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Case law update: What's new in administrative law?

Introduction

I often have difficulty in explaining to non-lawyers and even lawyers who do not practice in regard to "administrative law", what in fact this area of practice is or encompasses. I often resort to using the very non-specific and non–legalese term of "government law", but of course that is not necessary clarifying the issue either.

This seminar has given me cause to delve further into what the label, "administrative law" is now understood to cover. Although I am immersed in this area of practice, and also actively need to take a role in making administrative decisions myself as a member of the Queensland Board of the Psychology Board of Australia, I have been surprised as to the scope of this area of the law. On the other hand, I am indeed gratified to find that I am practising in a "growth area"!

As a result, my discussion today of recent case law and practical implications, has been drawn from quite a wide field of possible case law. I have focused mostly on cases decided this year except where the case is in a developing area and it is necessary to consider the context in which it was decided. The choice made is of necessity, quite eclectic, so I apologise if it does not cover the particular area of interest you have in administrative law. However, I hope that it will prompt you to consider some issues that you may not have otherwise considered, when next making that administrative decision or advising upon it.

The structure of this session is quite informal, as I am aware that many of you have considerable expertise in administrative law and will be in a position to contribute to the discussion of the implications of recent developments.

Time now for some puzzles – legal puzzles that is. Before I launch into a discussion of some of the recent case law, would you please select a person sitting next to you, to have a 5 minute discussion about the fact scenario now on the screen and in your handout? I want you to consider the scenario as one put before you not as a lawyer, but as a decision-maker. What would your answers be to the questions put at the end of the synopsis? After 5 minutes of discussion, I will ask for any volunteered answers and comments. Then all will be revealed (if you don't spot the case already), as to what the court decided.

1. Scenario 1.

You are an officer in an enforcement section of a government regulator. On inspection of a company, it has been found that a breach of the legislation has occurred. Proceedings to obtain a declaration and civil penalty order are brought, and there are negotiations between the parties to settle on a statement of agreed facts and a civil penalty prior to hearing.

(1) Do you proceed to file and rely upon the statement of agreed facts?
(2) Do you propose to the Court the agreed civil penalty, and in what manner?

Case Notes relevant to scenario 1:

CFMEU Case

If you identified that this outline was derived from the recent Full Court of the Federal Court decision in ***Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union and Another***[1] (*CFMEU*) decided on 1 May this year, then you are clearly up to date with current decisions in this area and deserve a gold star!

The government regulator involved in the case was the Director of Fair Work Building Industry Inspectorate established under the *Fair Work (Building Industry) Act 2012 (Cth)*. The matter involved an alleged breach of the *Building and Construction Industry Improvement Act 2005* (Cth) (*BCIIA*) by two unions, the CFMEU and the CEPU. In these proceedings the Director sought declaratory relief and imposition of civil pecuniary penalties. The Commonwealth was granted leave to intervene in order to address issues arising out of the decision of the High Court in ***Barbaro v The Queen***[2] (*Barbaro*).

The primary issue for determination was whether an agreement between to the parties as to penalties that should be imposed, should have been submitted, and the regard to which the Court

[1] (2015) 229 FCR 331; [2015] FCAFC 59.
[2] (2014) 253 CLR 58

should have to the agreed figure. More broadly the Court looked at the long-standing practice of parties making joint submissions, particularly as to a penalty figure or a range within which the penalty should fall in the context of the BCIIA. As submissions were made by the Commonwealth, as an intervener on behalf of other regulators such as the ACCC and the ATO, the comments in the judgment extended well beyond the BCIIA alone.

Indeed the Court strenuously rebuffed the various arguments put by the Commonwealth as to why the approach taken in regard to criminal prosecutions in *Barbaro* should not be applied to civil penalty proceedings.

Barbaro

In order to understand the CFMEU case, it is necessary to consider the High Court decision in *Barbaro*. *Barbaro* was an appeal by two serious drug offenders against lengthy prison sentences, on the basis that they were denied procedural fairness[3] by the judge's refusal to take into account a relevant consideration i.e. the judge refused to receive statements from the prosecution as to the "*available sentencing range*". A majority of the Court found that the submission of a prosecutor as to the bounds of the range of sentences which may be imposed, is a statement of opinion rather than law, and "*is not required, and should not be permitted*" to be made to a sentencing judge[4]. In so doing the Court found that the practice that had arisen since a decision of the Court of Appeal of the Supreme Court of Victoria of *R v MacNeil-Brown*[5], of the sentencing judge asking counsel for the prosecution to make a submission as to the "*available range*" of sentences, was wrong in principle and should cease. The principal reason for the decision was that sentences were a matter of discretionary judgment for the court, subject only to applicable statutory provisions and case law[6].

The Court said that the assumption that the statement as to a range of sentences would assist the court to come to a fair and proper result, depends upon the prosecution determining the range "*dispassionately*" and "*fairly*" as if it were a "*surrogate judge*". This was said not to be the role of the prosecution[7]. The Court considered that fixing the bounds of a range "*wrongly suggests that sentencing is a mathematical exercise*"[8]. The Court also noted that a party that makes a submission

[3] Interestingly the case was fought on this issue of procedural fairness rather than the more usual basis that the sentence was "manifestly excessive" (*Barbaro* (2014) 253 CLR 58 per the joint judgment of French CJ, Hayne, Kiefel and Bell JJ at p 65)
[4] *Barbaro,* (2014) 253 CLR 58, 66
[5] (2008) 20 VR 677
[6] *Barbaro* (2014) 253 CLR 58*,* 70
[7] *Barbaro,* (2014) 253 CLR 58, 71
[8] *Barbaro,* (2014) 253 CLR 58, 72

about the range does not tell the judge about the conclusions or assumptions on which the range depends. Such a submission must be based on predictions as to findings of fact which will be made by the judge, which may not necessarily be obvious or certain.

However, the court noted that the parties could still make submissions about the facts to be found, the relevant sentencing principles and comparable sentences so that the judge had the information necessary to decide the sentence. In the circumstances of the appeal before it, the Court ruled that there was no procedural unfairness, as the statement by a prosecutor as to the available range of sentences was not a material consideration for sentencing and therefore its absence did not affect the decision of the judge on sentence[9].

CFMEU Case – further details

Returning now to the CFMEU Case, the issues were as to whether an agreed statement as to facts, including admissions of liability and a provision as follows, were flawed, having regard to *Barbaro:*

> "*the Parties consent to and agree to seek from the Court: (a) Orders… that (CFMEU) pay the sum of $105,000 by way of pecuniary penalty… and (b) Orders… that (CEPU) pay the sum of $45,000 by way of pecuniary penalty …: "*

Unusually this matter was dealt with by the Full Court in its original jurisdiction, following a directions hearing in the principal proceedings, when it became apparent that a *Barbaro* issue may have arisen. After the Commonwealth intervened, all of the parties to the action agreed with the Commonwealth's submissions, and it was necessary for the Commonwealth to appoint a Counsel as "Contradictor", in order that the Court could have the benefit of arguments to the contrary. The Court largely agreed with the Contradictor.

The result was that only parts of the agreed statement were accepted by the court as establishing "*the factual matrix upon which our instinctive synthesis will be based leading to the quantification of the relevant pecuniary penalties*"[10] i.e. the court found that:

[9] *Barbaro*, (2014) 253 CLR 58, 76 per French CJ, Hayne, Kiefel and Bell JJ. Gageler J found similarly and also dismissed the appeals, except that he did not make the finding that the submission as to available range would be a submission of opinion, or that it should not be made. He simply noted that a sentencing court is not bound to accept the submission and may or may not be assisted by it. Gageler J also found that such a submission by either party would be a submission of law (at p 79).
[10] *CFMEU*, (2015) 229 FCR 331, 405

- the respondents consented to the declaration that their conduct contravened the Act;
- the respondents consented to the imposition of pecuniary penalties;
- that the penalties will be paid to the Commonwealth;
- the respondents had cooperated with the regulator and in the proceedings; and
- there were some details as to the relevant conduct provided in the statement.

However, the court was somewhat scathing as to the level of detail of the facts provided upon which the Court could form its independent opinion as to penalty. Ultimately the Court adjourned the matter for the parties to "*reconsider their respective positions*", for hearing at a date to be fixed.

On 18 June 2015, before this subsequent hearing was scheduled and held, the High Court granted special leave to the Commonwealth to appeal, and the High Court appeal is now listed for 13 October 2015. The Appellant's submissions as published on the High Court website, squarely attack the idea that the decision in *Barbaro* should be applied to civil penalty regimes.

Commentary

The lengthy judgment of the Full Court of the Federal Court contains some interesting comments on issues relevant to administrative law generally, such as:

- The nature of a pecuniary penalty scheme i.e. that it is a "civil" proceeding, but of a hybrid nature. The Court saw the distinction between civil and criminal proceedings in this context mostly as an issue as to the standard of proof[11]. The Court was not persuaded by the arguments put by the Commonwealth that there was a distinction between civil penalty provisions and criminal in regard to their purpose, duties owed by the prosecutor /regulator, or procedures, sufficient to mean that *Barbaro* should not apply[12]. Indeed the Court appears to consider that there is not a "sharp distinction" between civil and criminal proceedings, in this context[13].
- The role of the regulator in such proceedings. The Court rejected the suggestion that a regulator had a special role in proceedings for enforcement of legislation:

  "The suggestion of a special role for a regulator in court proceedings highlights a fundamental difficulty with which the Commonwealth must deal in opposing the

[11] *CFMEU* (2015) 229 FCR 331, 340
[12] *CFMEU* (2015) 229 FCR 331, 387-389
[13] *CFMEU* (2015) 229 FCR 331, 339

application of the decision in Barbaro to pecuniary penalty proceedings under the BCII Act. That decision is based upon a well-established understanding as to the permissible content of submissions in both civil and criminal proceedings. In submissions, counsel addresses the relevant law and the facts as they appear from the evidence. He or she cannot seek to supplement the evidence by opinions, whether they be his or her own, or those of the party for whom he or she appears. Further, the judge can only act upon the law and the evidence. Thus there is no point in offering an opinion. These rules apply to all legal proceedings, civil or criminal. In the end, this proposition underlies the decision in Barbaro."[14]

- A submission as to an agreed fixed amount of penalty is no more acceptable than a submission as to a range.[15]
- The case also highlights the care that needs to be taken in the drafting of statements of agreed facts, particularly to ensure that the facts agreed and the submissions as to relevant comparatives provide sufficient basis for the tribunal or the court to make an independent finding as to the appropriate penalty.[16]

Some issues left open in the decision would appear to be:

- The extent to which the principle in *Barbaro* may apply in regard to other sanctions imposed under legislation. The Court commented that there was "*considerable merit*" in an approach that the exercise of power in granting other kinds of orders sought by a regulator, should also be unfettered and entirely independent.[17] This may imply that similar limitations on the submission of jointly agreed statements as to fact and appropriate non-pecuniary sanctions, would in the Federal Court's view be desirable.

- The extent to which the principle in Barbaro may have application for non-judicial bodies making administrative decisions, or in "protective" rather than penal proceedings. Brief reference is made in *CFMEU* to a decision of the Supreme Court of Western Australia in *Legal Profession Complaints Committee v Love*[18], which found that *Barbaro* did <u>not</u> apply. The view taken in *Love* was that

  "Professional disciplinary proceedings are not criminal in nature, nor are they relevantly analogous to the process of sentencing in criminal proceedings… the objects are not punishment of the practitioner. Rather…the objects are the protection of the public and reputation of the legal profession".

[14] *CFMEU* (2015) 229 FCR 331, 388 and 391
[15] *CFMEU* (2015) 229 FCR 331, 391
[16] *CFMEU* (2015) 229 FCR 331, 405 -407
[17] *CFMEU* (2015) 229 FCR 331, 396
[18] [2014] WASC 389

On the High Court handing down its judgment in the CFMEU Case, these issues may be further elucidated.

Since the CFMEU decision was handed down, it has been applied in at least one other Fair Work Building Industry Inspectorate matter and an ACCC matter, and commented upon or skirted around in several others[19]. As you would no doubt already know, the decision has significant implications for ACCC procedures which have long relied upon agreed statements as to facts and penalty. Accordingly, the ACCC and many other similar regulators will be avidly awaiting the decision of the High Court[20].

2. Scenario 2

Now for scenario 2. Similarly we break for 5 minutes

> *In this scenario you are a middle manager in a local government working in an area responsible for enforcement of local laws. You arrange for another officer to investigate an incident concerning a dog attack, and subsequently propose the charges to be laid, draft and sign some of the charges, give instructions to the local government's solicitors to prosecute, and participate in negotiations on pleas. The local government is successful in the prosecution, with the owner of the dog pleading guilty. Subsequently you decide to convene a panel of 3 officers, including you, to decide whether the dog should be destroyed. You send out the notices and prepare the paperwork for the panel. The instruction to destroy the dog is ultimately issued by your superior officer, the Chair of the panel. You then prepare draft reasons for the decision to destroy the dog.*
>
> (1) What is wrong, if anything, with your actions in regard to this matter?
>
> (2) What should you have done?

Case note relevant to scenario 2:

The case to which these facts relate is ***Isbester v Knox City Council***[21] . The facts are essentially as outlined in the scenario. Some additional relevant facts include that in the letter advising Ms Isbester of the proposed panel hearing, Ms Hughes (the Council middle manager in my scenario)

[19] Applied in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FCA 755 ; *Australian Competition and Consumer Commission v Chopra* [2015] FCA 539; considered in *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614; *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492; *Tax Practitioners Board v HP Kolya Pty Ltd* [2015] FCA 472;

[20] See article *Stamping out rubber-stamp penalties* (2015) 43 ABLR 48, which the Court in CFMEU referred to with approval, for further discussion of the issues under consideration in the *CFMEU* case.

[21] (2015) 320 ALR 432; [2015] HCA 20; This decision has subsequently been applied in an administrative decision-making context *in Christie v Agricultural Societies Council of NSW Ltd* [2015] NSWSC 1118.

indicated that she would be a member of the panel, the chair would be the person delegated to make the decision and the third was to be an officer of the council, "*who has not had any involvement in the matters, to provide assistance in the decision making process*". The letter also stated that *"[t]he officer involved in the investigation may be present but they will not be involved in the decision making*". Ms Isbester did attend the panel proceedings, and provided evidence and submissions. It is also relevant to note that it was not a requirement of the legislation that the panel be convened for the purposes of making the decision – it could have been made by the Council or its delegate, subject to natural justice being afforded to Ms Isbester.

After the decision of the panel was made to destroy the dog, Ms Isbester sought judicial review, and orders of certiorari and prohibition in the Supreme Court of Victoria, and on being unsuccessful appealed to the Court of Appeal, solely on the ground of apprehended bias. She was unsuccessful also in the Court of Appeal, but was ultimately successful on this ground in the High Court. Consequently the decision to destroy the dog was quashed.

The court found that as a fair-minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision as to the destruction of the dog, natural justice required that she not participate in that decision[22]. The Court confirmed that there were two steps to be taken in determining whether apprehended bias exists, confirming the decision in *Ebner v Official Trustee in Bankruptcy*[23] i.e.

> *"The first requires the identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits. Where it is said that a decision-maker has an "interest" in litigation, the nature of that interest must be spelled out. The second requires the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits."*[24]

The Court went on to state:

> "*The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision*." (footnotes removed) [25]

It was noted that the principle as to apprehended bias had been applied not only in regard to decision-making by judicial officers, but also by administrative decision-makers, subject to

[22] *Isbester* (2015) 320 ALR 432, 437
[23] (2000) 205 CLR 337
[24] *Isbester* (2015) 320 ALR 432,437 [21]
[25] Isbester (2015) 320 ALR 432, 437 [23]

recognition of the differences between court proceedings and "*other kinds of decision-making*"[26]. That is, it was recognised in this decision that apprehended bias has a "*flexible quality, differing according to the circumstances in which a power is exercised*"[27]. The importance of the statutory context was highlighted.

In the circumstances of this case, the Court found:

- The question was whether it might reasonably be apprehended that a person in Ms Hughes' position would have an interest in the decision, which could affect her proper decision-making.
- It was accepted that the question for the Panel was different than the question before the Magistrates Court in regard to the prosecution. However, it was also found that much of the evidence relating to the past offence would also be relevant to the decision regarding the destruction of the dog. [28]
- The "*personal interest*" in this context was not a case of receipt of a benefit, but the interest was akin to the interest of a prosecutor in vindication of their opinion. The Court applied previous case law that found that involvement in the capacity of a "*prosecutor, accuser or other moving party*"[29] will not enable the person to bring the requisite impartiality to subsequent decision-making[30]. That is, the "*incompatibility of the interest of a prosecutor and judge*"[31] was emphasised.
- Even though the order as to destruction was finally issued by her superior, the chair of the panel, it was found that the participation of others on the panel did not "*overcome the apprehension that Ms Hughes' interest in the outcome might affect not only her decision-making but that of others*."[32]

C**ommentary**

On the facts as outlined in the judgment, it would seem clear that Ms Hughes was a very conscientious employee of the Council, who thought she was doing the right thing taking a matter through to a successful conclusion both in the prosecution and then in regard to the decision as to the destruction of the dog. In fact that Court expressly stated that nothing in its judgment should be

[26] Isbester (2015) 320 ALR 432, 437 [22]
[27] Isbester (2015) 320 ALR 432, 437 [23]
[28] Isbester, (2015) 320 ALR 432 ,441 [41]
[29] Isbester (2015) 320 ALR 432, 441 [45]
[30] Isbester, (2015) 320 ALR 432, 441 [46] applying *Dickason v Edwards* (1910) 10 CLR 243*; Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509
[31] Isbester, (2015) 320 ALR 432, 442 [47]
[32] Isbester (2015) 320 ALR 43, 442 [48]

taken to imply that Ms Hughes acted otherwise than diligently, and in accordance with her duties, or that she was not in fact impartial[33]. It was simply that natural justice required that she not participate in the decision as to the destruction of the dog. It is also interesting to note that the order for destruction of the dog could have been sought from the Magistrates Court at the time of sentence. If that had occurred, the issues which eventually went to the High Court, would not have arisen.

It is a salient reminder also that a "*personal interest*" in the context of apprehended bias, need not be beneficial in the usual way in which that term is understood in the context of conflicts of interest. Further, the Court noted with approval the comments of the earlier High Court decision of *Stollery v Greyhound Racing Control Board*[34] that even the mere presence of the person at the time of the decision-making, who could be considered to be biased by a fair-minded observer, may affect the natural justice of the manner of reaching the decision. The Court noted that the decision in Stollery was that:

> *"the manager's mere presence was sufficient to invalidate the decision, either because he was an influential person or because his presence might inhibit and affect the deliberations of others."* [35]

3. Scenario 3

You are an auditor in a tax department, with legal qualifications. You receive in regard to an existing audit, information by email from an informant providing documents and details that were apparently gathered while the informant was acting as a research assistant or advisor to the taxpayer being investigated, when the taxpayer was involved in litigation. The taxpayer at the time was also being advised by a firm of solicitors, with whom the informant had some connection. This informant was not admitted as a solicitor at the time of the gathering of the information.

(1) Do you have regard to the documents and information from the informant, for your report and subsequent assessments in regard to the taxpayer?

(2) Would there be any steps you would take in regard to the information and documents provided?

(3) Do you consider there will be any impact on the assessments, from use of the documents and information obtained from the informant, having regard to provisions in the legislation which stated that

- *validity of any assessment would not be affected by non-compliance with the Act, and*
- *the assessment was to be taken as conclusive evidence in all but administrative review proceedings?*

[33] Isbester (2015) 320 ALR 432, 442 [50]
[34] (1972) 128 CLR 509
[35] Isbester (2015) 320 ALR 432, 440 [37]

Case notes relevant to scenario 3:

This scenario is taken from the decision in ***Donoghue v Commissioner of Taxation***[36] which is currently on appeal to the Full Court of the Federal Court.

As you would expect, the issues in the case were as to whether there was a valid claim that the documents were privileged; if so, whether the Australian Taxation Office (ATO) appropriately had regard to the privileged documents when making its assessments of the taxpayer; and as to the effect of this on the validity of the assessments.

I need not go into the privilege issues raised, except to say that the Court at first instance found that the documents were privileged despite the cloudy nature of the employment and billing arrangements of the informant. What is interesting from an administrative law perspective, is as to the potential impact of the use of the material by the ATO officer on the validity of the assessments, and that this case (at least at first instance) is a rare example where "conscious maladministration" has been found to be established, illustrating one of the categories of jurisdictional error alluded to previously by the High Court in ***Commissioner of Taxation v Futuris Corporation Limited***[37] (*Futuris*).

In order to understand *Donoghue*, it is useful to recap on what happened in *Futuris.*

Futuris

In *Futuris*, you will recall that proceedings were taken by a taxpayer under the usual administrative review provisions[38] following an adverse decision by the ATO on objection to an amended assessment. However in addition, *Futuris* commenced proceedings in the Federal Court under s.39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*) for a declaration that the assessment was invalid, and for an order that it be quashed on the ground that the Commissioner had deliberately engaged in double counting of its taxation liability. The judge at first instance dismissed the application, but on appeal to the Full Federal Court, the appeal was allowed on the basis that the making of the amended assessment was not a bona fide exercise of the power. On appeal to the High Court, the Court found, there was no deliberate failure to comply, as it was fairly open to the Commissioner to take the interpretation that he did of the relevant legislative provision[39].

[36] [2015] FCA 235
[37] (2008) 237 CLR 146
[38] Part IVC of the *Taxation Administration Act 1953* (Cth),
[39] The relevant provision was s.177F(3) of the *Taxation Administration Act 1953* (Cth)

However in the course of coming to this decision, the Court considered and clarified the extent of the jurisdiction of the Federal Court under s39B of the *Judiciary Act ,* section 21 *Federal Court of Australia Act 1976*[40], and its relationship with section 75(v) of the *Commonwealth Constitution*. More importantly for this discussion, the Court considered that sections 175 and 177(1) of the *Taxation Administration Act 1953* (TAA) which provide as follows, had effect according to their terms, despite their largely privative effect:

> *"s.175. The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with. …*
>
> *s.177(1). The production of a notice of assessment, or of a document under the hand of the Commissioner…purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the Taxation Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct".*

The court found that these provisions still permitted the necessary "*contestability*"[41] of the tax imposed through the avenue provided in the Part IVA administrative review process, and the Court retained its powers under s.39B *Judiciary Act* to judicially review matters that did not meet the description of an "*assessment*" as protected by section 175 of the TAA. That is where the decision as to "*assessment*" did not meet the statutory description of this term, the Federal Court would have power outside of the process mandated in the Act for review under Part IVC of the *Income Tax Assessment Act 1936*, to entertain an action for judicial review on the basis of jurisdictional error. The Court stated in this regard:

> *"Reference is made later in these reasons to the so-called tentative or provisional assessment which for that reason do not answer the statutory description in s 175 and which may attract a remedy for jurisdictional error. Further,* ***conscious maladministration*** *of the assessment process may be said also not to produce an 'assessment' to which s 175 applies".* [42](emphasis added)

Donoghue Case – further discussion as to findings

The Court concluded that the provision which imposed a duty on the Commissioner[43] to make an assessment, did not expressly or by implication abrogate legal professional privilege[44]. Similarly, a

[40] Section 21 provides as to the power to grant declaratory relief, which section refers back to matters in which the court has "original jurisdiction", which is conferred by s.39B *Judiciary Act*.
[41] See *Nicholas v The Queen* (1998) 193 CLR 173 as referred to in *Futuris* at p 166.
[42] *Futuris* (2008) 237 CLR 146, 157 [24]-[25]
[43] Section 166 of the *Income Tax Assessment Act 1936*
[44] *Donoghue* [2015] FCA 235, [133]

provision in the legislation giving the Commissioner a right of access to books, documents and papers did not assist to make lawful what would otherwise be unlawful.[45]. The Court rejected an argument put by the Commonwealth, that the Commissioner could use the privileged material in the process of assessment, with any question of privilege to be a matter to be raised by the taxpayer on the hearing of a Part IVC appeal against the decision on objection.[46] To find otherwise, it appeared to the Court, would put the taxpayer in the invidious position, of having to waive the privilege relating to the material (even if conscious maladministration was involved in its use by the Commissioner) in order to argue that the assessment was excessive.[47]

The Court noted that *Futuris* demonstrated that the "*trust invested in the Commissioner by Parliament is not unqualified*"[48]. The Court applied *Futuris* in that it found that section 175 TAA did not encompass the "*wilful disregard of a right which Mr Donoghue had to claim legal professional privilege in respect of the material supplied to the Australian Taxation Office*"[49] by the informant. It noted that *Futuris* recognised that "*recklessness was sufficient to establish the element of consciousness in conscious maladministration*"[50] . It also found that what equated to the requisite recklessness was that which was sufficient to found the tort of misfeasance in public office. On the facts the Court found that the officer receiving and using the privileged material was reckless in the required sense and therefore the Commissioner's assessment process was affected by conscious maladministration, so that an assessment was not produced to which the protection of section 175 TAA would apply. The Court therefore considered that the assessments should be quashed. Pending the Appeal, to be heard in November this year, these orders have been stayed.

Commentary

As the case is on appeal there is little that can be said with any finality regarding the implications of the decision. If the decision is upheld in the current and any further appeal, it will be of significant interest as a rare example of the situation alluded to in *Futuris*, of "*conscious maladministration*", and an example of jurisdictional error able to be pursued in the supervisory or original jurisdiction of the Federal Court, outside of the otherwise mandated legislative administrative review process.

[45] *Donoghue* [2015] FCA 235, [136] referring to Mason J comments in *Commissioner of Taxation of commonwealth of Australia v Australia and New Zealand Banking Group Limited* (1979) 143 CLR 499 at 535.
[46] *Donoghue* [2015] FCA 235, [137]
[47] The Court also queried at [137] if a taxpayer was placed in that position, whether the tax provision could on that basis also be challenged as an "incontestable tax" on constitutional grounds.
[48] *Donoghue* [2015] FCA 235, [142]
[49] *Donoghue* [2015] FCA 235, [145]
[50] *Donoghue* [2015] FCA 235 [145]

There is also in the state jurisdiction, another jurisdictional error case being taken on appeal to the Court of Appeal of the Supreme Court – ***Harvey v Commissioner of State Revenue***[51]. At first instance the Supreme Court has applied *Futuris* in the state context, such that provisions similar to section 175 and 177(1) in the state *Taxation Administration Act 2001* (Qld) (QTAA) have been applied. However the Supreme Court has recognised that the power of the Court in its supervisory jurisdiction continues notwithstanding the privative effect of the provisions equivalent to s175 and 177(1)[52]. The court found that on the facts of the case, the Commissioner had made an error of law in issuing an assessment when it did not decide between two dutiable transactions as required under section 21 of the QTAA. However, this error was found not to be a jurisdictional error which was outside the limits of the equivalent of section 175 of the TAA (s.s132(2) QTAA). An argument by the plaintiff that section 132 was also open to attack on the basis that it resulted in an incontestable tax, was also rejected by the Court. The assessment was therefore upheld.

The appeal will be particularly of interest to practitioners in State revenue.

Concluding comments

Clearly this year has been quite an exciting year in administrative law[53]. And there is more to come, as alluded to in this presentation, before the year is out.

At the higher end of the scale, the High Court has clearly decided to exercise its muscles in determining what is appropriate to be put before courts and tribunals in the way of submissions, and reinforced the distinction between submissions and other aspects of the litigation process. The court has also been prepared to recognise the limits on legislative provisions which otherwise seek to mandate a particular administrative review process, outside of the higher courts' common law and constitutionally based jurisdiction in judicial review.

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[51] [2014] QSC 183

[52] The equivalent provisions in the QTAA are sections 77 and 132.

[53] Further reading: Knackstredt JP, *Judicial review after Kirk v Industrial Court (NSW)* (2011) 18 AJ Admin L 203; Meyers Z, *Revisiting the purposes of judicial review: Can there be a minimum content to jurisdictional error?* (2012) 19 AJ Admin L 138; Sackville R, *The constitutionalisation of State administrative law* (2012) 19 AJ Admin L 127; Alderton M, Granziera M, and Smith M, *Judicial review and jurisdictional errors: The recent migration jurisprudence of the High Court of Australia* (2011) 18 AJ Admin L 138; McDonald L, *The entrenched minimum provision of judicial review and the rule of law* (2010) 21 PLR 14; Robertson A, *Commentary on The entrenched minimum provision of judicial review and the rule of law by Leighton McDonald* (2010) 21 PLR 40

The High Court and the Federal Court are clearly protective of the role and function of the court. It may be that further such decisions will challenge previous practices in the administrative law area. Such a strong stand from the Federal Court in the face of concerted effort and submissions by a number of Commonwealth agencies in the *CFMEU* Case, can be seen by some as an healthy and appropriate counter-weight to the increasing powers of government, particularly at a federal level. On the other hand, commercial lawyers handling ACCC matters may not share the same view, as the decision is likely to have caused greater uncertainty in their dealings with the ACCC and in advising their clients as to the likely liability.

The expectations placed upon those making administrative decisions are high. In the everyday administration of government, it is difficult for any decision-maker to bear in mind all of the nuances of the case law as to what is or is not natural justice. However from the review of the case law undertaken today, there are at least a few "take home" messages, that it may pay to keep in mind, including the following:

- Treat the legislation as "king". In most cases, it will be the "source of truth" i.e. the authorisation required for the administrative action. Always keep in mind the overall purpose of the legislation but pay close attention to the procedural provisions.
- Ensure that the decision-maker specified in the legislation actually applies him or herself to the decision. Make sure that there is no person or entity involved in the ultimate decision who could be apprehended to be biased e.g. where that person has acted in the role of "mover" or "prosecutor".
- Respect the role of the tribunal or court as an independent decision-maker – i.e. treat it as the "queen", and ensure that submissions fully provide the facts and comparatives on which it may make an independent decision.
- Remember that the review processes mandated under legislation may in some circumstances be able to be ignored by a complainant, despite strong privative clauses, with recourse to the Supreme Court or Federal Court under its supervisory or original jurisdiction (and ultimately the High Court) remaining possible in areas of jurisdictional error. Accordingly, the processes followed must be robust and be able to withstand the scrutiny of the higher courts, even if the decision relates to the application of local laws e.g. as to the fate of a dog.