Administrative law update: natural justice, appeals on questions of law and administrative discretions

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1. Introduction

1. This session provides a refresher of some key principles for administrative decision makers to consider. The session does this by examining recent case law.

2. The session, in particular, focuses on the following areas:

   (1) The principles of natural justice;
   (2) Appeals from, or judicial review of, administrative decisions in light of the recent case of *Haritos v Commissioner of Taxation*;
   (3) Some of the principles in establishing errors in the exercise of administrative discretions with recent case law examples.

2. Natural justice

3. Principles of natural justice or procedural fairness must be observed by administrative decision makers to ensure that a person affected by a decision is:

   (1) Allowed a fair hearing, that is, the process by which the decision is made must be a fair one;
   (2) Given an impartial decision, that is, the decision must not be tainted by the perceived or actual bias of the decision maker.

4. There are many recent cases dealing with procedural fairness, both in courts, and in respect of administrative decisions. This paper has chosen two cases to illustrate some of the principles.

***Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277**

5. This case involved a witness' failure to answer questions in a domestic violence case. The Magistrate had given the witness many warnings about potentially being in contempt, but the witness continued to refuse to answer questions. Eventually, the Magistrate told the witness that the matter would be referred to the Prothonotary of the Supreme Court.

6. The relevant legislation[1] allowed the Magistrate to either decide a contempt matter itself, or alternatively, to refer the matter to the Supreme Court for determination. The penalties were considerably lower if the matter was heard by the Magistrate.

7. After referral to the Supreme Court, the Prothonotary commenced proceedings for contempt. The witness argued before a Supreme Court judge that the proceedings should not continue as procedural fairness had not been given by the Magistrate. The judge agreed with this complaint and found that:

   (1) The Magistrate should have asked whether the witness wished to make submissions about whether her refusal to answer questions constituted contempt;
   (2) The Magistrate should have asked whether the witness wished to make submissions on whether the Magistrate should determine the question of contempt or whether it should be referred to the Supreme Court.

8. The decision was subsequently appealed by the Prothonotary to the NSW Court of Appeal.

9. The first ground of appeal was that there was no requirement in every case for a judicial officer to seek submissions before referring an allegation of contempt to the Supreme Court. The Prothonotary made arguments including the following:

   (1) The referral function was ministerial in nature, not judicial, so the Magistrate was not required to observe principles of natural justice before exercising the power;
   (2) There was case law to the effect that a decision to commence criminal proceedings did not require the observance of the principles of natural justice.[2] This kind of referral should be seen as a decision to commence criminal proceedings;
   (3) This type of referral should be seen as analogous to a decision by a disciplinary board to refer a matter for commencement of disciplinary charges. There are cases which say that such a disciplinary board does not have to afford procedural fairness in making the decision to refer.[3]

10. The Court of Appeal considered this issue by reference to some standard principles regarding natural justice:

    (1) Whether acting in accordance with the principles of natural justice is necessary when exercising a statutory power is a question of construction;
    (2) The first issue is whether the exercise of the power has the potential to destroy, defeat or prejudice a person's rights or interests and, if so, it is necessary to consider whether the plain words of the statute exclude natural justice principles;

[1] s 24, *Local Court Act 2007* (NSW).
[2] For example, *Commissioner of Police v Reid* (1989) 16 NSWLR 453 at 461D.
[3] For example, *Medical Board of Queensland v Byrne* (1958) 100 CLR 582 at 591.

(3) Ordinarily, the need to comply with natural justice is implied into a statute on the assumption that the legislature would intend those principles to apply;
(4) If the principles of natural justice apply, the content of the obligations depends upon the circumstances of the particular case;
(5) If a statute requires those principles to be observed and they are not then the decision is not one authorised by statute and will be invalid.

11. When construing the relevant referral power, the Court needed to determine whether the exercise of that power had the potential to destroy, defeat or prejudice the rights or interests of a person who might be in contempt of court. The Court held that the power did have the potential to prejudice rights because if the potential contempt was heard by the Magistrate, rather than referred to the Supreme Court, the potential penalties would be significantly lower.

12. The Court then held that, because there was no express exclusion of the principles of natural justice from the statute, the referral power should be construed as being subject to those principles. In this regard, the Court rejected the Prothonotary's classification of the referral power as "ministerial" because the real issue was the nature of the power and that its exercise had the potential to prejudice the rights or interests of the person who was potentially in contempt. This referral power was also different to a decision whether to commence criminal or disciplinary proceedings – it involved a referral of the matter to another court to consider whether contempt proceedings should be brought.

13. In the circumstances of the case, the witness had not been informed about the options for the matter to be either heard by the Magistrate or referred to the Supreme Court. Given that she had no legal background, the Court found that natural justice would require an opportunity to make submissions on the possible options and to obtain legal advice.

14. The second argument raised by the Prothonotary was that the witness had been given an opportunity to be heard on the issue of whether the contempt prosecution should proceed during the hearing before the Magistrate and after the referral was made.

15. The Court of Appeal also rejected this second argument. Natural justice is concerned with avoiding practical injustice. The Court found a practical injustice before the Magistrate was suffered. Events which occurred after the contempt matter had been referred to the Supreme Court could not cure the breach of the principles of natural justice that had already occurred.

16. Essentially, the lesson here is that, if the principles of natural justice apply to the particular statutory power being exercised, they must be observed at all times. If a breach of those principles occurs, it is too late to attempt to cure the breach at some later stage.

***Chief Commissioner of Police v Nikolic* [2016] VSCA 248**

17. This second case also involved the requirement for an administrative decision maker to apply principles of natural justice when exercising a statutory power.

18. The case involved a well known racing identity (**Mr N**). The Chief Commissioner of Police had discretion, if necessary in the public interest, to prohibit a person from entering or remaining at race courses in Victoria.[4] If that discretion was exercised, then on an application to a court for review of the decision, the Chief Commissioner could seek to:[5]

    (1) Have a hearing at which evidence was given by a police officer on the basis of a confidential affidavit that was not disclosed to one or more of the parties or their representatives;
    (2) Have a hearing held in closed court at which each party had the right to make submissions;
    (3) Have a hearing without notice to, and without the presence of, one or more of the parties or any representative.

19. In making such an order, the court was required to take into account a number of matters including the public interest in protecting confidentiality.

20. In the case, Mr N was sent a notice of intention to make an exclusion order by the Commissioner's delegate which set out his preliminary view that there should be an exclusion order. Mr N sought particulars of the allegations made against him and all primary material that had been taken into account in reaching the preliminary view. Some documents were withheld on public interest grounds.

21. An exclusion order was subsequently made. A statement of reasons was given which referred to the delegate's consideration of protected information which demonstrated a "lack of integrity, criminal associations and poor character" of Mr N. Mr N said that, prior to receiving this statement of reasons, he was not aware of these particular allegations and did not have an opportunity to respond to them.

22. Judicial review of the decision was sought in the Supreme Court.

23. The case concerned one of the key principles of the natural justice rule requiring a fair hearing, namely, that a decision-maker must inform a person affected by the decision or disclose to them adverse information that is credible, relevant and significant.[6]

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[4] s 33, *Racing Act 1958* (Vic).
[5] s 35E, *Racing Act 1958* (Vic).
[6] *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 629; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 96.

24. This duty may be limited by the interests of others, including obligations of confidentiality. Importantly, because procedural fairness depends on the particulars of each case, the duty may require a decision maker to inform a person affected by the decision of the substance or gist of confidential information while preserving other important aspects of confidentiality.[7]

25. Where there is confidential information, procedural fairness therefore may require the nature of allegations to be disclosed to an affected person so that he or she can seek legal advice and respond to the allegation.

26. The issue in the case of Mr N was the scope of the requirement for the Commissioner to give procedural fairness. The primary judge found that the requirements of procedural fairness were breached by failing to provide Mr N with details of adverse information, including either providing the documents that contained such information or giving him the gist or substance of such information.

27. The Court of Appeal came to a different conclusion than the primary judge.

28. First, the Court of Appeal referred to the following comments by Brennan J in *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 615-616 as follows:

    Rather, the intention to be implied when the statute is silent is that observance of the principles of natural justice conditions the exercise of the power although in some circumstances the content of those principles may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred.
    .....
    Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.

29. The Court also referred to the subsequent High Court decision in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 where the High Court had found that, in that particular case, there were practical means for reaching an accommodation between the public interest in confidentiality being maintained and the need to give procedural fairness to the applicant.

30. Mr N's submission was that where a decision maker is obliged to accord procedural fairness then the content of the obligation to disclose cannot ordinarily be reduced to

[7] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 99-100.

nothing. That could only occur if the disclosure would defeat the purpose for which the power was given.

31. The Court of Appeal concluded that, in some cases where there is a public interest of protecting highly sensitive information, the result may be that procedural fairness does not require disclosure of even the substance or gist of the information. Procedural fairness in those cases would be qualified to accommodate the overriding public interest in protecting the information.

32. The Court of Appeal then examined the statutory context of the particular power given to the Commissioner. The Court referred to the context of this particular statute being an important public interest in ensuring the integrity of horse racing.

33. Further, the Court also referred to the specific methods for hearing a review of an exclusion order which might restrict the ability of a person to know and respond to material. That is, those hearing methods would, if applied by a court, potentially reduce the content of procedural fairness to nothingness. That context suggested that the legislature had intended significant departures from the principles of procedural fairness when the Commissioner exercised the power to make an exclusion order to protect confidential information.

34. The Court found that the information which Mr N had sought was of a type which, if it were disclosed, would frustrate the purpose for which the power to make an exclusion order would be exercised. Consequently, the appeal was allowed.

35. Importantly, the case demonstrates:

    (1) The need for decision makers to analyse the power they are exercising to determine if the rules of natural justice apply;
    (2) The need for decision makers to examine the circumstances of the case when analysing the obligation to provide procedural fairness;
    (3) That there can be instances where the public interest diminishes or overrides duties of a decision maker to accord procedural fairness.

3. Appeals from administrative tribunals and administrative decisions on questions of law

36. Administrative tribunals are a key mechanism for reviewing the merits of administrative decisions made by government departments. The right to appeal to a court from many administrative tribunals, including the Commonwealth Administrative Appeals Tribunal[8] and the Victorian Civil and Administrative Tribunal[9] is restricted to appeals on "questions of law".

[8] s 44, *Administrative Appeals Tribunal Act 1975* (Cth).
[9] s 148, *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

37. This restriction is also placed upon appeals from many other bodies in Australia, including in civil appeals from the Magistrates' Court of Victoria.[10]

38. Similarly, judicial review[11] directly by the courts of administrative decisions, generally, examines whether there is any legal error in the decision. That necessarily involves the same considerations as an appeal on a question of law.

39. Accordingly, identifying a "question of law" upon which to found such an appeal is important because in the absence of such a question the appeal will be incompetent.

Examples of possible legal errors

40. Appeals to a court from administrative tribunals and judicial review of administrative decisions are focussed on determining if there are any legal errors in an administrative decision. The courts do not generally rehear a matter to determine its merits.[12]

41. In exercising this appeal or judicial review jurisdiction, the task of a court is to leave to the decision maker questions of fact and only interfere when there is an error of law. There is no error of law in simply making a wrong finding of fact.[13] Similarly, it is a matter for an administrative decision maker to determine how much weight should be given to particular pieces of evidence. The weight to be attached to evidence and whether incorrect conclusions were drawn from the evaluation of evidence are matters of fact, not law.[14]

42. It has been traditionally difficult to ascertain the precise scope of what constitutes a question of law and therefore what will give rise to legal error in an administrative decision.

43. There are, however, some common examples:

    (1) whether a decision maker has identified the relevant legal test;
    (2) whether a decision maker has applied the correct legal test;
    (3) whether a finding of fact has been made without any evidence to support it;[15]

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[10] s 109, *Magistrates' Court Act 1989* (Vic).
[11] For example, under statute pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth).
[12] *Kelk v Australian Postal Corporation* [2014] FCA 147 at [171].
[13] *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 286; *Waterford v Commonwealth* (1987) 163 CLR 54 at 77.
[14] See, for example, *Re Commissioner of Taxation v Brixius* [1987] FCA 400 at [28]-[29] per Forster, Fisher and Spender JJ referring to *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* (1965) 1 QB 456 at 488. See also *Zizza v Commissioner of Taxation* [1999] FCA 37 at [51] and [90] per Katz J.
[15] The above three propositions are summarised in *FCT v Trail Brothers Steel & Plastics Pty Ltd* (2010) 186 FCR 410 at [13].

(4) whether an inference has been drawn which is not reasonably open on the primary facts;[16]

(5) when interpreting a statute or a legal agreement:[17]

   a. whether a word or phrase takes its ordinary meaning or a technical or other legal meaning;
   b. the ordinary meaning of a word, however, would be a question of fact;
   c. the effect or construction of a term which has a legal meaning is a question of law;
   d. the question whether facts that have been found to exist fall within the words of a statute is usually a question of law. If, however, a statute uses words according to their ordinary meaning then the question of whether the facts found fall within those words is a question of fact if it is reasonably open to find that the facts fall within the meaning of the words. It will only be a question of law if there is only one possible conclusion (i.e. alternative conclusions are not open).

(6) whether a decision maker has failed to give adequate reasons where reasons are required;[18]

(7) whether there has been a failure to consider and decide on submissions made to the decision maker;[19]

(8) whether the decision maker has made a decision outside the limits of the function and powers conferred on him or her, or has done something which he or she lacks power to do;[20]

(9) whether the decision maker has failed to comply with the rules of evidence;[21]

(10) whether the decision maker has failed to apply the rules of natural justice in making the decision (eg a failure to give a fair hearing or apprehended or actual bias in the decision);[22]

(11) whether the decision maker has failed to take into account a relevant consideration that they were bound to take into account either implicitly or explicitly by the law;

(12) whether the decision maker has taken into account an irrelevant consideration that they were bound to ignore;[23]

(13) whether the decision maker's decision was so unreasonable that no reasonable decision maker would have made it.[24]

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[16] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.
[17] *Collector of Customs v Agfa-Gavaert Ltd* (1996) 186 CLR 389 at 396.
[18] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 referred to in *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; *Ta v Thompson & Anor* [2013] VSCA 344.
[19] *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267 at 276-277.
[20] *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at 141.
[21] *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.
[22] *Craig v South Australia* (1995) 184 CLR 163.
[23] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-41.
[24] See, for example, *Kelk v Australian Postal Corporation* [2014] FCA 147 summarising the law including the seminal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

The law pre-Haritos

44. In prior years, the courts have taken a fairly strict approach to the need to identify questions of law in a notice of appeal from an administrative tribunal. Courts have previously said that the question of law is both the qualifying condition to invoke the court's jurisdiction and the subject matter of the appeal.[25] It is important to identify a question of law because that it what founds the court's jurisdiction to hear the appeal.[26]

45. The question must be a pure question of law,[27] not a mixed question of law and fact.[28] A mixed question of fact and law, for example, is the question whether a partnership is in existence. This is because the question involves a factual finding, but also if a tribunal has misunderstood the law relating to partnership a question of law will be raised.[29]

46. A notice of appeal from the Administrative Appeals Tribunal and from the Victorian Civil and Administrative Tribunal must identify both questions of law and grounds of appeal relating to those questions. The courts, in most cases previously viewed this requirement to identify a *pure* question of law in a notice of appeal as a strict one. The question of law had to be stated with precision in the notice of appeal. It was not permissible to identify the question of law by examining the grounds of appeal. Consequently, it was not sufficient that a question of law was capable of being extracted from the associated material, it had to be stated with sufficient clarity in the notice of appeal such that a pure question of law could be identified.[30]

47. There are, however, some examples of a less strict approach being taken where, although the notice of appeal did not expressly state a clear question of law, it was possible to discern a question of law to found the court's jurisdiction from the requisite material.[31]

48. Further, it is not permissible to "dress up" something as a question of law when, in substance, it is not one. This usually occurs when litigants seek to dress up what is, in

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[25] *Birdseye v Australian Securities and Investments Commission* [2003] FCAFC 232 at [11], [16]-[18] per Branson and Stone JJ referring to *TNT Skypak International (Australia) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175 at 178 per Gummow J.
[26] *Australian Telecommunications Corporation v Lambroglou* (1990) 12 AAR 515 at 521.
[27] *Birdseye v Australian Securities and Investments Commission* [2003] FCAFC 232 at [18] per Branson and Stone JJ.
[28] *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at [32].
[29] *Jolley v FCT* (1989) 86 ALR 297 at 299.
[30] *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290 at [46]-[47].
[31] *Ergon Energy Corp Ltd v Commissioner of Taxation* (2005) 153 FCR 551 at [51]; *Kolya v Tax Practitioners Board* [2012] FCA 215 at [8].

substance, a grievance with a factual finding as a question of law. In these cases, the litigant usually seeks to have a court delve into the merits of the matter.

49. *Bell v Commissioner of Taxation* [2012] FCA 1042 provides a good illustration of that principle. The case involved an appeal from the Administrative Appeals Tribunal. One of the issues in the case was whether a loan account and an offset bank account that was in credit constituted one account or two accounts. The Tribunal found that there were two accounts. On appeal, one of the purported questions of law included in the notice of appeal was as follows:

    Whether the Tribunal erred in law in not characterising the Adelaide Bank account as a single account or as in substance a single account with a credit balance of $166,288?

50. The court found that this was not a question of law, although it had been dressed up to appear as one by using the phrase "erred in law".

51. The grounds of appeal are also important. The notice of appeal is not to be drawn "in disregard of the distinction between the questions of law to be raised on the appeal and the grounds relied on in support" of the orders sought.[32]

52. Accordingly, it is important to properly draft questions of law and accompanying grounds when appealing from an administrative tribunal. An example may help to illustrate appropriately drafted questions and grounds. The following example is from one of the author's own cases on a construction law appeal from VCAT. Leave to appeal on the particular questions of law and grounds of appeal was granted by the Supreme Court:

    Questions of law

    1. *Whether it was open to the Tribunal to find that the Appellant repudiated his contract with the Respondent by virtue of the correspondence sent by the Appellant to the Respondent on 7 December 2012, 1 January 2013, 2 January 2013, 5 January 2013, and 7 January 2013.*

    2. *Whether the Tribunal failed to apply, or incorrectly applied, the following legal principles relating to repudiation:*
        (a) That bona fide adopting an incorrect interpretation of a contract is not ordinarily to be regarded as a repudiation, especially if open to correction;
        (b) That mere commercially robust behaviour or negotiation will not amount to repudiation: see Disctronics Ltd v Edmonds [2002] VSC 454.

[32] *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290 at 301[46]-[47]; *Narbey v Commissioner of Taxation* (2008) 111 ALD 312 at 315

3. *Whether there can be repudiation at law in circumstances in which the Appellant was willing and able to perform his own obligations under the contract, but there was an incorrect contractual interpretation or dispute concerning the Respondent's obligation in respect of the contract price.*

Grounds of appeal

1. *The Tribunal erred in law by finding that the Appellant repudiated his contract with the Respondent when there was no evidence in the correspondence of 7 December 2012, 1 January 2013, 2 January 2013, 5 January 2013, and 7 January 2013 of an intention not to be bound by the contract; of an unwillingness to perform or renunciation of his obligations under the contract; or of an intention to perform the contract only in a manner substantially inconsistent with his obligations.*

2. *In finding that the Appellant's correspondence amounted to a repudiation of the contract:*

   (a) The Tribunal applied the wrong legal test by adopting a test that a "bona fide but incorrect belief as to the correctness of the interpretation sought to be placed by a party on the terms of a contract, where there is an ambiguity, may not lead to a conclusion that a party does not intend to perform a contract according to its terms";

   (b) The test that the Tribunal should have applied is that:

   (i) bona fide adopting an incorrect interpretation of a contract is not ordinarily to be regarded as a repudiation; and

   (ii) if a party's incorrect interpretation is open to correction and the party is not unwilling to perform its own contractual obligations in the face of a clear enunciation of the true agreement, then there should be no repudiation.

3. In finding that the Appellant's correspondence amounted to a repudiation of the contract:

   (a) The Tribunal failed to apply the legal principle that mere commercially robust behaviour or negotiation will not amount to repudiation;

   (b) The Tribunal should have applied that principle and found that the correspondence sent by the Appellant was mere commercially robust behaviour and not repudiation of the contract.

4. The Tribunal erred in law by:

(a) finding that there could be a repudiation by the Appellant when he put forward an incorrect interpretation of the contract regarding the Respondent's contractual obligations, or disputed the extent of the Respondent's obligations regarding the contract price;

(b) failing to apply the legal principle that there will only be a repudiation if a party to a contract disavows or refuses to perform his own obligations under the contract, as opposed to disputing the obligations of the other party to the contract;

(c) the Tribunal should have found that, at law, there can be no repudiation in circumstances in which a party is willing and able to perform their own obligations under a contract, but put forwards an incorrect interpretation or is in dispute regarding the extent of the counter-party's obligations to pay the price under the contract.

The Haritos position

53. *Haritos v Commissioner of Taxation* (2015) 233 FCR 315 (***Haritos'* case**) has, in some significant respects, changed the law relating to appeals on questions of law.

54. *Haritos'* case was a taxation case originally before the Administrative Appeals Tribunal. The case concerned payments made from a company for the benefit of its shareholders/directors (**the Directors**). The issue was whether the payments were assessable income of those Directors as either:

(1) Dividends under s 44(1) of the *Income Tax Assessment Act 1936* (**ITAA36**);
(2) Deemed dividends under Division 7A of Part III of the ITAA36 (this Division can deem certain loans to shareholders of a private company or their associatesto be dividends); or
(3) Ordinary income under s 6-5 of the *Income Tax Assessment Act 1997* (**ITAA97**).

55. The Directors accepted that the payments had been made but argued that they were loans so should not be assessable under items (1) and (3) above. Loans to a shareholder or their associates can, however, still be assessable under Division 7A as deemed dividends. This will only be the case if the company has a distributable surplus (essentially, accumulated accounting profits). The Directors argued that there was no distributable surplus based on certain subcontractor expenses of the company.

56. In a taxation appeal, the taxpayer bears the onus of proving that the tax assessments are excessive. The Tribunal found that the Directors had failed to discharge this onus of proof.

57. The Directors appealed to the Federal Court. In their amended appeal statement, there were 11 lengthy questions of law:

1. Whether in each one or more of these instances:

a. In admitting into evidence and/or giving weight to the statements of persons who were not available for cross-examination [550], name of the statement of Mr Smith and the statements contained in documents attached to the statement of Mr Smith;
b. In receiving into evidence the opinion evidence of Mr Meredith [484] who did not possess relevant expertise in matters before the Tribunal;
c. In denying the applicants the opportunity to cross-examine Mr Meredith on the basis upon which his evidence was received;
d. In refusing to require the Commissioner to produce a s 264 notice issued to the Australian Federal Police [573] that contained a list of relevant documents in possession of the Commissioner but were not disclosed to the Tribunal;
e. In denying the applicants the opportunity to subpoena the auditors of the reports that informed the basis of the assessments the subject of review and in so doing denied the applicants the opportunity to cross-examine those witnesses on matters relevant to the discharge by the applicants of the burden of proof that the assessments were excessive;
f. In receiving evidence which had no rationally probative basis, which evidence included hearsay statements and documents, in circumstances where the applicants could not cross-examine the maker of those statements or test the content of those documents;
g. In giving written reasons for decisions and rulings on preliminary questions and issues that differed from oral reasons given during the trial [160, 193, 212];
h. In applying the rules of evidence inconsistently;
i. In allowing into evidence T documents in their entirety after the conclusion of the evidence and in failing to identify the weight to be accorded to each document [381, 599] and so denied the applicant the opportunity to properly review and test that material;
j. Denying the applicants the opportunity to ask Andrew Yeo questions in relation to the negotiations of the Deed of Company Arrangement between the applicants as directors of AES Services Pty Ltd, the Commissioner, and the Administrator; and
k. In refusing to receive into evidence T documents identified by the documents as relevant and upon which they relied to discharge the onus of proof that the assessments were excessive

[the] Tribunal breached its statutory duty in s 39 of the Administrative Appeals Tribunal Act 1975 and [the] common law duty to afford the applicants procedural fairness.

2. Whether, on the evidence before the Tribunal namely:

a. The evidence given by the Applicants that funds deposited in the Westpac account were used for the purposes of AES Services Pty Ltd (non-private purposes);
b. The evidence given by Glenys Murray in relation to the preparation of MYOB records of sub-contractor payments and director loans;

c. The evidence that all deposits into and withdrawals from the Westpac account were accounted for in full and that the sole issue the verification of the final destination of the withdrawals.

d. The evidence of the Applicants and that of Glenys Murray:

i. was accepted by the administrator of AES Services Pty Ltd in carrying out his duties as the administrator and in settling the dispute with the Commissioner;

ii. was consistent with the costs incurred during the administration of AES Services Pty Ltd by the administrator;

iii. was consistent with the costs incurred by AES Services Pty Ltd after the administration period;

e. The evidence given by Andrew Yeo about the cost structure of AES Services Pty Ltd and that the cost incurred by the Applicants were consistent with his experience in carrying on the business of AES Services Pty Ltd during its administration by him;

f. The evidence given by:

i. Stephen Adrian that the costs were reasonable and consistent with industry benchmarks;

ii. Ivan Dalla Costa that the costs were reasonable and consistent with industry benchmarks and practice;

iii. Jonathan Karlovsky that the costs were reasonable and consistent with industry benchmarks and practice;

iv. Greg Meredith (called by the Commissioner) that the costs were reasonable and consistent with industry benchmarks;

g. The acceptance by the Commissioner of those costs in negotiating his claim against AES Services Pty Ltd;

and the findings of fact made by the Tribunal [76-158], the Tribunal misunderstood and/or misapplied the test in section 14ZZK(b)(i) of the Taxation Administration Act 1953 [4] and concluding that the Applicants failed to discharge the burden cast upon them by that section 14ZZK(b)(i).

3. *Whether the Tribunal (i) failed to make findings of material fact that it was required to make (ii) failed to make inferences of fact it ought to have made or which were not permissible (iii) made findings of fact that were not supported by admissible, relevant or probative evidence or were contrary to the evidence (iv) made findings of fact that were manifestly unreasonable.*

4. *Whether, given the matters in questions 2(a)-(g), the Tribunal's reasoning process was illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds and made a decision it was not authorised to make.*

5. *Whether, given the matters particularised in ground 5 (a)-(f), the Tribunal decision was so unreasonable that no reasonable decision maker could have made and in so doing failed to act judicially.*

6. Whether the Tribunal failed to take into account relevant considerations particularised in grounds 6(a)-(k) and/or took into account irrelevant matters particularised in grounds 6(m)-(g) and in so doing failed to act judicially.

7. Whether, on the evidence before the Tribunal, namely:

a. The withdrawals from the Westpac account for private purposes were equal to $11,961 between the years of income 2005-2009 (as particularised in exhibit XZ)
b. The balance of the withdrawals from the Westpac account was used to pay expenses on behalf and for the benefit of AES Services Pty Ltd;
c. The withdrawals from the Westpac account were made to confer a benefit upon the associated of the Applicants and not the Applicants personally;
d. The amounts withdrawn were in the nature of loans from AES Service Pty Ltd to them as shareholders and at all material times, the Applicants intended to prepay the amounts withdrawn;
e. That the drawings from the Westpac account were not proportionate to the respective shareholding of the Applicants;
f. There was no formal or informal resolution authorising the distribution or crediting of the profits referable to the withdrawals for the years 2005-2008, if any, of AES Services Pty Ltd to the Applicants was passed;
g. There was no valid resolution authorising the distribution of the profits, if any, of AES Services Pty Ltd to the Applicants for the year of income ended 2009;
h. In the years 2005-2008 AES did not have a distributable surplus or profits to sustain a distribution of dividend;

the Tribunal erred in the proper construction and application of section 44(1) of the Income Tax Assessment Act 1936 and in deciding [4, 602-786] that the withdrawals from the Westpac account were assessable to the Applicants as dividend under that section 44(1).

8. Whether, on the evidence before the Tribunal, namely:

a. The withdrawals from the Westpac account for private purposes were equal to $11,961 between the years of income 2005-2009 (as particularised in exhibit XZ)
b. The balance of the withdrawals from the Westpac account was used to pay expenses on behalf and for the benefit of AES Services Pty Ltd;
c. The withdrawals from the Westpac account were made to confer a benefit upon the associated of the Applicants and not the Applicants personally;
d. The amounts withdrawn were in the nature of loans from AES Service Pty Ltd to them as shareholders;
e. There was no valid resolution authorising the distribution of the profits, if any, of AES Services Pty Ltd to the Applicants for the year of income ended 2009;
f. In the years 2005-2008 AES did not have a distributable surplus or profits to sustain a distribution of dividend;

the Tribunal erred in the proper construction and application of Division 7A of the Income Tax Assessment Act 1936 and In deciding, on alternative basis, [4, 787-828] that the withdrawals from the Westpac account were assessable to the Applicants as deemed dividend under that Division.

9. Whether, on the evidence before the Tribunal, namely:

a. The withdrawals from the Westpac account for private purposes were equal to $11,961 between the years of income 2005-2009 (as particularised in exhibit XZ)
b. The balance of the withdrawals from the Westpac account was used to pay expenses on behalf and for the benefit of AES Services Pty Ltd;
c. The withdrawals from the Westpac account were made to confer a benefit upon the associated of the Applicants and not the Applicants personally;
d. The amounts withdrawn were in the nature of loans from AES Service Pty Ltd to them as shareholders;
e. At all material times, the Applicants intended to prepay the amounts withdrawn;

the Tribunal erred in the proper construction and application of section 6-5 of the Income Tax Assessment Act 1997 and in deciding, on a further alternative basis, [829-838] that the withdrawals from the Westpac account were assessable to the Applicants as income on ordinary concepts within that section 6-5.

10. Whether, on the evidence before the Tribunal, the Tribunal erred in the construction and application of section 23L of the Income Tax Assessment Act 1936. Whether, on the evidence before the Tribunal, the Tribunal erred in the construction and application of sections 284-75(1), 284-90 and 284-220 of schedule 1 to the Taxation Administration Act 1953.

11. Whether, on the evidence before the Tribunal, the Tribunal erred in the construction and application of sections 284-75(1), 284-90 and 284-220 of schedule 1 to the Taxation Administration Act 1953.

58. The Court found that none of the above were proper questions of law and, accordingly, held that the appeal was incompetent. The Court's specific reasons were:

(1) Question 1 was purportedly about a lack of procedural fairness by the Tribunal, however, the question contained specific instances which were all maters the Tribunal considered and decided against the taxpayers;
(2) Some of questions 2 to 5 were purportedly expressed as a question of law, but were really just complaints about the Tribunal's decision on the evidence. Those questions essentially sought merits review;
(3) Question 6's complaint was misplaced because it sought to apply the unreasonableness doctrine to the Tribunal's findings of fact, as opposed to the exercise of a discretion;
(4) Questions 7 to 11 were expressed as concerning the proper construction of a statutory provision, but did not identify what the Tribunal's erroneous construction was supposed to be.

59. The Directors subsequently sought leave to appeal to the Full Federal Court. The Directors retained new counsel for this application who essentially rewrote the notice of appeal by arguing that the following questions of law could be discerned from it:

    A. *Whether a decision that was irrational, illogical or not based upon findings or inferences supported by logical grounds, is authorised by s. 43 the AAT Act?*

    B. *Whether a proper construction of s. 14ZZK of the Taxation Administration Act 1953 (Cth) (**the TAA Act**) requires a taxpayer to prove that an assessment is excessive and disprove any further excess before the Tribunal may set aside or vary an assessment?*

    C. *Whether on a proper construction of s. 44(1) of the Income Tax Assessment Act 1936 (Cth) (**ITAA 36**), company funds paid at the direction of a director who is also a shareholder, to the director's associate and not for the director's benefit, constitute dividends paid to the director?*

    D. *Whether on a proper construction of s. 6-5(4) of the Income Tax Assessment Act 1997 (Cth) (**ITAA 97**), company funds paid at the direction of a taxpayer company director to his associate and not for the director's benefit constitute income derived by the taxpayer?*

    E. *Whether on a proper construction of s. 109C(3) of the ITAA 36, company funds paid at the direction of a director who is also a shareholder, to the director's associate and not for the director's benefit, constitute payments to the director within s. 109C(3)?*

    F. *Whether the calculation of a distributable surplus under s. 109Y of the ITAA 36 for the financial years ending June 2004 to 2009 should be undertaken in accordance with s. 109Y as current at the end of each financial year, or in accordance with an amendment that regulated payments occurring from 1 July 2009?*

60. Under the strict rules predating *Haritos'* case, it would not have been permissible to seek to identify the substance of a question of law from the notice of appeal, the grounds and surrounding context. The notice of appeal would need to state the questions of law with precision and if it did not do so the court would have no jurisdiction to hear the appeal.

61. The Full Court's decision changed that strict approach. The Full Court summarised its conclusions on the principles that apply when appealing on a question of law as follows:

    (1) The subject-matter of the Court's jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.

    (2) The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.

(3) The Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.

(4) Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the Court by s 44(3) to hear and determine appeals instituted in the Court in accordance with s 44(1), but to the exercise of that jurisdiction.

(5) In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.

(6) Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.

(7) A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.

(8) The expression "may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal" in s 44 should not be read as if the words "pure" or "only" qualified "question of law". Not all so-called "mixed questions of fact and law" stand outside an appeal on a question of law.

(9) In certain circumstances, a new question of law may be raised on appeal to a Full Court. The exercise of the Court's discretion will be affected not only by *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 considerations, but also by considerations specific to the limited nature of the appeal from the Tribunal on a question of law, for example the consideration referred to by Gummow J in *Federal Commissioner of Taxation v Raptis* [1989] FCA 557; 89 ATC 4994 that there is difficulty in finding an "error of law" in the failure in the Tribunal to make a finding first urged in this Court.

(10) Earlier decisions of this Court to the extent to which they hold contrary to these conclusions, especially to conclusions (3), (4), (6) and (8), should not be followed to that extent and are overruled. Those cases include *Birdseye v Australian Securities and Investments Commission* [2003] FCA 232; 76 ALD 321, *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* [2003] FCAFC 244, 133 FCR 290, *Etheridge*, *HBF Health Funds* and *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128; 169 FCR 241.

62. The Full Court's approach involved a substantial shift. First, because it rejected the previous requirements that a question be a "pure" question of law. Secondly, because the Court accepted that some "mixed" questions of fact and law could form the subject matter of an appeal on a question of law.

63. Further, the Full Court rejected the previous strict approach to notices of appeal which required precise questions of law to be identified before the court would have jurisdiction. The Full Court's findings were that it could decide if it had jurisdiction;

that it could allow a notice of appeal to be amended; and that whether an appeal is on a question of law is a matter of substance, not form.

64. These findings are quite a significant shift because they diminish the role of the notice of appeal in identifying the questions of law. Essentially, this means that the court can conduct its own inquiry as to whether it has jurisdiction based on the substance of what is being appealed, rather than what is in the notice of appeal. The court can, as it did in this appeal, essentially allow the reformulation of the questions in the notice of appeal so that the appeal is on a question of law.

65. This approach is problematic for both respondents to an appeal and for the court because:

    (1) It may require the court to conduct its own analysis outside of the notice of appeal to determine if it is on a question of law. That may be a difficult burden to place on the court;

    (2) It also disadvantages respondents if the questions raised in the notice of appeal may not be the ultimate questions of law determined by the court.

66. These problems are evident in *Haritos'* case where essentially new questions were formulated in the appeal to the Full Court and the appeal was upheld because the court found the following errors of law:

    (1) The Tribunal's decision was illogical and irrational because the Tribunal concluded that the evidence of a particular witness was based on assertions of the Directors or material that could not be verified. The Full Court found that this was a finding made without any evidence;

    (2) One of the issues in the case related to whether a certain amount of subcontractor expenses had been proven to exist. The Tribunal found that the full amount of the expenses had not been proven. This was an error of law because rejecting the full amount of the expenses did not mean that the Tribunal should not inquire and make findings about whether a lesser amount of expenses had been proven;

    (3) The Tribunal applied the wrong version of Division 7A (it applied a version which had been amended when it should have applied a pre-amendment version).

67. Special leave was sought to appeal to the High Court. The High Court refused to grant special leave.[33] The law as summarised by the Full Court should therefore be

[33] *Commissioner of Taxation v Haritos & Anor* [2015] HCATrans 337.

taken as the law regarding appeals on questions of law in both Federal and State jurisdictions.

4. Administrative discretions

68. Legislation often gives administrative decision-makers discretion to make particular decisions or findings. The exercise of such discretion is subject to judicial review for errors of law. When an administrative tribunal stands in the shoes of the original decision maker and re-exercises the discretion, the tribunal's decision is also subject to appeal on a question of law.

69. The grounds upon which the exercise of an administrative discretion can be disputed include:

    (1) A failure to take into account relevant considerations, that is, matters which the decision was bound to take into account. If these are not explicitly stated then they must be determined implicitly from the subject matter, scope and purpose of the statute;
    (2) Taking into account irrelevant considerations, that is, considerations which the decision maker is bound to ignore when exercising the discretion;
    (3) Placing an impermissible fetter (i.e. restriction) on how the discretion can be exercised when the discretion is not subject to any such fetter;
    (4) An exercise of the discretion which is beyond the power conferred by the discretion, for example, for a purpose which is beyond the purposes for which the discretion was conferred;
    (5) An exercise of the discretion in bad faith, or in a manner that otherwise constitutes an abuse of the power;
    (6) An exercise of the discretion that is so unreasonable that no reasonable decision maker could have made it;
    (7) Exercising the discretion not independently, by rather on the instructions of another person to whom the power was not conferred;
    (8) Delegating the power when there is no express or implied power of delegation;[34]
    (9) Applying an incorrect legal principle in the exercise of the discretion;
    (10) Making any other kind of error of law when exercising the discretion (eg natural justice, or if a decision maker was bound to give reasons for a decision in respect of a discretion and failed to do so then that would constitute an error of law).

70. This paper will illustrate the review of a decision maker's exercise of discretion with two recent case law examples.

[34] Cf *Carltona Ltd v Commissioners of Works* (1943) 2 All ER 560 at 563.

***Waterhouse v ICAC (No 2)* [2016] NSWCA 133**

71. *Waterhouse v ICAC (No 2)* [2016] NSWCA 133 was an appeal relating to a decision by the Independent Commission Against Corruption (**ICAC**) not to investigate complaints that were made by Mr Waterhouse.

72. The applicant wanted the following complaints investigated by ICAC:

    (1) An allegation of "judge fixing" in respect of the appointment of a now deceased judge. Essentially, the applicant was of the view that he was unsuccessful in previous proceedings before this judge because other members of his family had used their relationship with a former NSW Premier to have the judge appointed for the purpose of hearing the case to ensure it was unsuccessful;
    (2) A complaint that the first allegation had been leaked by the former ICAC Commissioner to a former NSW Premier, such that ICAC had participated in a cover up;
    (3) An allegation that a previous NSW Government had filled key positions in ICAC with "their cronies".

73. At the relevant time, ICAC had the following discretion to determine whether or not to conduct an investigation into a matter:

    The Commissioner may, in considering whether or not to conduct, continue, or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commissioner's opinion):

        (a) the subject-matter of the investigation is trivial, or
        (b) the conduct concerned occurred at too remote a time to justify investigation, or
        (c) if the investigation was initiated as a result of a complaint – the complaint was frivolous, vexatious or not in good faith.

    Before deciding whether to discontinue or not to commence an investigation of a complaint, the Commission must consult the Operations Review Committee in relation to the matter.

74. ICAC declined to investigate the complaints. The applicant effectively sought judicial review of that decision. The application was rejected by the Supreme Court and then was appealed to the NSW Court of Appeal.

75. First, the Court of Appeal made some general comments on ICAC's discretion and how it should be interpreted. These comments illustrate the task that must be undertaken when determining the scope of an administrative discretion.

76. The matters listed for consideration in the section conferring the power did not limit ICAC's discretion to those matters. The discretion was not expressly subject to any constraints, so ICAC was free to take other matters into account. The power, however, was still constrained by the subject matter, scope and purpose of the statute. ICAC would not be able to exercise the discretion by reference to matters extraneous to its statutory functions. Those purposes essentially related to corruption in public administration.

77. One issue with this particular discretion was that it involved a refusal to investigate where ICAC had not made findings of fact to reach the decision. The Court of Appeal referred to the need for the exercise of the power to be informed by policy considerations, including broad questions of public interest. There were allegations of unreasonableness in the decision that were made, but the Court of Appeal accepted the primary judge's concern that limited resources of ICAC would be just one of the factors in this type of case that would make an assessment of unreasonableness speculative and place a constraint on the availability of judicial review.

78. The Court of Appeal did, however, note that there may be circumstances where the discretion may be coupled with a duty to act where the statute requires a particular duty to the public to be performed.

79. The Court of Appeal also considered whether there was actual and apprehended bias by the ICAC Commissioner and whether ICAC failed to consider material before it. Either of those grounds would have been sufficient to demonstrate that the discretion had not been made out. Neither of the grounds was, however, made out on the facts and the appeal was dismissed.

***Director of Consumer Affairs Victoria v Meng* [2015] VSC 668**

80. Often in legislation, one sees discretions whose exercise is preconditioned on the decision maker being "satisfied" about a particular matter, or forming an opinion that a particular set of facts exists.

81. When reviewing such satisfaction or opinion, the court does not merely substitute its own opinion for the decision maker. Instead, the court looks at whether the opinion has been properly formed. For example, if the opinion was reached by taking into account irrelevant considerations or was not formed in a bona fide manner then it would not have been properly formed.[35]

[35] *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd (No 2)* (1944) 69 CLR 407.

82. *Director of Consumer Affairs Victoria v Meng* [2015] VSC 668 provides a good recent example of a statutory discretion whose exercise was premised on the decision maker forming an opinion.

83. The case involved people breaching their visa conditions by working at a business requiring a licence from the State Government. The police had found a woman hiding in a wall cavity at the premises of the business. Her visa did not permit her to work in the business and she was in breach of her visa conditions by doing so. She was subsequently deported.

84. It was an indictable offence punishable by 2 years' imprisonment to knowingly or recklessly allow a person to work in breach of their visa conditions pursuant to s 245AC of the *Migration Act 1958* (Cth).

85. The decision maker had discretion, if satisfied that there were grounds for taking action against a licensee, to do one of a number of things including ordering a fine to be paid; reprimanding the licence holder; imposing conditions or restrictions on the licence; or cancelling the licence.

86. The decision maker could only be satisfied that there were grounds for taking action against the licensee if one or more of a number of things occurred. One of those things was that an indictable offence punishable by imprisonment of 12 months' or more had occurred.

87. There were a number of other grounds also alleged in the case which were upheld. The Tribunal rejected the ground based on an indictable offence having occurred. The decision maker sought cancellation of the licence. The Tribunal exercised its discretion and only imposed a fine; a reprimand; and placed conditions on the licence.

88. The decision maker appealed on these points to the Supreme Court.

89. On the "satisfaction" point, the decision maker argued, amongst other things, that the Tribunal made an error by misconstruing its function because it failed to satisfy itself whether the licence holder had committed an indictable offence. This argument arose because the indictable offence could be committed if a person either knew or ought to have known (i.e. acted recklessly) that a person was working in breach of their visa conditions.

90. The decision maker (**CAV**), however, had only alleged before the Tribunal that the person knew that someone was working in breach of their visa conditions and did not allege recklessness. The Tribunal was not satisfied to the requisite standard that knowledge had been made out and did not consider recklessness as it had not been alleged.

91. CAV, however, argued that the Tribunal should not have confined itself to the particulars of alleged by it. It was argued that the Tribunal was required to determine whether it was satisfied that any indictable offence had been committed and by failing to do so it misconstrued its function and applied the wrong legal test in exercising its power.

92. The court rejected that argument. There was nothing preventing the Tribunal from restricting itself to the decision maker's case as particularised. If it had not done so, there would also be a risk that the licence holder may not be accorded natural justice by the Tribunal.

93. The decision maker also appealed in respect of the manner in which the Tribunal had exercised its discretion. There were a number of different errors alleged in respect of the exercise of discretion.

94. First, CAV alleged that the Tribunal failed to take into account a relevant consideration in exercising its discretion, namely, its finding that the purpose of creating the wall cavity was to enable persons unlawfully on the premises to hide there. The court rejected the basis of the argument because the Tribunal's reasons had to be read as whole and considered fairly. Although there was no express reference to this matter in the part of the reasons dealing with penalty, a fair reading of the reasons suggested that it was taken into account. This was because the penalty reasons generally referred to illegally working on the premises which suggested that it was a matter taken into account.

95. The second part of the argument related to relevant considerations. The general principle is that a decision maker in exercising a discretion will have only failed to take a relevant consideration into account if it is one he is explicitly or implicitly bound by the statute to take into account.

96. CAV relied on the following comment by Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend*:

    The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.

97. CAV argued that the finding that the purpose in creating the wall cavity was to hide persons who were illegally on the premises was a salient fact of such importance that the failure to take it into account meant the discretion had not been properly exercised.

98. The court found that the comment by Brennan J was still subject to the requirement that, for there to be a failure to take into account a relevant consideration, it had to be a matter the decision maker was bound to take into account. The above matter was not one the statute explicitly or implicitly required to be taken into account. The Tribunal did, in any event, take into account the seriousness of the conduct in exercising the discretion.

99. CAV also argued that the Tribunal had taken into account an irrelevant consideration in exercising its discretion to impose a penalty, namely, the significant legal costs that the licence holder had paid in defending the proceeding before the Tribunal. CAV argued that the Tribunal took these legal costs into account for the purposes of fixing the amount of the fine imposed and this was impermissible under the statute because it undermined the protective regime of that statute.

100. The court found that, on a fair reading of the Tribunal's reasons, this characterisation was not correct. Further, there was authority to the effect that legal costs can be taken into account when determining the quantum of a penalty. Accordingly, legal costs were not a matter that the Tribunal was bound to ignore in exercising the discretion.

101. Finally, CAV argued that, in the circumstances of the case, the penalties were manifestly inadequate and so outside the range of reasonable discretionary judgment as to demonstrate error. The Tribunal was bound, on the facts, to cancel the licence. The court, however, found that argument to be inconsistent with the discretionary nature of the power. The penalties imposed by the Tribunal were open on the facts.