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This is June 2017 Vol 1 Issue 1.

In this edition, Walkley award winner and novelist, Debra Jobson, continues her series of articles on "Life Behind the Scenes" in the world of Tribunals. The first article provides us with a great overview of the inspiring career and achievements of Acting Judge Jennifer Boland AM, currently a Deputy President of NCAT. Debra has also kindly provided us with a brief profile piece on our own COAT Treasurer, Katrina Harry PSM. Katrina's achievements were recognised earlier this year when she was awarded a Public Service Medal. Congratulations Katrina.

Most of our energies have been directed in recent months towards planning the joint COAT National/NSW Conference to be held at the new International Convention Centre in Darling Harbour on 8 and 9 June. The quality of the programme developed is evident in the high number of registrations we have received so far. I would like to acknowledge the work of the respective sub-committees for making it all happen, more than ably led by our dynamic Vice Convenor, Anina Johnson.

Justice Duncan Kerr Chev LH. recently stepped down as Chair of COAT National. Whilst President of the AAT during the implementation of the amalgamated Tribunal, Justice Kerr also managed to accommodate the requirements of leading our national COAT body applying great skill and good humour. On behalf of all of us at COAT NSW I thank Justice Kerr for his leadership over several years.

Finally, I am hopeful of being in a position to announce details of our 11th annual Whitmore lecture in the next few weeks. We are aiming to hold the lecture in September or October.

I look forward to catching up with many of you at our forthcoming conference.

Malcolm Schyvens
COAT Convenor

■ In Profile: The Hon A/Judge Jennifer Boland AM

by Debra Jopson

Five years a Family Court trial then appeal judge and now a deputy president of NSW Civil and Administrative Tribunal (NCAT), Judge Jennifer Boland who began her working life delivering flowers across Sydney seems fond of pricking pomposity.

She likes to keep her CV short because she can't bear introductions at public events where someone goes on and on: "Her Honour did this and Her Honour did that," she says.

It's a tough edit because Her Honour has done a lot, before and after the late NSW Attorney-General Jeff Shaw appointed her as an Acting Judge of the NSW District Court in 1997, as part of his push to correct the judicial gender imbalance.

This unexpected promotion produced one of the stories of the comic aspects of judgely life she likes to tell. A fellow female judge hastily mustered an outfit for her.

Her bar jacket was made to fit with safety pins, bobby pins failed to hold an overlarge wig in place, so it slipped over her eyes and she blundered from the bench to an exit that did not exist. Pure slapstick.

Not long after, following a Melbourne judges' conference, she went shopping in jeans. Back at her hotel, she indicated her Comcar to the concierge. He patted her shoulder and said, "Oh dear no love, that's a Judge's car."

Now head of NCATs Occupational Division, which conducts disciplinary proceedings involving lawyers, doctors and other professionals, Boland may have forgone some perks, but says she enjoys the nitty-gritty work it brings.

"This sounds like I'm being too perfect, but I don't mean that at all. I've always felt a strong sense of the law and justice and this is at the coalface where most people experience the law. So, their experience of it should be as good as a person's experience in the High Court," she says.

She likes to confer on others the dignity she was sometimes denied herself as a single mother and as an aspiring career woman who was not born into privilege.

At the age of 74, Boland is of the generation of women who had to battle their way to the upper echelons of the law. Raised in Balmain when it was a working class industrial suburb, she left school aged 14 for work to help her family financially. She didn't want to, but there was little discussion at home, just expectation.

"My father was a shipwright, who probably did not put much value on education for women... My mother didn't work [and] he wasn't paid a huge wage," she says.

She worked as a florist, then a clerk, married at 21 and at 22 had baby Rosemarie. She lost her husband Rob to testicular cancer when the baby was aged 14 months. Reduced to tears by a government social security officer who loudly accused her of posing as a widow, Boland says she learnt the importance of listening to people's stories and treating them with dignity.

"I've always felt a strong sense of the law and justice and this is at the coalface where most people experience the law. So, their experience of it should be as good as a person's experience in the High Court ..."

“She loves the brain stretch of challenging cases which continues at NCAT.”

BOLAND STARTED working at the Legal Services Tribunal 21 years ago and the many Tribunals on which she has served since include the Guardianship Tribunal and the Nursing and Midwifery Tribunal, which she chaired.

Before that, she earned the title of “tampon queen,” as a corporate lawyer. She credits several male mentors with opening her pathway to the law. Ken Collins, the doctor who delivered baby Rosemarie, introduced her to barrister John Traill QC, who hired her as a legal secretary and encouraged her to study law.

“I remember when I started doing the SAB [Solicitors Admission Board studies], walking through the grounds at Sydney University thinking: ‘This is what I wanted all my life,’” she says.

By then, she had remarried and had two more girls, Catherine and Jane with her second husband, Michael.

“I used to work three days, go to uni three nights a week. I had three kids,” she recalls.

When she graduated aged 38, she was told she probably wouldn’t get work and the question of how she would manage childcare loomed large at her first job interview.

However, she landed a spot as a solicitor, then partner at Michell Sillar & Brown, where she juggled twin specialties of product liability and family law.

Her mentor there, the late Colin Marks, was a Johnson & Johnson director when it became embroiled in the first Australian toxic shock litigation and Boland became the successful defender of the Carefree tampon in the South Pacific.

There had been no reported cases in Australia, but one woman in New Zealand sued Johnson & Johnson after she was admitted to hospital with severe flu-like symptoms after tampon use.

As a litigation partner at Corrs Chambers Wessgarth, she was dubbed the “tampon queen” for her grasp of the scientific and legal issues.

She still easily reels off the background, including the curious fact that American women who had not been exposed to bugs like their more sexually active city sisters were prone to a virulent golden staph strain through super-absorbent tampon use.

She loves the brain stretch of challenging cases which continues at NCAT: “Sitting on professional discipline matters, I’ve learnt a lot about drugs, boundary violations...”

It’s also handy, she says, that as a teenager, she learnt to type at Miss Hale’s Business School, even though when she first became a solicitor in 1982, many warned her to keep it secret for fear of stereotyping.

“I was a legal secretary. I don’t have a problem typing my reasons. I use my laptop on the bench because I can type my notes faster than I can write,” she says.

FAMILY IS a word Boland uses often. Her preoccupation with family law began with a hairdresser, Rita, who was one of her first clients as a solicitor.

“I think she was responsible for building my practice. Every second person who came to me, I said, ‘How did you hear about me’ and they’d say, ‘Oh, Rita sent me’.”

As a judge, Boland says “in that court you are dealing with people who are facing one of the worst periods of their life” and her aim has been that they walk out of court believing they have had a fair hearing, win or lose.

“People tend to think oh, family law - you do that touchy-feely work. They don’t realise the depth of knowledge a Family Court judge has got to have. You’ve got to be across tax law, conveyancing law... You’ve got to be able to read a balance sheet and work out where the money’s missing. Be on your toes for where the money’s siphoned off and gone somewhere else.”

Then there’s grappling with international law, including conflicts between different nations’ legal systems.

“There are some cases you will always remember. There is the child. You wonder what happened to that child...” she says.

Family tragedy is not, of course, confined to that court. One case in the Civil and Administrative Tribunal (CAT) just over a year ago still haunts her.

The Health Care Complaints Commission (HCCC) brought professional disciplinary proceedings against 77-year-old general practitioner Dr Hamid Khan, over his treatment of a boy aged eight who had died of septic shock following a ruptured appendix.

The Coroner noted that the GP missed the boy’s appendicitis entirely. The HCCC claimed that the doctor had mild cognitive impairment. Sitting with three members as Deputy President, Boland cancelled the doctor’s registration.

“It saddens me for three reasons – the terrible tragedy that the misdiagnosis was in the chain of events that led to the child’s death and his parents’ huge loss, and also the sadness for the doctor - and his family - who had an unblemished career for many, many years,” she says.

Boland finds “normalcy” churning up and down a pool, in charity work and in doing practical things for her extended family.

“I’ve had a locker at North Sydney pool since time immemorial. I go to yoga on Tuesday nights. The most normal thing in my life is that I have five grandchildren and if I don’t work Thursdays ... I usually cook for the three who live closest to me,” she says.

Her voice brightens as she describes her 11-year-old grandson’s amazement that Nanny admits she talks to herself. She recently attended a school information night about another grandson’s impending European excursion. The teachers asked that the boys learn to wash their own undies. Boland chuckles.

She is still deeply involved in her daughters’ lives. The oldest, Rosemarie is 52, Catherine aged 47 and “baby Jane is 45.”

“My two eldest girls now have PhDs, so I’m very proud of them. That was in the last two years. I tell you, nothing is better than going to that PhD conferring ceremony,” she says.

“There are some cases you will always remember. There is the child. You wonder what happened to that child ...”

*“... I’ve always
thought that if you
stopped caring, it’s
time to hand in
your resignation.”*

Boland herself has hit the age of “statutory senility... It’s 70 for the Commonwealth, 72 for NSW. But you can be an acting judge till 77.”

Every 3-6 months, she runs a self-audit on whether she has remained sharp of mind, or whether it is time to “say bye bye.”

“You say to your friends and colleagues, tap me on the shoulder if you don’t think I’m up to this and I’m not doing the job properly. I look at something I wrote 5-6 years ago and I think, ‘Hmmm, am I writing as well as this now?’”

She checks the cardboard roll detailing her commission as NCAT deputy president from Governor David Hurley.

“I was appointed 1 January, 2015 expiring 31st December, 2018. That’s when I expire.”

Meantime, she allows herself slightly more leisure than before, including a trip with the entire family to Hawaii to celebrate her 50th wedding anniversary. She’s calling it Hawaii Five-O.

It’s about balance, she says. She lowers her voice. “I don’t think we all learn to shut everything off. There’s always a part where you lie in bed some nights...I’ve always thought that if you stopped caring, it’s time to hand in your resignation.”

Veterans' Review Board National Registrar honoured with Public Service Medal

by Debra Jopson

Five years a Family Court trial then appeal judge and now a deputy president As a child, Katrina Harry enjoyed marching on Anzac Day with her grandfather Oliver, a 1939 enlistee who served through World War II in New Guinea and the Middle East.

So to her, the role she won almost 10 years ago as Director of Legal and Policy Services for the Veterans' Review Board (VRB), helping former servicemen and servicewomen get paid their due was more than a job.

"When my grandfather passed away, my grandmother was given a war widow's pension. I thought: 'Our family has been lucky in this scenario, so if I could make a contribution to other veterans' lives, this would be a worthwhile use of my law degree.'"

Within three years of joining the VRB, aged just 30, she became the VRB's National Registrar and Principal Legal Advisor.

And now, at 37, she has won the Public Service Medal for devising and implementing an alternate dispute resolution (ADR) program which has dramatically cut the time it takes for veterans and their families to get decisions from the board.

"It was such a surprise... We're a pretty small tribunal. There's only 25 staff nationally. We're pretty lean and to have got the program up and running with a small team has been fantastic," she says.

The aim of introducing ADR was to remove bureaucratic hurdles and it's paid off. During the last financial year when ADR was introduced in NSW and the ACT, seven in 10 cases were resolved within three months, instead of the usual 12 months.

The VRB's hearing rooms are no longer needed five days a week, veterans and their representatives are measurably more satisfied and the number of appeals to the Administrative Appeals Tribunal has dropped, Harry says.

While total cost savings have not yet been quantified, the ADR process is about one-third cheaper than the older model, she says. And spending less time on cases allows veterans' advocacy groups to help more people.

The VRB operates under "beneficial legislation" designed to get the best outcome for Australia's war veterans and their families when they appeal Department of Veterans' Affairs decisions concerning their entitlements.

Traditionally, applicants and their representatives have put their arguments in board hearings, but the new model, first trialled in Sydney two years ago "turns that on its head," says Harry, who was encouraged by Principal Member Doug Humphreys to be bold.

Four years ago, as her medal citation explains, she provided "significant input into amendments to the *Veterans' Entitlement Act 1986* to underpin an ADR framework within the board."

"... if I could make a contribution to other veterans' lives, this would be a worthwhile use of my law degree."

“ADR takes that a step further in making sure it says ‘yes’ where we can in a way that is less stressful and a better experience for the veteran in getting to that decision ...”

Once the legislation was passed, she researched models here and overseas, introducing a unique mandatory first step, called “outreach” where a conference registrar discusses with a veteran’s advocate how best to resolve the matter successfully.

“Doug’s described our tribunal as very much here to say ‘yes’ if we can. ADR takes that a step further in making sure it says ‘yes’ where we can in a way that is less stressful and a better experience for the veteran in getting to that decision,” she says.

In training, as the model is rolled out across Australia, Harry describes the whole process as being like an octopus.

The head is the outreach. Then there are the tentacles, representing six different pathways which applicants can follow to get the best result. ADR at other tribunals which are not guided by such beneficial legislation offers fewer pathways to solving a dispute.

“We’ve got six legs. It’s not quite eight – it might be more of a squid,” Harry quips.

An independent evaluation conducted a year ago declared the model was a resounding success. VRB registries in all states and territories have rolled it out, except Western Australia and Queensland which will introduce it later this year of listening to people’s stories and treating them with dignity.

The case notes in this edition have generously been provided by the NSW Civil and Administrative Tribunal. The COAT NSW Committee kindly thank NCAT for their assistance in making these case notes available to our membership. Further case notes are available on the NCAT website (http://www.ncat.nsw.gov.au/Pages/about_us/publications_and_resources/legal_bulletin.aspx)

Federal Court of Australia Full Court

Minister for Immigration and Border Protection v SZVFW [2017] FCAFC

In brief: The Full Court of the Federal Court of Australia considered the principles concerning unreasonableness in the legal sense, in circumstances where judicial review had been sought in relation to a decision of the AAT concerning the exercise of a statutory discretion by the Minister's delegate.

The Full Court (at [38]-[39]) summarised a list of general principles on legal unreasonableness in this context, drawn from the leading Full Federal Court and High Court authorities of *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; and *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 listed below:

“[38] ...

- there is a legal presumption that a statutory discretionary power must be exercised reasonably in the legal sense of that word (*Li* at [63] per Hayne, Kiefel and Bell JJ; *Singh* at [43] per Allsop CJ, Robertson and Mortimer JJ; *Stretton* at [4] per Allsop CJ and at [53] per Griffiths J);
- nevertheless, there is an area within which a decision-maker has a genuinely free discretion, which area is bounded by the standard of legal reasonableness (*Li* at [66]; *Stretton* at [56] per Griffiths J);
- the standard of legal reasonableness does not involve a court substituting its view as to how a discretion should be exercised for that of a decision-maker (*Li* at [66]; *Stretton* at [8] per Allsop CJ) and [76] per Griffiths J);
- the legal standard of reasonableness is not limited to what is in effect an irrational, if not bizarre, decision and an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified (*Li* at [68]);
- in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions (*Li* at [74]; *Stretton* at [62] and [70] per Griffiths J);
- legal unreasonableness “is invariably fact dependent” and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases (*Singh* at [48]; *Stretton* at [10] per Allsop CJ and at [61] per Griffiths J);

“in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions ...”

- the concept of legal unreasonableness can be “outcome focused”, such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error (Singh at [44]; *Stretton* at [12]-[13] per Allsop CJ);
- where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification (*Singh* at [45]-[47]).

“the concept of legal unreasonableness can be “outcome focused”, such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error ...”

[39] It is not suggested that this summary is exhaustive. As has been emphasised, the proper elucidation and explanation of concepts of jurisdictional error and legal unreasonableness “does not depend on definitional formulae or on one verbal description rather than other” (*Stretton* at [2] per Allsop CJ and at [62] per Griffiths J). These statements of general principle provide guidance to the often difficult task of determining whether or not the exercise of a discretionary power involves legal unreasonableness. As Allsop CJ emphasised in *Stretton* at [2], it is unhelpful to approach the task by seeking to draw categorised differences between words and phrases such as “arbitrary, capricious, illogical, irrational, unjust, and lacking evident or intelligent justification, as if each contained a definable body of meaning separate from the other”. Rather, such concepts are expressed as “abstractions applying to the infinite variety of decision-making under variously expressed statutory provisions, in a wide variety of legal contexts” (*Stretton* at [3] per Allsop CJ.)”

Dee Why Auto Clinic and anor. v Roads and Maritime Services [2017] NSWSC 377

In brief: The Supreme Court of New South Wales considered the duty of a court to give adequate reasons for its decisions. As a starting point, the Court held (at [44]) that a failure to give sufficient reasons will be reviewable for legal error: *Inghams Enterprises Pty Limited v Lakovska* [2014] NSWCA 194 at [2] per Basten JA, citing *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; [2006] NSWCA 284 at [130] and *Wingfoot Australia Partners Pty Limited v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [28].

Bellew J, citing *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443, observed (at [45]) that the content of the obligation to give reasons may not be the same in every case. As such, there is no mechanical formula that can be applied to determine the extent of the obligation to provide reasons. As a general rule, however, there are three fundamental elements that underpin a statement of reasons (*Beale v Government Insurance Office of NSW* at 443):

“First, a judge should refer to relevant evidence. ... Secondly, a judge should set out any material findings of fact and conclusions or ultimate findings of fact reached. ... Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well.”

The Court, then, outlined the principles governing the obligation to give reasons, drawing from a decision of McColl JA, in *Pollard v RRR Corporation* [2009] NSWCA 110 at [56]ff, which had applied by Gleeson JA in *Keith v Gal* [2013] NSWCA 339 at [113]. The relevant principles, as summarised by Bellew J (at [47]), are extracted below:

“ the giving of adequate reasons lies at the heart of the judicial process. A failure to provide sufficient reasons promotes a sense of grievance and denies both the fact, and the appearance, of justice having been done, thus working a miscarriage of justice ...”

- “(i) a trial judge’s reasons must, as a minimum, be adequate for the exercise of a facility of appeal (at [56]);
- (ii) a superior court considering the decision of an inferior tribunal should not be left to speculate, from collateral observations, as to the basis of a particular finding (at [56]);
- (iii) the giving of adequate reasons lies at the heart of the judicial process. A failure to provide sufficient reasons promotes a sense of grievance and denies both the fact, and the appearance, of justice having been done, thus working a miscarriage of justice (at [57]);
- (iv) the extent and content of reasons will depend upon the particular case under consideration, and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning leading to a finding, it is essential that he or she expose the reasons for determining an issue which is critical to the contest between the parties (at [58]);
- (v) the reasons must do justice to the issues posed by the parties’ respective cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the decision, and the extent to which their arguments have been understood and accepted. It is necessary that the primary judge deal with the issues canvassed, and explain why one case is preferred over another (at [59]);
- (vi) a failure to refer to some of the evidence does not necessarily indicate that the judge has failed to discharge the duty which rests upon him or her. However, for a judge to ignore evidence which is critical to an issue in the case, and which is contrary to an assertion of fact made by one party but accepted by the judge, may promote a sense of grievance, and give rise to a feeling of injustice in the mind of the most reasonable litigant (at [61]);
- (vii) although it is not necessary to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered, where such evidence is not referred to by the trial judge, an appellate court may infer that the judge has overlooked the evidence, or failed to give consideration to it. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to (at [62]);
- (viii) where there is documentary material arguably supporting a party’s case, that material must be considered in the judge’s reasons in a satisfactory way (at [63]);
- (ix) bald conclusionary statements should be eschewed. In particular, it is not appropriate for a trial judge merely to set out the evidence adduced by one side, then set out the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one over the other (at [64]);
- (x) where credit issues are involved it is necessary to explain why the evidence of one witness is preferred to that of another. Bald findings on credit, where there remain substantial factual issues to be dealt with, may not constitute adequate compliance with a judge’s duty to provide the parties, and the appellate court, with the basis of his decision (at [65]);

- (xi) because a primary judge is bound to state his or her reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Where it is apparent from a judgment that no analysis was made of evidence which competes with evidence which was apparently accepted, and no explanation is given in the judgment for rejecting the evidence, the process of fact finding will have miscarried. This is because, so far as the reasons reveal, no examination was made of why the evidence which was accepted was to be preferred to that which was not (at [66]).”

Supreme Court of Western Australia

***Centex Australasia Pty Ltd v Commissioner for Consumer Protection* [2017] WASCA 79**

In brief: The Western Australia Court of Appeal considered the proper role that an appellate court should play in reviewing findings of fact by a court or tribunal at first instance, as well as the obligation on Tribunals to give reasons for their decisions.

Following --[2003] HCA 22; (2003) 214 CLR 118, the Court (at [99]) summarised the principles that govern the role of an appellate court in reviewing findings of facts, as developed by the plurality (Gleeson CJ, Gummow and Kirby JJ) in that case. These principles are as follows (references omitted):

- (a) all appeals are creatures of statute therefore the ambit of any appeal will turn upon the proper construction of the statute creating the right of appeal;
- (b) while on the one hand the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'[82] on the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the records;
- (c) these limitations include the disadvantage that the appellate court has when compared with a tribunal at first instance in respect of the evaluation of the credibility of witnesses and of the 'feeling' of a case which cannot be gleaned from the reading of the transcript;
- (d) furthermore, an appellate court does not typically get taken to or read all of the evidence taken at trial, with the result that a tribunal at first instance has advantages that derive from considering the entirety of the evidence, and reflecting upon that evidence over a longer interval;
- (e) within these constraints an appellate court is obliged to conduct a real review of the trial and is not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses and should make due allowance in this respect';
- (f) in general an appellate court is in as good a position as the court at first instance to decide on the proper inference to be drawn from facts which are undisputed or, which having been disputed, are established by the findings of the court;

“in deciding the proper inference to be drawn the appellate court will give respect and weight to the conclusion of the court at first instance but once having reached its own conclusion will not shrink from giving effect to it ...”

- (g) in deciding the proper inference to be drawn the appellate court will give respect and weight to the conclusion of the court at first instance but once having reached its own conclusion will not shrink from giving effect to it;
- (h) the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute;
- (i) in some cases incontrovertible facts or uncontested testimony will demonstrate that the conclusions of fact made by the court at first instance are erroneous even when they appear to be, or are stated to be based on credibility findings;
- (j) if the decision at trial is glaringly improbable or contrary to compelling inferences the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses;
- (k) while appellate deference to the decision of a trial judge can be justified by the advantage of assessing the demeanour of witnesses when giving their evidence, more recently caution has been expressed with respect to the weight properly given to assessments of demeanour as compared to an assessment of credibility based upon objectively established facts, contemporary documents and the apparent logic of events.

Furthermore, following *CSR Ltd v Della Maddalena* [2006] HCA 1 at [21] and *Robinson Helicopter Co Inc v McDermitt* [2016] HCA 22 at [43], the Court also observed (at [100]) that:

“Generally speaking, a trial judge's credibility based findings will not be reversed on appeal unless it is demonstrated that such findings are flawed by reference to incontrovertible facts or uncontested testimony, or are glaringly improbable or contrary to compelling inferences.”

In relation to a Tribunal's duty to give reasons for its decisions, the Court held (at [102]-[103]) that a statutory obligation to give reasons should be construed in the context of a line of appellate decisions that considered substantially similar provisions contained within Commonwealth statutes, namely s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) and s 27 of the Administrative Appeals Tribunal Act 1975 (Cth). These decisions include *SNF (Australia) Pty Ltd v Jones* [2008] WASCA 121; *Manonai v Burns* [2011] WASCA 165; *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; (2013) 252 CLR 480; *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2004] WASCA 149; (2004) 29 WAR 273; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430; *Garrett v Nicholson* [1999] WASCA 32; (1999) 21 WAR 226; *Beale v Government Insurance Office (NSW)*; *Riley v The State of Western Australia* [2005] WASCA 190; (2005) 30 WAR 525.

The propositions established in those decisions are as follows (references omitted):

- “(a) the primary function of reasons is to allow an appeal court to determine whether the decision involved appellable error and to provide procedural fairness to the litigants who are entitled to know why they have been successful or unsuccessful;

“ there is no mechanical formula which can be applied to determine whether reasons are adequate in any particular case ...”

- (b) the statement of reasons must explain the actual path of reasoning in sufficient detail to enable a court to see whether the decision is vitiated by error;
- (c) reasons need not be lengthy and elaborate, nor do they require a reference to all of the evidence led or to every submission advanced by the parties;
- (d) there is no mechanical formula which can be applied to determine whether reasons are adequate in any particular case - much will depend upon the particular circumstances of any individual case;
- (e) usually it will be necessary to look at the reasons as a whole, viewed in the context of the evidence;
- (f) where one set of evidence is accepted over a conflicting set of significant evidence the trial judge must set out his or her findings as to how it is that one has been accepted over the other;
- (g) inadequacy of reasons does not necessarily amount to appellable error - rather, an appeal court will only intervene when the inadequacy is such as to give rise to a miscarriage of justice;
- (h) appellable error arising from inadequate reasons does not necessarily result in a new trial - in an appropriate course the appeal court may itself determine the matter.”

The Tribunal’s statutory duty to provide reasons for its decisions is found within s 62(3) of the Civil and Administrative Tribunal Act 2013 (NSW), which provides that:

- “(3) A written statement of reasons for the purposes of this section must set out the following:
- (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
 - (b) the Tribunal’s understanding of the applicable law,
 - (c) the reasoning processes that lead the Tribunal to the conclusions it made.”

Committee NSW Chapter of COAT

People & Events

Upcoming Events

AIAL (NSW Chapter)

2017 June Seminar on Natural Justice

Monday 5 June 2017

Ashurst, Level 11, 5 Martin Place, Sydney

Natural Justice: Past, Present & Future

Speaker: The Hon Justice M J Beazley AO, President, Court of Appeal, Supreme Court of NSW

Natural Justice: practical implications for decision-makers where confidential information is involved

Speaker: Andrew Carter, Partner, Ashurst

2017 COAT National & COAT (NSW) Joint Conference

8 and 9 June, 2017

International Convention Centre, Darling Harbour

The theme for the 2017 Conference is 'Tribunals: Enablers of Justice'. The Conference program will offer thought provoking speakers as well as practical, skills based sessions to support Tribunal members in delivering justice in our diverse community.

Convenor	Malcolm Schyvens Deputy President NCAT
Vice Convenor	Anina Johnson Deputy President Mental Health Review Tribunal
Secretary	Rodney Parsons Registrar Workers Compensation Commission
Treasurer	Katrina Harry PSM National Registrar, Veterans' Review Board
Committee	Judge Greg Keating President Workers Compensation Commission
	Sian Leathem Principal Registrar Administrative Appeals Tribunal AAT
	Belinda Cassidy Principal Claims Assessor Motor Accident Claims Assessment & Resolution Service
	Jenny D'Arcy Member, Administrative Appeals Tribunal Senior Member, Veterans' Review Board Presiding Member, NCAT Legal Member, Mental Health Review Tribunal, NSW
	Susan Johnston Member NCAT

Contact Us

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COUNCIL OF AUSTRALASIAN TRIBUNALS
NEW SOUTH WALES