Learned Friends Conference

Lord Howe Island 2016

The Tribunal is not bound by the rules of evidence, but …!

The purpose of this paper is to raise for consideration and discussion s. 33 of the ***Administrative Appeals Tribunal Act 1975*** (the 'AAT Act') in the context of Tribunal hearings where the issue of the exclusion of liability under s. 5A of the ***Safety Rehabilitation and Compensation Act 1988*** (the 'SRC Act') arises before the Tribunal.

My focus will be on the circumstances where a psychological injury ('injury') has been sustained by an employee to which his or her employment has contributed to, to a significant degree, but is not compensable because that injury or the aggravation of that injury was suffered as a result of '***reasonable administrative action*** *taken in a reasonable manner in respect of the employee's employment*" ('RAA') as provided by s. 5A(1) of the SRC Act, and where appropriate, referring to subparagraphs 5A(2)(a) to (f) inclusive.

The 'but …!' invites, I hope, some thoughts on the circumstances as to a fuller understanding of the importance, application and effect of s. 33 in the decision-making process within a non-adversarial approach to merits review.

It will though be necessary before considering the 'effects' that s. 33 of the AAT Act may have on hearings concerning RAA to identify some of the basic requirements upon which the Tribunal must function under and procedure required by the AAT Act when considered holistically. I will at the conclusion of the most formal part of this presentation, pose some questions with the purpose of provoking some full and frank discussion as to the application of s. 33 by reference to hypothetical facts.

Section 33 of the AAT Act relevantly provides:

Procedure of Tribunal

(1) In a proceeding before the Tribunal:

(a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;

(b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

Decision-maker must assist Tribunal

(1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

Directions hearing

(1A) The President or an authorised member may hold a directions hearing in relation to a proceeding.

Who may give directions?

(2) For the purposes of subsection (1), directions as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may be given:

(a) where the hearing of the proceeding has not commenced—by a person holding a directions hearing in relation to the proceeding, by the President, by an authorised member or by an authorised Conference Registrar; and

(b) where the hearing of the proceeding has commenced—by the member presiding at the hearing or by any other member authorized by the member presiding to give such directions.

Types of directions

(2A) Without limiting the operation of this section, a direction as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may:

(a) require any person who is a party to the proceeding to provide further information in relation to the proceeding; or

(b) require the person who made the decision to provide a statement of the grounds on which the application will be resisted at the hearing; or

(c) require any person who is a party to the proceeding to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing.

…

Authorised Conference Registrar

(4) The President may authorise a particular Conference Registrar to be an authorised Conference Registrar for the purposes of paragraph (2)(a).

(5) An authorisation under subsection (4) may be:

(a) general; or

(b) limited to:

(i) a particular reviewable decision or particular reviewable decisions; or
(ii) reviewable decisions included in a particular class or classes of reviewable decisions; or
(iii) a particular proceeding or particular proceedings; or
(iv) proceedings included in a particular class or classes of proceedings.

AAT practice, procedure and evidence

The following, extracted from a paper given by the Honorable Justice Garry Downes AM, the immediate past President of the Tribunal, titled "*Practice, Procedure and Evidence in the Administrative Appeals Tribunal*", provides a summary along with some valuable observations as to the basis upon which the Tribunal conducts hearings:

Parliamentary direction as to how the AAT should operate

"The AAT is not a court. It is a creature of statute and derives its functions and powers solely from legislation. The ***Administrative Appeals Tribunal Act 1975*** *(Cth) contains two provisions that give general guidance as to the way in which the AAT is expected to operate. They overlap to some degree. The first section states that, in carrying out its functions, the Tribunal must provide a review process that is fair, just, economical, informal and quick.* (s. 2A of the AAT Act). *The second section states that any proceeding is to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and other relevant legislation and a proper consideration of the matters before the Tribunal permit* (s. 33(1)(b) of the AAT Act).

These provisions set the broad parameters within which the AAT has developed its practices and procedures. As Gleeson CJ and McHugh J said in ***Minister for Immigration and Multicultural Affairs v Eshetu****, the purpose of these kinds of provisions is "to free tribunals, at least, to some degree, from constraints otherwise applicable to courts of law, and regarded as*

inappropriate to tribunals" [(1999) 197 CLR 611 at (49)]. *The challenge is to find the appropriate balance between the various elements: fairness, justice, economy, informality and expedition. The way in which the AAT seeks to do this will be another focus of my presentation today*. Citations added.

Conducting a hearing

"The AAT is not bound by the rules of evidence and may inform itself on any matter as it thinks appropriate, subject to the requirements of procedural fairness (Section 33(1)(c) of the Administrative Appeals Tribunal Act). While this does not mean the AAT cannot apply the rules of evidence, the AAT does not generally do so. As Justice Hill stated in ***Casey v Repatriation Commission*** (1995) 39 ALD 34 at 38):

> *The criterion for admissibility of material in the tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance.*

Material relevant to the matters to be determined will generally be admitted avoiding the need for technical arguments on what should or should not be admitted during the course of the hearing. The issue then becomes what weight should be attached to the material. In this regard, the principles underlying the rules of evidence may well be of assistance in considering this issue".

Concluding:

"The AAT has developed a set of practices and procedures designed to deliver justice in its context. It aims to provide a fair and just review of a broad range of administrative decisions in a flexible and appropriate way for the diverse members of the Australian community. As Deputy President Todd noted in ***Re Hennessy and Secretary to Department of Social Security*** (1985) 7 ALN N113 at N117:

> *... the Tribunal has been given a degree of flexibility to deal with proceedings before it as it sees fit. The experience of the Tribunal has been that ... there is no one level of formality or informality which is appropriate for all cases.*" Citations added. [1]

In the context three important matters emerge from the relevant provisions of the AAT Act and as summarised by Justice Downes.

[1] Paper presented to the **Land and Environment Court Annual Conference** Sydney 5 May 2011.

Firstly, Justice Downes' reliance on the view expressed by Justice Graham Hill in *Casey v Repatriation Commission* as to the admissibility of material[2] is not to be found in gaps discoverable in the rules of evidence, but within the limits of relevance. Thereby pinpointing a significant consideration required as to whether or not 'material'; and particularly witness statements and oral evidence, should be admitted as evidence.

Secondly, notwithstanding that technical argument, as to what should or should not be admitted, can in the general sense be avoided there remains some scope for the rules of evidence to be of assistance in determining what if any weight ought to be given as to the material or oral evidence that is admitted.

Thirdly finding the appropriate response in each individual case and more generally to the challenge of finding "*the appropriate balance between the various elements: fairness, justice, economy, informality and expedition"* as identified by Gleeson CJ and McHugh J in ***Minister for Immigration and Multicultural Affairs v Eshetu***.

Of considerable importance is the requirement that the Tribunal 'act judicially'. In the context of the review of a decision of the Refugee Review Tribunal acting under the ***Migration Act 1958***: which required similar procedural requirements to the Tribunal, the Full Court of the Federal Court (per Lee and Moore JJ) observed in ***WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs*** [2004] FCAFC 74:

> *[20] While the expression "acting judicially" is not now often used when referring to administrative decision making, it usefully comprehends concepts relevant to this appeal. (See:* ***Australian Broadcasting Tribunal v Bond*** [1990] HCA 33; (1990) 170 CLR 321 per Deane J at 365*).*
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> *[21] Failure of the Tribunal to act "judicially" will necessarily stamp the review procedure as one which did not accord an applicant practical fairness or justice. To act "judicially" and according to law, the Tribunal must carry out its decision-making function rationally and reasonably and not arbitrarily. (See: Bond* per Deane J at 366-367*). That is to say; the Tribunal cannot determine the matter by a "tossing a coin" or by making a "snap decision" or by acting on instinct, a "hunch" or a "gut-feeling".*

[2] Unless otherwise stated and for convenience any reference to 'material' should at least be taken to include the electronic versions or hard copy of the following: witness statements, documentation, reports, documents produced pursuant to s. 37 of the AAT Act, dictionaries and text books and legal services and medical publications, research papers, commentaries, maps, government policy and guidelines, manuals, and medical guides.

> *[22] The requirement that the review procedure is carried out according to law, is an irreducible duty arising out of s 75(v) of the Constitution. (See:* ***Abebe v Commonwealth*** [1999] HCA 14; (1999) 197 CLR 510 per Gummow, Hayne JJ at [170]*). Failure to observe that requirement will mean that the purported decision of the Tribunal has no "jurisdictional" foundation. (See:* ***Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*** [2003] HCA 30; (2003) 198 ALR 59 per Gleeson CJ at [5]-[9]; McHugh, Gummow JJ at [34], [37]; Kirby J at [116], [127]-[128]*). The Tribunal only obtains the power to make a determination under the Act where the determination is based on findings or inferences of fact that are grounded upon probative material and logical grounds. (See:* ***Minister for Immigration and Multicultural Affairs v Eshetu*** (1999) 197 CLR 611 per Gummow J at [145]*;* ***Corporation of the City of Enfield v Development Assessment Commission*** [2000] HCA 5; (2000) 199 CLR 135 per Gleeson CJ, Gummow, Kirby and Hayne JJ at [34]*;* ***Hill v Green*** [1999] NSWCA 477; (1999) 48 NSWLR 161 per Spigelman CJ at [72]*). A determination based on illogical or irrational findings or inferences of fact will be shown to be a decision not supported by reason and to have no better foundation than an arbitrary selection of a result. It is because it is based on such findings that the determination is an unreasoned decision. Such findings or inferences of fact become part of, and are not distinguishable from, the decision subject to judicial review. (See:* ***S20/2002*** per McHugh, Gummow JJ at [54]*;* ***Bond*** per Mason CJ at 338, 359-360*). A review culminating in such a decision would be a process lacking practical fairness or justice and would not be a process conducted according to law.*

It should also be noted that the Tribunal has an inquisitorial function: proceedings before the Tribunal sometimes give the appearance of being adversarial but, in substance, a review by the Tribunal is inquisitorial (***Benjamin v Repatriation Commission*** [2001] FCA 1879 – Full Court: *per* Moore, Emmett and Allsop JJ).

Statutory functions require the Tribunal to provide "*a review process that is fair, just, economical, informal and quick*": though it must do so acting judicially. Moreover, the Tribunal must meet the statutory standard of procedural fairness required by s. 39 of the AAT Act that demands that the Tribunal, whilst performing its function, must provide the parties to a review a reasonable opportunity to present their respective cases and the opportunity to inspect any documents to which the Tribunal proposes to have regard to reaching a decision and to make submissions in relation to those documents. Section 39(1) of the AAT Act provides:

Opportunity to make submissions concerning evidence

Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard to reaching a decision in the proceeding and to make submissions in relation to those documents.

Rules of Evidence

In what might seem paradoxical, it is trite that the rules of evidence that developed at common law over more than 400 years and which are now largely codified as 'Uniform Evidence Law' throughout Australia are demonstrably rules developed to ensure fairness in proceedings in both criminal and civil matters.

Those rules have become quite technical in their application and often involve excluding 'evidence' because to do otherwise would likely to prove to be unfairly prejudicial. Moreover, in an inquisitorial setting adherence to exclude 'material' from consideration is counterintuitive.

The answer as summarized by Justice Downes and by reference to ***Casey*** is to be found within the limits of relevance and what if any weight ought to be given to the material that is admitted as evidence.

During the last 30 years, governments throughout Australia have modeled a plethora of administrative tribunals upon the statutory functions, powers and procedures vested to the Tribunal by the AAT Act.

In their application not all of those tribunals have succeeded in providing a "*process that is fair, just, economical, informal and quick*" or utilised their inquisitorial powers to avoid the technicalities of the rules of evidence to achieve that outcome.

Recently the following was attributed to Megan Latham the Commissioner charged with the administration of the NSW *Independent Commission Against Corruption* ('ICAC') where she is reported to have said to a group of young lawyers at a NSW Bar Association seminar:[3]

"*On a concluding note, can I say that if any of you get tired of adversarial litigation, inquisitorial litigation is fantastic,*" she tells them.

"*You are not confined by the rules of evidence. You have a free kick. You can go anywhere you want to go, and it's a lot of fun*." [Referencing s. 17 of the ICAC Act 1988 that the Commission is not bound by the rules of evidence].[i]

[3] Daily Telegraph Sydney 8 April 2015; The Australian 21 April 2015.

What is in issue before the Tribunal when a claim for compensation for an injury is rejected because of RAA?

A review of the Tribunal's published decisions, concerning the application of RAA to exclude liability for what otherwise is a compensable injury establishes that the predominant issue does not involve the issue of whether or not the injury has been suffered and is otherwise compensable.

The issue, in general, is whether or not some 'action' can be characterised as 'administrative action'[4] and whether that action was reasonable and taken in a reasonable manner in respect of the employee's employment.

Procedure and what develops at the hearing?

Statements' of Facts Issues and Contentions

My experience is that the 'Issues' invariably quote whether or not the applicant has suffered the injury; notwithstanding that the respondent has either determined that the applicant has suffered an injury and that work related circumstances have been accepted as having satisfied s. 5B of the SRC Act. Moreover, considerable detail has usually been provided in the reasons for the primary determination and reviewable decision as to why s. 5B of the SRC Act has been satisfied.

The 'Contentions' similarly raise the uncontentious question of whether the circumstances have satisfied s. 5B of the SRC Act.

Expert evidence as to RAA that results in injury

Expert medical evidence is obtained and adduced but often the expert (s) has not been asked to provide an opinion based on the proposition that a particular event or events in the nature of 'administrative action' have, more probably than not, contributed to the cause or the aggravation of the injury. Consideration of the key question is left to be elicited during the course of the examination of the expert(s) during the hearing.

Further, despite generally a number of conferences including, and more often than not a conciliation conference, directions are not issued to rectify the lacuna in the evidence prior to 28 days of the date fixed for the hearing.

Section 66(1) of the SRC Act provides that evidence to be relied on by a claimant (an applicant) must be disclosed 28 days before the date fixed for hearing and without leave is not admissible.

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[4] See *Drenth v Comcare* [2012] FCAFC 86 (21 May 2012): *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463.

Applicant and lay witness statements

Despite generally a number of conferences: including and more often than not a conciliation conference; directions are not issued to rectify the lacuna in the evidence that has been provided prior to conferences or indeed deals with allegations made in statements that are highly unlikely to be relevant to the true issue.

In some instances the statement of the applicant and other lay witnesses statements are particularly concerned with attacks on a supervisor's general demeanour and character by which the Tribunal is to seemingly conclude that the administrative action was not reasonable or the action was not taken in a reasonable manner: or the statements are primarily concerned with allegations of 'agency-wide' or 'employer-wide' alleged abuse of which they have not personally experienced or the application of employment policies and guidelines that they do not agree with in principle but are not objectively unreasonable.

In some instances lay witness statements are being filed and served: some without having been signed and/or dated; too often within a few days prior to the date that the hearing has been fixed or on the morning of the day the hearing commences.

Discussion

Objections and material being admitted: what are your experiences and a solution to any change to the approach in your experience adopted by the Tribunal?

Does the 'tail' wag 'the dog'? Does a quick consideration as to the possible 'weight' to be given to material govern its relevance?

What opportunity, if any, should the Tribunal provide when the 'weight' to be given becomes determinative of the application for review and the question of the weight to be given to material has not been the subject of submissions and particularly as to its relevance?

To what, if any extent, should character evidence be admitted in the consideration of and application of RAA?

Conclusion

In my opinion s. 33 of the AAT Act has served the interests of justice in administrative review well and has not generally resulted in decisions that no reasonable person could, on the evidence, come to. Overt 'free kicks' are not a feature of the Tribunal's exercise of power, the proper completion of its functions in coming to the correct and preferable decision on the merits.

John Wallace

Barrister

Melbourne

29 March 2016

ICAC Act 1988 (NSW)

17 Evidence and procedure

(1) The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.

(2) The Commission shall exercise its functions with as little formality and technicality as is possible, and, in particular, the Commission shall accept written submissions as far as is possible and compulsory examinations and public inquiries shall be conducted with as little emphasis on an adversarial approach as is possible.

(3) Despite subsection (1), section 127 (Religious confessions) of the Evidence Act 1995 applies to any compulsory examination or public inquiry before the Commission.