italiano v Carbone* [2005] NSWCA 177 at [105] to [106] per Basten JA. It is all a matter of statutory construction.

The principle was applied in majority decisions of the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162; (2005) 79 ALJR 1009. That case was also discussed in *Italiano v Carbone* [2005] NSWCA 177 at [63] by Basten JA (in dissent on this point – on application only, the principle is still good) in the following terms:

> "[*SAAP*] gives support to the contention that, in particular circumstances, breach of a mandatory statutory procedure may lead to

> invalidity of any resulting decision." (See also Einstein J at [2005] NSWCA 177 at [163]).

Italiano v Carbone involved judicial review of a Consumer Trader and Tenancy Tribunal case where damages were made against an entity that was never a party before the Tribunal. The Court of Appeal set aside the decision.

The real implications of *SAAP* are still to be felt at the State level.

Legislative provisions that may properly be characterised as open to fall within the *SAAP* principle, include where:

1. An essential part of a statutory scheme is a strict procedure that must be followed before any relevant finding or determination can permissibly arise;

2. The language of the relevant statutory provision is such that it is mandatory that the decision-maker not make an adverse finding unless or until some other step is taken; and/or,

3. The provision provides for a fair procedure or is part of Parliament affording a fair procedure (in the context of what might otherwise have been characterised as procedural fairness) before the decision or finding may lawfully be made,

(See, *SAAP* at [77] and [83] (per McHugh J - with Kirby J agreeing at [173] fn 129); [173] (per Kirby J); and [205] to [208] (per Hayne J - with Kirby J agreeing at [173] fn 129).

When to Argue, Intervene or Appear as Amicus for a Government Defendant or Respondent

A continuing and difficult issue for government or public sector defendants is to know when, and if so, to what extent, to oppose an applicant in judicial review proceedings as an active party.

In Court proceedings, if the defendant is a statutory decision-maker (whether independent from his or her employer in this regard or not) the choice is usually to file an ordinary appearance and to contest the proceedings (asserting that the decision was valid or correct in law). That decision exposes the agency to full costs orders and, possibly, judicial criticism.

Other options might include:

1. To put on a submitting appearance and let another interested party play the role of the contradictor (only available if there are opposing applications before the original decision-maker and where both or some of them are also joined as parties);

2. To examine the alleged grounds of review and accept them and agree or consent to orders setting aside the impugned decision (for those grounds pleaded or for other reasons); the applicant/plaintiff would expect an award of

costs. However, if a government agency consents to vitiating orders without a hearing on the merits of the judicial review case taking place, the proper order is for each party to pay their own costs – provided the matter was effectively settled or was rendered futile and the agency acted reasonably up to that date (*Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 esp at 624.5 and 625.6 (McHugh J)); or,

3. To accept that the decision is invalid (or affected by jurisdictional error) and re-make the decision (applying *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597) either before litigation has commenced or by consenting to the applicant discontinuing pending litigation (without any order as to costs);

4. To determine that a new decision may be made as an exercise of the *Interpretation Act* power to make a decision "from time to time as occasion requires" (provided there is no contrary intention in the Act – eg: *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (Gillard J)) and *Allianz Australia Insurance Limited v Crazzi* [2006] NSWSC 1090 (Johnson J) – again, either as a term of settlement of pending litigation or before proceedings have commenced.

In judicial review proceedings, the defendant may be a tribunal or a quasi-judicial body, particularly one that hears evidence or submissions from two or more parties, or undertakes or conducts hearings and makes an impartial and binding determination (such as the NSW Workers Compensation Commission and the NSW Motor Accidents Authority).

Ordinarily, the tribunal or entity would not seek to participate in Court as an active party where there is an active contradictor based on the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35 & 36. The rationale is that there is a risk that such participation might endanger the important perception of impartiality of the tribunal or its members if and when the subject matter of the impugned decision comes before it again upon remittal (*ibid* at page 36)

The options for an active role are:

1. If there is no or no adequate contradictor at the hearing, consider whether the Attorney-General should be joined as an active party (who can appeal if the Court makes the wrong decision) (See, eg, *Police Integrity Commission v Shaw* [2006] NSWCA 165 (per Basten JA) at [39]–[43]);

2. Appear at the hearing and make submissions only going to the tribunal's powers, functions guidelines and procedures (as permitted by *Hardiman*);

3. Maintain (or file, if not already filed) a submitting appearance and do not turn up (or appear once as a courtesy to the Court and seek to be excused from further attendance at the hearing); or

4. Put on a submitting appearance, do not appear but maintain a "watching brief" at court in order to monitor the progress of the hearing and, if necessary, speak

> to the solicitors and/or counsel for the relevant parties at a convenient juncture about particular issues or facts that might arise (perhaps, including implications of particular questions from the Bench).

In *Police Integrity Commission v Shaw* (2006) 46 MVR 257 ([2006] NSWCA 165) (per Basten JA) at [39]–[43], the Commission was roundly criticised for appearing, arguing a position as to its jurisdiction to continue to conduct a hearing and for appealing that decision to the Court of Appeal. Basten JA held that the active participation of both the Commission and the Commissioner in the proceedings was of "particular concern" and raised the question whether there could later be a "disinterested inquiry" in the particular matter then before it (at [42]). The Commission was undertaking an inquiry into a former Supreme Court judge as to whether there was any misconduct on the part of the NSW police force in relation to a particular alleged drink-driving incident and a missing blood sample.

See also, *Campbelltown City Council v Vegan* [2006] NSWCA 284 at [54]-[64](per Basten JA with McColl JA agreeing) where the Court held that NSW WorkCover should not have played an active role in the litigation (which should have been run inter-parties) and it should have confined its role to that of an amicus curiae. The Court refused to make any costs order in relation to the Authority.

State Privative Clauses

One of the larger issues that will need to be determined in due course by the High Court is the question of the effectiveness of judicial review of wide ouster or privative clauses of the States, such as the one in s 179 of the *Industrial Relations Act 1996* (NSW) considered this year (and largely avoided) in *Fish v Solution 6 Holdings Limited* [2006] HCA 22 and *Batterham v QSR Limited* [2006] HCA 23. It has been described by some commentators as the "mother of all privative clauses" – it is cast in such wide terms.

At the Commonwealth level, the last significant word was *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 on the application of jurisdictional error in the face of a strongly-worded federal privative clause in the *Migration Act* 1958(Cth).

In *Solution 6*, the High Court dealt with a NSW privative clause and held relevant presumptions of Parliament in enacting ouster clauses as set out by the majority judgment, including (at [33]):

> "...the "basic rule, which applies to privative clauses generally … that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies". In addition, it must also be presumed that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution."

Whether the High Court follows through on this remark remains to be seen in a future case.

There is much activity at the State level (particularly in NSW) on the scope and effect of such State clauses. There is strong support among practitioners and commentators for the view that all that should be required to overcome an ouster clause is the establishment of a jurisdictional error. Upon that event, it can be said that a lawful decision was never made or the power never exercised – see, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [76] and the cases referred to there (per the majority). However, in the face of a State ouster clause, the NSW Court of Appeal is presently preoccupied with the task of identifying or characterising any errors as first constituting breaches of "essential", "imperative" and "inviolable" provisions before setting them aside – see, for example, *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales* (2005) 145 IR 327 at [56] & [57]; *Mitchforce Pty Ltd v Industrial Relations Commission* (2003) 57 NSWLR 212; *Uniting Church in Australia Property Trust (NSW) v Industrial Relations Commission of NSW* (2004) 60 NSWLR 602; cf: *Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd* (2004) 88 SASR 311.

That is a debate for anther day.

As for a comprehensive and recent review of the NSW administrative law landscape at the judicial review level, I commend to you the two papers given on 30 August 2006 in Sydney as part of the AIAL National Lecture series by

- Michael Sexton SC, NSW Solicitor General; and
- Keith Mason, President of the NSW Court of Appeal.

Wish List for State (and Federal) Administrative Law

Some of the developments I wish for (to achieve clarity and certainty) in this area include:

1 That "error of law", whether or not appearing on any "record" (however defined), be plainly justiciable for executive decisions in all matters, not merely for tribunals or quasi-judicial tribunals;

2 That the nature of an external or internal administrative appeal that is expressed by Parliament in broad terms (such as in providing merely for a "review" by a panel) be settled;

3 That the bounds of the scope of a permissible State privative clause be finally determined and that the word "*inviolable*" be stricken from the relevant State and constitutional writ jurisprudence (along with the word "*reconciliation*" - in an administrative law context - and the "*Hickman principles*"). The concept of jurisdictional error should be sufficient;

4 That the void/voidable distinction be settled so that it is capable of being explained sensibly to clients;

5 That procedural ultra vires rise from the ashes as an effective ground of review and that *Project Blue Sky* be distinguished or overturned;

6 That "Wednesbury unreasonableness" be renamed "manifest unreasonableness" (as suggested by Basten JA in *Saville v Health Care Complaints Commission* [2006] NSWCA 298) and become useful and effective again (as it remains so in Tasmania); and,

7 That an applicant in <u>any</u> case has good prospects of succeeding on the apparently available (and so far unattainable) "*S20"* ground of "manifest irrationality".

Jacko and Ruffy

I conclude with a heart-rending story highlighting a dubious development in the State engine room of judicial review.

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). The plaintiffs had a dog, Jacko. He died. The plaintiffs 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 merits challenge in the NSW Consumer Trader and Tenancy Tribunal failed as the park had evinced a plain intention to and had in fact amended the rules so as not to allow such pets in future. One might have thought that an opportunity presented itself to develop notions not only of procedural fairness but also of the circumstances in which "accrued rights" might be preserved. In the Supreme Court of NSW (with Legal Aid funding and senior counsel) it was alleged there had been a denial of procedural fairness and 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