

A Question of Law: Practice and Procedure in Courts and Tribunals in New South Wales

A paper delivered by Mark Robinson SC to a LegalWise Government Lawyers Conference
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I am asked to speak to you today on some matters pertaining to administrative law.

I will speak on:

- Preparing judicial review cases or appeals “*on a question of law*” from tribunals;
- Continuing lessons from *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390;
- Drawing permissible grounds of appeal;
- Differences between appeals, judicial review, and a “*rehearing*” under s. 75 of the *Supreme Court Act 1970* (NSW); and
- Can a court reconsider and determine the original impugned decision on an appeal or review? *Tasty Chicks Pty Limited v Chief Commissioner of State Revenue* (2011) 85 ALJR 1183; (2011) 281 ALR 687; [2011] HCA 41.

Appeals, Reviews and Original Jurisdiction?

In *Tasty Chicks Pty Limited v Chief Commissioner of State Revenue* (2011) 85 ALJR 1183; (2011) 281 ALR 687; [2011] HCA 41, the High Court dealt with the concepts of persons having a statutory right of “*review*” of an administrative decision, as opposed to a right to an “*appeal*”.

There was a decision of the Chief Commissioner for State Revenue to “group” three companies together for the purposes of payroll tax. They did not like this decision this very much. There was a statutory right of a “*review*” to either the Supreme Court of NSW or the Administrative Decisions Tribunal (ADT).

The High Court held that the NSW Court of Appeal got confused when the matter came before it, between the concepts of appeals and reviews. Its analysis was held to be “faulty” (at [12]).

It said (at [5] and [6]):

An “*appeal*” from an administrative decision to a court is the creature of statute and it confers original, not appellate, jurisdiction. Further, where a jurisdiction called an “*appeal*” is enlivened, it is essential to identify its nature and the duties and power of the court in the exercise of that jurisdiction. The term “*review*” presents similar considerations. It takes its meaning from the context in which it appears. It may be used by the statute in question to empower decision-making by an administrative

body, or to confer a species of original jurisdiction on a court. If the latter, again it will be necessary to identify the nature of the “review” and the duties and powers of the court in the exercise of that jurisdiction.

These distinctions are essential to the resolution of the issues presented on this appeal. (footnotes omitted)

The power to apply to the Supreme Court for a “review” was section 97 of the relevant *Taxation Administration Act*. Section 19(2) of the *Supreme Court Act 1970* (NSW) provides that section 97 reviews are “*appeals*” for the purposes of the Supreme Court Act. It is “*taken to be an appeal*”. The practical effect of this was merely that the Court had some additional powers under the Supreme Court Act, specifically pursuant to s 75A(7) (the Supreme Court may receive further evidence) and s 75A(10) (the Supreme Court may make any assessment which ought to have been made).

The High Court held that the trial judge (Gzell J) correctly determined that he was entitled to re-exercise the powers of the Commissioner on the review.

Statutory Appeals “on a Question of Law”

In *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292 (Spigelman CJ, Allsop P, Basten JA) the NSW Court of Appeal handed down a significant decision as to the nature of a statutory appeal from the NSW Consumer, Trader and Tenancy Tribunal (CTTT) to the Supreme Court pursuant to section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) (“**CTTT Act**”). Such appeals must now be commenced in the District Court of NSW. Judicial review is still provided for in section 65 of the CTTT Act and section 69 of the *Supreme Court Act 1970* (NSW)

The underlying facts were that in proceedings brought before the Tribunal by building owners, the builder claimed to have served two claims for extension of time for the contracted building work before the owners served a letter of termination of the contract. The builder’s contention was accepted by the Tribunal. On appeal to the Supreme Court, it was held that there was no evidence before the Tribunal that the builder had served either claim. The Court of Appeal held that this finding was a “no evidence” point (in terms of being one of the grounds of judicial review) and it could not support an appeal with respect to a matter of law.

It was held in *Kostas* (at [102]) that section 67 appeals are limited to “*any decision on a question with respect to a matter of law which affects the ultimate outcome*”. Accordingly, it became imperative that in commencing such appeals in the District Court, practitioners identify in the proceedings “*with a degree of precision the decision with respect to a matter of law which is sought to be challenged on the appeal*” (*ibid* at [103]).

In the case, Basten JA (at [83] to [86]) set out his survey or excursus of statutory appeal provisions that were restricted in some way to legal error. He found that there were (at least) three broad categories that can be identified by reference to different forms of statutory language. He said:

The first and broadest category of appeal arises where the right of appeal is given from a decision that “*involves a question of law*”, being language which permits “*the whole case, and not merely the question of law*” to be the subject of the appeal: see *Brown v The Repatriation Commission* (1985) 7 FCR 302 at 303 (referring to *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; 41 CLR 148 and subsequent authorities).

The second category is exemplified by provisions which permit an appeal “*on a question of law from a decision of*” a tribunal. In such cases, it is the appeal which must be on a question of law, that question being not merely a qualifying condition to ground an appeal but the sole subject matter of the appeal, to which the ambit of the appeal is confined: *Brown v The Repatriation Commission* at 304; *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (1988) 82 ALR 175 at 178.

The third and narrowest category is one restricted to “*a decision of a Tribunal on a question of law*”, in which case it is not sufficient to identify some legal error attending the judgment or order of the Tribunal; rather it is necessary to identify a decision by the Tribunal on a question of law, that decision constituting the subject matter of the appeal.

Statutory appeals from the CTTT under section 67 are in that third category. Accordingly, no appeal lies with respect to a matter of fact (at [16] per Spigelman CJ). Such appeals are liable to be the subject of continued scrutiny by the Court of Appeal. For those who consider that the Court of Appeal was drawing unnecessary distinctions in the *Kostas* case, identification of an appealable “*question of law*” or “*point of law*” will become increasingly important in NSW.

The appellant *Kostas* sought to argue in the Court of Appeal a “*no evidence*” ground of

judicial review as part of the section 67 appeal. The no evidence rule is that decisions which are based upon findings of fact must be founded upon logically probative evidence and not mere suspicion.

The Court of Appeal refused to allow the appellant to reply on the no evidence ground of appeal holding it did not fall within the section 67 expression “*a decision on a question with respect to a question of law*”. It was also held that the appellant tended to confuse matters of law and fact. They made no real attempt to identify decisions of the Tribunal with respect to matters of law.

President Allsop did not join in with the no evidence ruling. He said (at [27]):

[T]he question whether a “*no evidence*” ground falls within the expression “*a decision on a question with respect to a question of law*” may depend upon the circumstances. A finding of fact made in the absence of supporting evidence is an error of law. This will usually support judicial review proceedings to the extent that an error of law is a ground for such review. Such a finding may or may not amount to or involve “*a decision on a question with respect to a matter of law*”. Whether it does or not may depend upon the context of that aspect of the Tribunal’s reasoning and approach.

This view of the President was upheld on the appeal by the High Court of Australia in *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390.

On the appeal to the High Court, the Court held that the Tribunal made a finding of fact in the absence of supporting evidence and this raised a question “*with respect to a matter of law*”. Further, it held that whether there was no evidence to support a factual finding itself was a question “*with respect to a matter of law*” (per Hayne, Heydon, Crennan and Kiefel JJ).

The Court also held that the words in section 67 “*a question with respect to a matter of law*” in the CTTT Act encompassed decisions on questions of mixed law and fact (per French CJ).

Unlike the Basten JA approach as to the drafting precision required to articulate a question with respect to a matter of law, French CJ held (at [34]):

It may be accepted that the “*question with respect to a matter of law*”, which is the subject of a decision under appeal pursuant to s 67, may be defined with varying degrees of generality. It may be defined as a single question or multiple questions

which can be regarded as subsumed in one decision or separately decided.

Accordingly, a significant degree of flexibility was introduced by the High Court into this important area. Justice Basten's taxonomy was criticised (at [89]) with the Court curtly stating:

The language of the statute must be the relevant starting point ...

Finally, what looked like a very complicated case running over 10 years was ruled on by the High Court in the following simple terms (at [92]):

In this case, the Tribunal made a wrong decision with respect to a question of law.

Similar lessons can be found in other cases.

In *SAS Trustee Corporation v Pearce* [2009] NSWCA 302 (Beazley, Giles & Basten JJA) (24 September 2009) a member of the police force who was hurt on duty including a psychological injury claimed a lump sum compensation payment under the *Workers Compensation Act 1987* (NSW) styled as a "gratuity" under the *Police Regulation (Superannuation) Act 1906* (NSW). His case in the District Court was to seek a ruling that he had suffered a 17% whole person impairment as a result of his psychological injuries. This was part of the "residual jurisdiction" of the District Court that was conferred by the *Compensation Court Repeal Act 2002* (NSW). The District Court (Hughes DCJ) found that police officer suffered only whole body impairment of only 15.3%. The "employer" appealed to the Court of Appeal by section 142N of the *District Court Act 1973* (NSW) whereby one can appeal if "aggrieved by an award of the Court in point of law". "Award" is defined in s 142M to include "interim award, order, decision, determination, ruling and direction".

The Court held, *inter alia*, that where on a statutory appeal a decision of the Court below in point of law is said to be erroneous, a ground alleging failure to give reasons must be identified as a decision in point of law (at [121] per Basten JA, Beazley JA agreeing). Accordingly, this ground of appeal (that the reasons given by the trial judge were inadequate and constituted an error of law) failed because it was not correctly described on the appeal in accordance with the terms of the statutory appeal provision.

In *Vero Insurance Limited v The Owners of Strata Plan No. 69352* [2010] NSWDC 54, Judge Levy struck out an appeal pursuant to section 67 of the CTTT Act as it did not disclose a question of law, because it concerned a question of fact (concerning the identification of an insurance policy to a strata unit and the correct amount of the excess). The Court of Appeal in *Vero Insurance Limited v Owners of Strata Plan No 69352* [2011] NSWCA 138 (Allsop P, Basten JA and Sackville AJA) held that the questions could have raised a question of law, but it did not matter, as the result would be a dismissal of the appeal anyway.

The practical lesson for legal practitioners is that the courts are not shy to dismiss an appeal if the precise requirements of the enabling Act are not met.

In *Osland v Secretary to the Department of Justice (No 2)* (2010) 241 CLR 320; [2010] HCA 24 at [18] to [20] the High Court of Australia determined the case of an unsuccessful FOI applicant who applied to the Victorian Court of Appeal, under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (“**the VCAT Act**”) for leave to appeal on questions of law from the order of the Tribunal refusing access to the particular FOI documents. Section 148 provides for an appeal from the Tribunal on a question of law and it was modelled in part on section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (dealing with appeals from the AAT to the Federal Court of Australia on a question of law). The High Court said (at [18]):

Section 148 confers “*judicial power to examine for legal error what has been done in an administrative tribunal*” [*Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 79 [15] per Gaudron, Gummow, Hayne and Callinan JJ]. Despite the description of proceedings under the section as an “*appeal*”, it confers original not appellate jurisdiction; the proceedings are “*in the nature of judicial review*”(ibid).

Therefore an appeal is not an appeal!

Importantly, the High Court said (at [19]) that section 148(7) of the VCAT Act, which grants the Supreme Court its powers on the appeal did “*not enlarge that jurisdiction. It confers powers on the court in aid of its exercise*”. The Court pointed out that one must appreciate the distinction between jurisdiction and power (at footnote 42 and the cases cited there).

Even though these appeal powers may be wide, the High Court said (at [19]) that the Court “*should not usurp the fact-finding function of the [tribunal]*” (see the cases at footnote 50).

The Federal Court of Australia is on-message here as well. In *Hood v Secretary, Department of Education, Employment and Workplace Relations* [2010] FCA 555 (Ryan J) the Court reminded us (at [1]):

Section 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“**the AAT Act**”) provides a mechanism by which an appeal may be brought from a decision of the Administrative Appeals Tribunal (“**the Tribunal**”), “*on a question of law*”. The “*appeal*” for which that section provides is an application in the original jurisdiction of this Court on an extremely limited basis. All that s 44 contemplates is the resolution by this Court of a question “*stated with precision as a pure question of law*”: *Birdseye v Australian Securities and Investments Commission* (2003) 76 ALD 321, per Branson and Stone JJ, at 325. A so-called appeal is therefore quite distinct from an appeal by way of re-hearing (as to which see, for example, *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, at 533), or an appeal *stricto sensu* as exemplified by *Mickelberg v The Queen* (1989) 167 CLR 259, per Mason CJ, at 267ff. The distinction is not merely one of form; it exists; as the High Court pointed out in *Repatriation Commission v Owens* (1996) 70 ALJR 904, at 904 because s 44(1) is concerned to ensure that the merits of the case are dealt with, not by this Court, but by the AAT, a “*distribution of function [which] is critical to the correct operation of the administrative review process*” *MacDonald v Secretary, Department of Family and Health and Community Services and Indigenous Affairs* (2009) 180 FCR 378, at 382 [14].

To sum up, the State appellate courts, the Federal Court of Australia and the High Court of Australia are unanimous in trying to improve the drafting skills of all administrative law lawyers so that appeals on questions of law might be properly determined.

Questions of law must be drafted with precision, as questions and which are central to the decision under appeal or review.

In 2010, the NSW Court of Appeal sounded a related but familiar warning to Supreme Court judges hearing judicial review matters (and not appeals in the nature of a re-hearing, such as are heard in the Court of Appeal itself). In *Sydney Ferries v Morton* [2010] NSWCA 156 (Allsop P, Basten and Campbell JJA) the Court considered the case of a physical fight

between the Master of a government owned ferry and his employed engineer. The Master was sacked and his appeal to the Transport Appeals Board was dismissed. He successfully applied to the Supreme Court, quashing the decision and the matter was remitted to the Board. It refused to allow an appeal again. In the Supreme Court a second time, the Master won again and the State appealed to the Court of Appeal. The appeal was dismissed with costs. One of the matters NSW complained about on the appeal was that the trial judge made findings of fact that he was not permitted to make and that he conducted the second judicial review hearing as if it were a “*rehearing*” or an appeal to which s 75A of the *Supreme Court Act 1970* (NSW) was applicable. Basten JA (not in dissent on this point) said (at [72]):

Such an approach would not be consistent with the limited scope of judicial review which required the identification of jurisdictional error or error of law on the face of the record. It may be difficult, and indeed undesirable, to seek a bright line distinction between errors of fact and errors of law in identifying the permissible grounds of judicial review (see McHugh and Gummow JJ in *Applicant S20/2002* at [54]). Nevertheless, there is an uncontroversial distinction to be drawn between the powers of a court on a rehearing and the powers of the court exercising jurisdiction under s 69 of the *Supreme Court Act*. To the extent that the primary judge appears to have made findings of fact with respect to matters which fell squarely within the purview and jurisdiction of the Board, the complaint is justified. Nevertheless, it is important for present purposes to identify findings which were material to his Honour’s conclusion. Otherwise, it is sufficient to note that the Board which conducts the rehearing will be entitled to form its own view as to the relevant facts on the material before it.

One matter that is yet to be resolved in the states and which may take on a different light or significance after *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 is the extent to which one may seek to commence a statutory appeal and also seek to invoke (Constitutionally protected) judicial review as well - perhaps in the same pleading or summons.

It is not uncommon to do this in the Federal Court, where applicants appealing from the AAT “*on a question of law*” routinely seek to invoke three jurisdictions:

- (a) s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth);
- (b) ss 5 & 6 of the *Administrative Decisions (Judicial Review) Act 1975* (Cth); and,
- (c) s 39B(1A) of the *Judiciary Act 1903* (Cth).

See, for example, *Comcare v Etheridge* (2006) 149 FCR 522 at [29]-[31] (Spender, Branson

and Nicholson JJ).

In Practical Terms

In judicial review proceedings, a proceeding on a question of law is the same as a proceeding on an issue of law. There is no distinction or difference. A question or issue of law is that which points to or demonstrates an error of law, preferably an error of law on the face of the record (which would enable orders in the nature of certiorari to be made pursuant to section 69 of the *Supreme Court Act 1970* (NSW)). It can also point to jurisdictional errors or constructive failures to exercise jurisdiction (all vitiating errors).

It is only on appeals on or limited to a question of law where great care needs to be taken to craft or fashion an appropriate or acceptable question of law so that the matter may be heard and determined (and not dismissed, or dismissed summarily).

The most practical suggestion I can make is to place a question mark at the end of each asserted issue or question of law sought to be raised in the appeal.

At least that will make the issue look like a question of law and therefore be arguably compliant with the requirement that there be a question of law.

Secondly, the issue of law needs to be something about which the decision below turned or it must be a decision which was a step along the way to final conclusions. It may be an express or implied decision or simply something that mattered in the making of the decision.

In summary, questions of law must be drafted with precision, as questions and which are central to the decision under appeal or review.

The price to be paid for not complying can be severe.

Even very recently, the District Court dismissed an appeal to it made under section 67 of the CTTT Act. In *Strangas and Son Building Contractors Pty Ltd v Lim* [2012] NSWDC 72 (Knox DCJ), a building case had gone on for years and years between the CTTT and the Court. It was worth about \$400,000 in damages. The woeful pleading on a question of law was (at [6]):

- (1) Considering the delay of 10 months in delivering the judgment the Plaintiff asserts that the Member erred at law regarding his findings and his approach to the evidence and the credibility of Kyriakos Strangas on behalf of the Plaintiff.
- (2) The decision is unreasonable in that it make errors in the conclusion of amounts owed pursuant to the Scott Schedule and that the matter should be remitted to the CTTT for rehearing pursuant to section 67(3)(b) of the CTTT Act.
- (3) The presiding member failed to give adequate reasons for the conclusion that the builder was an unsatisfactory witness.
- (4) The defendant builder was prejudiced by the failure of the presiding member to grant an adjournment for the consideration and reply to further evidence adduced by the Plaintiff during the proceedings.

The court held that, in the main, a question of law had not been properly enlivened by the appellant, and where it had, there was no such error found. Incredibly, on the adjournment application before the CTTT, the primary point on the appeal, the court held that it was a procedural decision only and that, as the District Court is a court of statutory jurisdiction, it cannot deal with such a matter. It should have been raised in the Supreme Court as a prerogative writ claim. It was struck out.

In *Strangas and Son*, the court relied on the Court of Appeal decision in *Edyp v Brazbuild Pty Ltd* [2011] NSWCA 218 (Allsop P, Giles and Basten JJA) where the Court considered a building dispute on appeal from the CTTT.

President Allsop held that the parties were effectively agreed (at [6] and [7]) that:

.... on either view the Tribunal had constructively failed to exercise its jurisdiction: either because it failed to give effect to a concession central to the running of the case (that Dr Edyp and Ms Baumung were parties to the contract) or because it failed to

address a live and central issue in the proceedings (as to who were the parties to the contract).

Such jurisdictional error could be analysed from the perspective of a failure to afford procedural fairness. That is not how any of the parties has approached the matter. No one seeks to invoke the *Supreme Court Act 1970* (NSW), s 65 or s 69 to attack the decision of the Tribunal. Nothing further, therefore, needs to be said about this way of analysing the matter.

The President considered the nature of a “*decision*” in s 67 of the CTTT Act (from [24] on) and analysed *Kostas* in the High Court. He said (at 26]):

The scope of what is an implied decision was stated by their Honours in the High Court in *Kostas* broadly and simply. To understand when a decision can be seen to be implied it is unnecessary to go beyond acceptance of the expressions of the matter by French CJ: “*decisions which were necessary steps in the Tribunal’s reasoning*” (398 [23]); and by the plurality: “*necessarily implicit in making the finding*” (412 [69]); “*necessary step in the Tribunal reaching its conclusion*” (414 [78]); and “*necessarily depended upon*” (418 [91]). Once one recognises that the statutory language not only encompasses any express decision of the Tribunal, but also any implicit decision as broadly expressed as in the reasons of the High Court in *Kostas*, it follows that the decision may concern a question or matter not specifically addressed by the parties. French CJ in *Kostas* addressed this at 410 [59] and 397-398 [23] of his reasons.

He also said (at [33]):

... there needs to be identified a decision (express or implied) on a question with respect to a matter of law.

And (at [34]):

Broadly speaking, the statutory purpose in s 67 is to confer the jurisdiction to hear appeals, but limit those appeals, through the words used, to legal (and not factual) questions.

His Honour then described the essential task (at [35] and [36]) as:

The essential first task in any appeal under s 67 is therefore to identify the express or implied decision on a question with respect to a matter of law. Without the existence or identification of such a decision, the District Court will have no authority or jurisdiction to review the decision of the Tribunal. The relevant decision will have a clear relationship with any asserted “*error of law*”. Though “*error of law*” is not the

expression of the jurisdictional *discrimen*, it is centrally relevant for at least three reasons. First, the statute provides for an “*appeal*”. As a matter of language and legal taxonomy, it can be accepted that the function of an appeal is to remedy the consequences of relevant error. Secondly, it is the “*dissatisfaction*” of the party with the decision that is to be remedied by the appeal process. Dissatisfaction implies that the party has a complaint about the decision which must carry with it the notion that the decision is said to be relevantly wrong. Thirdly, it is a decision on a question (implying an answer) about which there is to be dissatisfaction.

One will thus be assisted in identifying the relevant decision (express or implied) by understanding the question, the answer and the error that was posed, answered or said to have been made by the Tribunal. Given the width of the notion of decision (express or implied) there may be more than one decision involved or the relevant decision may be able to be expressed at different levels of abstraction. Once the relevant decision or decisions is or are identified, for there to be an appeal legitimately founded in the District Court that decision (or one of them) must satisfy the description as one on “a question with respect to a matter of law”.

Justice Giles broadly agreed with this, but he said it all his own way.

Justice Basten dissented in the case. He did (at [166]) accept that the correct position was that:

... any question of law which formed a necessary step in reaching the conclusion of the Tribunal could be the subject matter of appeal, whether identified by the parties and the Tribunal or not.

It is all so perfectly clear.

Perhaps the title for this paper should be renamed “*Dancing on the Head of a Question Mark*”?

Thank you