Persuasive Advocacy in NCAT: What does it take?

A paper delivered by Mark Robinson SC to a Legalwise Seminar
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I am asked to speak to you today on the topic Persuasive advocacy in NCAT: What does it take? It concerns knowing what to say and how to say it.

Specifically, I hope to cover:

- Advocacy before the tribunal;
- Advocacy before the Appeal Panel (in Internal and External Appeal matters);
- The role of laws relating to evidence in the tribunal; and
- Onus of proof and standard of proof before the tribunal.

Basic advocacy at the Tribunal

Advocacy is the art of persuasion. Advocacy at the tribunal is very similar to advocacy at the Local Court, the District Court, the Supreme Court and the Federal Court and the High Court.

It is identical to appearing at the Commonwealth Administrative Appeal Tribunal.

If you have leave to appear as a legal practitioner (and that's a big question at NCAT), the most important thing to note is that the tribunal members do not require legal practitioners to stand when addressing the tribunal.

You must sit.

This takes some getting used to, especially for barristers and solicitor advocates, who are used to standing.

Most tribunal members are not positioned higher than the legal practitioners, so standing would be a little awkward. The fact is that some legal practitioners are so conditioned to standing in court that they feel they cannot make a credible oral submission while seated. I

once witnessed one hapless barrister in this predicament and he was so obviously uncomfortable that he asked the Senior Member if he could please stand while he addressed the tribunal. The Member (Allen SM) said "No. If you did that you would be towering over me in height and I would feel intimidated!"

I acknowledge that it is very difficult even for me to take a formal objection to the admission of evidence while one is sitting. I suppose, raising your hand to emphasise the objection might be acceptable. It's hard to shake old habits.

Before you sit (and stay there), you must navigate bowing (or not bowing) before the tribunal as the member or members emerge. Understand that most barristers ordinarily do not bow to any person or body unless that person or body possesses at least some judicial power. We will nod or tilt the head, as an acknowledgement and as a sign of respect, but we will not normally bow upon a tribunal member entering the hearing room or on the practitioner leaving or entering the room while a hearing is on. One Senior Member of the Administrative Appeals Tribunal (or former member) routinely arrived at the hearing room and gave the practitioners (and anyone present) a full tilt – from the hip. It was hard to resist making even a partial tilt in return. There are no fixed rules here.

I normally refer to a tribunal member as "your Honour", if the tribunal is constituted by a justice or magistrate, or as "Deputy President", "Senior Member" and so on. However, apart from a judge or justice (whom you call "Your Honour"), for me personally, it always comes back to "Tribunal" or "Tribunal Member". That way, the integrity of the transcript is preserved and I do not have to remember which tribunal I am appearing in or what is the member's name and designation.

Applicants generally go first, then the respondent and the applicant goes on in reply. This is invariably so except in freedom of information (GIPPA) cases where the legislation gives the State agency the onus of proof and the State goes first.

Irrespective or what orders or directions the tribunal has made before the hearing (and whether you are the applicant or the respondent), always prepare, file and serve written submissions (a few pages) and a chronology (one page and referring to the filed evidence).

That, and the decision under review, might be all that the tribunal member has time to read before the oral hearing commenced.

It is your client's first (and often best) shot across the bow.

Keep the submissions brief. Any more that 5 or 6 pages is pushing it.

Direct the tribunal first to the sections of the Act or the regulations it has to deal with.

Set out what evidence you rely upon.

Give a sketch outline of your arguments.

When you commence your address, ensure your submissions have made it into the tribunal's hands and ascertain whether they have been read.

It is not a good idea to read them (if they have already been read) or to repeat all of the contents in open session. Just take the tribunal to the legislation or the regulations first and then to the decision under review, then to the evidence second and to the chronology last.

If you have prepared these documents, you can relax, because you will have broken the back of the work you have to do in the tribunal hearing. You still have significant work to do, but you can relax a bit while doing it. If your submissions are good enough, you just have to join the dots at the hearing,

In many respects, presenting a case in the tribunal is very much like presenting a case in a court. Apart from the rules of evidence, as to which, see below, it is very similar in approach.

Most of the principles of advocacy do apply. So do most of the advocacy rules. For example, for barristers, in the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) the word "court" is defined to include "all statutory tribunals", such as the NCAT. The duty to the court (rule 23) and the duty to the client (rule 35) still apply in NCAT. See also the *Legal*

Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW).

Section 36(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) ("**NCAT Act**") provides the "*guiding principle*" for the Act and the procedural rules namely to facilitate the "*just, quick and cheap resolution of the real issues in the proceedings*".

These same principles (in identical terms) apply to the Supreme Court of NSW by virtue of section 56(1) of the *Civil Procedure Act 2005* (NSW).

NCAT is required to give effect to this guiding principle when it exercises any power given to it by the NCAT Act or the procedural rules, or when it interprets any provision of the Act, or the procedural rules (section 36(2)).

Significantly, each party to NCAT proceedings and each barrister or solicitor representing them is "*under a duty to co-operate with the tribunal*". Their duty is to give effect to the guiding principle and it includes participating in the processes of the tribunal and complying with directions and orders of the tribunal (section 36(3)).

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

As to opening statements, they are not usually done at the tribunal. The tribunal just proceeds having read the decision under review, the submissions and the evidence already filed. If you feel you need to make some brief opening remarks, just say so at the beginning (or after the evidence is all in and marked). The tribunal member will probably let you do so.

The art of persuasion is the mirror image of effective organisation and having structure to your evidence and submissions. If they are logical and concise and not cumbersome, the ability to persuade the tribunal is greatly enhanced.

Appeal Panel Advocacy

The tribunal's Appeal Panel deals with its appeal jurisdiction (external and internal appeals) - sections 31, 32 and Part 6 of the NCAT Act, sections 79-81.

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

An internal appeal may be made to an Appeal Panel by a party to a tribunal decision from an "*internally appealable decision*" (section 80). Interlocutory decisions may be appealed with leave. Other appeals are heard "*as of right*" on any question of law, or with the leave of the Appeal Panel, on any other grounds (section 80(2)). There are few, if any, such appeals available to health professionals. The intention is to by-pass the internal appeals and – to go straight to the Supreme Court from a single layer tribunal hearing (from an external appeal).

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

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

(a) the appeal to be allowed or dismissed,
(b) the decision under appeal to be confirmed, affirmed or varied,
(c) the decision under appeal to be quashed or set aside,
(d) the decision under appeal to be quashed or set aside and for another decision

to be substituted for it, or

(e) the whole or any part of the case to be reconsidered by the tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

On appeals, the Appeal Panel may exercise all the functions that are conferred or imposed by the Act or other legislation on the tribunal at first instance when varying, or making a decision in substitution for, the decision under appeal. The tribunal, will be able to stand in the shoes of the tribunal below, which itself, could stand in the shoes of the original administrative decision-maker - *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [140]-[141], Kiefel J stated (with Crennan J agreeing (at [117]); at [96] to [100] (per Hayne and Heydon JJ); at [30] to [32], [33] to [38],[39] to [42] (per Kirby J) and *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [14] to [15].

Advocacy Notes for the Appeal Panel

I will not touch on the rules of advocacy that are contained in the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).

You should already know these.

It is the duty of advocates to be "clear, concise, accurate and comprehensive" (Justice K.M. Hayne AC, "Written Advocacy", a paper delivered as part of the Continuing Legal Education program of the Victorian Bar on 5 and 26 March 2007)

As to written submissions, Justice Hayne said:

> ""The principal task of an advocate is to persuade. The principal purpose of written advocacy is, therefore, to persuade. If the author is to persuade, the written submissions must be useful to the audience to whom they are directed – the judges who are to decide the case. If the submissions are to be useful to the judges, the author must convey the requisite information clearly, concisely, accurately and comprehensively" (Hayne ibid page 4)

Justice Hayne had one more devastating lesson for us in advocacy. In an urgent late-night injunction application in the High Court of Australia in 1999 before Justice Hayne (where he was asked to stop a deportation of an illegal non-citizen scheduled to occur later that evening - *M.I.P. Ex parte: The Minister for Immigration and Multicultural Affairs* M30/1999 (29 March 1999)), the following exchange took place between counsel and the bench:

Mr Gunst: We understand the force of that argument, your Honour. We put our submissions. We put them as forcefully as we can. We acknowledge that the test - the threshold is a low one.

HayneJ: I smile because one other member of the Bench in response to a submission that was said to be put forcefully replied, “You can put it with all force you like but would you please put it with cogency”.

So, the full lesson is to be clear, concise, accurate and comprehensive and cogent.

Justice Sackville made this point in the most compelling way in the C7 litigation (*Seven Network Ltd v News Ltd* [2007] FCA 1062). He wrote to the parties in the following terms:

> “At the risk of stating the obvious, part of the art of advocacy is to make it easy for the decision-maker to understand what issues need to be resolved and to explain clearly, cogently and concisely how and why the crucial issues should be resolved in favour of a particular party. To leave the Judge, if not completely at large, then without a reliable working compass in a vast sea of factual material, is not a technique calculated to advance a party’s case. This, I hasten to say, is not because any Judge would consciously penalise a party by reason of the bulk of its submissions or the manner in which its arguments are presented. It is because the cogency and persuasiveness of submissions depends on the ability of the Judge to follow them and to isolate the critical legal and factual issues upon which a case is likely to turn.”

Evidence and the NCAT

The tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice (section 38(2) NCAT Act). However, the rules of evidence <u>do</u> apply in the tribunal’s enforcement jurisdiction and section 128 (Privilege in respect of self-incrimination) of the *Evidence Act 1995* applies to all proceedings – section 38(3) and in disciplinary matters under the *Legal Profession Uniform Law (NSW)* in the Occupational Division.

The duty of the advocate is to ensure the tribunal has before it the best evidence it can have. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-360 (per Mason CJ), the court said:

> "… a finding of fact will … be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts, which amounts to the same thing."

A finding of fact that is made in the absence of supporting evidence is an error of law - *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390. See also, *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 62–68 per Deane J (with Evatt J agreeing). The position that findings of fact must be supported by logically probative evidence is also developed in Deane J's judgment in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 (compare the decision of Mason CJ at 356).

Generally speaking, in practice, the tribunal will admit most apparently relevant documents into evidence. If they are contested, they will be admitted subject to their relevance being established. This is the same approach in the Commonwealth Administrative Appeals Tribunal. This does not mean the rules of evidence are not relevant. They are.

Sullivan v Civil Aviation Safety Authority (2014) 226 FCR 555; [2014] FCAFC 93

Sullivan is decision of the Full Court of the Federal Court, dismissing the Mr Sullivan's appeal from a decision of Justice Jago (then on the Federal Court) who had dismissed his appeal from the AAT. The AAT had affirmed the decision of the CASA, the Civil Aviation Safety Authority, to cancel the applicant's helicopter pilot licence. The appellant raised two issues to be resolved on the Full Court appeal. First, whether the AAT was bound to apply the test in *Briginshaw (Briginshaw v Briginshaw* (1938) 60 CLR 336) in making factual findings and whether in fact it had applied that test. Second, whether the tribunal was required to comply with the evidentiary rule in *Browne v Dunne* (1894) 6 R 67 in relation to the evidence of one of the applicant's witnesses. That rule is a rule of fairness which restricts the submissions that may be put where the subject matter had not been put to particular witnesses or it contradicts them, when they were not challenged while giving evidence.

As to the rule in *Briginshaw*, it is ultimately founded upon principles of fairness and common sense, but is more immediately derived from the decision of the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336. That was a case concerning the standard of proof to be applied in a petition for divorce on the ground of adultery under the *Marriage Act* 1928 (Vic) (at [99]).

The more oft-repeated observations of Dixon J are as follows (60 CLR at 361-362):

> "… But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences …"

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

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

1) The procedure that the Tribunal decides to follow in any particular case, including the extent to which, if at all, it decides to apply common law rules of evidence is a matter which the legislature has left to the tribunal to determine.

2) There is no "general principle of law" which is to be applied by the Tribunal to some "indeterminate fact findings which may be characterised as 'grave' or 'serious' (at [16]).

3) Within some other principles including principles of procedural fairness, the Tribunal is free to make findings of fact untrammelled by principles that would apply to judicial proceedings.

4) This does not mean that findings of fact by the Tribunal are free of judicial scrutiny; for example, findings must be neither "irrational" nor "illogical" and the Tribunal must in that sense rationally consider probative evidence.

5) When making its findings of fact that have “serious or grave” consequences the Tribunal is free to consider the evidence and other materials before it. (But the more central a particular fact may be to the decision reached, the Tribunal, “it may be accepted would express greater caution in evaluating the factual foundation for the decision to be reached” [120].

6) Like *Briginshaw*, the rule in *Browne v Dunn* has its origins in the common law and in the judicial resolution of disputes. The Court found that the rule is “also founded in basic common sense and fairness” [140].

The Court re-emphasised that while not bound by the rules of evidence, the Tribunal was bound to carry out its review function in accordance with the *Administrative Appeals Tribunal Act 1975* (Cth) (including section 39 of that Act which required the parties to be given a “reasonable opportunity to present (their) case”. Subject to those requirements the procedure of the Tribunal is within its own discretion [164].

The same is true of the NCAT in relation to the admission of evidence.

Onus of Proof before the Tribunal

The NCAT Act does not provide for the standard or onus of proof (except in s 77(6) of the NCAT Act which relates to civil penalty matters only and provides that the standard of proof is proof on the balance of probabilities). Accordingly, unless it is found in the applicable enabling Act, there is no onus of proof and the tribunal must achieve the requisite state of satisfaction.

In *CGP v Children's Guardian* [2017] NSWCATAD 12, the tribunal considered (at [21]) the standard and onus of proof in the tribunal's own proceedings, having regard to s 38(2) of the NCAT Act. The tribunal, citing *Bronze Wing Ammunition Pty Ltd v SafeWork NSW (No 2)* [2016] NSWSC 988, considered that (at [24]) the rules of evidence did not apply before a single member and there was no onus of proof cast upon either party.

The tribunal determined (at [25]) that a tribunal must be “comfortably satisfied” as to the facts in issue.

In *Health Care Complaints Commission v Attia* [2016] NSWCATAD 309, in a disciplinary matter, the tribunal applied the principles of evidence and onus in *Briginshaw v Briginshaw* [1938] 60 CLR 336. It was considered (at [57]) necessary where the allegations, if found proven, carried potentially serious consequences, that the evidence provided by applicants should not constitute "slender and exiguous proofs", nor "inexact proofs, indefinite testimony, or indirect inferences".

In *Hawkins v Council of the NSW Bar Association* [2019] NSWCATOD 148 the Tribunal said (at [23]):

> "[W]e see the following passage from the decision of Brennan J (as he then was) in *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-5 as applicable to our review:
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> … Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the AAT is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it. If the material is inadequate, the Commission, the Board or the AAT may request or itself compel the production of further material. The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings.

What is the right balance or standard of proof that should be applied by tribunal members?

The Act provides no guidance - tribunal members are merely required to make assessments of disputed questions or issues. The guidelines provide some guidance in the procedures that are to be implemented but give no direction and make no suggestion as to the standard of proof to be applied.

In that famous case of *Briginshaw v Briginshaw* (1938) 60 CLR 336 the High Court of Australia was dealing with the Victorian *Marriage Act 1928*. Section 90 of that Act provided that on a marriage dissolution application, the Court had to "satisfy itself as far as it reasonably can as to the facts alleged". If it was satisfied that the case of the petitioner was established, the Court shall pronounce a decree nisi. The question before the court was whether the standard of proof of beyond reasonable doubt applied. The Court held that the civil standard applied and not the criminal. In making its determination, the justices made a

number of comments on the concept of the civil standard of proof and how wide and flexible it is. Latham CJ stated (at 343):

> "There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue—See Wills' Circumstantial Evidence (1902), 5th ed., p. 267, note n: "Men will pronounce without hesitation that a person owes another a hundred pounds on evidence on which they certainly would not hang him, and yet all the rules of law applying to one case apply to the other and the processes are the same.""

Dixson J stated:

> "[On Starkie's Law of Evidence] When, however, he passes to the standard of proof in other cases, he describes it in less positive and definite terms (1st ed. (1824), p. 451; 4th ed. (1853), p. 818):—"But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or prima-facie right, operates in favour of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or of the other." ...
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> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

That is how the civil standard of proof is best described and discussed in its application to a Court (described as a "tribunal" at various points in the extracts).

The situation that pertains to an executive decision maker (even if he or she is constituted as a tribunal of some description) is very different. The ordinary concepts of the civil standard of proof do not apply and, in some cases, cannot apply.

In many cases, the standard of proof for the tribunal or executive decision maker is set out in the particular legislation. For example, in the *Veterans' Entitlements Act 1986* (Cth) there are a number of different standards that must be applied by the Commonwealth Administrative Appeals Tribunal when considering compensation claims of (section 120(1) & (2) and see, for example, *Budworth v Repatriation Commission* (2001) 33 AAR 48.

Tribunal members are sometimes investigative or inquisitorial bodies under the enabling Act.

No particular burden of proof applies.

The rules that applied to investigative tribunals and the assessment of evidence were discussed by the Privy Council in *Mahon v Air New Zealand Ltd* [1984] AC 808. That was a Royal Commission into the events surrounding the aircraft crash into the side of Mount Erebus in the Antarctic. 257 people died. On assessing the evidence, Lord Diplock said at pages 814-815), that an investigative inquiry is in "marked contrast" to an ordinary civil inquiry. It is conducted differently and the evidence emerges differently, sometimes piecemeal. He also noted that such investigative tribunals are subject to supervision by the courts in judicial review proceedings. In discussing the rules of natural justice and, what is known in Australia as the "no evidence rule" he said (at 820-821):

> "The first rule is that the person making a finding in the exercise of such jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
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> The technical rules of evidence applicable to civil or criminal litigation for no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on some material that tends logically to show the

> existence of facts consistent with the finding and that the reasoning supportive of the finding, it be disclosed, is not logically self-contradictory.
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> The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."

Mahon's case has been considered and applied in Australia. It was mentioned in *Minister for Immigration v Wu Shan Liang* (1996) 185 CLR 259 at 283 in the context of the validity of a decision refusing refugee status to a Chinese applicant by a Government Panel (RSRC). The Court (Brennan CJ, Toohey, McHugh and Gummow JJ) stated (at page 282):

> "Submissions were made at the hearing of the appeal as to the correct decision-making process which it would have been permissible for the delegates to adopt. These submissions were misguided. They draw too closely upon analogies in the conduct and determination of civil litigation.
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> Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature (*Mahon v Air New Zealand* (1984) AC 808 at 814). A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term "balance of probabilities" played a major part in those submissions, presumably as a result of the Full Court's decision. As with the term "evidence" as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.
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> In *Fernandez v Government of Singapore* ((1971) 1 WLR 987; (1971) 2 All ER 691), the House of Lords considered the test to be applied to determine if a fugitive offender "might, if returned, be prejudiced at his trial". This raised a similar issue to the assessment of a real chance of persecution. Lord Diplock said ((1971) 1 WLR 987 at 993-994; (1971) 2 All ER 691 at 696):
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>> "I think it only leads to confusion to speak of 'balance of probabilities' in the context of what the court has to decide under ... the Act. It is a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences. But the phrase is inappropriate when applied not to ascertaining what has already

> happened but to prophesying what, if it happens at all, can only happen in the future."
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> We would adopt that reasoning as applicable to the present case. The term "balance of probabilities" is apt to mislead in the context of s 22AA, even if it be used in reference to "what has already happened"."

The statement by the High Court that the term balance of probabilities is apt to mislead in the context of administrative decision-making even in relation to fact-finding of past events sounds a warning to New South Wales tribunal members that such language should not ordinarily be used in the reasons for decision. Even though the process might be analogous to that undertaken in the civil courts, it is not the same process and it is made in a very different context.

Tribunals are generally given a fair degree of latitude in fact finding, particularly in relation to matters predicting the future - see also, *Minister for Immigration v Guo* (1997) 191 CLR 573-574.

One way in which the matter might be approached is to achieve or seek to achieve a degree of level of satisfaction in the making of a determination. While making a determination, a tribunal member should not speak in terms of the balance of probabilities but should speak in terms of reasonable satisfaction that a fact occurred and reasonable satisfaction that a particular party is successful. This will avoid the sort of problems identified by the High Court in a number of cases.

The concept of "satisfaction" as a criterion of decision-making is sometimes set out in legislation. For example, in the *Migration Act 1958* (Cth) by the combination of sections 36 and 65, the Refugee Review Tribunal (now, the AAT) must be "satisfied" that the applicant was a refugee under the relevant international conventions. Justice Gummow discussed this concept at length and what it took to be so satisfied on the cases in *Minister for Immigration v Eshetu* (1999) 197 CLR [128] to [148].

A summary of some aspects of that discussion is that for the decision to be legally valid:

- if an opinion is required, it must be the opinion of a reasonable person who understands the meaning of law under which he or she acts;

- the opinion must not take into account irrelevant considerations or misconstrue the legislation and it must not be arbitrary, capricious, irrational and it must be made bona fide;
- there must be evidence upon which a reasonable person could form the opinion; and
- the court will test or assess and whether a decision maker has reasonably attained the necessary degree of satisfaction.

To complicate matters somewhat further, the expression "reasonable satisfaction" is the standard set out for the AAT to apply in one provision of the *Veterans' Entitlements Act* 1986(Cth), s 120(4). The Full Court of the Federal Court of Australia has held that the civil standard of proof (the balance of probabilities - Briginshaw) should be applied. In *Repatriation Commission v Smith* (1987) 15 FCR 327, the logic was that since the High Court spoke of "reasonable satisfaction" in Briginshaw, the same standard of proof should apply to the meaning of that expression in the Act. The Court also quoted from Cross on Evidence as to the use of a number of different terms in describing the civil standard (at page 334-335):

> "In ordinary civil cases it is usually expressed as involving the 'preponderance of probability', the 'balance of probabilities', or the 'preponderance of evidence'. It might be argued that the last of these seems to involve no more than the preponderance of the evidence produced by the proponent of an issue over that produced by its opponent. It is more common, however, to regard all of these terms as synonymous, and as connoting not really relative preponderance over the evidence of the opponent but satisfaction of a prescribed level of probability. The possibility of a contrary finding does not prevent a finding reached on that standard from being appropriate. It is not enough for a plaintiff to fail that his account 'may not be correct'."

While that plainly relates to the civil standard of proof, it may be that as a matter of actual practice, all that tribunal members do in making their "assessments" is to come to a level of reasonable satisfaction in the legal and practical senses set out above in this paper.

Having said that, it is probably best "not to mention the war" and to achieve a proper level of satisfaction by way of a reasoned approach that is rational and defensible and is capable of explanation in written reasons and without mentioning the civil standard of proof at all (or indeed, any standard of proof) lest it invite legal challenge.

These issues were argued in the High Court of Australia in February 2022 in *DRY16 Applicant v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and the Administrative Appeals Tribunal* HC S48/2021. The decision appealed from was *DRY16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1465 (Logan J).

The special leave question there concerned whether the principles stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336, especially at 362-363, have application in administrative decision-making. The question so framed is properly unpacked into two sub-questions, expressed as follows in the present statutory context.

First, whether a tribunal exercising the power in s 109(1) of the *Migration Act 1958* (Cth) to cancel a visa is required to consider the gravity and consequences of a particular finding before arriving at a state of satisfaction that a person lied to obtain a protection visa and provided false documents in support of the application for that visa. Secondly, whether such considerations mean that the power in s 109(1) requires a decision maker to be satisfied to a "high degree of satisfaction", in the sense described in Briginshaw, before arriving at such a state of satisfaction.

It was said that answering these questions involves determination of whether the obligation of reasonableness of administrative decision-making can require consideration of the nature, gravity and adverse consequences of particular conclusions.

The second question posed was answered in the positive by a Full Court of the Federal Court in *NBDY v Minister for Multicultural Affairs* [2006] FCAFC 145 (in an appeal also concerned with a visa cancellation under s 109 of the Act), but answered in the negative in *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220; [2016] FCAFC 52.

There was therefore said to be a difference of opinion on the question in the Full Court.

In essence, the applicants attempted to cast the *Briginshaw* test not as a rule of evidence, but in terms of legal reasonableness in reasoning and procedural fairness.

In the High Court, at *DRY16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2022] HCATrans 15 (18 February 2022) after hearing the special leave arguments, the Court ruled "We are not persuaded that there is currently a division of opinion in the Federal Court on the question sought to be raised which might warrant the grant of special leave. The appeal has insufficient prospects of success."

Thank you