

Rounding Up CATs - The Respective Roles of Tribunals and Courts in Disciplinary Proceedings against Lawyers

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Background Paper for Presentation to COAT National Conference:

‘Between CATs and Courts’ (Hobart, Tasmania, 9–10 June 2016)

This Paper examines the roles of disciplinary tribunals (including CATs) and courts by reference to appeals for error of law and identifies areas where tribunals are vulnerable to appeals on this ground. The first Part examines the legal profession legislation and the respective roles of regulatory authorities, disciplinary tribunals and courts. Part II introduces the scope of appeals and ‘deference’. The first section outlines where substantive legal error may arise – in finding the facts, and in determining, and applying, the law. Reference is made to some recent cases which illustrate how courts respond to appeals arising in these areas, including in relation to ‘discretionary’ decisions, the characterisation of misconduct and the application of *Wednesbury* unreasonableness. The second section, again by reference to recent cases, shows where procedural error may arise, including in the application of rules of evidence and matching the findings with the charge. The final Part examines the widening scope of judicial review and its impact on statutory appeals. Having identified areas where appeals commonly arise, one method by which tribunals might limit the prospect for such appeals is suggested.

The Theme

The theme of this conference is the intersection between CATs (Civil and Administrative Tribunals) and courts. This is, as the pop psychologists might say, an issue of ‘boundaries’: what is ‘in-bounds’ and acceptable, or ‘out of bounds’ and impermissible. They might further suggest that, from CATs’ point of view, the boundaries may be seen symbolically:

¹ Retired barrister, part time senior sessional member, State Administrative Tribunal WA (SAT). The views expressed are my own. This Paper has been prepared using *Austlii’s* comprehensive online data base (and adopting its medium neutral case citations). SAT’s librarian assisted in providing material not available online. Professor Aronson kindly commented on an earlier (longer) draft. Whilst the object has been to distill principles from relevant case-law, such principles do not always apply, or apply without qualification, in a different statutory context, particularly where from a different area of law. So for example, principles derived from decisions on judicial review cannot automatically be applied to review by statutory appeal; principles from cases decided on a rehearing may not apply where appeals are restricted to error of law.

- 1 *The Great Wall of China.* Within the Wall CATs, like provincial mandarins, largely rule their own domains. There is the occasional assault on the Wall, but it is usually distant and the Wall quickly re-built around the incursion. There remains however, one troubling fact. The soldiers who man the Wall and, on rebuilding, determine its new boundary, are from the outside. To restore the original boundary may sometimes require assistance from a foreign (legislative) power.
- 2 *The Front.* CATs at the front line are the long suffering soldiers who stoically and heroically perform their daily duty. Meanwhile, in palatial quarters, far from the daily grind, courts make decisions critical of the combatants' labors; at once demanding greater effort and imposing further limits.
- 3 *The Food Chain.* Here CATs occupy a position part way up the Executive Chain but at the bottom of the Judicial Chain. (Judicial members occupy the No Man's land of the Front.) There is the risk of being picked off from those immediately above. But there are consolations. CATs are more plentiful. And for the larger predators further up the chain, the lower tier courts constitute a more meaningful prize.
- 4 *The Peace Corp.* It remains that there are soldiers and officers. But in a sometimes hostile environment (the public), surrounded by sometimes unfriendly forces and upon whom both must depend (the Government), the common interests of CATs and courts are much stronger than those which divide them.

Introduction

[A]dministrative review, in both process and outcome, should appear rational and fair, not least to the person whose decision is being reviewed. ... The civil justice system only manages to function because the great majority of cases are resolved without the need for a judicial decision.

Chief Justice Murray Gleeson, '*Outcome, Process and the Rule of Law*' (Speech delivered at the Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2006).

[T]he courts have the ultimate responsibility of resolving disputes about the limits of official power and in so doing they, like those whose decisions they review, must act lawfully, rationally, consistently, fairly and in good faith and within the proper limits of their constitutional function.

Chief Justice Robert French, '*The Rule of Law as a Many Coloured Dream Coat*' (Singapore Academy of Law 20th Annual Lecture, 18 September 2013, Singapore).

All power is, in Madison's phrase, 'of an encroaching nature.' ... Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint.

Justice Frankfurter (cited in *Attorney-General (NSW) v Quin* [1990] HCA 21 [22] (Brennan J)).

In order to keep the subject of this paper within tolerable limits (and not all, or many, will think that has been achieved), the focus of this Paper is on a discrete section of the boundary which separates CATs and courts in Australia. At this sector, the subject generally is disciplinary proceedings against legal (and medical) practitioners, and the particular segment concerns statutory appeals limited to error of law. This point of the crossing has been selected because it is one where the court's jurisdiction is the most circumscribed.² That is, the tribunal's decision is open to challenge only where the appellant is able to demonstrate legal error in the tribunal's procedure, reasoning or conclusion. The errors of law under consideration largely concern the proper interpretation of the statutory provisions governing misconduct.

Notwithstanding a concerted effort by Commonwealth and State agencies over several decades, Australia has not achieved uniform legislation regulating the legal profession. There remains, for example, a wide variety in the composition and procedures of disciplinary tribunals hearing complaints against practitioners and in the rights of appeal from their decisions to the courts. General comments about such procedures and rights of appeal, must always be tested against the specific legislative provisions governing each tribunal.

However, the efforts of those promoting a national approach has been successful in one significant respect. Each of the States and Territories limits disciplinary action against lawyers to *unsatisfactory professional conduct* and *professional misconduct* (together '*statutory misconduct*'). Moreover, there is a common statutory definition (of sorts) of these terms and instances are given of what conduct may constitute statutory misconduct.³

These statutory provisions are significant because they establish the jurisdiction (the authority to decide) of a disciplinary tribunal to hear and determine disciplinary proceedings. The '*ultimate question*' for the tribunal is whether, having regard to the facts as found and the applicable statutory definitions, the practitioner is 'guilty' of statutory misconduct. This enquiry is the general equivalent of that in migration cases – '*has the applicant the status of a refugee as having a well-founded fear of persecution?*' Mercifully, the question here considered has not generated the same level of controversy and case-law as the latter;

² As will be seen from the Table, in several jurisdictions the appeal is by way of rehearing. In such appeals the scope of error will generally extend to error of fact, law or discretion: *Allesch v Maunz* [2000] HCA 40 [23].

³ This is a significant advance on the earlier position described in *Graham v Queensland Nursing Council* [2009] QCA 280 [95].

although a practitioner receiving a complaint from a regulatory authority, with a 'request' for an explanation and hinting at a forced return to life before the law, might find significant parallels. However, the expansion of the scope of judicial review in migration cases, in part the High Court's response to Parliament's attempts to confine it, exerts pressure on the borders of statutory appeals. In both areas, the focus on review is the relevant statutory provisions and how they have been interpreted and applied in the course of the tribunal determining the ultimate question. In interpreting the scope of statutory misconduct, courts and tribunals have invoked the common law concepts of *professional misconduct* and *unprofessional conduct*. It will be apparent that this subject matter generally concerns issues of law, namely the interpretation and application of statutory provisions and of common law principles.

The second area which has commonly attracted statutory appeals concerns the procedure adopted by a disciplinary tribunal in reaching its decision. Where there is evidence of a breach of the rules of procedural fairness the courts will, where this impacts on the outcome of the proceedings, intervene. This may be in circumstances where the legislation governing the disciplinary tribunal (the '*founding legislation*') or as applying in this context (the '*enabling legislation*') expressly incorporates the rules of procedural fairness. But even in the absence of such provisions, the rules will apply by reason of the common law presumption of the application of the rules of procedural fairness where a statutory power affects the rights of individuals. In such circumstances (and it is not self-evident), a failure to provide procedural fairness will be treated as an 'error of law.'

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Part I – The Legal Profession Legislation, Disciplinary Proceedings

In order to consider these issues in context, there follows a brief overview of the legal profession legislation and the roles of the various entities in disciplinary actions.

The Legal Profession Legislation

From about 2004, each of the Australian jurisdictions enacted legislation governing the legal profession based upon the provisions of the national Model Bill (Model Provisions) 2004 (Cth) (*Model Bill*).⁴ The Model Bill did not seek to impose a uniform regulatory structure so that the existing local disciplinary authorities continued: ie a *'regulatory authority'* investigating and prosecuting complaints and a *'disciplinary tribunal'* (including, in some jurisdictions, CATs) hearing the more serious complaints but subject to a right of appeal to the Supreme Court. Since then Victoria and NSW have enacted new legislation (their respective *'Application Acts'*) incorporating the Uniform Law (*'Uniform Law'*).⁵

(In this article, the current legislation for all Australian jurisdictions ie including the Uniform Law, is referred to as the *'legal profession legislation.'* The Table at the end of the Paper identifies the disciplinary authorities, including CATs, and the relevant statutory provisions, in each jurisdiction.)

Disciplinary Provisions

In relation to complaints and discipline, the legal profession legislation has provided *'definitions'* of *unsatisfactory professional conduct*⁶ and *professional misconduct*⁷ and *conduct capable of constituting* such conduct.⁸ However, beyond expressly including within

⁴ This legislation initially comprised the: *Legal Profession Act 2004* (NSW) (since repealed); *Legal Profession Act 2004* (Vic) (since repealed); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2008* (WA) and (effective from 1 July 2014) the (amended) *Legal Practitioners Act 1981* (SA). The *Lawyers and Conveyancers Act 2006* (NZ) also reformed the law relating to lawyers, including for the purposes of protecting the consumers of legal services and to provide for a more responsive regulatory regime (s 3).

⁵ The *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 contains the *Legal Profession Uniform Law*. The *Legal Profession Uniform Law Application Act 2014* (NSW) adopts the Uniform Law as a law of NSW, in the form of a note to the Act. This legislation provides for the nomination (in effect continuation) of disciplinary authorities being, as the *'designated regulatory authority'*, the respective Legal Service Commissioner and, as the *'designated [disciplinary] tribunal'*, the respective CAT (*'VCAT'* and *'NCAT'* respectively).

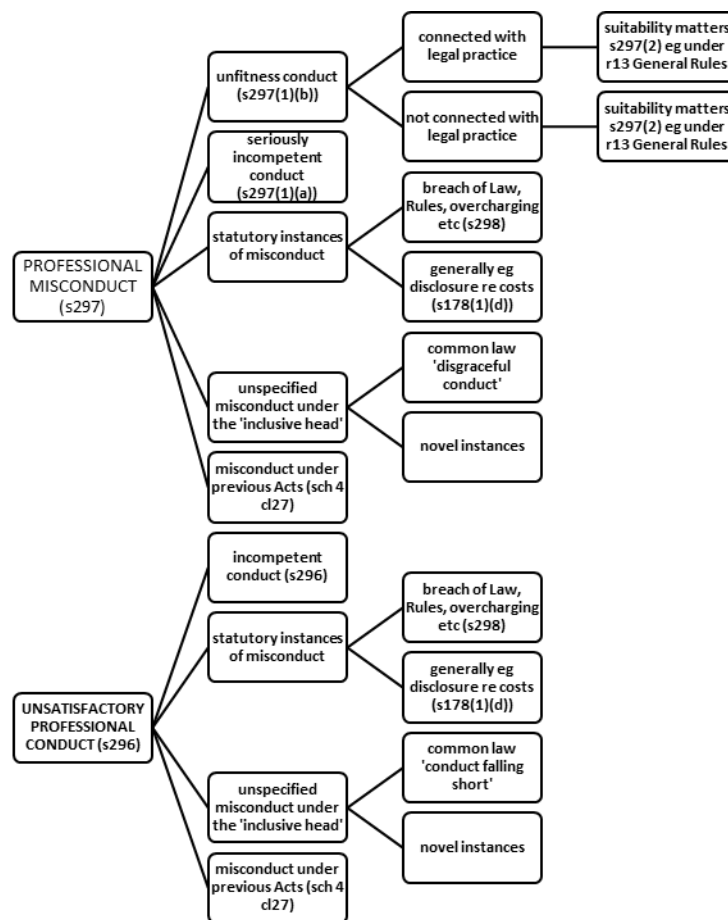
⁶ *'unsatisfactory professional conduct'* includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner' (here *'incompetent conduct'*).

⁷ *'professional misconduct'* includes (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; [here, *'seriously incompetent conduct'*] and (b) conduct of a lawyer whether occurring in connection with the practice of the law or occurring otherwise ... that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice' (here, *'unfitness conduct'*).

⁸ Such conduct includes for example (a) conduct consisting of a contravention of the relevant Act (which includes professional conduct rules made thereunder); (b) charging excessive legal costs; (c) conduct for which there is a conviction for a serious offence etc.

these two concepts a breach of standards of competence and diligence, and conduct evidencing unfitness for practice, there is no attempt to define either concept in an exclusive manner. This provides a gateway to other forms of misconduct constituting statutory misconduct. The legal profession legislation does provide some assistance in this respect by identifying instances of conduct capable of constituting statutory misconduct. The pathway to a finding of statutory misconduct in accordance with these provisions may be represented as follows.⁹

Disciplinary Diagram



(References are to the provisions of, and the Rules under, the Uniform Law.)

Whilst these ‘categories’ of statutory misconduct generally may readily be seen as based upon the statutory definitions, some brief explanation is called for in relation to the reference to the ‘common law’ categories. Where the conduct lies outside the situations described in the definition sections (ie incompetent conduct, seriously incompetent conduct, unfitness

⁹ This Diagram was prepared for, and included in, the author’s article, ‘The Disciplinary Provisions of the *Legal Profession Act 2008* (WA) - Design, Divisions, Difficulties and Developments’, *BRIEF*, February 2016, 18.

conduct) and the instances of statutory misconduct described (breach of the Uniform Law/Act etc), it may fall within a category of misconduct at common law. In such circumstances, or where a novel situation arises, courts and disciplinary tribunals will make a finding of professional misconduct or unsatisfactory professional conduct (under the ‘inclusive’ description of the relevant provision),¹⁰ where the respective common law tests is satisfied.¹¹

‘Professional misconduct’ under the general law is ‘conduct which would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence’ (*disgraceful conduct*).¹² ‘Unprofessional conduct’ (the term used in earlier legislation) has been interpreted to include, as well as disgraceful conduct, ‘conduct which may reasonably be held to fall short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency’ (*conduct falling short*).¹³ If the conduct lies outside the statutory descriptions, but is regarded by the disciplinary tribunal as meeting one or other of these tests the conduct will be treated as professional misconduct or unsatisfactory professional conduct respectively.¹⁴

The legislation provides instances of conduct which ‘is *capable of* constituting’ (rather than which ‘*is*’) statutory misconduct. It follows that even where the conduct falls within one of the forms of statutory misconduct instanced in the legislation (eg a contravention of a conduct rule), there remains the question whether it is serious enough to warrant a finding of statutory misconduct. In this respect disciplinary tribunals and courts again apply the common law tests, or aspects of them, as a condition for a finding of statutory misconduct.

¹⁰ That is, each of the definitions of professional misconduct and unsatisfactory professional conduct *includes* the categories which follow (here described as incompetent conduct, seriously incompetent conduct and unfitness conduct).

¹¹ As to the proposition that, because the definitions are inclusive, the common law concepts remain applicable see eg *Law Society of Tasmania v Turner* [2001] TASSC 129 [43]–[49] (*Turner*); *New South Wales Bar Association v Meakes* [2006] NSWCA 340 [23]–[24], [85]–[86] (*Meakes*); *Scroope v Legal Services Commissioner* [2013] NSWCA 178 [12]–[17] (*Scroope*); *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 [32]–[36], [105]–[106] (*Fidock*); *The Legal Practitioner v Council of The Law Society of The Australian Capital Territory* (No 2) [2014] ACTSC 9 [579]–[580]; *Pham v Legal Services Commissioner* [2015] VSC 671 [8]–[9] (*Pham*). Except for some discussion in *Turner* [2001] TASSC 129 [43]–[53] (in relation to earlier legislation) there is remarkably little analysis as to the appropriateness of applying the common law tests to the new legislative regime based upon the Model Bill.

¹² This ‘common law’ concept of professional misconduct is derived from the test formulated in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 (*Allinson*) for determining what conduct of medical practitioners satisfied the statutory description ‘infamous conduct’.

¹³ This ‘common law’ concept of unprofessional conduct is derived from the test in *Re R, A Practitioner of the Supreme Court* [1927] SASR 58 (*Re R*) for determining what conduct satisfied the statutory term ‘unprofessional conduct’.

¹⁴ Where in the tribunal’s judgment the conduct satisfies the statutory descriptions (incompetent conduct, seriously incompetent conduct or unfitness conduct), then arguably it would be bound, absent exceptional circumstances, to find the appropriate head of statutory misconduct.

The utility of these common law tests is that where the conduct in question does not fall within the statutory descriptions (incompetent conduct etc), they provide a guide as to whether the conduct qualifies as statutory misconduct. However, and it is outside the scope of this paper, there are grounds upon which the unconsidered adoption of the common law tests may be questioned.¹⁵

Roles of Regulatory Authority, Disciplinary Tribunal, Court

With respect to disciplinary matters, the legal profession legislation limits the jurisdiction of the regulatory authority and the disciplinary tribunal to hearing and determining cases of unsatisfactory professional conduct and (the disciplinary tribunal only) professional misconduct. The regulatory authority investigates complaints of misconduct directly or by its delegate (generally the local Law Society or Bar Council). It may determine cases of unsatisfactory professional conduct or refer these to the disciplinary tribunal and must refer cases of professional misconduct to the disciplinary tribunal. In referring such cases, the regulatory authority frames and prosecutes the charge.

The role of the disciplinary tribunal is to hear and determine cases of statutory misconduct and, in the event it is satisfied the charge is made out, to impose an appropriate penalty or, in some instances, to refer the matter to the Supreme Court for that purpose. Where a disciplinary tribunal as such is in place, its procedure is governed by the respective legal profession Act. Where a CAT hears disciplinary cases, its procedure is regulated by the founding legislation (CAT Act), but as modified by the enabling legislation (legal profession Act).

As might be expected given that the subject is proceedings brought by a regulatory authority against a legal practitioner, the procedures adopted by the parties, and the disciplinary tribunal, closely resemble adversarial court procedures. It follows that there is considerably less scope in disciplinary proceedings for those practices which characterise administrative tribunals and to some extent provide the rationale for their separate existence – ie speedy and inexpensive procedures etc.¹⁶ In some senses that merely reflects the power a CAT has over

¹⁵ See the author's article 'Misconduct of Australian Lawyers under Legislation based on the National Model - Aligning the Common Law Tests with the New Statutory Regime' (2013) 39(3) *Monash University Law Review* 776.

¹⁶ A subject discussed by Bertus De Villiers, 'Accessibility to the Law - the Contribution of *Super-Tribunals* to Fairness and Simplicity in the Australian Legal Landscape' (2015) 39(2) *University of Western Australia Law Review* 239.

its own procedures and the extent of its jurisdiction – that is, informal procedures will clearly be more appropriate in certain proceedings than in others. Even so, in disciplinary proceedings where the rules of evidence do not apply there is likely to be a degree of informality eg in the taking of uncontested evidence by telephone etc. Moreover, there are other statutory requirements in relation to the tribunal’s procedure, not subject to its discretion, such as the time within which it must bring down a reserved decision. (VCAT is given 60 days – VCAT Act s 117.)¹⁷

In each State and Territory there is provision in defined circumstances for a reference, or an appeal, to the court.¹⁸ Those circumstances vary widely. In some jurisdictions there is an unconditioned right of appeal by rehearing. In other jurisdictions appeals are confined to questions or errors of law and sometimes subject to leave from the court.

Disciplinary Tribunal – Composition, Objectives Provisions, Procedure

There is again considerable variation within the various jurisdictions as to the composition of the disciplinary tribunal. Some tribunals include a judicial officer. Most tribunals include a panel which includes professional and lay members. Other regimes permit a single member, who will generally be a lawyer, to determine the matter.

In the case of CATs, the legislation in each case stipulates the ‘main objectives’ of the tribunal proceedings. These include, for example, that it is to make decisions fairly and according to the substantial merits of the case, to act speedily and with as little formality and technicality as practicable and to make appropriate use of the knowledge and experience of its members (*‘the objectives provisions.’*) The precise scope of these provisions will depend upon their statutory context, but they generally have a limited field of operation. These provisions do not mean, for example, that the case may be decided by reference to ‘equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms’ (SAT Act s 32) rather than by principles of law, but only that rules of procedure may be relaxed on that basis.¹⁹

¹⁷ Unless the President gives an extension. Even under the general law, because the object of disciplinary proceedings is the protection of the public, their disposition is somewhat different from normal adversarial proceedings: *Wentworth v New South Wales Bar Association* [1992] HCA 24 [13]–[15] (court proceedings).

¹⁸ Some jurisdictions also provide for the tribunal’s ‘internal’ review on questions of law, or generally by way of a merits review.

¹⁹ See *S v State Administrative Tribunal of Western Australia (No 2)* [2012] WASC 306 [94]–[97] and cases cited.

It might be asked whether a court hearing an appeal from a disciplinary tribunal ought to acknowledge the *constraints* which may be imposed upon a CAT by its objectives provisions. In relation to refugee review tribunals, the High Court has described the function of such provisions as ‘facultative, not restrictive’ (ie in terms of allowing review for breach) and their purpose to ‘free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals.’²⁰ In *Minister for Immigration and Citizenship v Li (Li)*²¹ French CJ recognised that in considering a request for an adjournment, the Migration Review Tribunal ‘is entitled to have regard to legislative objectives including timeliness in its processes.’ However, the objectives provisions could not excuse the tribunal from compliance with the criteria of ‘lawfulness, fairness and rationality that lie at the heart of administrative justice ...’²² Gageler J used the objectives provisions as an aspect of judging the (*Wednesbury*) reasonableness of the decision. Whilst he acknowledged that ‘a court must be careful not to “draw too closely upon analogies in the conduct and determination of civil litigation”’ he regarded the application of such objectives provisions to a decision whether to adjourn as within the court’s experience²³ ie such that it would not inhibit the court reviewing the tribunal’s exercise of a discretion in that respect.

With respect to the application of the rules of evidence, there is again little uniformity amongst disciplinary tribunals. Most tribunals are bound by such rules (see Table). In the case of NSW for example, the NCAT Act (sch 5 pt 4 div 4 cl 20) provides that the NCAT is bound by the rules of evidence in relation to a hearing of professional misconduct and overrides the general position under the NCAT Act (s 38) in this respect. Where the tribunal is expressly made subject to the rules of evidence, then the usual court procedures in relation to the admissibility and use of evidence (which in many respects substantially depart from the technical rules of evidence) will apply.

Where the rules do not apply, the disciplinary tribunal will nevertheless be bound, expressly or by implication, by the rules of procedural fairness.²⁴ Subject to that, there is considerable

²⁰ *Minister for Immigration v Eshetu* [1999] HCA 21 [49] (*‘Eshetu’*) (Gleeson CJ and McHugh J).

²¹ [2013] HCA 18 [10].

²² *Ibid* [14]. Such obligations would, subject to the statute, apply equally to a disciplinary tribunal.

²³ *Ibid* [112].

²⁴ The subject has been covered in a number of articles. See eg Justice Giles, ‘Dispensing with the Rules of Evidence’ (1991) 7 *Aust Bar Review* 233; Neil Rees, ‘Procedure and Evidence in ‘Court Substitute’ Tribunals’ (2006) 28 *Aust Bar Review* 41.

scope for dispensing with various evidentiary rules and differences between the procedures of CATs and courts in this respect has readily been acknowledged.

Part II Scope of Statutory Appeals for Error of Law

The threshold question on any appeal to the court is the nature and extent of the statutory provisions granting a right of appeal. In each type of appeal (appeal in the strict sense, hearing de novo, rehearing with or without additional evidence, appeal for question or error of law) the statutory basis for, and consequent limits of, the court's intervention will be closely examined. What will govern is the specific statutory language, not whether that language is said to fall within some identified category of appeal.²⁵ In relation to appeals as provided under the VCAT Act, the High Court has noted that the relevant provision (s 148) confers original not appellate jurisdiction on the Supreme Court to determine the legal correctness of the tribunal's decision (ie it is an 'appeal' from an administrative tribunal, not an appeal within the court hierarchy), by proceedings in the nature of judicial review (ie not by rehearing).²⁶ In practice, a failure by a party to exercise a right of appeal will mean that an application for judicial review (ie seeing relief by prerogative writ) will, absent exceptional circumstances, be refused on discretionary grounds.²⁷

Where the appeal is limited to error of law, there is a considerable body of case-law and commentary (an outline is given in Part IIA below) on what qualifies as an error of law, including the distinction with error of fact²⁸ and the division between legality review (ie whether the decision was made within the lawful limits of the tribunal's authority) and 'merits' review (ie a reconsideration of the facts, law and policy of the original decision and a determination of the correct or preferable decision). In legal theory, review for jurisdictional error (ie an error of law, or fact, going to jurisdiction) is distinguished from merits review because it is limited to determining the legality of the decision under review, such that the 'wrong' (not preferable) decision might be untouched and the 'right' decision (on the merits)

²⁵ *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32 [89] ('*Kostas*').

²⁶ *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* [2001] HCA 49 [15], [52] ('*Roy Morgan*'). See also the several propositions relating to an appeal from SAT on 'a question of law' in *Commissioner for Consumer Protection v Carey* [2014] WASCA 7 [161]–[168] (Buss JA), (but, with the qualification in relation to a question of 'mixed law and fact' noted in Part IIA below).

²⁷ *Roy Morgan* [2001] HCA 49 [15], *Re Carey; Ex Parte Exclude Holdings Pty Ltd* [2006] WASCA 219 [6], [133]–[140].

²⁸ See generally Mark Aronson, Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) ('*Aronson JRAA*') ch 4; M Aronson, 'The Growth of Substantive Review: The Changes, their Causes, and their Consequences' in J Bell et al (eds) *Public Law Adjudication in Common Law Systems* (Hart Publishing, Oxford, 2016) ch 6 ('*the Aronson Article*'), considered in Part III.

vitiated by jurisdictional error. However the reach of jurisdictional error has eroded the areas previously reserved for merits review - findings of fact, credibility, weight, discretionary factors.²⁹ To the extent this ‘judicial creep’ (Professor Aronson’s term) widens the scope of ‘error of law’, it impacts, or potentially impacts, on statutory appeals conditioned on a question, or error, of law.

In circumstances where an appeal lies for error of law only, the court must give considerable weight to the decision of the tribunal. That is, that decision must stand, unless the appellant is able to demonstrate legal error. One corollary of this is that the tribunal’s reasons must be adequate to allow a question or error of law arising in them to be identified.³⁰ However, statutory provisions stipulating what must be included in reasons (eg VCAT Act s 117) do not extend to a requirement on the tribunal to ‘draw out every conclusion of fact which it has made, assumed or subsumed in the course of arriving at and making its ultimate findings of fact’ nor to ‘spell out in terms each of these steps in the reasoning process.’³¹

Where, under the legal profession legislation, an appeal lies only with the leave of the court (see Table), the relevant criteria centres on the ‘interests of justice.’³²

Judicial Deference to Specialist Tribunal

The High Court in Australia (cf the position in the USA and Canada), has rejected the doctrine of ‘due deference’ by which courts will defer to an administrative tribunal’s interpretation of its enabling statute where that interpretation is reasonably open. Here, the position is that decisions of administrative tribunals on the law have no ‘authoritative’ status. That is, in legal theory there is only one correct answer to a legal question and that is to be (finally) determined by the court. Courts are limited in reviewing decisions of administrative tribunals, not by ‘deference,’ but by respecting the boundary between legality and merits.³³

²⁹ In *Aronson JRAA* above n 28, 173 [3.350] the authors suggest that ‘merits’ today seems ‘to be defined residually, as the issues or errors which are not reached by judicial review’s grounds. Judicial review has retained its distinction from merits review, whilst expanding its grounds.’ See also the *Aronson Article* above n 28, discussed in Part III below.

³⁰ Eg *Harle v Victorian Legal Services Commissioner* [2015] VSC 697 [31]–[38] and cases cited. A tribunal’s failure adequately to state its reasons may constitute error of law (at [37]). See generally, Justice Emilios Kyrou, ‘Adequacy of Reasons’ (VSC) [2010] VicJSchol 22.

³¹ *Bannister v Walton* (1993) 30 NSWLR 699, 713G, cited in *Colquhoun v Health Care Complaints Commission* [2015] NSWSC 387 [89].

³² *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 [16] (application under VCAT Act s 148).

³³ *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5 [39]–[51] (*‘Enfield’*). The subject is discussed in *Aronson JRAA* above n 28, 189–195 [4.30]–[480].

However, outside issues concerning the tribunal's jurisdiction, the court will on certain issues give 'weight' to the decision of the tribunal, particularly where the tribunal has special knowledge. The High Court has said that such weight will be given where the primary facts are largely undisputed and there is no issue of jurisdiction or of statutory interpretation but rather 'as to the side of the line on which a case falls.'³⁴ The weight to be given will vary according to 'the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions and the extent to which its decisions are supported by disclosed processes of reasoning.'³⁵

In the context of an appeal against the decision of a disciplinary tribunal, including by rehearing, there are a number of cases which refer to the weight to be attributed to its decision, particularly where constituted to include judicial officers and professionals from within the relevant discipline. Statements to this effect have often been made in relation to cases involving the medical profession. For example:

The Tribunal is a specialist one. Its expressions of opinion that conduct does or does not amount to unsatisfactory professional conduct should be given considerable weight and not disturbed in the absence of demonstrated error in the process of reasoning, or fact finding, or the application of the statutory definition to the facts. This I understand to be the orthodox approach to appeals from specialist tribunals.³⁶

Such 'weight' has also been acknowledged in lawyers' disciplinary cases. The following judgment of Owen J in *Re Hodgekiss*³⁷ is invariably cited:

Such a tribunal [constituted by practising solicitors with wide penalty powers] is eminently fitted to decide whether the conduct of a solicitor in any given set of circumstances amounts to professional misconduct and to determine what is the proper penalty to be imposed in any particular case. While an appeal from its decision to the Court is in the nature of a rehearing, the Court should give great weight to and be slow to differ from the Committee's opinion that particular acts or omissions by a solicitor do or do not amount to professional misconduct, and the Court should attach the same weight to a decision of the Committee as to the appropriate order to be made in a particular case.³⁸

³⁴ *Enfield* [2000] HCA 5 [45], [60].

³⁵ *Eshetu* [1999] HCA 21 [140] (Gummow J); *Enfield* [2000] HCA 5 [47].

³⁶ *Fletcher v Queensland Nursing Council* [2009] QCA 364 [86] and cases cited. See from other jurisdictions *Lindsay v Health Care Complaints Commission* [2005] NSWCA 356 [46]; *Papps v Medical Board of South Australia* [2006] SASC 234 [36]–[37].

³⁷ [1962] SR (NSW) 340, 343

³⁸ Owen J went on to say that with respect to the facts upon which the finding of statutory misconduct is based, the court should regard these in the same manner as it would the findings of a single judge. Hardie J (at 354–5) appeared to confine 'deference' to the decision in relation to penalty and, in relation to findings of fact, to those based upon credibility. Cases referring to the quoted passage include *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 410, 439–440, 471; *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 205–206; *Edward v Legal Practitioners Complaints Committee* [2006] WASCA 194 [19]; *De Pardo v Legal Practitioners Complaints Committee* [2003] WASCA 274 [16]. But cf *Graham v Queensland Nursing Council* [2009] QCA 280 [67]–[71] (Fryberg J) - where the issue is one of primary fact and the appeal by rehearing, the principles of *Warren v Coombes* [1979] HCA 9 apply.

Importantly for present purposes these passages recognise that the expertise of the tribunal is acknowledged both in determining the ‘ultimate question, as well as in determining penalty where, more obviously, a statutory discretion is involved. Such ‘deference’ (in the sense described) is of specific relevance to the subject of this Paper. It has been argued that the courts, notwithstanding their protestations, engage in merits review and that ‘the only difference between review of the merits of a decision and *Wednesbury* unreasonableness is the degree of deference afforded to the decision-maker - a difference of degree and not substance.’³⁹

However, there does not appear to have developed a practice whereby deference is customarily referred to, and applied. The passage from *Re Hodgekiss* does not appear to have been cited in this context by a superior court in any Australian jurisdiction for a decade. The explanation for this sporadic reference where the complaint is against a lawyer, may lie in the fact that a judge hearing an appeal may be expected to have an appreciation of the practice and standards of lawyers, as opposed to that of other professions.⁴⁰ However, with respect to issues of competence and diligence, the legal profession legislation has introduced an objective standard based on the perspective of a member of the public, and generally made express reference to the statutory objectives of ‘the protection of consumers of the services of the legal profession and the public generally.’ That might weigh in support of a specialist tribunal’s finding on the subject, particularly where it includes lay members.

Part IIA Appeals for (Substantive) Error of Law

Fundamental to a CAT’s determination of disciplinary proceedings is its understanding of the statutory framework under which it may find statutory misconduct, its application of that law to the facts which it finds and its expression of those matters in its reasons. It will likely be a staged process. Thus, for example, in a recent case the questions which the Tribunal had to raise and answer were identified as: (a) what was the nature of the power conferred on the Tribunal; (b) what statutory criteria needed to be satisfied in order to engage the power (and by reference to what elements identified in the statutory provisions); and (c) what matters

³⁹ Alan Freckelton, ‘The Concept of “Deference” in Judicial Review of Administrative Decisions in Australia – Part I’ (AIAL Forum No 73) 52, 53. Professor Aronson (*Aronson Article*, above n 28) says something similar: ‘When accorded, it [deference] amounts to a variable allowance for the decision maker’s greater expertise or competence, or as a prudential exercise in self-restraint.’

⁴⁰ *Turner* [2001] TASSC 129 [46].

could and must the Tribunal consider in addressing the statutory criteria (again by reference to the statutory provisions).⁴¹

For present purposes, an error of law includes where the tribunal identifies a wrong issue, asks itself the wrong question, ignores relevant material, relies on irrelevant material, makes a decision that no reasonable decision maker would have made (‘*Wednesbury* unreasonableness’), in limited circumstances makes an erroneous finding or reaches a mistaken conclusion (or breaches the rules of natural justice).⁴² In determining whether error has occurred, much will depend upon the statute under which the tribunal operates. Thus for example, the scope of the ‘*relevancy grounds*’ (ignoring mandatory material or relying on prohibited material) is determined by the construction of the statute conferring the power.⁴³ The stages at which a tribunal (or court) may make an error of law of this nature, as opposed to an error of fact, have often been identified as (1) in determining the facts by way of primary findings and inferences, (2) directing itself as to the law and (3) applying the law to the facts found.⁴⁴

Error in Finding the Facts – Recent Developments

It will be apparent that error on the part of the tribunal in its interpretation of the statutory scheme or in its understanding and application of the related common law precepts, will constitute error of law. But there may also be appealable error in relation to its finding the facts, although occasions where this ground has been successfully invoked in disciplinary proceedings, or generally, are rare.⁴⁵ Generally, a ‘mere’ mistake of fact was not sufficient to constitute error of law.⁴⁶ This precluded arguments, all to similar effect, that the finding was perverse, contrary to the overwhelming weight of the evidence, that the evidence was one

⁴¹ *Scicluna v NSW Land and Housing Corporation* [2008] NSWCA 277 [5]–[13].

⁴² *Craig v South Australia* [1995] HCA 58 [14]–[15] (‘*Craig*’) identifying errors of law which are capable of constituting jurisdictional errors. In *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 [82] it was explained that this catalogue of errors was not exhaustive, the kinds of error may overlap, and that the circumstances may permit more than one characterisation of the error identified.

⁴³ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 [15] (Mason J identifying the relevant principles governing failure to take into account a relevant consideration).

⁴⁴ *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 150 (Kirby P, dissenting), 156 (Glass JA) (‘*Azzopardi*’).

⁴⁵ The difficulties for an appellant are revealed in *Myers v Medical Practitioners’ Board of Victoria* [2007] VSCA 163 [39]–[55]; *Colquhoun v Health Care Complaints Commission* [2015] NSWSC 387 [24], [34]–[38], [65]–[66], [92]–[94]. An example of a court finding that the evidence did not support the inferences found is provided by *Kostas* [2010] HCA 32.

⁴⁶ *Waterford v The Commonwealth* [1987] HCA 25 [14] (Brennan J): ‘The error of law which an appellant must rely on to succeed must arise on the facts as the AAT has found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make.’

way, that no reasonable person could have made it or that the reasoning was demonstrably unsound.⁴⁷ Neither would illogical reasoning in finding a fact constitute error of law, provided the inference was reasonably open.⁴⁸ An error of law at this stage would only be recognised where there was no evidence (or no probative evidence) to support the finding.⁴⁹ That principle, although often cited and applied, did not preclude a court in some circumstances finding error of law in relation to facts where some other established ground was available – for example, where the reasoning or conclusion satisfied the *Wednesbury* unreasonableness test, including where the tribunal had failed to give adequate weight to a relevant factor of great importance, or had given excessive weight to a factor of no importance.⁵⁰

More recently, the High Court has said that it may be an error of law to make a decision which is ‘irrational, illogical and not based upon findings or inferences of fact supported by logical grounds’.⁵¹ This may be because there is only one decision open on the evidence and that decision is not made, or the decision made was not open on the evidence, or there is no logical connection between the evidence and the inferences or conclusions drawn.⁵² The principle is qualified in that a conclusion that a decision involves a lack of reason or logic sufficient to amount to an error of law is not to be lightly drawn and not every lapse in logic is sufficient to constitute an error of law.⁵³ This ground of jurisdictional error has been treated as an aspect of the unifying concept of ‘unreasonableness’:

⁴⁷ *Azzopardi* (1985) 4 NSWLR 139, 155–7 (Glass JA).

⁴⁸ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 [88]–[89];

⁴⁹ *Kostas* [2010] HCA 32 [90]–[91] (joint judgment); *The Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126, 138.

⁵⁰ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 [15](d) (Mason J). For example, where the error went to a finding of fact of significance to the outcome, the decision was invalidated ‘for failure to take account of a material consideration or for lack of reasons’: *Sabag v Health Care Complaints Commission* [2001] NSWCA 411 [62], [76]. The conflict between exclusion of fact review, and the availability of other grounds of review covertly to achieve this, created an uncertain equilibrium ‘which could not last’: *Aronson JRAA* above n 28, 254 [4.690].

⁵¹ *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 [23], [40]–[42], [94]–[96], [102]–[103], [119], [124]–[131], [135]–[136] (‘SZMDS’) (jurisdictional facts); *Li* [2013] HCA 18 [14], [24]–[25], [72] (exercise of a discretionary power). In *SZMDS* there is a distinction between the approach to illogicality or irrationality of Gummow ACJ and Kiefel J (at [40]) (was the reasoning illogical or irrational) and that of Crennan and Bell JJ (at [130]–[131]) (no logical or rational decision maker could arrive at the outcome). The authors of *Aronson JRAA* above n 28, 257–258 [4.730] question the latter approach for denying the existence of error on the basis that a rational decision maker might have reached the same result. They also reject the suggestion that the principle applies only to jurisdictional facts, including that based on a state of satisfaction or belief, rather than fact finding more generally.

⁵² *SZMDS* [2010] HCA 16 [135].

⁵³ *SZMDS* [2010] HCA 16 [130] (Crennan and Bell JJ). That qualification was applied in *Donnelly v Health Care Complaints Commission (NSW)* [2011] NSWSC 705 [116]–[119].

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.⁵⁴

Whilst the recent decisions establishing these concepts concerned jurisdictional error, the suggestion that the principle is limited to ‘migration cases,’ or to cases under Federal jurisdiction, or to findings of ‘jurisdictional facts’ has been rejected.⁵⁵ Moreover, the irrationality principle was recently applied in a decision of the Full Federal Court in *Haritos v Commissioner of Taxation*,⁵⁶ in relation to a statutory appeal on a question of law. The AAT had concluded that it could not place weight on corroborative evidence because this was based upon the assertions of Mr Haritos or evidence that could not be verified. The Court held that in circumstances where the reliability of those witnesses was not in question and could be shown to be independent, such a conclusion was irrational or illogical in the relevant sense. However, ‘[s]o to conclude is not to enter into the field of merits review or fact finding. It is to supervise the legality of the fact finding process of the tribunal.’⁵⁷ This Court moreover widened the scope of such an appeal by holding (1) that a question of law might be derived from ‘a mixed question of fact and law’⁵⁸ and (in a second case decided at the same time - *May v Military Rehabilitation and Compensation Commission*)⁵⁹ (2) a statutory term construed according to its ordinary meaning, was a question of law rather than of fact.

These decisions have the potential to open up for review findings of fact, previously regarded as virtually untouchable on appeal for error of law (a subject examined further in Part III).

Error in Determining the Law - Interpreting the Statutory Scheme

An error made by the tribunal at the second stage of the ‘judicial’ process will, by definition, be an error of law. The tribunal must match the underlying conduct with the appropriate

⁵⁴ *Li* [2013] HCA 18 [72] (French CJ). This passage suggests that irrationality is not confined to review for jurisdictional facts, but includes review of the exercise of a discretion cf *SZMDS* [2010] HCA 16 [38]. It might also suggest that ‘*Li* unreasonableness’ is different from, and more comprehensive than, ‘*Wednesbury* unreasonableness.’

⁵⁵ *D’Amore v Independent Commission Against Corruption* [2013] NSWCA 187 [237]–[241] (statutory judicial review). See also *Aronson JRAA* n 51 above. Earlier, in *Prakash v Health Care Complaints Commission* [2006] NSWCA 153 [87] Basten JA said it would be unfortunate if there were distinctions between legal error for statutory judicial review and for appeal under the relevant statute (appeal with ‘respect to a point of law’).

⁵⁶ [2015] FCAFC 92 [209]–[218] (*‘Haritos’*). The Commissioner’s application for special leave to appeal to the High Court was dismissed on the basis that the appeal had insufficient prospects of success.

⁵⁷ *Ibid* [217]–[218]. The AAT’s conclusion was also described as equivalent to a finding of fact with no evidence, or to drawing a conclusion that was not reasonably open (at [217]).

⁵⁸ *Ibid* [62], [110]–[202]. A number of earlier Federal Court decisions were reversed on the point.

⁵⁹ [2015] FCAFC 93. The actual decision was reversed on appeal, *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19, but the High Court did not question the proposition here noted.

statutory classification which conditions a finding of statutory misconduct. There will necessarily be several steps to this process. Ultimately, the tribunal must determine the meaning of ‘unsatisfactory professional conduct’ and ‘professional misconduct’. Anterior to this, it may be required to direct itself correctly as to the meaning of the statutory concepts unfitness conduct, seriously incompetent conduct and incompetent conduct. There is a considerable body of case-law in relation to these concepts.⁶⁰ So a misapprehension by the tribunal, for example, as to the meaning or application of the statutory term ‘not of good character,’ may give rise to a question of law.⁶¹

Yet another level of interpretation may be required in relation to conduct which, in terms of the legislation, ‘is capable of constituting’ statutory misconduct. Whether, for example, ‘a conviction for a serious offence’ within the meaning of the statute constitutes statutory misconduct, will give rise to legal issues.⁶²

Moreover, there are broad classes of conduct which under the general law have been regarded as constituting professional misconduct and which may be relied upon by the regulatory authority in formulating the charge. These include, for example, fraudulent conduct, dishonest conduct, conflicts of interest, breach of confidentiality, negligence and discourtesy.⁶³ These concepts are generally incorporated into professional conduct rules which require, for instance, that practitioners act honestly and ethically and with competence and diligence and proscribe furthering a client’s conduct by unfair or dishonest means. A contravention of such rules will constitute a contravention of the relevant Act. Even where such conduct is not specifically proscribed under the Act or rules, it will be capable of constituting statutory misconduct under the ‘inclusive’ head of the definition sections. So for example, a charge of the practitioner acting ‘dishonestly’ or ‘fraudulently’ or ‘misappropriating trust funds,’ may require consideration of those concepts under the general law.⁶⁴

Finally, having found the conduct constitutes misconduct within a statutory or common law category, the tribunal must determine by reference to the level of seriousness of the conduct,

⁶⁰ See (2013) 39(3) *Monash University Law Review* 776, 784–788.

⁶¹ *Health Care Complaints Commission v Karalasingham* [2007] NSWCA 267 [45]–[55].

⁶² Under the legal profession legislation, it is necessary to consider the fact of conviction, as well as the underlying conduct, as evidencing the practitioner’s failure to obey the law: *Legal Services Commissioner v CBD* [2012] QCA 69 [28]–[30].

⁶³ The various types of misconduct are identified and discussed, together with the relevant caselaw, in G E Dal Pont *Lawyers’ Professional Responsibility* (Lawbook Co, 5th ed, 2013) ch 25.

⁶⁴ Eg *Berger v Council of the Law Society of NSW* [2013] NSWSC 1080 [24]–[27].

whether it constitutes unsatisfactory professional conduct or professional misconduct. The considerations relevant to determining the appropriate category may not be those relevant to determining the ultimate question.⁶⁵

A number of recent decisions have allowed an appeal on the basis that the conduct was properly characterised as incompetent conduct and therefore unsatisfactory professional conduct, rather than, as the tribunal found, seriously incompetent conduct and therefore professional misconduct. (*Xu v Council of the Law Society of NSW*⁶⁶ - breach neither substantial nor consistent - but see the discussion below); *Scroope*⁶⁷ - conduct, in the circumstances, did not involve a substantial or consistent failure to maintain a reasonable standard of competence and diligence so as to be characterised as professional misconduct.) And the reverse has also occurred. (*Meakes*⁶⁸ – tribunal took into account irrelevant factors in determining the overcharging did *not* constitute professional misconduct and ought to have found disgraceful conduct or seriously incompetent conduct and so professional misconduct.) These cases were all decided on an appeal by way of a rehearing. However, to the extent they provide a judicial interpretation of the relevant definitions, a failure correctly to apply this interpretation will constitute error of law.

Less commonly, there may be an error of law involved where the conduct is properly characterised as, for example, ‘dishonest’ (in its common law sense), but the tribunal makes a finding to the contrary. This may be reflected in its decision on penalty, and its discretion in that respect may accordingly miscarry.⁶⁹

In this context, it is to be noted that whilst the position at common law is that ‘mere negligence’ or ‘mere professional incompetence’ does not constitute misconduct, that position cannot be maintained under the legal profession legislation, given the statutory descriptions of incompetent conduct.⁷⁰ A finding of professional misconduct at common law might also be made in the absence of moral obliquity, unless the disgraceful conduct test is

⁶⁵ In *Meakes* [2006] NSWCA 340 [87], the Court distinguished between factors which determined whether the charges made could properly be characterised as ‘gross overcharging’, and factors which went to determining whether in the circumstances such gross overcharging constituted professional misconduct.

⁶⁶ [2009] NSWCA 430 (*‘Xu’*).

⁶⁷ [2013] NSWCA 178.

⁶⁸ [2006] NSWCA 340 [62], [88].

⁶⁹ *Legal Practitioners Conduct Board v Jones* [2009] SASC 347 [18]–[31] (rehearing on the documents of discretionary decision as to penalty).

⁷⁰ Eg *Clough v Queensland Law Society Inc* [2000] QCA 254 [10]–[12], [98].

(erroneously) treated as the only method of describing professional conduct under the general law.⁷¹

Error in Applying the Law to the Facts – Inferred Error

As concerns the third stage of the process, the application of the law to the facts, there is some conflict as to whether error is to be treated as necessarily one of law, rather than of fact. The argument against this view is that it would make every decision taken under statute susceptible to appeal on an issue of law. Some principles are clear. It will be an error of law if the tribunal, misunderstanding the statute under which it operates, mistakes the ‘ultimate’ question of fact, or inference, to be determined. Further, where it satisfies itself that the statutory provision has been met on inadequate material, it may be inferred that it is applying the wrong test or has not been properly satisfied of the requisite matters.⁷²

Moreover: ‘If the facts inferred ... from the evidence ... are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law.’⁷³ So if a tribunal were to conclude that there was no statutory misconduct and on appeal the court took the view that, in the circumstances, the only finding possible was one of statutory misconduct, an error of law will be inferred.

Matter for Evaluation by the Tribunal

The determination by a disciplinary tribunal of the proper characterisation and categorisation of the conduct, including of the ultimate issue (has statutory misconduct been established), will very often involve a subjective evaluation or a question of fact and degree. That determination may be described as the exercise of a ‘discretion’ in a ‘broad sense.’⁷⁴ In determining, for example, whether a breach of the relevant Act is serious enough to constitute statutory misconduct, or whether unfitness conduct is established, the tribunal must weigh the public interest in seeing that misconduct by lawyers is condemned and clients protected,

⁷¹ The *Allinson* test will preclude a finding of disgraceful conduct where, although the conduct might otherwise be regarded as professional misconduct at common law, it is brought about by the practitioner’s mental condition: *Robinson v The Law Society of New South Wales* (Supreme Court of New South Wales, Court of Appeal, unreported, 17 June 1977) discussed in *BRJ v Council of the New South Wales Bar Association* [2016] NSWSC 146 [78]–[80], [92], [101]. But *Allinson* merely identifies *one* form of conduct amounting to ‘infamous conduct’ (now professional misconduct). Moreover, the standard is an ‘objective standard’, although often identified, in part, by reference to the opinion of the profession: *Wong v Commonwealth* [2009] HCA 3 [220], [223].

⁷² Kirby J in *Azzopardi* (1985) 4 NSWLR 139, 150 referring to *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22 [15]

⁷³ *The Australian Gas Light Co v Valuer-General* (1940) 40 SR(NSW) 126, 138; *Azzopardi* (1985) 4 NSWLR 139, 157, Glass JA describing cases within this situation as ‘marginal cases’.

⁷⁴ *Coal and Allied v AIRC* [2000] HCA 47 [19]–[20] (‘*Coal and Allied*’).

against ensuring that a practitioner's living and reputation are not impaired without good cause. Such considerations perhaps explain why Parliaments have, in most jurisdictions, determined that professionals and lay members sit on disciplinary tribunals.⁷⁵ That a discretion is involved is made explicit in most of the legal profession Acts (see Table), where the tribunal may impose a penalty 'if *satisfied* that the practitioner is guilty' of statutory misconduct. Clearly, where the issue is the penalty to be imposed, that is again a matter for evaluation by the tribunal. In such circumstances, an appeal for error of law (or generally, unless a hearing *de novo*) is particularly circumscribed. It is not enough that a judge on appeal might consider that, she or he would have taken a different course.⁷⁶

The principles were summarised by Jordan CJ:⁷⁷

Thus, if the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior Court which can determine only questions of law' (citations omitted).

So much does not of course mean that a finding of statutory misconduct is at the whim of a disciplinary tribunal. The extent to which it is circumscribed by legal principles is evident from the outline given above. But it means that there is an area within which this aspect of the decision is left to the (rational and reasonable) judgment of the tribunal. Put differently, where the discretionary judgment of the tribunal might reasonably be supported 'either way', the courts may be expected to defer to the judgment of the tribunal.

The principles were applied in *Myers v Medical Practitioners Board*⁷⁸ where Dr Myers alleged that on the facts found by the VCAT it had erred in holding that this constituted unprofessional conduct:

In some cases it may be that it is a question of law whether the facts as found by a tribunal fall within a statutory definition. However in other cases the issue which is before a Tribunal may be one on which different minds might respectably and reasonably reach different conclusions. In such a case, it has been held, if it is reasonably open to the Tribunal to reach the conclusion which it did on the facts as found by it, no error of law arises (citation omitted).

⁷⁵ Eg the *Legal Profession Act 2006* (NT) s 461(1)(d) which, in describing the purposes of the disciplinary chapter, includes: 'to enable lay persons to participate in complaints and disciplinary processes involving lawyers to ensure community interests and perspectives are recognised.'

⁷⁶ *Coal and Allied* [2000] HCA 47 [72] (Kirby J) – court's approach is one of 'caution and restraint'.

⁷⁷ *The Australian Gas Light Co v Valuer General* (1940) 40 SR (NSW) 126, 137–138 and again in *Dennis v Watt* (1942) 43 SR (NSW) 32, 32. See also *Klein v Domus Pty Ltd* [1963] HCA 54 [14] Dixon J (appeal); *Buck v Bavone* [1976] HCA 24 [3] Gibbs J (judicial review).

⁷⁸ [2004] VSC 532 [14]–[15]. This analysis was found to be 'without error' on appeal: *Myers v Medical Practitioners' Board of Victoria* [2007] VSCA 163 [51]–[52].

In this case the assessment whether the plaintiff was guilty of unprofessional conduct as defined by the Act, was in my view such a determination. Such a question does involve an element of judgment on which different minds might reasonably differ. It is also a question of mixed fact and law. ... Thus in order to establish that the Tribunal erred, the plaintiff must establish that on the facts found by the Tribunal, it reached a conclusion which no reasonable tribunal might come to.

The issue then is when the margin within which the tribunal may operate is exceeded. That is likely to involve reference to *Wednesbury* unreasonableness,⁷⁹ and, at least by analogy, the application of the principles in *House v The King* ([1936] HCA 40).⁸⁰ That is, there must be some error demonstrated in the exercise of the discretion.⁸¹

The issue was put this way in *Fraser v Health Care Complaints Commission*,⁸² in relation to the ultimate question (professional misconduct):

[I]n the present case it can be said that the power of the Tribunal ... was contingent upon its satisfaction that a complaint of (say) professional misconduct had been established. Nevertheless, even on this approach, no question of law will arise unless, in the language of Latham CJ in *The King v Connell; Ex parte The Hetton Bellbird Collieries Ltd*, the opinion was formed by taking into account irrelevant considerations, misconstruing the terms of the relevant legislation, or acting arbitrarily, capriciously, irrationally or for an improper purpose. Viewed in that way, the formation of the necessary opinion, like the exercise of discretionary power, can be challenged if it is seriously unreasonable.

Where the particular misconduct does not fall within a particular statutory or common law category (dishonesty, incompetence etc) and so may be described as a ‘novel instance,’ then it may still constitute professional misconduct to the extent it falls outside ‘a generally accepted standard of common decency and common fairness.’⁸³ That would again seem to be a case where the tribunal’s (rational and reasonable) evaluation would be difficult to upset.

It is fair to say that this limitation on a court finding error of law where the tribunal is engaged in an evaluative judgment, is not always acknowledged. *Xu*⁸⁴ provides an (imperfect) instance of a tribunal evaluating conduct being ‘within the description of a word or phrase in a statute’ according to ‘the relative significance attached’ to the facts. A

⁷⁹ Even where it is a matter upon which the tribunal is to be satisfied, an unreasonable decision may provide grounds for inferring error in the exercise of its discretion: *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26 [13] (Dixon J).

⁸⁰ See *Li* [2013] HCA 18 [75]-[76], [110]. This raises the question of the scope of the grounds for review of a discretionary judgment identified in *House v The King*. Where the ‘error’ identified is one where the tribunal ‘mistakes the facts’ and the appeal is limited to error of law, the effect may be to widen the scope of appeal, at least outside the ‘generous ambit of reasonable disagreement’ (*Norbis v Norbis* [1986] HCA 17 [8], Brennan J) – cf *Prakash v Health Care Complaints Commission* [2006] NSWCA 153 [88] (relevancy grounds). In this context also, it seems likely that (following *Li*), a court examining the exercise of a tribunal’s evaluation of a lawyer’s misconduct, or of the penalty imposed, would regard itself as familiar with the considerations relevant to the exercise of the tribunal’s judgment, such as to limit the degree of ‘deference’ to an administrative body.

⁸¹ For example, a failure to give proper consideration to the quality of an error leading to miscategorisation of the conduct: *Health Care Complaints Commission v A Medical Practitioner* [2001] NSWCA 158 [42]-[43].

⁸² [2015] NSWCA 421 [42] (Basten JA).

⁸³ *Clyne v NSW Bar Association* [1960] HCA 40 [22].

⁸⁴ [2009] NSWCA 430.

practitioner for a purchaser signed two documents in circumstances conveying a false impression to the vendor.⁸⁵ The Court treated the tribunal as having found professional misconduct by seriously incompetent conduct. The Court's described the practitioner's conduct as 'incredibly sloppy' and his signing of the certificate as 'irresponsible' and, in relation to the vendor, characterised the practitioner's conduct as constituting a negligent misstatement and as misleading and deceptive. But it held this did not constitute a 'substantial' failure of competence (but without elucidating on 'substantial') so as to be 'professional misconduct,' but rather constituted unsatisfactory professional conduct. Although the appeal was by a rehearing, it still required demonstration of error on the part of the tribunal and (with respect, and without taking a position on the outcome) it is arguable that it was for the statutory tribunal to evaluate the seriousness of the conduct.

Court Orders Following Appeal

Although under the legal profession legislation, the court on allowing an appeal for error of law has wide powers to make such orders as the tribunal might have made or 'as it thinks appropriate,' in practice it usually remits the matter to the tribunal:

Absent such restraint, a question of law would open the door to an appeal by way of rehearing. Where there is a factual matter that has to be determined as a consequence of the appeal, it may be that it is able conveniently to be determined by the Court of Appeal upon uncontested evidence or primary facts already found by the Tribunal. When the outstanding issue involves the formation of an opinion which is, as in this case, based upon considerations of public interest, then it should in the ordinary case be remitted to the body established for the purpose of making that essentially factual, evaluative and ministerial judgment.⁸⁶

Recent case-law: Characterising the Conduct, *Wednesbury* Unreasonableness, Leave to Appeal

One instance of the potential for an error of law in relation to the proper characterisation of the practitioner's conduct under the statutory scheme, arises where the regulatory authority frames the grounds of the application to the tribunal in the alternative. For example, the charge may be that the practitioner 'knew or ought to have known' of a matter or that the practitioner 'knowingly or recklessly' (or carelessly) made a false statement.

⁸⁵ The practitioner witnessed the client's signature on a contract of sale. The client subsequently told him that his wife had signed and produced the contract with her name on it such that it appeared the practitioner's signature witnessed the signing of both names. The practitioner also signed, without reading it, a certificate naming both client and wife as purchasers, to the effect that he had explained certain matters to them. In fact the client had forged the wife's signature and she repudiated the contract.

⁸⁶ *Osland v Secretary to the Department of Justice* [2010] HCA 24 [20] (appeal from VCAT decision).

There is (at the risk of appearing provincial) a series of cases from WA on the subject. In this jurisdiction appeals from SAT to the Supreme Court lie only with leave and, unless the effect of SAT's decision is to deny the practitioner the right to practice, only on a question of law. (The fourth case mentioned provides an insight into principles governing leave to appeal.)

The first case is *Legal Profession Complaints Committee v Detata*⁸⁷ where Martin CJ addressed the categorisation issue in these terms:

It was, of course, open to the Committee to bring its application against Mr Detata on the basis that he was guilty of professional misconduct either because he deliberately and knowingly breached the terms of the undertaking, or because he acted with reckless disregard as to whether on its true meaning, his actions would amount to a breach of the undertaking. It was nevertheless necessary for the Tribunal to make a determination as to which of those alternative cases had been made out. While it is undoubtedly true that either alternative case, if made out, would amount to professional misconduct, the gravamen of the misconduct is significantly different as between the two alternatives.

The second case is *Fidock*.⁸⁸ The Court found that SAT had applied the wrong legal test as to what constituted recklessness in relation to a finding professional misconduct, in that it had used the test for accessorial liability for breach of trust rather than that derived from the law of deceit.⁸⁹ In the event however, the appeal was dismissed on the basis that the facts as found by SAT justified a conclusion that the practitioner's conduct might be described as disgraceful conduct (as SAT has found) or as seriously incompetent conduct (as the Court added). In relation to the characterisation of reckless conduct the Court said:

professional misconduct is not necessarily confined to the situation where a practitioner knowingly misleads the court. ... Thus, for example, a practitioner who makes a false assertion in closing submissions to the court about the facts, in the absence of any genuine belief that the evidence supports such an assertion, would ordinarily be acting dishonestly toward the court even if the practitioner did not know that the statement was misleading.⁹⁰

Further, there was no reason in principle why conduct which could be classified as 'negligent', could not amount to professional misconduct:

a misleading statement to the court made by a practitioner on a matter of importance to the disposition of the case, where the misstatement is made as a result of gross carelessness, may, depending on all the circumstances, involve a 'substantial ... failure to reach or maintain a reasonable standard of competence and diligence' and thereby constitute professional misconduct ...⁹¹

⁸⁷ [2012] WASCA 214 [23]. See also *Legal Services Commissioner v Brereton* [2011] VSCA 241 [80] where the Court upheld the judge's decision setting aside the tribunal's finding of dishonesty where the appropriate subjective test for dishonesty had not been applied and where based on the finding that the practitioner 'new or ought to have known' of his responsibilities.

⁸⁸ [2013] WASCA 108.

⁸⁹ The tribunal had, no doubt on the basis of submissions by the parties, used the test in *Royal Brunei* and made reference to a Federal Court decision that this test was 'capable of general application in civil matters where good faith and honesty are in issue.' *Legal Profession Complaints Committee v Fidock* [2011] WASAT 78 [121].

⁹⁰ [2013] WASCA 108 [100].

⁹¹ *Ibid* [102].

The third case is *Giudice v Legal Profession Complaints Committee (Giudice)*.⁹² The regulatory authority alleged that the practitioner had engaged in professional misconduct based on seriously incompetent conduct by preparing and filing an affidavit which contained a statement when the practitioner knew this to be false, or recklessly disregarded whether the statement was true or false. SAT found the practitioner guilty of unsatisfactory professional conduct based not on knowledge of falsity, but recklessness. The Court noted the appeal was confined to a question of law, that excluding a question of mixed fact and law.⁹³ The grounds of appeal ('with some prompting from the Court') were that SAT had erred in law in that (1) the finding was unreasonable within the meaning of *Wednesbury* and (2) SAT had applied the wrong test in finding recklessness.

Martin CJ introduced the 'categorisation' issue in these terms:

[W]hen a practitioner provides information or makes a statement to a court which is false or misleading, there are (at least) three categories of case in which that conduct will constitute either professional misconduct or unsatisfactory professional conduct. First, the practitioner might know that the statement or information is false or misleading. Second, the practitioner might have a reckless disregard to the question of whether the statement or information is false or misleading, and third, the practitioner might be negligent or careless. Because the first two categories will only apply if, assessed subjectively, the practitioner is either aware that the statement or information is false or misleading, or wilfully indifferent to its truth, in the absence of special circumstances one would ordinarily expect a finding of either category of conduct to be characterised as a substantial departure from the standards of conduct reasonably expected of a practitioner such as to constitute professional misconduct, within the taxonomy of the Act. In cases falling within the third category - that of negligence or carelessness - whether or not the practitioner's conduct is either unsatisfactory professional conduct or professional misconduct will depend upon the nature and degree of negligence or carelessness involved.⁹⁴

As to *Wednesbury* unreasonableness, the Chief Justice acknowledged that such constituted a question of law, but questioned whether such principle, construed in the light of *Li* ([2013] HCA 18), applied to findings of fact (as opposed to the outcome of a discretionary decision), or could so apply other than where there was no evidence upon which the finding could be made.⁹⁵ It was insufficient to raise a question of law if the finding was against the evidence or the weight of the evidence.⁹⁶ Edelman J identified the question as whether an inference of recklessness, as found by SAT, was *not* reasonably open, such as to constitute an error of law. The Court found there was ample evidence to support the findings that the affidavit was false and that the practitioner was reckless in that respect.⁹⁷

⁹² [2014] WASCA 115. Following the Court's decision, the case was remitted to the tribunal, was re-heard and is pending a further appeal.

⁹³ *Ibid* [28], [73].

⁹⁴ *Ibid* [8].

⁹⁵ *Ibid* [35].

⁹⁶ *Ibid* [36].

⁹⁷ *Ibid* [38]–[39], [116], [159].

As to the application of the wrong test (whether the right question was asked and answered), the Court confirmed that recklessness in this context required a finding that the practitioner's actual state of mind was indifference (ie not caring) as to the truth of the statement. Upon a close analysis of SAT's reasoning, the Court concluded that SAT had applied an objective assessment rather than the necessary finding of fact as to his actual state of mind. The Court supported this conclusion on the basis that SAT had found the practitioner guilty of unsatisfactory professional conduct based on incompetent conduct, rather than professional misconduct based on serious incompetence, a finding which would have been more likely if actual recklessness had been found.⁹⁸ Given the manner in which the case had been conducted and decided below, the Court was not prepared to consider whether the finding of unsatisfactory professional conduct might have been upheld on the alternative basis of the practitioner's negligence or carelessness.⁹⁹

Some brief observations might be made about these cases. First, the decisions emphasise the importance of the distinction between misconduct in the form of knowing, reckless and negligent misstatements and conduct, and how these relate to the statutory scheme. Where a charge is brought, for example, that the practitioner 'knew or ought to have known' that a statement was false, the tribunal will need clearly to distinguish between those concepts and make findings accordingly.¹⁰⁰ However, whilst it was not an issue in either appeal, it is not clear how in both *Fidock* and *Giudice*, a knowingly or recklessly false statement might be categorised as seriously incompetent or incompetent conduct.¹⁰¹ Second, whilst the Court in *Giudice* did not explore the scope of *Wednesbury* unreasonableness in the light of *Li*, it seems clear from *Li* itself,¹⁰² and more recent decisions and commentary, that the effect of *Li* is substantially to widen the ambit of 'unreasonableness.'¹⁰³ Moreover, it seems apparent from recent cases that 'serious irrationality' is a concept directed at error in fact finding generally, including where arising under a statutory appeal. That is, the ground of 'unreasonableness'

⁹⁸ Ibid [46]–[52], [104]–[108], [132]–[152].

⁹⁹ Ibid [54], [109].

¹⁰⁰ *Pham* [2015] VSC 671 [41]–[43] illustrates the difficulty of a charge that the practitioner 'knew or ought to have known' that a statement was false' and so implies dishonesty, but this is not alleged. Cf *Puryer v Legal Services Commissioner* [2012] QCA 300 [22] where it was held that an express allegation of a misleading statement with knowledge connoted dishonesty, but it was not necessary to add 'deliberateness'. It is difficult to conceive how the making of a knowingly false statement could be regarded as other than dishonest.

¹⁰¹ In *Meakes* [2006] NSWCA 340 [101] Basten JA distinguished dishonest conduct (deliberate or grossly reckless overcharging constituting disgraceful conduct) from incompetent conduct.

¹⁰² *Li* [2013] HCA 18 [68]: 'The legal standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision which is to say one that is so unreasonable that no reasonable person could have arrived at it' (Hayne, Kiefel and Bell JJ). See also at [69]–[75].

¹⁰³ Discussed in Part III below.

encompasses ‘irrationality’ in fact finding, which would include, but not be limited to, a decision made without (probative) evidence. And the Court of Appeal’s affirmation that a question of law excluded a mixed question of fact and law, may now need to be reconsidered given *Haritos*.¹⁰⁴

Leave to Appeal

*Western Australian Planning Commission v Questdale Holdings Pty Ltd*¹⁰⁵ was an application for leave to appeal from a decision of SAT in relation to costs. Martin CJ pointed out the SAT Act ss 105(1)–(2) imposed two constraints. First, an appeal was subject to the leave of the court. Second, appeals were limited to a question of law. The combined effect of those provisions was that ‘the legislature did not intend that every appeal on a question of law from a decision of the Tribunal should, for that reason alone, be entertained by the court.’¹⁰⁶

Applying this criteria, the Chief Justice determined that the appeal did not in substance involve a question of law (the appeal grounds were merely ‘a cloak or disguise for what is in substance nothing more than a complaint that the discretion conferred upon the Tribunal should have been exercised in its favour’) and that even if it had, because it involved a question of practice and procedure and the exercise of a discretion, it would not be appropriate to grant leave.

Part IIB – Appeals for (Procedural) Error of Law

The legal profession legislation contains detailed provisions governing the procedures to be adopted by the regulatory authority and the disciplinary tribunal. They provide for wide powers of investigation into the conduct of practitioners. They also provide protection to practitioners the subject of such inquiry, and those provisions will not be narrowly construed.¹⁰⁷ Subject to such provisions, the rules of procedural fairness will apply to disciplinary proceedings. In *WAQA v Technical and Further Education Commission*¹⁰⁸ the

¹⁰⁴ [2015] FCAFC 92 [62]. For this proposition, the Court of Appeal cited its earlier decision in *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97 [53]. That decision relied upon several Federal Court cases with respect to s 41(1) of the AAT Act, the terms of which were said in *Paridis* to be materially the same as the SAT Act s 105(1), (2). To the extent those earlier cases held a question of mixed fact and law was necessarily *not* a question of law, they have been overruled by *Haritos*. A remaining point of distinction may be that the SAT Act s 105(13) does expressly distinguish between ‘a question of law, a question of fact and a question of mixed law and fact.’

¹⁰⁵ [2016] WASCA 32.

¹⁰⁶ *Ibid* [4].

¹⁰⁷ *Walsh v NSW Law Society* [1999] HCA 33 [62].

¹⁰⁸ [2009] NSWCA 213 [45] (judicial review).

Court observed: ‘The obligation to accord procedural fairness, as a mandatory precondition to valid decision-making, has proved to be a major component of expanding judicial supervision of administrative decision-making.’¹⁰⁹

In this context, there are three subjects considered below. The first (not directly concerned with procedural error) provides an insight into how courts’ view the composition of tribunals. The second and third subjects are illustrative of grounds of appeal commonly invoked in this area: the application of rules of evidence, and matching the decision with the charge. Considerable care must be taken however, in seeking to apply the principles from these cases in a different statutory and factual context.¹¹⁰

Composition of Tribunal

In *Law Society of New South Wales v Foreman*¹¹¹ the Court, on an appeal by a rehearing de novo, made reference to the respect commonly shown to the decisions of disciplinary tribunals. Mahoney JA acknowledged that this was the position ‘in the past,’ but questioned whether on appeal the Court could give weight to the Tribunal’s finding of professional misconduct under the *Allinson* test, and as to whether the profession would continue to repose trust and confidence in the practitioner, where the Tribunal included lay members.¹¹²

The comment was prompted because the *Allinson* test depends upon the tribunal actually (through evidence – which rarely happens) or notionally (in its judgment) acting on the opinion of a body of competent and reputable lawyers as to the propriety of the conduct in question. A lay member could contribute nothing to that exercise. However, in many jurisdictions Parliament has mandated the inclusion of a member of the public on regulatory authorities and disciplinary tribunals, and provided an appeal from the tribunal for error of law. The answer to Mahoney J’s reservation is not that the court may not rely upon the findings of the tribunal in these circumstances – but that the *Allinson* test, based upon the views of ‘competent and reputable’ practitioners and otherwise without reference to the interests of the public, is no longer the appropriate test for professional misconduct.

¹⁰⁹ The prospect of a finding of procedural unfairness can arise in a multitude of circumstances and at any point in the hearing. The Court in *King v Health Care Complaints Commission* [2011] NSWCA 353 [202]–[205] decided that the respondent practitioner had been treated unfairly where the tribunal had made its decision including on penalty without granting him the opportunity to make submissions on penalty in a second hearing.

¹¹⁰ *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASCA 115 [3] (Martin CJ).

¹¹¹ (1994) 34 NSWLR 408, 410, 440, 471.

¹¹² *Ibid* 439–40.

In *Xu*,¹¹³ Basten JA remarked on the transfer of the disciplinary jurisdiction from the court to statutory tribunals (relevantly then the Administrative Decisions Tribunal). He noted that the tribunal was sufficiently constituted by two solicitors and a lay member. This was so notwithstanding that its decision might lead to the cancellation of a practitioner's practicing certificate and that matters before the tribunal were frequently of some complexity. In the judge's view, that composition provided less 'protection' than in medical disciplinary cases, where the tribunal was presided over by a judge.

That position remains. Under the current NCAT Act (sch 5 pt 4 div 4 cl 18) the NCAT hearing disciplinary proceedings may be constituted by two barristers or, as appropriate, two solicitors, and a general (lay) member. Moreover, in Victoria the composition of the VCAT for disciplinary proceedings against legal practitioners is at the discretion of the President (VCAT Act s 64(3), ss 10–14). A search of recent decisions reveals that in disciplinary proceedings against lawyers, the VCAT is commonly comprised of a senior member who is a lawyer (VCAT Act (s 13(2)(a)). Arguably a tribunal so constituted may, in fact or perception, restrict the opportunity for consideration of the interests of the client and the public generally. That is, it might be thought that the authorities' concern, as reflected in the Model Bill and the Legal Profession National Law as well as in the current legislation, to introduce co-regulation by the inclusion of lay members on disciplinary tribunals, and to take into account in disciplinary proceedings the interests of the public, has in these circumstances not been realised.¹¹⁴

Rules of Evidence - *Briginshaw, Browne v Dunn*

Practitioners regularly include the tribunal's alleged failure to apply these cases as a ground of appeal. As indicated by the cases which follow, they are generally unsuccessful.

The principles are reasonably well known. Because the primary object of disciplinary proceedings is the protection of the public rather than the punishment of the individual, the civil standard, rather than the criminal standard, applies – ie proof on the balance of probabilities. Nevertheless, the serious consequences for a professional found guilty of statutory misconduct has an impact on the evidence required to meet that standard. In this

¹¹³ [2009] NSWCA 430 [3]–[6].

¹¹⁴ The Uniform Law s 3(f) includes as an objective of the Law, 'providing a co-regulatory framework ...' It is acknowledged that on appeal, the matter is heard and determined by a judge of the Supreme Court, or by judges of the Court of Appeal. But, at least where the appeal is based on error of law, these decisions are confined to legal questions. And the scope for the Court itself determining the matter, as opposed to remitting it, is confined.

context, the well-known judgment of Dixon J in *Briginshaw v Briginshaw*¹¹⁵ is authority for two propositions: (1) the strength of the evidence required is related to the seriousness of the charge, the unlikelihood of its occurrence and its consequences, and (2) a tribunal must feel an actual persuasion that the relevant conduct has taken place, something more than a mathematical balancing of probabilities on whatever evidence is before it.

With respect to *Browne v Dunn* (1894) 6 R 67, the general rule is that if a party proposes to make submissions that the evidence from a witness for the opposing side should not be accepted, that witness must be cross examined to that effect in order to allow an opportunity to explain that evidence.

Tribunals commonly quote and apply *Briginshaw* as if it were a mandatory requirement. In cases where the rules of evidence do not apply, this is technically incorrect. The decision in *Kyriackou v Law Institute of Victoria Limited*¹¹⁶ explained:

Because the Tribunal is not bound by the rules of evidence, it is not bound by the provisions of s 140 of the Evidence Act 2008 [which encapsulates the common law principles established by *Briginshaw*]. Nevertheless, those principles reflect common sense notions of probability with respect to human conduct and it is entirely proper for the Tribunal to take them into account when considering allegations of serious misconduct.

The second limb of Dixon J's judgment ('actual persuasion') has received little attention. It was however referred to in the recent James Hardie litigation. The Court of Appeal of NSW expressed the view that 'actual persuasion' was equivalent to the required state of 'satisfaction' and did not require a 'subjective belief.'¹¹⁷ However, Heydon J in the High Court (who might be regarded as an authority on the subject) differed - he held that actual persuasion was equivalent to a 'subjective belief' and was required.¹¹⁸

The proceedings in *Sullivan v Civil Aviation Safety Authority*¹¹⁹ involved an appeal from a decision of the AAT cancelling Mr Sullivan's pilot's licence. The AAT was not bound by the rules of evidence. An appeal lay only for error of law. The Court started with the proposition that whether the AAT must apply the evidentiary rules in *Briginshaw* and *Browne v Dunn* could not be answered by reference to court rules and procedures in civil litigation, but:

¹¹⁵ [1938] HCA 34 (*Briginshaw*).

¹¹⁶ [2014] VSCA 322 [26].

¹¹⁷ *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 [748]–[750].

¹¹⁸ *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17 [255].

¹¹⁹ [2014] FCAFC 93.

The procedural flexibility afforded to an administrative tribunal freed from the rules of evidence does not absolve it from the obligation to make findings of fact based upon material which is logically probative in which the rules of evidence provide a guide.¹²⁰

In relation to *Briginshaw*, the Court rejected the suggestion that it represented a general *principle of law* or that it applied generally to all facts in issue which might be characterised as ‘serious’ or ‘grave.’ It concluded that the tribunal ought to rely upon evidence ‘which properly supports the seriousness of the findings being made and the seriousness of those findings upon a party.’¹²¹ In relation to *Browne v Dunn* the Court again rejected its application as a principle of law, but recognised circumstances (not applying in this case, where witness statements were exchanged) where it would be procedurally unfair for the tribunal to base its decision on the evidence of a particular witness without affording the other party notice of a differing version.¹²²

It is suggested that these cases ought not to be taken as meaning that, where the rules of evidence do not apply, a disciplinary tribunal is free to ignore the principles derived from *Briginshaw* and *Browne v Dunn*. An administrative tribunal in disciplinary proceedings will need to be acquainted with, and apply, the rule in *Browne v Dunn* in circumstances where to do otherwise would deny a party a fair opportunity to put its case. And where a finding of improper conduct critical to the determination of the case is to be made, the tribunal will need to acknowledge the seriousness of such finding and the compelling nature of the evidence in support of it. In each case however, it is suggested that in doing so, the tribunal need not, in terms, refer to the foundation cases.

Correspondence between Charge and Finding

Perhaps the most common and successful ground of appeal based on breach of the rules of procedural fairness (the hearing rule) is that the tribunal’s findings go beyond the particulars of the charge. This ground of appeal has also been invoked where, following an appeal, the (lower) court’s determination went beyond the subject of complaint before the tribunal and the grounds of appeal.¹²³

¹²⁰ Ibid [97] (Flick and Perry JJ.)

¹²¹ Ibid [106]–[114]. The judgment identifies occasions where the *Briginshaw* test might apply - eg to a finding that a practitioner had engaged in fraud or had lied. Disciplinary tribunals have grappled with the limits of *Briginshaw* in this respect eg *Legal Practitioners Complaints Committee v Trowell* [2009] WASAT 42 [65].

¹²² [2014] FCAFC 93 [48]–[49], [145], [159].

¹²³ *Walsh v NSW Law Society* [1999] HCA 33 [71]. See also *Smith v New South Wales Bar Association* [1992] HCA 36 [40] (joint judgment), [5] (Deane J); but note as to findings of credibility and their use in final orders *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32 [107]–[109].

Illustrations of such cases involving a disciplinary tribunal are: *Archer v Howell (no 2)*¹²⁴ (the practitioner was denied natural justice because he was found guilty based on what he ought to have known, when the complaint was as to what he actually knew – certiorari ordered); *Daskalopoulos v Health Care Complaints Commission*¹²⁵ (charge was failing to provide an appropriate written direction in relation to certain medical procedures – finding was failing to direct a change in documentation to reflect the actual practice; breach of procedural fairness); *Nikolaidis v Legal Services Commissioner*¹²⁶ (finding of deliberately charging excessive costs based on failure to supervise and acting recklessly, exceeded jurisdiction because the practitioner had been charged with deliberate over-charging only); *Mijatovic v Legal Practitioners Complaints Committee*¹²⁷ (charge of dishonesty introduced during proceeding – no breach of procedural fairness in the circumstances; but incidental findings by tribunal not the subject of any charge and would not be taken into account in relation to penalty); *Legal Services Commissioner v Madden No 2*¹²⁸ (charges were appearing and deducting fees without authority - tribunal exceeded jurisdiction in drawing inferences of dishonesty when dishonesty was not expressed in the charge); *King v Health Care Complaints Commission*¹²⁹ (majority view that complaint sufficiently alleged sexual misconduct and that aspect also made apparent during hearing).

More recently, in *Simon v Legal Services Commissioner*¹³⁰ the charge was giving an undertaking which required the action of third parties, but the VCAT finding was breaching that undertaking. The Court treated the case as one where, in terms of *Craig* ([1995] HCA 58), the tribunal had identified the wrong issue and asked itself the wrong question.¹³¹

Part III – the Future

In Australia until early in the 20th century, the general position was that whilst the regulation of the legal profession was governed by State legislation, cases of professional misconduct were heard by the various Supreme Courts within their inherent jurisdiction. Thereafter, State legislation increasingly provided for the hearings to be undertaken by statutory bodies, whilst

¹²⁴ (1992) 10 WAR 33.

¹²⁵ [2002] NSWCA 200 [47]–[54] (where earlier authorities are discussed).

¹²⁶ [2007] NSWCA 130 [93], [167].

¹²⁷ [2008] WASCA 115 [8]–[14], [16]–[17], [63]–[69], [73]–[74], [286]–[296].

¹²⁸ [2008] QCA 301. Note the analysis of the statutory scheme and case-law at [59]–[92].

¹²⁹ [2011] NSWCA 353.

¹³⁰ [2014] VSC 185.

¹³¹ *Ibid* [22]–[23]. The Court rejected the Commissioner’s submission that the Court vary the Tribunal’s order to make the finding of professional misconduct conform to the charge (at [27]).

preserving the inherent jurisdiction of the Supreme Courts.¹³² Under the legal profession legislation the inherent jurisdiction of the Supreme Court to sanction a legal practitioner as one of its officers is preserved. However, with the transfer of jurisdiction to new disciplinary authorities operating under a comprehensive legislative regime, even in this residual jurisdiction the role of the Supreme Court has been substantially diminished. The inherent jurisdiction is in practice limited to cases where the practitioner has been found guilty of a serious criminal offence or the practitioner's misconduct arose in proceedings before the court.¹³³ Even in such cases, the court will usually refer the matter to the regulatory authority.¹³⁴

The Theme Revisited

There are a multitude of statements in judgments of all courts, including the High Court, as to the need for courts to respect the role of tribunals selected by Parliament to determine certain matters and, where jurisdictional error or error of law is under consideration, to confine their intervention to demonstrated legal error.¹³⁵ Even in relation to *Wednesbury* unreasonableness, which 'may appear to open the gate to judicial review of the merits of a decision taken within power',¹³⁶ judges have emphasised its limited operation: 'Twilight does not invalidate the distinction between night and day; and *Wednesbury* unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action.'¹³⁷

There is an equally impressive body of academic writers who, over many years, have argued that the courts are impermissibly encroaching into the merits of tribunals' decisions.¹³⁸

¹³² Eg in NSW the *Legal Practitioners Act 1898* was amended in 1935 to provide for the hearing of cases of professional misconduct of solicitors by a statutory body. By a further amendment in 1987 (Act No 109) a Professional Standards Board (for minor professional misconduct) and a Disciplinary Tribunal (for serious professional misconduct) were established to hear complaints of misconduct against barristers and solicitors.

¹³³ Linda Haller 'Australian Discipline: The Story of Issac Brott', (2012) 15 *Legal Ethics* 26 suggests that there may be occasions where a court will likely be more effective than a tribunal in disciplining a practitioner appearing before it.

¹³⁴ *Brooks v Prothonotary of the Supreme Court of New South Wales* [2008] NSWCA 31 [26].

¹³⁵ *Attorney-General (NSW) v Quin* [1990] HCA 21 [17], [21] (Brennan J) is invariably cited.

¹³⁶ *Ibid* [19].

¹³⁷ Chief Justice Murray Gleeson, 'Judicial Legitimacy', (Paper presented at Australian Bar Association Conference, New York, 2 July, 2000). See also Gageler J in *Li* [2013] HCA 18 [113] but cf Hayne, Kiefel and Bell JJ (at [68]–[75]).

¹³⁸ See for an earlier paper David Bennett, 'Balancing Judicial Review and Merits Review' (Paper presented at administrative law conference, 27 September 1999) and more recently John McMillan, 'The Courts vs The People: Have the Judges Gone Too Far?' (Paper presented to the Judicial Conference of Australia, Launceston Colloquium, 27 April 2002) and Justice Michael Barker, 'Legal Unreasonableness: Life after Li' [2014] *FedJSchol* 15 [67]. See also Alan Freckelton, 'The Concept of "Deference" in Judicial Review of Administrative Decisions in Australia – Part 1' (AIAL Forum No 73), who argues for a form of substantive

In the most recent of these articles, Professor Aronson¹³⁹ has described the growth of *substantive review* by which the courts, in the course of judicial review, go beyond checking the legality of the decision and address its quality ie reviewing *how well* something was done (as in merits review), not merely *whether it was done* (as in legality review). Errors of fact, treated as errors of law, now extend beyond the ‘no evidence’ rule, *Wednesbury* unreasonableness (previously the only acknowledged ground of substantive review) and (in relation to judicial review) ‘jurisdictional fact.’ They now include ‘irrational reasoning’ and ‘unreasonable outcomes.’ Further, *Wednesbury* unreasonableness generally (ie not confined to findings of fact) has been expanded by *Li* ([2013] HCA 18), so that its scope might be ‘analagised (albeit not equated) to the standard required of judges exercising discretionary powers.’¹⁴⁰ The concept of ‘proportionality’ now threatens as a determinant of reasonableness. (In the event this ‘new’ ground gained acceptance, in the current context it might be a mechanism for deciding whether the finding made or the penalty imposed fairly balanced protection of the public with the impact of the decision on the practitioner.)¹⁴¹ And under the guise of procedural fairness, courts now review for a tribunal overlooking or misunderstanding the fundamentals of a party’s case, or forgetting or overlooking the evidence, or failing to meet the statutory requirement for a genuine hearing.¹⁴² And the requirement that the tribunal provide ‘adequate’ reasons, allows for a qualitative review. To the extent that reasons are tested for error of law, that ‘probably means that decision-makers would be well advised to set out their understanding of the governing law.’

However, Professor Aronson suggests that the growth of substantive review in relation to fact finding, has ‘in practice made very little difference to the outcome of the great mass of cases’. It is in the Federal Court where, following *Li*, ‘a new approach is emerging in its migration jurisdiction where the gist of the complaint is about the quality of the tribunal’s fact-finding.’

review of administrative decisions ie whether it is ‘reasonable’ or ‘correct’, rather than relying on artificial and unsustainable distinctions between errors of law and errors of fact, or, ‘even worse’, jurisdictional and non-jurisdictional error of law.

¹³⁹ *Aronson Article* above n 28.

¹⁴⁰ Referring to the joint judgement of Hayne, Kiefel and Bell JJ (at [75]–[76]). That is, under the principles in *House v The King* [1936] HCA 40.

¹⁴¹ The Uniform Law s 3(e) provides as an objective of the Law, ‘promoting regulation of the legal profession that is efficient, effective, targeted and proportionate ...’

¹⁴² So the relevancy grounds, which did not trespass into the weight given a material consideration, have been used in order to make ‘a qualitative assessment of the relative gravity of the tribunals’ misunderstandings’ but expressed in terms of procedural fairness.

As regards the present context (disciplinary proceedings against lawyers), the case-law provides support for the view that the growth of substantive review into fact-finding (and generally), has (to this point) made little impact outside migration cases. Austlii's companion *LawCite* shows that whilst *Li* has been cited in over 650 cases (to 1 June 2016), the great majority are cases in the Federal Court,¹⁴³ and it appears that *Giudice* is the only decision referring to it in relation to disciplinary proceedings against lawyers. It has been suggested that the limited development of administrative law processes outside the area of asylum-seeker law may be for the very reason that statutory appeals for error of law from tribunals are provided for and operate within well understood principles. That is to be distinguished from migration cases where the legislature has increasingly curtailed rights of review, leading to a degree of judicial creativity: 'other areas of executive action may call for a differential application of principle.'¹⁴⁴

It seems inevitable that the concepts of irrational reasoning and unreasonable outcomes will eventually be applied in statutory appeals for error of law generally, including in disciplinary cases. And the widening reach of the rules of procedural fairness are likely to be invoked by practitioners in appeals from disciplinary proceedings. In terms of constitutional theory, the widening scope of statutory review might be said to cut across Parliament's intention to have disciplinary cases determined by disciplinary tribunals and moreover to do so in a manner which achieves inexpensive, informal and speedy determinations. Specifically, this 'judicial creep' (others might see it rather as a 'surge,' or even 'regime change') might be said to encroach upon the evaluative task of a disciplinary tribunal, including by reference to protecting legal consumers, of determining whether statutory misconduct has been established and fixing the appropriate penalty.

But there are other considerations. It seems likely that the majority of disciplinary cases are settled and consent orders made.¹⁴⁵ It seems fair to assume that of those which reach a hearing, many involve a point of principle or at least issues of some complexity. Where a finding of statutory misconduct is made, the impact on a practitioner of such a finding, and of the consequential disciplinary orders, is significant.¹⁴⁶ Practitioners are entitled to see that

¹⁴³ Note however *Bayley v Nixon and Victoria Legal Aid* [2015] VSC 744 [41]–[50] (judicial review).

¹⁴⁴ See the conclusions of Justice John Basten in 'Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed) *Key Issues in Judicial Review* (The Federation Press, 2014) 35, 48–49.

¹⁴⁵ That is an assumption drawn from a cursory review of SAT decisions in this area.

¹⁴⁶ As to the scope of protecting the practitioner's rights in relation to this, see Kirby J in *Barwick v Law Society of New South Wales* [2000] HCA 2 [91] describing the (then) new statutory scheme for NSW.

tribunals stay within the law – the intention of Parliament, in making available a right of appeal with respect to error of law. And in terms of administrative justice, practitioners would hardly be likely to accept a decision affected by ‘unreasonableness’, ‘unfairness’ or ‘irrationality.’ The object of administrative law generally is to allow a person affected to test the legality, fairness and rationality of the decision.¹⁴⁷

The Tribunal’s Control over Proceedings – A Suggestion

It is apparent from this overview of the roles of CATs and courts, that there are some common areas where tribunals are ‘vulnerable’ to successful challenge for error of law. Specifically, many appeals are based upon (1) the tribunal’s misunderstanding of the statutory and common law categories of misconduct and (2) the tribunal’s failure to ensure its findings do not go beyond the particulars of the charge.

It is the responsibility of disciplinary tribunals to be mindful of the potential for error in these areas. But there would seem to be some practical means for tribunals to obtain assistance in that respect. There have been a number of cases (particularly as concerns the health profession) where tribunals and courts have been critical of the regulatory authority in failing properly to identify and particularise the statutory provisions relied upon.¹⁴⁸ Similar criticism has been made where the regulatory authority has failed to provide appropriate submissions on the law. In *Legal Services Commissioner v Madden No 2*¹⁴⁹ the charges were acting without instructions and deducting fees without authority. The application, and the agreed facts, did not impute dishonesty. The tribunal (which was presided over by the Chief Justice) suggested during the hearing that an inference of dishonesty was open and that the charge be amended accordingly. The Commissioner elected not to do so and did not cross-examine the practitioner on that basis. The tribunal reasoned that it was nevertheless within its powers to infer that the practitioner had acted dishonestly and so found. On appeal, the Court held the tribunal had exceeded its jurisdiction in this respect, both in relation to its ultimate decision

¹⁴⁷ Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50, (September 2012) 41–42.

¹⁴⁸ *O’Reilly v Law Society of NSW* (1988) 24 NSWLR 204, 210–11, 224; *Fraser v Health Care Complaints Commission* [2015] NSWCA 421 [7]–[8]; *Health Care Complaints Commission v Karalasingham* [2007] NSWCA 267 [27]–[31]; *Legal Profession Complaints Committee v A Legal Practitioner* [2013] WASAT 37 [17]–[20]; *Lucire v Health Care Complaints Commission* [2011] NSWCA 99 [41]–[45]; *Lindsay v Health Care Complaints Commission* [2010] NSWCA 194 [20]–[28], [107]. The common law principles are discussed in *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1 [26]–[30] (joint judgment).

¹⁴⁹ [2008] QCA 301.

and for the purposes of penalty. In its conclusion, the Court observed in relation to the manner in which the tribunal had, in error, proceeded that:

important decisions referred to in these reasons, notably including *Walsh*, were not brought to the Tribunal's notice. Nor, it seems, did the Tribunal have the benefit of the detailed submissions made in the appeal, which included an extensive analysis of the relevant provisions of the Act and reference to other authorities. Given the significant role of the Commissioner in the administration of the regulatory scheme under the 2007 Act the Tribunal is entitled to expect that the Commissioner will ensure that appropriate submissions about the construction of the Act are made if such issues arise.¹⁵⁰

A tribunal has control over proceedings before it and may need to exercise it at the outset in relation to the nature and scope of the charges brought. Where the issue is the form of the charge, this might be raised with the parties in the course of pre-trial conferences or (at the latest) at the commencement of proceedings. In several jurisdictions statutory provisions may facilitate the tribunal's powers in this respect (eg NSW Application Act s 140). In raising such a matter the tribunal must, of course, acknowledge that it is for the regulatory authority to determine what charges are to be brought and what particulars are pleaded and relied upon. Moreover statutory provisions allowing for a variation to a disciplinary application do not enlarge the tribunal's jurisdiction. It is no part of the tribunal's function to remedy a deficiency, as such, in the regulator's case much less in its reasons to 'explore an arguably serious case against a practitioner ... because the Commissioner has pegged the charge at what turned out to be an inappropriately low level.'¹⁵¹ Its role rather is to ensure a fair trial. But within that role it would seem proper and appropriate for the tribunal, in circumstances where the charges are not adequately formulated or supported to make known to the parties, both in the subject case and for the future, what it regards as essential requirements in that respect.¹⁵² That may include:

- 1 It is necessary that the charge identify the head of statutory misconduct relied upon ie whether professional misconduct or unsatisfactory professional conduct;
- 2 It is necessary that the charge identify the appropriate pathway to the head of misconduct; ie whether 'unfitness conduct' or 'disgraceful conduct' etc;

¹⁵⁰ Ibid [94].

¹⁵¹ Ibid [81].

¹⁵² In *Legal Services Commissioner v Bradshaw* [2009] QCA 126 the tribunal had suggested an amendment to the charge, which the Commissioner adopted. It was held by the tribunal on an interlocutory application, and by the Court on appeal, that this did not exhibit bias or constitute the judge (of the tribunal) 'entering the arena.' This ground of appeal was 'completely unmeritorious' (at [34]–[37]). It may be necessary for the tribunal to raise legal issues even where the parties are content to proceed on the basis that the case is one which is to be determined 'on the facts and evidence': *Legal Services Commissioner v Brereton* [2011] VSCA 241 [109]–[110].

- 3 In particular, where the conduct is not related to competence or unfitness, it is necessary that the statutory category, including that at common law, be identified.
- 4 Where the conduct does not relate to competence or unfitness or breach of the Act (overcharging etc) that does not necessarily mean that it must be treated as within one of the common law categories. It is very likely to constitute a breach of a conduct rule. If so, that may prove a more appropriate and flexible test than finding 'disgraceful conduct' or 'conduct falling short.'
- 5 Where alternatives charges are brought (eg 'recklessly, alternatively negligently') it is necessary that they be separated and identified within the relevant statutory category.
- 6 It is necessary that the particulars of the charge be appropriate to the statutory category relied upon. For example where the charge is that the practitioner 'knew or ought to have known,' separate particulars are likely to be required for each.
- 7 Where some instance of misconduct at common law is relied upon (eg dishonesty, fraud) it is necessary that submissions on the relevant legal principles underpinning that common law concept are provided and explained.
- 8 Where the charge (eg a knowingly false statement) necessarily involves a further category of misconduct (dishonesty), it is necessary that this category is explicitly referred to in the charge.
- 9 Where an issue such as dishonesty becomes apparent during the course of the hearing, the regulatory authority may need to consider an amendment to include that additional charge.
- 10 Where an issue arises as to the tribunal's jurisdiction, a comprehensive analysis of the relevant statutory provisions and the common law principles may be required.

No doubt in the great majority of cases the regulatory authority properly formulates the charge and provides the appropriate submissions in support. Where the exception occurs, the tribunal may properly raise the issue with the parties. In terms of fairness, the practitioner is entitled to know the precise nature of the charge being brought and what particulars are being relied upon. And addressing the nature and particulars of the charge will aid the tribunal in the proper approach to its task and may limit the prospect of it committing legal error.

TABLE

Disciplinary Authorities/Provisions under Australian legislation¹⁵³

	Uniform Law	ACT	NT	Qld	Tasmania	WA	SA
Disciplinary Tribunal	VCAT (Vic); NCAT (NSW)	ACAT	Disciplinary Tribunal ¹⁵⁴	QCAT	Disciplinary Tribunal	SAT	Disciplinary Tribunal ¹⁵⁵
Constitution – judicial, legal and public members on Tribunal	VCAT Act ss 8–14; s 64 (3); constitution a matter for President (a judicial officer); NCAT Act s 13 and sch 5 pt 4, div 4 cl 18 (judge or professionals & gen member)	s 384(d); ACAT Act ss 93–7 (lawyer, members, assessors)	s 461(1)(d); s 670(1) judge or lawyer; s 674(2)(b) (lay member)	ss 598–9 – judge, & panel members including lay member	s 611; 3 members, lawyers plus lay member	s 437 - President and or Deputy President and practitioner and lay member; SAT Act s 11(4)	s 80 panel of 3 - lawyer and includes a lay member (sub-s 1c), unless minor conduct when 1 member.
Procedure of Disciplinary Tribunal	s 301 procedural fairness; and VCAT Act ss 97–100 - not bound by rules of evidence; NCAT Act sch 5 pt 4 div 4 cl 20 rules of evidence apply for professional misconduct.	s 420 ACAT bound by rules of evidence	s 521 Tribunal bound by rules of evidence	s 656C standard of proof. ¹⁵⁶ QCAT Act ss 28–30, s 95 - informal evidence	s 466(1) includes power for tribunal to regulate own procedure	SAT Act s 32– not bound by rules of evidence, bound by natural justice.	ss 80(5), 84, 88; & r 9(c) Disciplinary Tribunal Rules – set its own procedure
Appeal to Court	VCAT Act s 148 - question of law, with leave. NCAT Act sch 5 pt 6	ACAT Act s 86 – appeal fact or law with leave; (and div 8.1)	s 533 – appeal w/o restriction	s 468 appeal w/o restriction to C/A, appeal rehearing on	s 484–5 w/o restriction, rehearing; s 486 refer to Court	SAT Act s 105 question of law and leave ¹⁵⁷	s 86 appeal w/o restriction s 89 proceeding

¹⁵³ References, other than to the Uniform Law, are to sections of the respective Legal Profession Acts, unless shown otherwise.

¹⁵⁴ This jurisdiction has not yet been transferred to the NTCAT, which commenced 1 January 2015.

¹⁵⁵ This jurisdiction has not yet been transferred to the SACAT, which commenced 30 March 2015.

¹⁵⁶ Expressly applies the *Briginshaw* test.

¹⁵⁷ Unless (s 105(13)), the effect of the decision is to deny the practitioner the right to practice when the practitioner (only) may appeal on any ground including a ‘question of law, a question of fact or a mixed question of law and fact.’

	cl 29(4) rehearing			evidence below			in or referral to Court
Inherent jurisdiction of Court	s 264	s 462	s 554	s 13	s 510	s 465	s 88A
Penalty orders of disciplinary tribunal	302 - if the tribunal finds statutory misconduct	s 425 - if ACAT is satisfied of statutory misconduct	s 525 - if DT is satisfied of statutory misconduct	s 456 - if QCAT is satisfied of statutory misconduct	ss 470–7 - if DT is satisfied of statutory misconduct	s 438 – if SAT satisfied of statutory misconduct	s 82(6) if DT is satisfied of statutory misconduct
Regulatory Authority (or by its delegate)	LSC (Vic); LSC NSW (s 406)	Bar Council; Law Society Council.	Law Society	LSC	Legal Profession Board	Complaints Committee	Legal Profession Conduct Com'er
Objectives provisions	VCAT Act ss 97–98 NCAT Act s 36	ACAT Act ss 6–7		QCAT Act s 3–4		SAT Act s 9	
Unsatisfactory professional conduct	s 296	s 386 (and s 388)	s 464	s 418	s 420	s 402	s 68
Professional misconduct	s 297	s 387	s 465	s 419	s 421	s 403	s 69
Conduct capable of misconduct	s 298	s 389	s 466	s 420	s 422	s 404	s 70