What is the Proper Measure of Natural Justice Demanded by the Act?

Justice James Douglas[1]

In *Brodyn Pty Ltd v Devonport* (2004) 61 NSWLR 421 there is a significant passage of Hodgson JA's decision at [55] where his Honour, having previously identified what he described as the basic requirements laid down by the NSW Act for the existence of a valid adjudicator's determination, said: "If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements the legislature has indicated as essential to the existence of a determination." It set some bells ringing in my head.

In *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 91-101 at [16]-[41] Gaudron and Gummow JJ considered the requirements of procedural fairness, particularly for the grant of a writ of prohibition under the *Constitution*, in some detail. The Honours said at [17] in particular that "if there has been a breach of the obligation to accord procedural fairness, the consequences of the breach were not gainsaid by classifying the breach as 'trivial', or non-determinative of the ultimate result – the issue is whether there has or has not been a breach of the obligation."

It is in that context that Hodgson JA's reference to a substantial denial of procedural fairness that would lead to a void decision may be criticised. It seems erroneous conceptually if not necessarily leading to a different result than might occur anyway.

I recognise the strength of what his Honour had to say about the structure of the legislation, that it is designed to encourage early payment to subcontractors with a later final determination of who, as between the contractor and the subcontractor should be entitled to how much. In other words, as Palmer J has said, "pay now, fight later". It seems to me, however, that it may be preferable to recognise that breaches of the right to procedural fairness are not classifiable as "substantial" or "trivial" but that the question of the grant of the remedy, in this case an injunction coupled with a declaration, will depend upon the content of the requirements of procedural fairness in this statutory context and the exercise of a discretionary judgment by the court to determine whether relief is required in the circumstances. It may be that the content of the requirements of procedural fairness in this statutory context is limited but, as Basten JA said in an aside in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385, 403-405 at [76], that is a different point.

His Honour discussed a number of issues of interest at [69]-[79]. He referred to *Aala* and drew attention to the recent decision of the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1009 where, for example, McHugh J said at [77]:

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1 The Hon Justice James Douglas was appointed as Justice of the Supreme Court of Queensland on 27 November 2003. He completed degrees in Arts and Law at the University of Queensland and was admitted to the Bar in 1973. After working in a solicitors' firm in London he commenced private practice at the Bar in Brisbane in 1977, became a QC in 1989 and was President of the Bar Association of Queensland from 1999 to 2001.

> *[77] However, because the Act compels the tribunal in the conduct of the review to take certain steps in order to accord procedural fairness to the applicant for review, before recording a decision, it would be an anomalous result if the tribunal's decision were found to be valid, notwithstanding that the tribunal has failed to discharge that obligation. It is not to the point that the tribunal may have given the applicant particulars of the adverse information orally. It is also not to the point that in some cases it might seem unnecessary to give the applicant written particulars of adverse information (for example, if the applicant is present when the tribunal receives the adverse information as evidence from another person and the tribunal there and then invites the applicant orally to comment on it). If the requirement to give written particulars is mandatory, then failure to comply means that the tribunal has not discharged its statutory function. There can be no "partial compliance" with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act. Any suggestion by the Full Federal Court in NAHV to the contrary should not be accepted. Parliament has made the provisions of s 424A one of the centrepieces of its regime of statutory procedural fairness. Because that is so, the best view of the section is that failure to comply with it goes to the heart of the decision-making process."*

See also *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411; [2005] HCA 72 at [10] for another statement by the High Court of the approach to take in issues of this nature.

Mr Walker SC, in his submissions on the special leave application to the High Court put the issue this way: "the importance of a judicial review matter is that the Court of Appeal in the combination of *Brodyn* and this case following *Brodyn* appears to be taking the approach that there are jurisdictional errors which, in the absence of a combination of a privative clause and some *Blue Sky* reasoning, may nonetheless not be subject to judicial review, that is, ... by the only place a person can go, namely, a court to enforce the limits of law upon the actions of persons appointed and purporting to act under a statute." His opponent put up some reasons why this legislation should be treated as containing a privative clause, based on s 25 of the NSW Act, but this seems to me to be a live issue – what is the proper content of procedural fairness under this Act and are any breaches of those requirements exempt from a judicial remedy?

In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* Basten JA also drew attention to the fact that the statement of "basic requirements" by Hodgson JA was said not necessarily to be exhaustive. He pointed out that there were factors which were excluded by his Honour which appeared to be mandatory, such as the requirement of s 13(2) of the NSW Act that a payment claim "must" do certain things, but which were not one of the factors listed by his Honour in the five basic requirements he set out at [53] of the decision in *Brodyn*; see at [73] of *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*. His Honour made similar comments about the need to comply with s 22(2) of the New South Wales Act at [74]. In *Coordinated Construction Co Pty Ltd v Climatech*

(Canberra) Pty Ltd [2005] NSWCA 229 at [44]-[45] he gave reasons why a determination under s 13(2) need not be set aside because it depended on the personal opinion of the adjudicator.

His Honour also drew attention, at [78] of *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*, to the issue whether adjudicators were intended by parliament to have the power to determine whether a requirement was an essential precondition to the exercise of power or only to the application of the law correctly, as to which *Craig v South Australia* (1995) 184 CLR 163, 179 demonstrates that there is an important distinction to be drawn in Australia between administrative decision makers and courts of law. Basten JA went on to say:

> *"Properly understood,* Brodyn Pty Ltd *may be saying that the structure of the Act demonstrates that, contrary to the general rule with respect to administrative tribunals, an adjudicator has been given power to determine a payment claim so long as he or she takes into account the legal parameters prescribed by the Act and the contract, and whether or not the decision actually made reflects a correct understanding of the legal principles to be derived from those sources."*

Applications for special leave to appeal to the High Court were filed in each *Coordinated Construction* matter but dismissed by the High Court on 3 February 2006. Gleeson CJ said:

> *"The statutory provisions that had to be construed by the Court of Appeal of New South Wales have occasioned some difficulty and some differences of opinion among judges. The conclusion reached by the Court of Appeal, whilst not inevitable, was well open to it and we are not persuaded that it is likely to be productive of injustice.*
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> *In those circumstances, we think that there is insufficient reason to doubt the correctness of the decision of the Court of Appeal of New South Wales to warrant a grant of special leave to appeal to this Court and the application is dismissed with costs."*

The Court was told of the existing Victorian legislation similar to that in New South Wales but that did not persuade them that these cases should be given special leave. Nevertheless, I expect that there is more to be heard about these issues and the proper application of these Acts now that the legislation has been copied in other Australian jurisdictions also.

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