HIGH COURT OF AUSTRALIA

GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE ROY MORGAN RESEARCH CENTRE PTY LTD APPELLANT

AND

COMMISSIONER OF STATE REVENUE (in his capacity as Commissioner of Pay-roll Tax) RESPONDENT

The Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue
[2001] HCA 49
9 August 2001
M108/2000

ORDER

1. *Appeal allowed with costs.*

2. *Order of the Supreme Court of Victoria Court of Appeal of 4 February 2000 set aside.*

3. *Remit the matter to the Court of Appeal for further hearing and determination.*

4. *The costs of the original appeal and of the further proceedings in the Court of Appeal to be determined by that Court.*

On appeal from the Supreme Court of Victoria

Representation:

R R S Tracey QC with S J Cooper for the appellant (instructed by Tanya Cirkovic & Associates)

R L Berglund QC with P H Solomon for the respondent (instructed by Solicitor to the Commissioner of State Revenue)

CATCHWORDS

The Roy Morgan Research Centre Pty Ltd v
Commissioner of State Revenue

Courts and judges – Jurisdiction – Court of Appeal of Victoria – Application for leave to appeal from decision of Victorian Civil and Administrative Tribunal under s 148(1) of *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) – Application refused by single judge of Trial Division of Supreme Court – Whether Court of Appeal has jurisdiction to hear appeal from refusal of application – *Supreme Court Act* 1986 (Vic), s 17(2) – Unless otherwise expressly provided an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a judge – Whether s 148(1) of *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) expressly provides otherwise.

Statutes – Construction – State legislation governing jurisdiction of State appellate court – Whether appeal lies to Court of Appeal from determination of a single judge – Considerations relevant to construction of legislation – Relevance of constitutional context – Relevance of conferral of jurisdiction on a superior court – Relevance of apparent purpose of supposed limitation on jurisdiction – Relevance of judicial review of administrative decisions – Analysis of legislation.

Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 148(1).
Supreme Court Act 1986 (Vic), s 17(2).

Rabel v Eastern Energy Ltd [1999] 3 VR 45, overruled.

1 GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ. In 1996, the respondent ("the Commissioner") issued to the appellant two assessments for pay-roll tax under the *Pay-roll Tax Act* 1971 (Vic). The appellant objected to the assessments but the Commissioner disallowed those objections. At the appellant's request, the Commissioner's decisions to disallow the objections were referred to the Administrative Appeals Tribunal of Victoria[1]. (The appellant chose not to ask the Commissioner to treat the objection as an appeal to the Supreme Court, as it might have done[2].)

2 On the establishment of the Victorian Civil and Administrative Tribunal ("the Tribunal") by the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ("the VCAT Act") proceedings then pending in the former tribunal, but in which the hearing had not commenced, were taken to have been commenced in the Tribunal and were to be heard and determined by it[3]. Accordingly, the appellant's objections were determined by the Tribunal.

3 On 28 May 1999, the Tribunal ordered that each assessment should be amended by reducing the amount of penalty imposed, but otherwise it confirmed each assessment. The appellant sought leave to appeal, on a question of law, to the Trial Division of the Supreme Court of Victoria. That leave was sought under s 148(1) of the VCAT Act which provides:

> "A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding –
>
> (a) to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or
>
> (b) to the Trial Division of the Supreme Court in any other case –
>
> if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal."

---

1 *Taxation Administration Act* 1997 (Vic), s 106. That Act makes general provision for the administration and enforcement of certain Victorian taxation laws, including the *Pay-roll Tax Act*. (See s 4(d) of the *Taxation Administration Act*.)

2 *Taxation Administration Act*, s 106.

3 *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act* 1998 (Vic), Sched 2, Item 9.

4 On 29 October 1999, the primary judge (Balmford J) refused leave, saying that:

> "Pursuant to Mr Justice Beach's decision in the matter of *The Department of Human Services v Thwaites*[4] and the inadvisability of giving reasons for granting or refusing leave to appeal, despite the normal desire of judges to do so, and without giving reasons, the application for leave is refused."

5 The central issue which arises in the appeal to this Court is whether the appellant was entitled (whether as of right, or by leave) to appeal to the Court of Appeal of Victoria against the primary judge's refusal of leave to institute proceedings under s 148 of the VCAT Act.

6 The appellant sought to appeal to the Court of Appeal as of right; it did not seek leave to appeal. Its Notice of Appeal described the subject-matter of the appeal as "the judgment given on 29 October and the declaration and orders of the Honourable Justice Balmford made on 29 October 1999".

7 The Commissioner applied for an order dismissing the appeal "on the basis that it is an abuse of the process of the Court". It was accepted in this Court that the Commissioner did not thereby seek to contend that the appeal was incompetent for want of leave. The Commissioner's contention in the Court of Appeal, and in this Court, was that no appeal lies to the Court of Appeal against a refusal of leave under s 148(1) of the VCAT Act.

8 Consistently with what had been earlier held by the Court of Appeal in *Rabel v Eastern Energy Ltd*[5], the Court (Buchanan and Chernov JJA) dismissed the appeal instituted by the appellant saying that:

> "the Court of Appeal [has] no jurisdiction, as a consequence of s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998, to entertain an appeal from an order made by the Trial Division refusing or granting leave to appeal from an order made by a non-presidential Tribunal. Section 148 expressly provides within the meaning of s 17(2) of the *Supreme Court Act* 1986 that there is to be no appeal to the Court of Appeal from such a determination."

---

4 [1999] VSC 163.

5 [1999] 3 VR 45.

It is from the order dismissing its appeal to the Court of Appeal that the appellant now appeals to this Court by special leave.

9 The inquiry must begin with the relevant statutory provisions. Whether an appeal lies to the Court of Appeal depends upon the *Supreme Court Act* 1986 (Vic) and, in particular, s 17(2) of that Act. Section 17(2) provides that:

> "Unless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge."

Section 17A qualifies the generality of s 17(2) in some respects and, while it will be necessary to return to consider those qualifications, it is convenient to defer doing so. Two aspects of s 17(2) should be noticed. First, it provides for appeals from "any *determination* of the Trial Division constituted by a Judge" and, secondly, it contemplates contrary express provision by the *Supreme Court Act* or any other Act.

10 The word "determination" is not defined in the *Supreme Court Act* and, in s 17A of the Act, the words "order" and "determination" are both used in identifying particular qualifications to the otherwise general provision of s 17(2). Thus, no appeal lies to the Court of Appeal (except as provided in Pt VI of the *Crimes Act* 1958 (Vic)) from a "determination … made on or in relation to the trial or proposed trial of a person on indictment or presentment"[6]. By contrast, s 17A provides that an "order made … by consent of the parties"[7] and several other kinds of "judgment"[8] or "order"[9] are not subject to appeal to the Court of Appeal. In this context, "determination" must be read in s 17(2) as a word which embraces a wide variety of judicial decisions[10]. It is not necessary to attempt to

---

6 s 17A(3).

7 s 17A(1)(a).

8 Defined by *Supreme Court Act*, s 3(1), as including "order".

9 For example, s 17A(4)(b) prohibiting (subject to some exceptions) appeal against judgments or orders in interlocutory applications and s 17A(6) prohibiting an appeal from an order giving unconditional leave to defend.

10 cf *The Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 625; [1950] AC 235 at 294 and *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 228; [1969] 1 AC 590 at 630 where the breadth of application of the word "decision" in s 74 of the Constitution is discussed.

chart the limits of that embrace. It is enough to say that it is a word which would be apt to apply to a refusal of leave under s 148 of the VCAT Act, even if that refusal was not embodied in an order of the Court (as it was here).

11 Section 17(2) contemplates "express" provision otherwise. There are legislative provisions in which "expressly" is not used as an antonym of "impliedly" but "merely serves to emphasize the generality of [one] provision by making clear that no case is outside that provision unless that is the necessary result of the operation of another enactment according to the intention it manifests"[11]. It may greatly be doubted, however, that "expressly" should be understood as being used in s 17(2) in this way. Section 17(2) is a provision which confers jurisdiction upon a court and it is, on that account alone, to be given no narrow construction. Rather, it is to be construed with all the amplitude that the ordinary meaning of its words admits[12]. It follows that the conclusion that there is express provision to the contrary will seldom, if ever, be available in the absence of explicit words excluding the jurisdiction of the Court of Appeal to hear an appeal from any determination of the Trial Division when constituted by a judge.

12 In terms, s 148(1) deals only with review of orders of the Tribunal. It does not deal with the appellate review of decisions made by the Supreme Court. That may very well be reason enough to conclude that s 148(1) is not an express provision of the kind contemplated by s 17(2) of the *Supreme Court Act*.

13 In *Rabel*, the Court of Appeal held that, whether or not a refusal of leave under s 148 of the VCAT Act was a "determination" within the meaning of s 17(2) of the *Supreme Court Act*, s 148 of the former Act "expressly provided"

---

11 *Rose v Hvric* (1963) 108 CLR 353 at 358 per Kitto, Taylor and Owen JJ, referring to *Metropolitan District Railway Co v Sharpe* (1880) 5 App Cas 425 and *Chorlton v Lings* (1868) LR 4 CP 374.

12 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J, 290 per Gaudron J; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-276 per Gummow J; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [21] per Gaudron and Gummow JJ; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

that an appeal to the Court of Appeal should not lie against the refusal by a judge of the Trial Division of leave under s 148[13]. There were two important elements in the reasoning of the Court in *Rabel*. First, the Court concluded that the expression in s 17(2) of the *Supreme Court Act* "[u]nless otherwise expressly provided by this or any other Act" did not "necessarily mean 'expressly excluded by words'"[14] but rather "bear[s] a meaning whereby the language of the 'other Act' will be taken to have attracted the exclusion referred to if upon its plain meaning that language implies that the right conferred by the general Act has no operation"[15]. For the reasons given earlier, that conclusion may be doubted.

14 Secondly, the Court concluded in *Rabel* that s 148(1) of the VCAT Act, by giving what it described as "a bifurcated right of appeal", should, in light of what was described as the principle in *Lane v Esdaile*[16], be understood as expressly providing that there could be no appeal under s 17(2) against a refusal of leave under s 148 by a judge of the Trial Division[17]. This conclusion should be rejected.

15 Section 148 of the VCAT Act is concerned with the invocation of judicial power to examine for legal error what has been done in an administrative tribunal. Although s 148 uses the word "appeal", it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review. That is not to say that there are no other avenues for judicial review. The VCAT Act makes no express provision excluding the general supervisory jurisdiction of the Supreme Court. It may, therefore, be doubted that s 148 should be understood as doing more than providing, in some cases, an important discretionary reason for not permitting resort to that general supervisory jurisdiction on the basis that s 148 provides a suitable alternative remedy[18]. Nevertheless, it is important to recognise that the

---

13 [1999] 3 VR 45 at 49 [12].

14 [1999] 3 VR 45 at 49 [13].

15 [1999] 3 VR 45 at 49 [13].

16 [1891] AC 210.

17 [1999] 3 VR 45 at 49-50 [14]-[15].

18 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185.

essential character of s 148 is that it provides for the institution of proceedings in the Supreme Court, by leave, in which the legal correctness of what the Tribunal has done can be challenged.

16 The proceedings for which leave is sought under s 148 are, therefore, of a very different kind from those considered in *Lane v Esdaile*[19]. In that case, the question was whether an appeal lay to the House of Lords against the refusal of the Court of Appeal to grant special leave to appeal out of time. It was, therefore, a case concerning leave to appeal where other rights to commence the process of appeal had been lost by the effluxion of time. The decision turned on whether the refusal of special leave was an "order or judgment" in s 3 of the *Appellate Jurisdiction Act* 1876 (UK). Lord Halsbury reached the conclusion that it was not, by considering the purpose for requiring leave to appeal (which he identified as being to prevent frivolous and unnecessary appeals[20]) and by what he saw as the absurd result that would follow from the contrary construction (that agitation of the question whether leave should have been granted would almost always require examination of whether the matter was a fit case for appeal[21]). Some other members of the House put the matter in rather different terms by treating the question as whether the Court of Appeal was intended to be the final arbiter of whether leave should go[22]. It is, however, not necessary to examine whether these differences in approach are substantial.

17 *Lane v Esdaile* has been taken to stand for a general proposition that "a provision requiring the leave of a court to appeal will by necessary intendment exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that court"[23]. Even if a general rule of that kind can be distilled from what is said in *Lane v Esdaile*, any such general rule must yield to the proper construction of the provisions which govern appeals in the particular case. In the end, then, what emerges from *Lane v Esdaile* may be little if anything more than the result of the

---

19 [1891] AC 210.

20 [1891] AC 210 at 212 per Lord Halsbury LC.

21 [1891] AC 210 at 212 per Lord Halsbury LC.

22 [1891] AC 210 at 214 per Lord Herschell, 215-216 per Lord Macnaghten, 216 per Lord Field.

23 *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1 at 13. See also *In re Housing of the Working Classes Act 1890; Ex parte Stevenson* [1892] 1 QB 609.

particular application of the well-known principle of statutory interpretation that constructions leading to absurd results are to be avoided, if possible. The decision can provide no absolute rule which automatically resolves the present issue.

18 In *Kemper Reinsurance Co v Minister of Finance*[24], the Privy Council considered whether the provision of the *Court of Appeal Act* 1964 of Bermuda permitted an appeal against an order refusing leave to apply for an order of certiorari. Lord Hoffmann, giving the advice of the Privy Council, considered that it was "by no means obvious that a refusal of leave to challenge [the] legality [of a decision subject to judicial review] should be final"[25]. His Lordship said[26]:

> "In principle … judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the *same* question to be decided. The court is specifically given power to decide that a decision on a particular question should be final. There is obviously a strong case for saying that in the absence of express contrary language, such a decision should itself be final. But judicial review seldom involves deciding a question which someone else has already decided. In many cases, the decision-maker will not have addressed his mind to the question at all. The application for leave may be the first time that the issue of the legality of the decision is raised". (emphasis added)

19 Again, however, *Kemper* can provide no absolute rule. The relevant statutory provision must govern. Further, it may be important to notice that the parallel with *Kemper* is not exact. The kind of judicial review for which leave was sought in this case is narrower than the general supervisory jurisdiction which was invoked in *Kemper*. Importantly, however, *Kemper* does invite attention to the radical difference between leave to initiate originating judicial process to review a decision of an administrative decision-maker for error of law, and leave to initiate an appeal against the decision of a court. A conclusion that the latter kind of decision is final may be reached more readily than a conclusion

---

24 [2000] 1 AC 1.

25 [2000] 1 AC 1 at 15.

26 [2000] 1 AC 1 at 14-15.

that a litigant is to be barred from invoking the judicial process to review administrative action without the legitimacy of that bar being capable of being considered on appeal in the same way as any other determination by the court would be[27].

20 If, contrary to the view we prefer, the exceptive provision in s 17(2) of the *Supreme Court Act* has, as the Commissioner contended, some broader operation than its words would suggest, the question then would be whether s 148(1) is to be construed as providing that leave to institute proceedings under that section in respect of an order of the Tribunal, not constituted by the President or a Vice President, may be granted *only* by the Trial Division of the Supreme Court. That is, does the separate provision for cases where the order was made by the Tribunal constituted by the President or a Vice President and for "any other case" mean that in such an "other case" *only* the Trial Division may grant leave?

21 The division, or bifurcation, of the treatment of applications under s 148(1) does not lead, leave aside *necessarily* lead, to the conclusion that the Commissioner asserted. Even if the reference in s 17(2) of the *Supreme Court Act* to express provision otherwise is understood as reaching beyond express words of exclusion (which we doubt it does) s 148(1) does not constitute an express provision of the kind to which the otherwise general right given by s 17(2) is subject. The division of the power to grant leave is to be explained by reference to the fact that the President of the Tribunal must be a judge of the Supreme Court[28] and a Vice President must be a judge of the County Court[29]. Appeals against judicial decisions by judges of the Supreme Court and the County Court lie to the Court of Appeal. It is, therefore, not surprising that special provisions should be made, by the VCAT Act, for the Court of Appeal to decide whether an "appeal" may be instituted against an order of the Tribunal when constituted by the President or a Vice President.

22 The Commissioner submitted that if the decision of a judge of the Trial Division refusing leave could be challenged in the Court of Appeal there would be such duplication of argument on both the question of leave, and the merits of

---

27 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554.

28 VCAT Act, s 10(1).

29 VCAT Act, s 11(2).

the question of law allegedly raised, that the result of that construction of the relevant Acts should be classed as absurd.

23 In part, the argument depended upon the premise that an appeal to the Court of Appeal against refusal of leave under s 148(1) lies as of right. That is a separate question which turns upon whether, within s 17A(4)(b) of the *Supreme Court Act*, the refusal of leave is "a judgment or order in an interlocutory application". On its face, this provision directs attention to the nature of the application as interlocutory rather than to the nature of the order. Nevertheless, the Court of Appeal of Victoria has taken the view that the substitution of the expression "judgment or order in an interlocutory application" for the expression "interlocutory judgment" which was formerly used involved no change in meaning[30]. Accordingly, that Court has applied to s 17A(4)(b) the tests adopted in this Court's decision in *Licul v Corney*[31]. The correctness of this approach not having been challenged on the hearing of this appeal and there having been no issue about it when this matter was before the Court of Appeal, it is neither necessary nor appropriate to embark upon it. Even if an appeal against refusal of leave does lie as of right, the consequent duplication of arguments and reagitation of issues debated before a single judge would be no greater than will often be the case in any proceeding by way of appeal. It is not such an odd or absurd result as to invite attention to whether it is required or contemplated by the legislation. If, on examination, it emerges that an appeal does not lie as of right, but only by leave, considerations of duplication of argument and reagitation of issues are still less pressing.

24 For completeness, it should be noted that, since the Court of Appeal dealt with the appeal in the present matter, s 17A of the *Supreme Court Act* has been amended to provide that an appeal against an order made by a judge of the Trial Division "on an appeal to the Court … under section 148(1)(b)" of the VCAT Act is not *subject to appeal* to the Court of Appeal except by leave of a judge of the Trial Division or of the Court of Appeal[32]. Because this provision deals only with orders made *on an appeal* under s 148(1)(b), it does not apply where the

---

30 *Border Auto Wreckers (Wodonga) Pty Ltd v Strathdee* [1997] 2 VR 49; *Little v State of Victoria* [1998] 4 VR 596.

31 (1976) 180 CLR 213. See also *Hall v Nominal Defendant* (1966) 117 CLR 423; *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246.

32 *Supreme Court Act*, s 17A(3A), inserted by the *Courts and Tribunals Legislation (Further Amendment) Act* 2000 (Vic), s 10.

question is, as here, whether there should have been leave to institute such proceedings. It may, therefore, be put to one side.

25 As has been noted earlier, the primary judge gave no reasons for refusing leave. It may be thought that some support for that course may be derived from *Coulter v The Queen* where it was said[33] that the discretion to grant or refuse an application for leave or special leave to appeal "can commonly be exercised without the provision of detailed or, sometimes, any reasons". But it is very important to notice two considerations. First, what was said in *Coulter* related to the refusal of leave or special leave to appeal to a court – a process which is invoked only where there has been at least one earlier judicial disposition of the matter attended by full reasons for judgment. An application for leave under s 148(1) is the first engagement of judicial power and is an engagement of judicial power in respect of a controversy which is framed differently from, and more narrowly than, whatever may have been the controversy in the Tribunal. It is, therefore, not to be supposed that the course of argument in, and decision by, the Tribunal, even if taken with the course of argument before a judge of the Trial Division, will ordinarily reveal to the applicant with any certainty why it is that leave to bring proceedings under s 148(1) is refused. Secondly, as was recognised in *Coulter*, it is usual to give short reasons for refusing leave or special leave to appeal. Not giving reasons is exceptional.

26 The practice of giving no reasons for refusing leave under s 148(1) of the VCAT Act is unwarranted. There is no basis for departing in such cases from the ordinary rule that reasons should be given[34]. Those reasons need not be extensive. In appropriate cases, little more may be required than a short, perhaps very short, statement of the chief conclusions which the judge refusing leave has reached. The disappointed applicant (and any court asked to review the refusal) must, however, be able to know from the reasons given by the primary judge why the judge reached the decision to refuse leave.

27 The appeal should be allowed with costs, the orders of the Court of Appeal set aside and the matter remitted to that Court for further hearing and determination. As was pointed out earlier, the Commissioner has not previously submitted to the Court of Appeal that the appeal to that Court is incompetent for want of leave. It will be for that Court, on the remitter of the matter, to deal as it

---

33 (1988) 164 CLR 350 at 359-360 per Deane and Gaudron JJ.

34 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247. See also *Fleming v The Queen* (1998) 197 CLR 250.

thinks fit, if any issue then is raised about the competence of the appeal or any application that may be made for extension of time to apply for leave to appeal to it. Similarly, the costs of the original appeal to the Court of Appeal and of the further proceedings on remitter should be in the discretion of that Court.

28 KIRBY J. This appeal[35] presents a confined question of construction of two Acts of the Victorian Parliament. The question arises in circumstances that occasion unease.

The context of the appeal

29 A party, discontented with a decision of an administrative tribunal[36], wished to appeal against it, on a question of law, to the Supreme Court of Victoria. By law, it was entitled to do so. Because the Tribunal had, for the purpose of making its order in the case, been constituted by a non-presidential member (who was not a judge), under the Tribunal's statute[37] the appeal lay, by leave, to the trial division of the Supreme Court. It did not lie, as it would have done had the Tribunal been constituted by a presidential member (who is a judge), to the Court of Appeal of the Supreme Court ("the Court of Appeal").

30 The judge constituting the trial division of the Supreme Court heard the application for leave to appeal. It was not contested that the amount at stake in respect of the payroll tax found by the Tribunal to be payable was substantial. This Court was told that it amounted to "something like $400,000 to $500,000". Before the primary judge, both parties were represented by counsel and solicitors. Submissions proceeded over half a day of oral argument supported by written contentions. At the end of the hearing, the primary judge dismissed the application without reasons, save for the briefest reference to suggested authority sustaining that course. The appellant was ordered to pay the Commissioner's costs.

31 The decision refusing leave to appeal and requiring the payment of such costs was entered in the records of the Supreme Court as an "order" of that Court. It was so described under the hand of the Prothonotary. From that order the appellant purported to appeal to the Court of Appeal. Its grounds of appeal complained that the primary judge had erred in law both by failing to provide reasons for her decision and by rejecting the appellant's application for leave to

---

35 From an order of the Supreme Court of Victoria (Court of Appeal): *Commissioner of State Revenue v The Roy Morgan Research Centre Pty Ltd* unreported, Supreme Court of Victoria (Court of Appeal), 4 February 2000 per Buchanan and Chernov JJA.

36 The Victorian Civil and Administrative Tribunal ("the Tribunal"), established by the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s 8(1) ("the VCAT Act").

37 VCAT Act, s 148(1). For the full text of s 148(1), see the reasons of Gaudron, Gummow, Hayne and Callinan JJ ("the joint reasons") at [3].

appeal to the Supreme Court[38]. Applying its own authority in *Rabel v Eastern Energy Ltd*[39], the Court of Appeal dismissed the purported appeal. It did so on the footing that no appeal lay to the Court of Appeal from a determination of a judge refusing leave to appeal in such a case. According to this reasoning, the only appeal to the Supreme Court lay to the judge in the trial division and she had already refused leave.

32 One has only to state these facts to appreciate how unsatisfactory the law would be if the judgment now challenged were affirmed. Ordinarily, in Australia, judicial officers are bound to give reasons, appropriate to the circumstances, for any formal determination of the rights of parties before them[40]. Whatever controversies may exist in respect of the obligations of administrators to give reasons for decisions of a like character[41], the duties devolving on judicial officers in this country are clear. In part, those duties arise from the nature and incidents of the judicial office. In part, they arise from the ordinary entitlement of parties, in proceedings in courts below this Court, to pursue rights of appeal or judicial review (as the case may be) whether as of right or by leave (as the law provides)[42].

33 A party leaving an Australian courtroom with an adverse decision and without any reasons would, in my opinion, be entitled to feel unjustly done by, especially where the decision concerned a question of law argued before a judge for several hours against an opponent whose costs the party was ordered to pay, and where the decision itself had large financial implications. The extent of the

---

38 The sole reasons given by the primary judge (Balmford J) are set out in the joint reasons at [4].

39 [1999] 3 VR 45 ("*Rabel*").

40 *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388, affirmed *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666; *Fleming v The Queen* (1998) 197 CLR 250 at 260 [22].

41 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; cf *State of West Bengal v Atul Krishna Shaw* [1990] Supp 1 SCR 91 at 99; *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531; *Stefan v General Medical Council* [1999] 1 WLR 1293; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817; see also Taggart, "Administrative Law", (2000) *New Zealand Law Review* 439.

42 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666 referring to *Deakin v Webb* (1904) 1 CLR 585 at 604-605; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388; *De Iacovo v Lacanale* [1957] VR 553 at 558-559; see also *R v Harrow Crown Court; Ex parte Dave* [1994] 1 WLR 98; [1994] 1 All ER 315.

reasons required by law would obviously depend on the circumstances of the decision in question[43]. Where judicial officers (including the Justices of this Court) give reasons disposing of the rights of parties, those who lose may not be convinced by the reasons. But they will at least know generally why they have lost. They will ordinarily be made aware that their principal submissions have been considered. If they have rights of appeal or review, they may seek further advice and pursue those rights.

34 Here, the appellant did not have those satisfactions. Acting on the assumption that reasoned justice is part of the obligations of judicial officers in Australia, it therefore challenged the determinations of the Supreme Court and the fairness and lawfulness of the procedures by which those decisions had been arrived at. If (as it has held) the Court of Appeal has no jurisdiction or power to exercise any supervision of the primary judge, the apparent affront to the ordinary norms of justice would be reinforced.

35 In the Court of Appeal, the judges took pains to explain why, bound by *Rabel*, they were obliged to hold that no appeal lay to them from the primary judge's determination[44]. But if this were indeed the end of the appellant's legal rights (subject to the wholly exceptional provision of special leave to appeal by this Court) it would reveal a most unsatisfactory situation. It would elevate unreasoned finality of judicial consideration of the lawfulness of a decision of an administrative tribunal to a point where finality effectively overwhelmed all other considerations[45]. Lord Atkin once rightly said[46]: "Finality is a good thing, but justice is a better."

36 Subject to the federal and State Constitutions, legislation of the Parliament of Victoria could limit, or strictly control, appeals within the judicial hierarchy of the State. But such is the apparent injustice of the course of events that I have described, that one would expect any such limitations to be supported by

---

43 eg *Dinsdale v The Queen* (2000) 74 ALJR 1538 at 1543 [21], 1550 [66], 1551 [71]; 175 ALR 315 at 320-321, 331, 332; see also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259, 269-271, 280-281; *Apps v Pilet* (1987) 11 NSWLR 350; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 382; [2000] 1 All ER 373 at 378.

44 *Commissioner of State Revenue v The Roy Morgan Research Centre Pty Ltd* unreported, Supreme Court of Victoria (Court of Appeal), 4 February 2000 at 2 per Buchanan JA.

45 cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 172.

46 *Ras Behari Lal v The King-Emperor* (1933) 60 LRIndApp 354 at 361 (Privy Council).

legislative provisions of unarguable clarity[47]. Otherwise, a court would not lightly attribute to an Australian Parliament the purpose of conferring on a superior court powers or duties to deal with the arguments of law advanced by a party in such a peremptory and apparently unsatisfactory way.

The facts, legislation and common ground

37 The joint reasons set out in more detail the facts of this case, the decision of the primary judge, the reasons of the Court of Appeal and the applicable legislation that must be construed. That legislation is s 148(1) of the VCAT Act and s 17(2) of the *Supreme Court Act* 1986 (Vic)[48].

38 The joint reasons explain why it should be held that a decision, called an "order", in the records of the Supreme Court, should be regarded as a "determination of the Trial Division constituted by a Judge" within s 17(2) of the *Supreme Court Act*[49]. I agree with this conclusion and with the reasons for it.

39 The joint reasons also note how, during argument before this Court, a question arose as to whether an appeal to the Court of Appeal against refusal of leave lay as of *right* or whether *leave* was required[50]. I agree that it is inappropriate for this Court now to resolve that question. It is not raised on the record before this Court and was not a basis of the Commissioner's challenge to the appellant's proceedings in the Court of Appeal. For the reasons given[51], if an appeal from the primary judge's order lay only by leave of the Court of Appeal, that conclusion would remove some of the urgency of the arguments by which the Commissioner sought to sustain the decisions of the courts below. However, even if an appeal from an order lay as of right, given the powers of the Court of Appeal to control proceedings before it, arguments of convenience would scarcely, without more, be sufficient to constitute a reason for rejecting the construction of the legislation urged by the appellant. The inconvenience of an appeal as of right may be a lesser affront to justice than no appeal at all.

40 I agree generally with the reasons given by the other members of the Court for upholding this appeal. However, because I am conscious that this

---

47 *Rose v Hvric* (1963) 108 CLR 353 at 359-360.

48 Set out in the joint reasons at [3], [9].

49 Joint reasons at [10].

50 Joint reasons at [23] with reference to *Supreme Court Act*, s 17A(4)(b); *Licul v Corney* (1976) 180 CLR 213 at 220, 225 and other cases cited.

51 Joint reasons at [23].

Court is reversing a unanimous opinion of the Court of Appeal (and overruling the unanimous decision in *Rabel*), because the reversal relates to the interpretation of the Court of Appeal's constituting statute and provisions governing its own practice and because I believe that there are additional considerations that warrant the orders of this Court, I will add a number of reasons of my own.

The constitutional setting

41 The federal Constitution was not raised by either party to support its position. It was, however, raised by the Court during argument. It should not, in my view, be overlooked[52]. No constitutional provision dictates the outcome of this appeal. Yet the constitutional context does afford an additional reason for concluding that the interpretation of the Victorian legislation adopted by the Court of Appeal is not the preferable one.

42 Under the federal Constitution, the Supreme Courts of the States are not simply the Supreme Courts established in colonial times, renamed. Those Courts are expressly mentioned in the constitutional text[53]. Their continuance is constitutionally entrenched. They are part of the integrated Judicature of the Commonwealth.

43 Appeals from the "judgments, decrees, orders, and sentences" of a Supreme Court lie to this Court, subject to "exceptions" and "regulations" such as the Federal Parliament prescribes. Even such exceptions and regulations are, in the case of an appeal from the Supreme Court of a State, limited by the Constitution itself[54]. If the decision of the Court of Appeal in the present case were affirmed, it would follow that the determination of the primary judge, constituting the trial division of the Supreme Court, would necessarily represent the "judgment [or order] of the Supreme Court of a State" from which an appeal would lie to this Court[55]. Appeal outside the State judicial hierarchy would only

---

52 In the case of federal legislation the constitutional context is obvious: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 421-422 [106].

53 Constitution, s 73.

54 Constitution, s 73. Relevantly, it provides: "But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council."

55 *Judiciary Act* 1903 (Cth), s 35(1); Constitution, s 73.

lie to this Court by special leave[56]. The consequence would be a telescoping of the appellate procedures of a State of the Commonwealth, as now ordinarily observed. This Court would be deprived of the assistance of the opinion of the appellate court of the State. The facility of appeal to this Court, being afforded by the Constitution, could not be excluded by any "exceptions" or "regulations" enacted by the Victorian Parliament.

44 The foregoing constitutional framework indicates how specially unsatisfactory it would be for leave to appeal to be refused by the judge of the trial division, constituting the Supreme Court of Victoria, without substantive reasons, should that judge's order be final so far as the State courts were concerned. The inconvenience of such a consequence for the operation of the appellate system established under the Constitution therefore supports the argument that an alternative construction of the Victorian legislation, if available, should be preferred.

45 In the United States of America, legislation limiting appeals in certain circumstances to cases where "manifest error" can be demonstrated has been held to be compatible with the constitutional requirements of due process applicable in that country[57]. No analogous constitutional point was argued in the present case, although the implications in Ch III of the federal Constitution for requirements of due process in Australian courts remain to be fathomed[58]. Nevertheless, the cases in the United States, although in a different constitutional setting, contain a lesson that, apparently, Australian courts have yet to grasp fully. This is that legislative provisions, federal, State and Territory, which purport to regulate or provide exceptions to the jurisdiction and powers of Australian courts, affecting in particular the facility of appeal, must always be measured against the standards for the integrated Judicature laid down by the Constitution[59].

---

56 *Judiciary Act*, s 35(2); see also s 35A.

57 *Kimberly v Arms* 129 US 512 (1889); cf my reasons in *Natoli v Walker* unreported, Supreme Court of New South Wales (Court of Appeal), 26 May 1994 at 24.

58 cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470, 484-490, 501-503; Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341.

59 cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Re Macks; Ex parte Saint* (2000) 75 ALJR 203 at 211-212 [30]-[31], 219-220 [74]-[81], 233-234 [151]-[161], 243 [208], 260-264 [292]-[305], 274 [366]-[367]; 176 ALR 545 at 553-554, 564-566, 584-586, 597-598, 622-627, 641.

Interpretation of legislation and judicial authority

46 The arguments in a number of recent appeals demonstrate a tendency to give priority to judicial exposition of legislation over analysis of what the legislation actually provides. It is as if the legal mind finds it more congenial to apply the law as stated by judges rather than the law as stated by a legislature. This tendency must be resisted, as must the related tendency, when construing our own legislation, to look to English judicial authority on English legislation, sometimes enacted more than a century ago[60].

47 Apart from everything else that demonstrates the error of this approach, it should not be forgotten that, a century ago, the general facility of appeal, being a creature of statute copied in the Judicature Acts from the precedent of Chancery, was then relatively new[61]. There is much evidence that the early judicial approaches to the scope and operation of appellate jurisdiction, in England and Australia, could sometimes be unsympathetic to appeal. Instead of considering that the new right represented a beneficial opportunity for a second look at the applicable law and in some cases the facts, judges all too often yearned for a return to the finality and conclusiveness of judicial orders before appeal became available in common law and other proceedings.

48 It is this historical consideration that, I think, helps to explain some of the remarks in the House of Lords in *Lane v Esdaile*[62] and in the English Court of Appeal in *In re Housing of the Working Classes Act 1890; Ex parte Stevenson*[63]. The very name of that last-mentioned case evokes the bygone era in which the judicial observations were written. Yet such remarks have been handed down from one generation of judges to another[64], including by judges in Australia[65], as

---

60 Such as *In re Housing of the Working Classes Act 1890; Ex parte Stevenson* [1892] 1 QB 609 at 611 per Lord Esher MR; see *Marshall v Director-General, Department of Transport* [2001] HCA 37 at [59], [62].

61 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322-323 [72]-[74]; 160 ALR 588 at 609-610.

62 [1891] AC 210.

63 [1892] 1 QB 609 at 611 per Lord Esher MR, 613 per Lopes LJ ("*Ex parte Stevenson*").

64 *Bland v Chief Supplementary Benefit Officer* [1983] 1 WLR 262 at 267; [1983] 1 All ER 537 at 541; *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] QB 650 at 657-659, 662 per Sir John Donaldson MR.

65 eg *Costain Australia Ltd v Frederick W Nielsen Pty Ltd* [1988] VR 235 at 239 ("*Costain*").

if they afforded authoritative expositions for the interpretation and application of later, different and local legislation. They do not. It is a mistake of statutory construction to approach the task presented by a case such as this in such a way.

49 Occasionally, where language is identical, or similar, it may be useful to look to judicial expositions given in an earlier time and in a different country[66]. But just as the constitutional context for Australian judicial decision-making on statutory meaning is different, so will be the general legal context and so also may be the social context in which the legislation falls to be construed. There are doubtless countries where, out of deference to the primacy of finality, what happened to the appellant in the present case would be accepted with judicial indifference. Australia is not one of them.

50 Therefore, the main task of an Australian court, required to examine the intersection of s 148(1) of the VCAT Act and s 17(2) of the *Supreme Court Act*, is to discover how, from the language, purpose, history and practical operation of the two Acts (viewed in the context of constitutional and other legal norms), they were meant to operate together. The fact that Lord Esher MR felt able "on principle and on consideration of the authorities … to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given"[67] is, with respect, completely irrelevant to the task in hand.

51 Lord Esher MR, in the passage cited, was not, for example, obliged to give any thought to how such an approach would affect the determination of the Supreme Court of a State of the Australian Commonwealth for constitutional purposes. Moreover, his Lordship's exposition represents the exact opposite of the words enacted by the Victorian Parliament. Those words expressly afford an appeal to the Court of Appeal from "any determination" of a judge of the trial division of the Supreme Court "[u]nless [it is] otherwise expressly provided"[68]. This fact serves to emphasise the critical importance of examining the statutory language enacted by the relevant Australian Parliament. The judicial task is not

---

66 An analogy is a case involving interpretation of the provisions of insurance contracts containing common terms: *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 273-274 [19]; cf at 284 [40].

67 *Ex parte Stevenson* [1892] 1 QB 609 at 611 cited in *Costain* [1988] VR 235 at 239.

68 *Supreme Court Act*, s 17(2).

that of applying language uttered by an English judge in completely different constitutional, legal, temporal and social circumstances[69].

Aids to interpretation of the State laws

52 *Conferral of powers on a court*: When one turns to the examination of whether the language of s 148(1) of the VCAT Act amounts to an express provision by an Act excluding the otherwise available facility of appeal from the primary judge to the Court of Appeal, the first step must be to understand what s 148(1) is doing. It is providing an "appeal" from an administrative tribunal which, for the first time, enlivens the judicial power of a court that is part of the integrated Judicature of the Commonwealth.

53 It is a well-established principle of general application that where a legislature confers jurisdiction and powers on a court, it is ordinarily taken to accept that court with its jurisdiction and powers as they are, unless the legislature validly restricts or changes such jurisdiction and powers[70]. In *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW*[71], this Court, in a unanimous exposition of the rule applicable in Australia, said:

> "[T]he rule or principle invoked is but an expression of the natural understanding of a provision entrusting the decision of a specific matter or matters to an existing court. It is no artificial presumption. When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality."

---

69 The same is true of the reasons of the Privy Council, certainly after it ceased to be part of the Australian Judicature; cf *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1 at 10, 13.

70 *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205.

71 (1956) 94 CLR 554 at 560; see also *Stratton v Parn* (1978) 138 CLR 182; *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 95-96; *Minister for Industrial Affairs v Civil Tech Pty Ltd* (1997) 69 SASR 348.

54 *Purpose of supposed limitation*: This presumption, therefore, reinforces the language in which s 17(2) of the *Supreme Court Act* is, in any case, expressed. It strengthens the impression that, by allowing an "appeal" to the trial division, the Victorian Parliament was simply engaging one part of the Supreme Court of the State, with all the incidents that such engagement would normally involve.

55 But can it be said that the bifurcation in pars (a) and (b) of s 148(1), for appeal to the Court of Appeal or to the trial division of the Supreme Court, represents the enactment of an expressly stated contrary provision? To answer this question, one must consider why the Victorian Parliament provided such a bifurcation. Its purpose was not simply to limit facilities of further appeal within the Supreme Court. Its purpose is clearly based in notions of hierarchy and deference to the judicial office that are commonly observed in such cases, both in Victorian and in other comparable Australian legislation[72]. In short, the bifurcation expressed in pars (a) and (b) of s 148(1) of the VCAT Act is explained by reference to the fact that the President, or a Vice-President, of the Tribunal is a judge of the State whereas a non-presidential member is not[73]. In the case of a judge, even where acting in an administrative tribunal, Parliament has taken the unsurprising view that the order of the Tribunal so constituted should be subject to appeal to a court constituted by more than one judge, not to a court comprising another single judge.

56 It is true that, where the Tribunal is, by law or decision contemplated by law, comprised of a presidential member, the issues involved will often be more complex and important than otherwise. But this is not necessarily so as the present case, involving a stake of at least $400,000, demonstrates. Nor is importance or complexity the necessary explanation for the bifurcation in s 148(1) of the VCAT Act. That explanation is to be found, and found only, in the common Australian practice that, if the orders of a person who is a judge are to be reversed, that power will usually be exercised by more than one other judge. When this explanation of the structure of s 148(1) is appreciated, the argument that the sub-section represented an express provision ousting further appeal within the Supreme Court from a determination by a judge in the trial division of the Supreme Court evaporates.

57 *Judicial review of administrative decisions*: This conclusion is still further reinforced (if such reinforcement be needed) by the consideration that the "order of the Tribunal" referred to in s 148(1) is an administrative decision brought for the first time under the scrutiny of an Australian court. The problem in accepting

---

72 See eg *Supreme Court Act* 1970 (NSW), s 101.

73 VCAT Act, Pt 2 Divs 1, 3.

the approach encapsulated in Lord Esher MR's dictum[74], and inherent in the conclusion of the Court of Appeal in this case, and in *Rabel*, then appears in sharp relief. Not only would the approach adopted purport to expel the general facility of appeal within the Supreme Court for scrutiny of the correctness of the decision made (which, after all, is limited to consideration of "a question of law"[75]). It would also exclude an appeal involving the kind of question raised in this case concerning the procedures observed in the disposition of the matter.

58 The logic of *Rabel* would appear to remove the possibility of a challenge in the Court of Appeal concerning the fairness of the procedures observed by the judge in the trial division, anterior to its determination; an adverse ruling of the judge in that division concerning suggested disqualification for bias[76]; or (as in this case) a complaint that the judge was legally bound to give reasons and had omitted to do so. Complaints of this character could not be cured by the Court of Appeal's providing relief in the nature of a prerogative writ. Such relief is ordinarily unavailable to quash the orders of a judge of a Supreme Court[77]. It therefore seems inherent in the logic of *Rabel* either that such injustices are completely incurable or that they can only be cured in this Court in the exceptional case in which special leave to appeal is granted.

59 These propositions have only to be stated to indicate why it would require legislation of the greatest clarity and particularity to allow such outcomes. Given that there is another perfectly sensible and available explanation for the bifurcation in s 148(1) of the VCAT Act, it is hardly surprising that this Court should prefer that other construction. Apart from anything else, it is one which upholds the integrity of the Supreme Court itself. It permits the Supreme Court to correct errors if they can be shown to have occurred within that Court. It allows a comprehensive remedy for the possibility (which cannot logically be excluded) that judges of the trial division of the Supreme Court may make, and persist in, significant mistakes of substance or procedure.

---

74 *Ex parte Stevenson* [1892] 1 QB 609 at 611.

75 VCAT Act, s 148(1).

76 cf *Barton v Walker* [1979] 2 NSWLR 740.

77 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 386-387. The constitutional writs, however, lie to a judge of a court created by the Federal Parliament notwithstanding that the court is declared to be a superior court of record: Constitution, s 75(v); *The Tramways Case [No 1]* (1914) 18 CLR 54 at 62, 66-67, 82-83, 86; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

60 *Analysis of legislative scheme*: To commit to virtually absolute finality, unreviewable in the Court of Appeal, orders of a judge of the trial division of the Supreme Court based on nothing more than the constitution of the Tribunal does not, on its face, seem either logical or just. The same might be said of a conclusion that would afford a right to appeal from the order of a judge of the trial division who *granted* leave to appeal but not from an order of the same judge, possibly at the same time, *refusing* such leave[78]. Normally, parties who come before courts in Australia enjoy equality of rights. It is not immediately apparent, from the legislation under scrutiny here, why it should be construed to permit an appeal to the Court of Appeal against a determination that goes one way but not one that goes the other. Basic to such a distinction would be a very strong preference for finality; a conclusion that a decision refusing leave to appeal is not the kind of determination that engages an appellate court[79]; or a fear that the contrary view will result in vexatious challenges[80] or in attempts to turn the appeal against the refusal into a complete reargument of the legal merits.

61 As to vexation, Australian courts[81] and the Supreme Court of Victoria in particular[82] have more than sufficient means at their disposal to defend themselves from frivolous and vexatious proceedings. Similarly, with the hearing of an appeal. Even if no leave were required[83], it would remain open to the Court of Appeal, which has ample powers, to control the hearing of such a challenge[84]. The hearing could quite readily avoid or curtail obviously meritless arguments whilst permitting the Court of Appeal's intervention where mistakes of substance or errors of procedure are demonstrated to have occurred at first instance.

---

78 cf *Coles Myer Ltd v Bowman* [1996] 1 VR 457.

79 cf *Fraser Credits Pty Ltd v Osterberg-Olsen* [1978] 1 NSWLR 121; *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 98, 116.

80 The fear of frivolous appeals was high on the list of concerns of Lord Halsbury LC in *Lane v Esdaile* [1891] AC 210 at 212.

81 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *Munnings v Australian Government Solicitor* (1994) 68 ALJR 169; 118 ALR 385.

82 *R v Smith* [1995] 1 VR 10.

83 *Supreme Court Act*, s 10(1)(a).

84 cf *Kay v Attorney-General for Victoria* [2000] VSCA 176; *Supreme Court Act*, ss 17A(4)(b), 21.

62 Finally, if attention is addressed to other provisions of the *Supreme Court Act*, besides s 17, they afford yet further contextual reasons to support the conclusion reached. Thus it is possible, in the case of an order made by the trial division, constituted by a judge, where the order has been made by consent of the parties or relates to costs which are in the discretion of the trial division, to appeal to the Court of Appeal by leave of the Court of Appeal or by leave of the judge constituting the trial division who made the original order[85]. It is extremely difficult to see any logic in legislative provisions that would permit, subject to leave, appeal against orders of that variety and yet exclude totally appeal to the Court of Appeal from a determination of a judge of the trial division such as that made in the present case.

63 Illogicalities can, of course, sometimes intrude into legislation, particularly where the different parts of legislation are enacted at different times[86]. However, such disharmony in the interpretation of succeeding sections of the *Supreme Court Act* should, if possible, be avoided. It can be avoided here. Where the Victorian Parliament's purpose was to exclude completely the possibility of appeal to the Court of Appeal it has said so in plain language. Thus, it has expressly excluded appeal from an order allowing an extension of time for appealing from a judgment[87] and from an order giving unconditional leave to defend a proceeding[88]. All that the Commissioner could invoke in the present case, as amounting to an express provision excluding any right of appeal, was the bifurcation in s 148(1) of the VCAT Act and judicial dicta in English courts that have influenced the decision in this case and earlier decisions like it.

64 The bifurcation, being otherwise explained, does not amount to an express expulsion of a right of appeal to the Court of Appeal as provided. Judicial dicta cannot alter this conclusion.

Orders

65 I therefore agree in the orders proposed in the joint reasons.

---

85 *Supreme Court Act*, s 17A(1).

86 Section 17A was inserted in 1994: *Constitution (Court of Appeal) Act* 1994 (Vic), s 20.

87 *Supreme Court Act*, s 17A(4)(a).

88 *Supreme Court Act*, s 17A(6).