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KEYNOTE ADDRESS:

***JURISDICTION AND POWERS OF TRIBUNALS: A QUESTION OF STATUTORY
CONSTRUCTION?***

The Hon John Basten

Judge of the NSW Court of Appeal

It is a great privilege to be here this morning and I thank your Convenor, Judge Kevin O'Connor, for the invitation.

It is also a pleasure to renew a number of old acquaintances.

There is a degree of vagueness about my topic this morning, which resulted from Judge O'Connor permitting me to choose it. At any rate I thought I would avoid discussing the topic of your afternoon session, namely appeal-proofing by providing adequate reasons. I do not feel I am any longer in the business of providing such advice, though I note that Justice Rothman is. He will no doubt be able to check your report cards in later cases.

On reflection I realise that I might have, perhaps at the expense of accuracy, offered a more colourful title for the first offering of the day, suggesting a delicious entrée, rather than a dose of volcanic ash. Nevertheless, I like to view these occasions as an opportunity to step back from the daily fare of reading papers, conducting hearings and writing reasoned decisions. I doubt if any of us can do our jobs properly unless we use such opportunities as come our way for a little quiet reflection along those lines.

Subject matter and relief

The subject matter of a tribunal's jurisdiction is closely related to the kind of relief that it can provide. As you will all understand better than I do, it is not uncommon, to be

asked, especially by litigants in person, to provide a remedy of a kind which is simply unavailable. However, it can be important to distinguish between unavailability because the kind of dispute is not one which is within the jurisdiction of the tribunal and the situation where the dispute can be considered, but the kind of relief sought is unavailable or inappropriate. The kind of case I have in mind may be illustrated by a recent decision of our Court, *AVS Group of Companies Pty Ltd v Commissioner of Police*.¹ As members of the Administrative Decisions Tribunal may well be aware, the case involved a preliminary issue which arose in relation to a review of the decision of the Commissioner of Police to revoke the applicants' licences under the *Security Industry Act 1997* (NSW). Having commenced proceedings for review, the applicant sought a "stay" of the Commissioner's decision.

The difficulty with the form of relief sought was that there was actually nothing to "stay". The order made by the Commissioner had already taken effect, according to the terms of the statute, so that, for the applicants to be able to continue to operate under security industry licences, the effect of the Commissioner's order needed to be reversed.

An appreciation of that situation had practical significance. It required the Tribunal to consider whether it in fact had power to reinstate the licences and, if so, perhaps whether it could do so retrospectively. It needed to be appreciated that the order sought was not merely maintaining the status quo pending determination of the review application. Similar issues have arisen in relation to orders of professional disciplinary tribunals cancelling rights of practice.

Procedural powers

The focus of my comments will be common procedural powers.

Identified by their source, procedural powers of a particular tribunal may fall within one or more of four categories:

- (a) powers flowing from the terms in which jurisdiction is conferred;

¹ [2010] NSWCA 81 (15 April 2010) (Campbell JA, Handley AJA and I).

- (b) general powers expressly conferred;
- (c) specific powers expressly conferred, and
- (d) implied powers.

The distinction between the first and last categories may seem improbable. The mere conferral of jurisdiction might not be thought generally to amount to a conferral of power, except by implication. The point of distinction arises from the use of particular language in conferring jurisdiction and limitations deriving from the nature of the tribunal and the matters for consideration.

To take, as an example, in conferring of power on the Refugee Review Tribunal, the *Migration Act* identifies first the class of decisions which may be the subject of review, described as “RRT-reviewable decisions”.² The Tribunal is then told, in language of both power and obligation, that where a valid application has been made, the Tribunal “must review the decision”.³

What may constitute a “review” and what is to be inferred from the use of that term has been the subject of comment in a number of cases, including by Hayne J in *SAAP*.⁴ The Court returned to this topic more recently in *Minister for Immigration and Citizenship v SZIAI*.⁵ The question posed in the latter case was whether the Tribunal had a “duty to inquire”, in relation to what were identified as “factual matters which can readily be determined and are of critical significance to a decision made under statutory authority”.⁶ The Court unanimously held that the facts did not disclose circumstances which could give rise to any duty of inquiry and upheld the appeal on that basis. In respect of the underlying principle, it is clear that the joint judgment of six members of the Court (Heydon J wrote separately) was unwilling to countenance any general duty to inquire. They noted that the Tribunal had power to “get any information that it considers relevant”⁷ but did not consider that, generally,

² See *Migration Act 1958* (Cth), ss 411 at 412.

³ Section 414(1).

⁴ *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 79 ALJR 1009 at [186]-[202].

⁵ [2009] HCA 39; 83 ALJR 1123.

⁶ At [20].

⁷ *Migration Act*, s 424.

such a power carried with it an obligation to make inquiries. The starting point of the analysis was the nature of the Tribunal and the power of review conferred on it. Thus, the joint judgment stated:⁸

“It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word ‘inquisitorial’ has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker, is not itself a contradictor to the cause of the applicant for review. Nor does the primary decision-maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of ‘inquisitorial’ is ‘having or exercising the function of an inquisitor’, that is to say ‘one whose official duty it is to inquire, examine or investigate’. As applied to the Tribunal ‘inquisitorial’ does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal’s functions. They are to be found in the provisions of the *Migration Act*. The core function, in the words of s 414 of the Act, is to ‘review the decision’ which is the subject of a valid application made to the Tribunal under s 412 of the Act.”

The Court noted the “observation” in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*⁹ that the Tribunal was “bound to make its own inquiries and form its own views upon the claim which the appellant made”.¹⁰ *Applicant VEAL* concerned what was colloquially known as a “dob-in” letter, meaning an anonymous letter sent to the Department suggesting that an applicant for refugee status might not be what he or she claimed to be. The point in *Applicant VEAL* was that the Tribunal could not put the letter aside and thus a void seeking the applicant’s comment on its contents, by concluding that he would have been ineligible for the visa in any event. In those terms, *Applicant VEAL* sought to apply *Kioa v West*,¹¹ a point to which I will return. It would seem that, in *Applicant VEAL*, the word “inquire” was used as a synonym for “review”. By this apparently innocent change of one word it is easy to see how the obligation to review could be

⁸ At [18]:

⁹ [2005] HCA 72; 225 CLR 88.

¹⁰ At [26].

¹¹ [1985] HCA 81; 159 CLR 550.

transposed into an obligation to inquire, although the former might be limited to the materials before the Tribunal, the latter implies an obligation to obtain material.

In *SZIAI* the joint reasons referred to the possibility that a failure to seek out further material might involve an unreasonable exercise of a power, in the *Wednesbury* sense.¹² However, that line of inquiry was not pursued. The furthest that the discussion was taken is to be found in the following passage:¹³

“The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.”

Another limitation on any such obligation may be seen in,¹⁴ the companion case to *Plaintiff S157*.¹⁵ In *Applicants S134* the principal applicant had sought a protection visa on the basis of her own claims to refugee status. She was in fact entitled to a visa as the spouse of a person who held a protection visa. (The family had separated on their way to Australia and Mrs B did not know her husband was here.) When her application was dealt with by the Tribunal, there was a document on the Department file, which was before the Tribunal, which identified her husband as the holder of a temporary protection visa.¹⁶ The case was not run in the High Court on the basis of a failure to inquire, but on the basis of a failure either to act on the material fact known to it, or to advise the applicant of the material fact (so that she could present her case on a different basis). She was unsuccessful, the Court holding that the Tribunal had before it only an application based on her status as a person entitled to protection, which it had rejected. The minority (Gaudron and Kirby

¹² At [21]-[23].

¹³ At [25].

¹⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1; 211 CLR 441.

¹⁵ *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476.

¹⁶ At [8]-[9] in the reasons of the majority.

JJ) held that there had been a failure to consider criteria relevant to the wife's application.¹⁷

Looking at the decision from the standpoint of recent authority, it may be thought that *Applicant S134* took a strict view as to the limits of the obligations of the Tribunal to consider an application before it.¹⁸

There is probably another chapter to be written in relation to the obligations of a Tribunal exercising inquisitorial powers, in the sense described above. For example, s 418 of the *Migration Act* requires the Secretary of the Department to give to the Tribunal each document in the Secretary's possession or control which is considered to be "relevant to the review of the decision".¹⁹ That the Tribunal in *Applicants S134* had before it the Department's file was presumably because the contents of the file had been considered by the Secretary to be relevant to the review: on that approach, the Tribunal should have considered the contents relevant and, if not inclined to rely upon a matter unknown to the applicant which might have founded an entitlement to the visa which she sought, albeit on a different ground to that articulated by her in her ignorance, it may be thought surprising that the Tribunal was neither required to take the document into account and act on the basis of it, or refer its contents to the applicant. (Though legally irrelevant, the fact that the document revealed the presence of the applicant's husband in Australia, was a matter about which common humanity might have thought she should have been informed.)

Many tribunals now have, as part of the statutory scheme under which they operate a provision similar to s 420 of the *Migration Act*, requiring the Tribunal in carrying out its statutory functions "to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick"²⁰ and providing that the Tribunal in reviewing a decision "is not bound by technicalities, legal forms or rules of evidence"

¹⁷ At [86]-[88].

¹⁸ *Applicant S134* appears not to have been referred to in *SZIAI*.

¹⁹ Section 418(3).

²⁰ Section 420(1).

and “must act according to substantial justice and the merits of the case”.²¹ Such provisions are commonplace in both State and Federal statutes.

Despite being commonplace, their effect is often unclear. They do not purport to exclude principles of procedural fairness and have been held not to do so. Further, especially when found in statutes which include an appeal for error of law, they would not excuse a Tribunal from determining the matter before it in accordance with relevant legal principles, again a conclusion which is confirmed by authority.²²

It is possible that such a provision might form the basis for an argument that an appellate court should accord deference to the tribunal’s understanding of its own statute, perhaps based on practice within its jurisdiction established over a period of time. Such an approach might reflect the willingness of North American courts to defer to the expertise of an administrative body in such circumstances. However, that approach has not yet been adopted in Australia.²³

More importantly, such a provision may provide a degree of flexibility in the procedures which the Tribunal is entitled to adopt and as to the material on which it may rely. The most obvious inference is that the rules of evidence will not apply, where that conclusion is not expressly stated. On the other hand, that inference may not be open where an appeal is provided which extends to the admission or rejection of evidence.²⁴

The importance of procedural unfairness as a ground of review of tribunal decisions helps to focus the mind squarely on the powers and procedures available to a tribunal in exercising its functions. This may seem inevitable, because failure to accord procedural fairness in particular circumstances will invalidate the resultant decision. Nevertheless it is the imperial expansion of procedural fairness as a ground of review which must be considered.

It is necessary to ask, ‘what is procedural fairness?’ If it is an implied statutory limitation on the powers of a Tribunal, it should be necessary to ask whether, by

²¹ Section 420(2).

²² *Qantas Airways Ltd v Gubbins* [1992] 28 NSWLR 26 at 30 (Gleeson CJ and Handley JA).

²³ Cf *Enfield City Corporation v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.

²⁴ See, eg, *Dust Diseases Tribunal Act 1989* (NSW), s 32; *District Court Act 1973* (NSW), s 142N.

implication, the legislation intended that a decision should be no decision at all if a particular procedural step was not taken. That is the functional question which, since *Project Blue Sky v Australian Broadcasting Authority*²⁵ has replaced the old distinction between mandatory and discretionary requirements. However, there is a tendency to think of “fairness” as an ordinary English word, so that anything which is perceived to be unfair will violate an express or implied obligation to accord procedural fairness. In the context of a privative clause, the question is sometimes asked as to whether a particular statutory provision imposes “an inviolable procedural requirement, compliance with which [is] essential to the validity of a Tribunal decision”.²⁶

Given the importance of procedural fairness as a mechanism for supervising the activities of tribunals and inferior courts, it is surprising how little attention is given to the statutory provisions governing the procedure of a tribunal, either in the reasons provided by tribunals, or in the arguments presented by counsel when a court is asked to review a tribunal decision.

I accept that my experience in this respect is limited, that far greater consideration may be given to such matters informally than appears on the record, and that there may be a healthy literature which I have failed to identify. On the other hand, if my impression is even partly correct, it may be a matter which deserves further attention.

One reason why such provisions have not received greater attention may be that they are thought to be exhortatory in effect, rather than a statement of legal principle. However, such a view would be mistaken.

A similar approach is taken in some quarters to the requirement of the *Civil Procedure Act* in this State (which has its equivalents in other jurisdictions) identifying the overriding purpose of the Act and the rules of court as being “to

²⁵ [1998] HCA 28; 194 CLR 355.

²⁶ *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 79 ALJR 1009 at [13] (Gleeson CJ); *Minister for Immigration and Multicultural Affairs v SGLB* [2004] HCA 32; 78 ALJR 992 at 1001 (Gummow and Hayne JJ, Gleeson CJ agreeing).

facilitate the just, quick and cheap resolution of the real issues in the proceedings”.²⁷ In a similar vein, the courts are directed in the management of proceedings to “seek to act in accordance with the dictates of justice”.²⁸ These sections are not mere statutory window dressing, nor are they devoid of effective content. They may not always require attention, nor indeed do they require application in most cases. However, in an important minority of cases, they can drive the effective management of litigation and, indirectly, establish practices in the courts to which the *Civil Procedure Act* applies. There is a growing literature which attests to their jurisprudential significance.²⁹

One way of viewing what I may describe as an “equity, good conscience and substantial merits” provision, is to treat it as a form of privative clause, which may affect either express or implied procedural limitations. In explaining the operation of a privative clause, Brennan J said in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*.³⁰

“When the general provisions of a statute prima facie condition the valid exercise of a power and are found together with another provision which confers validity on a purported exercise of the power despite a failure to comply with the general provisions, the problem of reconciling the general provisions and the validating provision is indistinguishable from that which arises when a privative clause withdraws jurisdiction to review. In both cases the legislature manifests an intention that the purported exercise of the power should have the effect of a valid exercise of power notwithstanding non-compliance with the conditions governing that exercise.”

This approach has been varied to some extent by the reasoning in *Plaintiff S157*.³¹ Both lines of authority adopt a “reconciliation” approach, but in *Plaintiff S157* the reconciliation was focused at an earlier stage, namely in determining whether a particular statutory constraint is to be understood as mandatory (or inviolable) with

²⁷ *Civil Procedure Act 2005* (NSW), s 56(1).

²⁸ *Civil Procedure Act*, s 58(1).

²⁹ For a recent discussion of their operation, see *Hans Pet Constructions Pty Limited v Cassar* [2009] NSWCA 230 at [36]-[42] (Allsop ACJ, Campbell and Young JJA agreeing); *Halpin v Lumley General Insurance Ltd* [2009] NSWCA 372 at [30] (in my judgment) and at [90] ff (Sackville AJA).

³⁰ [1995] HCA 23; 183 CLR 168 at 194-195.

³¹ See fn 15 above.

the result that breach will render a decision invalid or whether the statutory direction does not entail such a consequence.

These are matters of growing importance, because legislatures are demonstrating an increasing willingness to identify and prescribe procedures. In part that course is taken to promote transparency in the operation of the many tribunals which now determine important questions affecting large sections of the population, but in part, at least in some cases, in an attempt to prevent courts setting aside decisions for procedural irregularity. The latter purpose has been partly successful, but in some areas has increased confusion and uncertainty. In a recent paper, the Commonwealth Solicitor-General, Stephen Gageler SC, described the development of the legislative structure of migration law as involving five stages which he labelled discretion, prescription, limitation, privation and now targeted tinkering.³²

Such legislative activity has taken place in the context of a legal framework governed by the supervisory jurisdiction of superior courts. This can best be explained by a number of propositions:

- (1) No decision of a court or tribunal can be the subject of appeal, except in accordance with a statutory power. In other words, there is no general principle (nor statute providing for) a general right of appeal.
- (2) Operative decisions of tribunals and inferior courts will generally be subject to judicial review by a superior court, subject to statutory intervention.
- (3) The scope of judicial review (which, in relation to administrative decisions, may be seen to reflect an underlying separation of power principle) is limited to determining whether the decision-maker operated within the legal limits of his or her power.
- (4) Statutory appeals from tribunals (and in some cases from inferior courts) reflect the principles underlying judicial review, that is, they are limited to errors of law.

³² Gageler S, "Impact of Migration Law on the Development of Australian Administrative Law" (2010) 17 AJ Admin L 92 at 93.

At the risk of over-generalisation, particularly because the statement disregards the differences between general law judicial review by way of prerogative relief, general statutory forms of judicial review and statutory qualifications of judicial review in particular respects, it is frequently said that the courts may correct legal error, but cannot enter upon review of the merits. To the extent that merit review is permitted, that must flow from a relevant statutory scheme of (usually) internal appeals.³³

Like the distinction between law and fact, the distinction between judicial review and merit review is fraught. This point is readily illustrated by what I have described above as the imperial march of procedural fairness. This is not the time or place to chart its progress, but you will recall that the exponential expansions of the case law dates broadly from *Kioa v West* in 1985. Leaving to one side the topic of bias (sometimes treated as part of the procedural fairness) one major Australian text on administrative law, that by Aronson, Dyer and Groves,³⁴ devotes no fewer than 235 pages to procedural fairness.³⁵ The case law there discussed demonstrates the difficulty in distinguishing between the legal constraints on valid decision-making and the proper resolution of a dispute on the material before the tribunal.

Put rather crudely, *Kioa v West* said that a tribunal could not avoid giving an applicant an opportunity to comment on adverse material merely by defining the issues before it so as to discard the adverse material as irrelevant. (To describe material as “adverse” is not necessarily to imply that it is adverse to the applicant personally; it may simply be adverse to his interests in a way which may not have been foreseen.³⁶)

Brennan J, in *Kioa v West* qualified the obligation to provide an opportunity to comment as being limited to adverse information that is “credible, relevant and significant to the decision to be made”.³⁷ His Honour also stated that an opportunity

³³ Of which the Refugee Review Tribunal is itself an example; an example in State law being found in the provision for internal appellate review by an Appeal Panel of the Administrative Decisions Tribunal in New South Wales: *Administrative Decisions Tribunal Act 1997* (NSW), s 113.

³⁴ *Judicial Review of Administrative Action* (4th ed, 2009).

³⁵ See Ch 7, “Procedural fairness: the Scope of a Duty” and Ch 8, “The Hearing Rule”.

³⁶ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; 206 CLR 57.

³⁷ 159 CLR at 629.

must be granted in relation to such material which the decision-maker “proposes to take into account”.³⁸

In *Applicant VEAL*,³⁹ the limits imposed by Brennan J on this statement were addressed, but given a rather muted reception. (Why the focus was on his judgment is unclear and I will refer to the other judgments shortly.) The Court (in *Veal*) noted that the principles of procedural fairness “focus upon procedures rather than outcomes” and govern what a decision-maker “must do *in the course of* deciding how the particular power ... is to be exercised”.⁴⁰ Their Honours continued:⁴¹

“‘Credible, relevant and significant’ must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently [I interpose, to whom?] not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is ‘credible, relevant and significant’ are not to be understood as depending upon whatever characterisation of the information the decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.”

This language demonstrates a considerable tightening of the requirements of procedural fairness since *Kioa v West*. To illustrate the extent of the change we need to return to *Kioa*, in which each of the majority (Mason, Wilson, Brennan and Deane JJ, Gibbs CJ dissented) gave separate reasons.

Mason J referred to the need for the person affected to have an opportunity to respond to reasons “on which [a] refusal is based”, and in relation to a consideration “by reference to” which the decision-maker intends to reject the application.⁴² Wilson J noted that “it cannot be denied that the concern expressed [in the adverse comment] was a factor which contributed to and supported the recommendation”.⁴³

³⁸ At 628.

³⁹ At [16]

⁴⁰ 225 CLR 88 at [16].

⁴¹ At [17].

⁴² At 587.

⁴³ At 602.

Deane J agreed with the reasons of both Mason J and Wilson J.⁴⁴ The language of Brennan J, has already been noted.

There may be a degree of ambiguity in the precise approach adopted in *Kioa*, however that was a case in which the adverse material, involving an allegation of active involvement with persons seeking to circumvent Australia's immigration laws, was expressly referred to by the delegate in the reasons for the recommendation to deport. The suggestion in *Applicant VEAL* that a decision-maker "cannot" dismiss information from consideration unless it is "evidently" not relevant or significant, together with the implication, the basis for which was not clearly identified, that it was only later in the course of providing reasons that the decision to disregard had been made, carries the demands of procedural fairness to a higher level. And to return to my earlier question (evident to whom?), is the judgment of the tribunal in that regard to be ignored or is it given weight? If the test is objective, should (or can) the reviewing court take into account the surrounding material? If it can (or should) is that not an intrusion into the fact-finding exercise, said to be immune from review?

This reveals another respect in which the willingness of the courts to intervene may be seen to have increased in recent years. It concerns the freedom of a tribunal to determine the issues which it needs to address. Prior to *Minister for Immigration and Multicultural Affairs v Yusuf*⁴⁵ there had been a number of cases discussing the obligation of the Refugee Review Tribunal to set out its findings on any material questions of fact, pursuant to s 430 of the *Migration Act*. The High Court held that the obligation could not possibly be read to mean "anything other than the findings which the Tribunal has made".⁴⁶ As explained by Gaudron J:⁴⁷

"[I]f in its written statement setting out its decision, the Tribunal fails to refer to or fails to make findings with respect to a relevant matter, it is to be assumed, consistently with the clear directive in s 430 of the Act, that the Tribunal has not regarded that question as material. And depending on the matter in issue and the context in which it arises, that may or may not disclose reviewable error. For example, the failure to

⁴⁴ At 630.

⁴⁵ [2001] HCA 30; 206 CLR 323

⁴⁶ At [10] (Gleeson CJ); [34] (Gaudron J); [64] (McHugh, Gummow and Hayne JJ).

⁴⁷ At [37]

make a finding on a particular matter raised by the applicant may, in some cases, reveal an error of law”

That approach is consistent with the principle established long before decision-makers were required to give reasons, elegantly expressed by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*:⁴⁸

“The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some [legal] misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.”

In *Dranichnikov v Minister for Immigration and Multicultural Affairs*⁴⁹ Gummow and Callinan JJ noted that the Refugee Review Tribunal had treated the claimant’s case as based on membership of a particular social group, namely “businessmen in Russia”, whereas the case he had presented was a significantly narrower one, namely membership of a group comprising “businessmen who publicly criticised and sought reform of the law enforcement authorities to compel them to take effective measures to prevent crime”.⁵⁰ The failure of the Tribunal to determine the matter put before it by the applicant was treated by their Honours as a failure to exercise jurisdiction and hence jurisdictional error. It was said to be analogous to the situation of Mr Bhardwaj,⁵¹ in respect of whom it was said that a failure by the Tribunal to consider a matter put before it, constituted a breach of natural justice.⁵² Kirby J described *Dranichnikov* as a case “where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded

⁴⁸ [1949] HCA 26; 78 CLR 353 at 360

⁴⁹ [2003] HCA 26; 77 ALJR 1088

⁵⁰ At [18].

⁵¹ See *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597.

⁵² At [32]

by an applicant”.⁵³ This was the reverse of *Applicant S134*; if the Tribunal did not have to search out the basis of which the applicant could make her claim, it did have to address the claim as made.

There are not many cases in which that principle has been applied, but it may be appreciated that there is a fine line between allowing a tribunal a degree of flexibility in determining what are the issues to be determined and what, in terms of the submissions made, may be material to that exercise, and an objective review of the materiality (or need for) certain findings, as a matter of law.

It is, in part, the intrusive interventions of the courts in seeking to ensure that procedural fairness is accorded which has led the legislatures to define what is and is not required. However, the tendency to prescribe procedures is not accompanied by clear indications as to the consequences of non-compliance. Because the procedures tend to reflect general law principles of procedural fairness, it is frequently assumed that non-compliance must entail invalidity of the consequent decision. The result is that tribunal members seeking a degree of flexibility within their own statutory regimes may perceive an increasingly hostile reception from superior courts in judicial review proceedings. Curiously, that reception has hardened as the obligation, and even where there is no obligation, the practice, of providing extensive reasons has spread. The intellectual discipline of providing written reasons was expected to improve the standard of decision-making. From my own experience, I would expect that it has had that effect. Nevertheless, it does not appear to have reduced the level of cases in which tribunal decisions are overturned; rather, impressionistically, it appears to have the opposite result. The stricture not to review reasons “minutely and finely with an eye keenly attuned to the perception of error” is, on one view, a constraint more honoured in the breach than the observance.⁵⁴

Within the State jurisdiction, at least in New South Wales, it is clear that more recent statements of procedure are designed both to inform the parties before a tribunal as

⁵³ At [87]

⁵⁴ See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 96; 185 CLR 259 at 272.

to how they should proceed and what they may expect, as well as to inform the tribunal as to how it should conduct proceedings. For example, the Consumer Trader and Tenancy Tribunal of New South Wales (“the CTTT”) is expressly permitted “subject to this Act” to determine its own procedure.⁵⁵ It is empowered to “inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of procedural fairness”.⁵⁶ Importantly, reflecting its role in the community:⁵⁷

“The Tribunal is to take such measures as are reasonably practicable to ensure that the parties in any proceedings understand:

- (a) the nature of the assertions made in the proceedings and the legal implications of those assertions, and
- (b) the procedure of the Tribunal and any decision or ruling made by the Tribunal that relates to the proceedings.”

Such a provision is eminently sensible and probably reflects good practice in courts and tribunals generally around the country. Its statement in express terms in a statute should not give rise to any greater level of judicial review than might occur in accordance with rules of procedural fairness. I am not aware that it has in fact given rise to review proceedings, and perhaps it imposes no enforceable obligation. Nevertheless, there is a risk that, in the absence of any clear indication to the contrary, a failure in particular circumstances to comply with the statute may give rise to a claim that the ultimate decision is invalid.

The CTTT Act also contains an obligation to ensure, as far as practicable, “that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings”.⁵⁸ Again the obligation appears sensible and its expression desirable. Nevertheless, it is capable of inspiring complaints that the Tribunal has failed to comply with its obligations, has thereby failed to discover material which is credible, relevant and significant, thereby invalidating the result.

⁵⁵ *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), s 28(1)

⁵⁶ Section 28(2)

⁵⁷ Section 28(4)

⁵⁸ Section 28(5)(b)

Obviously such examples can be multiplied manifold times, by reference to other statutes and other jurisdictions. The risks associated with such statutory expression of procedures should not be seen as a discouragement to the parliaments. In referring to such matters before this audience, my purpose is to underline the importance for tribunal members of being thoroughly aware of the scope of their powers, as well as the limitations, both express and implied (derived from any of the four sources mentioned earlier). Before another audience, I might be inclined to emphasise the importance of understanding the statutory statements of procedures in a broader context, both of the expectations reasonably imposed on tribunal members, and of the role of particular tribunals, understood by reference to their objects and purposes. For example, in the case of the CTTT, the objects are set out and include accessibility, efficiency, effectiveness and fairness.⁵⁹ Other objects refer to informality, expedition, inexpensiveness and to the quality and consistency of decision-making. On the other hand, a simple reading of admirable objectives does not easily translate into a clear understanding of the particular tribunal's manner of operation.

It is obviously impractical to suggest that tribunal decisions generally should contain a statement of background as to procedure and practice which might have been relevant to some stage of resolving the dispute in issue. Nor would I encourage the use of template paragraphs, of a kind used in some tribunals to outline relevant legal principles at a level of generality which is often unhelpful in the particular case, but which can be relied upon not to demonstrate error of law. On the other hand, it is highly desirable that there be a mechanism which allows supervising courts to understand better than they presently do, in a practical sense, the way in which particular tribunals operate, the reasons why they adopt particular processes and the benefits which might be thought to flow from them.

It may well be desirable to establish a level of informal dialogue between tribunals and the courts responsible for their supervision.

⁵⁹ CTTT Act, s 3.