"FINALITY OF ADMINISTRATIVE DECISIONS"
The Ramifications of
Minister for Immigration and Multicultural Affairs and Bhardwaj
(2002) 209 CLR 597

The Hon. Justice Garry Downes AM
President of the Australian Administrative Appeals Tribunal

Hartigan Memorial Lecture

Brisbane
30 November 2005

It gives me great pleasure to present the Hartigan Memorial Lecture for 2005.

Trevor Hartigan was one of a distinguished line of Presidents of the Administrative Appeals Tribunal. It is a sad fact that his term as President was cut short by his untimely death in 1990 before he reached the age of 50. Had he been alive today he might still be the President of the Tribunal.

I am also pleased to present this lecture because Queensland, in general, and the Queensland Bar, in particular, have had a close relationship with the Tribunal. One third of its Presidents have come from the Queensland Bar, including, of course, Sir Gerard Brennan, its first President.

In *Minister for Immigration and Multicultural Affairs and Bhardwaj* (2002) 209 CLR 597 at 614, 615 Gaudron and Gummow JJ said this: *"A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all."* They repeated these precise words on the following page. They concluded that where the Immigration Review Tribunal had failed to consider an adjournment application based on illness, because the application had not been drawn to

the attention of the member constituting the Tribunal, the Tribunal made a valid decision when it subsequently reconsidered the matter and made a different decision. McHugh J agreed. Hayne J said (at 646*): "…[I]f the decision would be set aside for* jurisdictional error*, the statutory power given to the Tribunal has not been exercised."* He agreed with the result.

In *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 Gaudron, McHugh, Gummow, Kirby and Hayne JJ, referring to the *Migration Act 1958* (Cth), said a decision affected by jurisdictional error cannot be regarded as *"a decision ... made under this Act".* They went on to say (at 506): *"This Court has clearly held that an administrative decision which involves jurisdictional error is* 'regarded, in law, as no decision at all'*"*. *Bhardwaj* was cited as authority.

The limits of jurisdictional error have still not been set. However, *Plaintiff S157* established that denial of procedural fairness is jurisdictional error (at 508). In a frequently cited passage in *Craig v South Australia* (1995) 184 CLR 163 at 179 the High Court said:

> *"If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."*

Does this mean that if a tribunal such as the Administrative Appeals Tribunal relies on irrelevant material its decision is no decision at all and the Tribunal, of its own motion, can start again? Importantly, in practical terms, what is the Tribunal to do if an application is made to it to reconsider a matter on the ground that its decision is no decision?

It was ponderings upon these issues which led me to select the topic for today's talk. This seemed like an appropriate venue to explore some of the legal, dare I say philosophical, and practical, problems which might arise. Since I communicated the title of the talk these problems have ceased to be

hypothetical. The Administrative Appeals Tribunal now has before it applications to reconsider two matters in which it is said that there has been jurisdictional error. In both cases the parties have informed the Tribunal that they are aware of the right to appeal on a question of law to the Federal Court but they have decided not to do so. My talk will accordingly be less academic than it might have been, although it may be a little more circumspect.

All of the judges in *Bhardwaj* addressed the issues by reference to the terms of the statute conferring jurisdiction. It was argued that the limited nature of the appeal provided for in the Migration Act was inimical to a legislative intention that a decision which could not be corrected on appeal could be corrected by the original decision-maker. The Court's response to this was that until a decision in accordance with the statute had been made there was no decision. Gaudron and Gummow JJ said (at 616): " [*T]he duty to make a decision remains unperformed*". Hayne J, in particular, stated a number of times (see 647; *cf* 642) that the *"issue* [was] *when the Tribunal exercised its powers and performed its duties…".* He concluded that it was on the second occasion. The first occasion must be considered as an interlocutory step. There was no decision. Nothing to appeal from. No basis for the statute to determine whether there was a statutory ground of appeal or whether any appeal was out of time.

To my mind this really seems to be the stuff of legal philosophy. When is a decision not a decision? Is there no decision where a process of reasoning has produced a result, even though there may be some invalidity in the logic? The major or minor premises may be wrong. The reasoning may be invalid. But is the resulting decision nothing at all? Or is there a decision which has some existence notwithstanding some invalidity in the logic? These are the questions which faced the High Court. Perhaps resorting to philosophical analysis and logic might have assisted their Honours. However, for those of us working within the umbra of the High Court this is no longer the appropriate realm of discourse. Jurisdictional error on the part of a Tribunal generally means there has been no decision.

A joint judgment of Gray J and myself, in the Federal Court, in *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 204 ALR 55, with which Kenny J broadly agreed, has suggested some limitations on *Bhardwaj* and *Plaintiff S157*. We said (at 68):

> *"In our view,* Bhardwaj *cannot be taken to be authority for a universal proposition that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever. All that it shows is that the legal and factual consequences of the decision, if any, will depend upon the particular statute".*

However, these limitations do not appear to operate with respect to decisions of the Administrative Appeals Tribunal whose decisions are more amenable to judicial review than were decisions of the Immigration Review Tribunal. They are consequently less likely, in accordance with the reasoning of the High Court, to be effective notwithstanding jurisdictional error.

The problem for tribunals like the Administrative Appeals Tribunal becomes the practical problem of how to deal with *Bhardwaj* applications. Should the Tribunal entertain a second hearing? Should the Tribunal be differently constituted for a second hearing? Accepting that the Tribunal as originally constituted did not determine the matter, might that not require the Tribunal to be constituted as before? What is the power, in any event, to reconstitute? What is the power to reassemble the original Tribunal?

Bhardwaj was, perhaps, an obvious case. An administrative mistake was made. The Tribunal did not consider an application for adjournment. It determined the merits without hearing the case of the applicant. It is not surprising that the Tribunal, once it became aware of these errors, simply relisted the matter. Requiring an appeal to the Federal Court setting aside the decision and remitting the matter to the Tribunal might not have been consistent with the obligation of the Immigration Review Tribunal and now also of the Administrative Appeals Tribunal to be "*fair, just, economical, informal and quick*" (*Administrative Appeals Tribunal Act 1975*, s 2A). Further consideration by the original decision-maker was inherently likely to result in a further hearing. The decision-maker would not need to reverse any previous finding or ruling. But how should a tribunal approach less obvious cases.

Most of the judges in *Bhardwaj* recognised the practical problems of allowing reargument of a failed case. However, they were not required to address the problem in *Bhardwaj*. Only Hayne J considered whether the appropriate response to a claim which, if sustained, would mean that a purported decision of a Tribunal was no decision at all, should be considered by the Tribunal. He said this (at 645):

> *"It is, therefore, not to the point to ask whether the Tribunal was* wise *to make its October decision without first having the comfort and certainty of a court order holding the September decision to have been not a lawful performance of the Tribunal's duties any more than it is to the point to ask about the efficiency of adopting the course that was followed in this matter."*

His Honour contrasts wisdom and efficiency. Perhaps he had in mind that efficiency might lead to reconsideration in the clearest of cases while wisdom would otherwise counsel caution.

This observation strikes a chord with the reasoning of the other judges forming the majority in *Bhardwaj*, namely Gleeson CJ and Callinan J. The reasoning of Gleeson CJ included a finding that: *"[t]he Tribunal, through an administrative error, failed to implement its own intention and failed to comply with the statutory requirement to give the respondent an opportunity to be heard"* (at 605). Callinan J concluded that the earlier decision *"was something more than a breach of the rules of natural justice. It was a failure to exercise a jurisdiction which the Tribunal was bound to exercise"* (at 649). Even Gaudron and Gummow JJ said this (at 612):

> *"To say that the* [first] *decision was not a 'decision on review' …is simply to say that it clearly involved a failure to exercise jurisdiction, and not merely jurisdictional error constituted by the denial of procedural fairness."*

The broader proposition later stated by their Honours may be qualified by these remarks. It is not easy, however, to read down the broader proposition, particularly when it was so emphatically repeated in the case itself and in *Plaintiff S157,* which was itself a procedural fairness case.

Accordingly, there may be a reasonable basis in *Bhardwaj* for declining to reconsider an application except in the case of the most manifest of errors. But is it appropriate for a matter to be considered even then?

The problem is that a tribunal will not make a final decision unless it is at least implicitly satisfied that the decision is without jurisdictional error. Any reconsideration will involve the tribunal determining that error exists even though there has already been an implied determination that there is no error. The problem is highlighted by the reasoning in *Bhardwaj*, particularly the reasoning of Hayne J, that the question on appeal is when the tribunal exercised its jurisdiction. If the first decision amounted to a proper exercise of jurisdiction then it is the second decision which will be "no decision at all". It is not competent for a Tribunal to make a binding, or any, ruling as to whether it has made an error of law. It is at least theoretically possible that the Federal Court or the High Court might have ruled in *Bhardwaj* that it was not a denial of natural justice to proceed with the first hearing because, for example, the adjournment application was not supported by evidence or was the latest of many similar applications. In that event the second decision of the Immigration Review Tribunal would only have created needless doubt.

It follows that, except in the clearest case, the making of a second decision by a tribunal will only lead to uncertainty of result. This is, at the least, a further reason for a tribunal to act with extreme caution before reconsidering a matter which has already been decided.

There remains a problem as to how, in any event, a tribunal can go about the task. Nothing in the judgments in the High Court suggests any qualification to the principle that a tribunal cannot revisit its own decision; that the decision-making power is spent once it is exercised. Indeed this principle of *functus officio* is endorsed in *Bhardwaj* (Gleeson CJ at 603; Gaudron and Gummow JJ at 610). If the making of a decision is an implicit assertion that the decision-making power has been properly exercised how can a Tribunal consider it again? If there was no jurisdictional error then the decision cannot be reconsidered. However, it is only by reconsideration that a determination

can be made as to whether there has been jurisdictional error. Again, these are questions as much for the philosopher as for the lawyer.

Philosophical or not, however, they have practical ramifications. What is a tribunal to do when it is asked to reconsider one of its decisions for jurisdictional error? The matter is closed. The file has been put away. However, if there is jurisdictional error those are meaningless acts. The only basis for reconsideration could be the possibility of jurisdictional error. Any response must be to examine the concluded matter to see if there is any basis for such a claim. There is no occasion for a fresh application. The first application removed the matter for review by the tribunal. There is nothing to remove a second time.

The appropriate course would seem to be for any reconsideration to be performed by the tribunal as originally constituted. That is consistent with the legal position, if the claim is correct, that there has been no decision. It may also provide an in-built control because the tribunal as previously constituted will be reluctant to reconsider arguments already rejected.

Can any guidance be given to a tribunal asked to re-examine a matter for jurisdictional error? One such guide is to confine the reconsideration to cases of manifest error. However, a further potential guide finds support in the reasons of some of the justices in *Bhardwaj*.

Gleeson CJ characterised the error in *Bhardwaj* on four occasions as “administrative oversight” or “administrative error” (602, 605(2) and 606). Kirby J, in dissent, used the phrase “administrative error” three times (627 and 630(2)). The justices were referring to the fact that the underlying cause of the error was a matter of administration internal to the Registry of the Immigration Review Tribunal and not something associated with the actual conduct of the hearing or the process of decision-making following it. The nature of such an error has been discussed in the decision of the Full Federal Court in *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 in which the Court held that there had been an appealable denial of natural justice by the Administrative Appeals Tribunal when it failed

successfully to notify a hearing date to one of 131 applicants seeking enrolment for the 2002 ATSIC elections in Tasmania. The concurring judgment of Gyles J addresses the alternative remedies available to correct such an error.

Subsection 42A(10) of the *Administrative Appeals Tribunal Act 1975 (Cth)* empowers the Tribunal to reinstate an application if it has been "dismissed in error". The power is confined to default dismissals under s 42A. In *Goldie v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 383 Wilcox J and I held that "'*error*' in the section was not confined to administrative error". We said this (at para 31):

> *In the course of argument, it was suggested that it is unlikely that parliament intended that one member of the tribunal could sit in judgment on a decision of another member. It was said that the appropriate course, envisaged by the Act, was appeal under s 44 of the Act. However, it is not uncommon for rules of courts to allow one member of the court to set aside an order (especially a default order) made by another member. As a matter of practice, no doubt, the application to set aside the original order will usually be heard by the person who made it. But this is not always practicable and there is usually no rule to that effect. The suggested inconsistency with s 44 must be considered in the light of the fact that s 42A(10) only covers default dismissals under s 42A, not dismissals after a hearing on the merits.*

Although the kind of error addressed by subs 42A(10) is not confined to administrative error that type of error will undoubtedly form the most likely basis for the exercise of the discretion to reinstate given by the section. In addition, the dismissal will have been a default dismissal. If *Bhardwaj* had occurred in the Administrative Appeals Tribunal subs 42A(10) would seem to have provided a statutory solution.

In addition to limiting reconsideration to obvious cases of manifest jurisdictional error an additional appropriate restraint may be to confine reconsideration to appropriate administrative errors or errors of the kind covered by subs 42A(10).

It may be appropriate to conclude by drawing together the threads of this paper and to see what conclusions seem appropriate.

1. The principle that tribunals cannot revisit their own decisions has been endorsed by the High Court. The obvious public policy against repeated applications to a tribunal to reconsider its own decisions is still in place.

2. However, where a tribunal does not exercise its jurisdiction, although it purports to do so, there is no bar to the tribunal considering the matter again.

3. This power may arise in all cases involving jurisdictional error.

4. None of these propositions address the question of whether it is wise for a tribunal to reconsider a decision.

5. There are significant legal and practical reasons why it will usually be unwise for a tribunal to reconsider a decision.

6. A tribunal which has purported to complete its consideration of a matter and make a final decision has no obligation to reconsider the matter. If it has not exercised its jurisdiction that matter can be declared on appeal and the matter remitted.

7. The conclusion seems to be that tribunals should act with extreme caution before ever giving consideration to the question whether a matter once determined should be revisited. Such reconsideration should be confined to the simplest and most obvious cases of manifest error. One circumstance which finds some support in the judgments in *Bhardwaj* is where there has been administrative error or oversight. Another circumstance, which finds a parallel in subs 42A(10) of the *Administrative Appeals Tribunal Act* is where the matter has been dismissed in error for default without any hearing.