

**IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
GENERAL LIST**

No G605 of 2008

BETWEEN:

GARY KRACKE

Applicant

and

MENTAL HEALTH REVIEW BOARD & ORS

Respondents

**HUMAN RIGHTS LAW RESOURCE CENTRE'S
SUPPLEMENTARY WRITTEN SUBMISSIONS**

I THE BOARD IS A PUBLIC AUTHORITY

1. It is not disputed by any of the parties, the interveners or the *amicus* that the Board is a “tribunal”. The question whether the Board is also a “public authority” turns on whether it can be said to be “acting in an administrative capacity” (*Charter*, s 4(1)(j)).
2. The correct approach to the identification of those occasions on which a court or tribunal will be acting in an administrative capacity was stated by the Supreme Court in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 at [122]ff. The question is whether the court or tribunal is exercising administrative power. The following elements of the power exercised by the Board demonstrate that it is executive power (by reference to the identity of the entity exercising the power, that the power concerns future rights and obligations and that it does not involve the application of legal principles to the facts as found):
 - (1) the question for the Board is whether the s 8 criteria presently apply to the patient (s 36C(2),(3));

- (2) the Board’s determination of the review or appeal concerns the future status, rights and obligations of the patient, that is, whether the patient will continue to be subject to a CTO;
 - (3) when determining whether the s 8 criteria apply to the patient, the Board asks, *inter alia*, whether the person *appears* to be mentally ill, whether the mental illness *requires* immediate treatment, whether involuntary treatment *is necessary* for his health or safety or the protection of members of the public. Although enacted in statute, these are not legal principles to be applied by the Board, but matters for medical and psychiatric expertise and judgement;
 - (4) the Board must have regard primarily to the patient’s *current mental condition* and consider the patient’s medical and psychiatric history and social circumstances (s 22(2)); and
 - (5) in the course of the review or appeal, the Board must review the treatment plan (s 35A).
3. To the contrary, the Secretary submits that “acting in an administrative capacity” has a particular *Charter* meaning that excludes courts and tribunals when they are acting in a “quasi-judicial capacity”. That submission is made by reference to the Explanatory Memorandum to the *Charter*.
 4. But that submission does no more than restate the question; it does not provide a means of determining when a court or tribunal is acting in an administrative capacity. As it is used in the Explanatory Memorandum, the term “quasi-judicial” cannot be used to exclude those administrative functions in which the court or tribunal *acts judicially*. That is because the *Charter* itself identifies committal proceedings as an example of a court or tribunal acting in an administrative capacity.¹ It was established in *Grassby v R* (1989) 168 CLR 1, 11, 15 that whilst committal proceedings are an administrative function, magistrates are required to act judicially.

¹ *Interpretation of Legislation Act 1984*, s 36(3A).

5. “Quasi-judicial”, then, must be used to describe the *functions or capacity* in which the court or tribunal is acting. So used, it is a “weasel word” that does no more than express a conclusion reached on other grounds.² In particular, used in this way, it does no more than introduce a “hybrid” capacity in which a court or tribunal may be acting and does not assist in identifying when a court or tribunal is acting in an administrative capacity.

II A BROAD CONSTRUCTION OF SECTION 6(2)(B) OF THE CHARTER SHOULD BE ADOPTED

6. A consideration of the text, context and purpose of s 6(2)(b) of the *Charter* leads to the conclusion that a broad construction of that paragraph should be adopted, pursuant to which courts and tribunals have the “function” of protecting and promoting all of the rights set out in Pt 2 of the *Charter*.
7. Section 6(2)(b), read with the definition of “function” in s 3(2) inserted, relevantly provides:

This Charter applies to –

...

(b) *courts and tribunals, to the extent that they have [functions, powers, authorities and duties] under Part 2 and Division 3 of Part 3.*

8. Several features of that paragraph (and the Charter generally) should be noted:
- (1) pursuant to s 6, Parliament has provided that courts and tribunals (and only courts and tribunals) have functions under Pt 2 (in contrast, the functions that public authorities have in respect of the rights under Pt 2 are provided by s 38 of the *Charter*);
 - (2) those functions are not limited to particular rights in Pt 2 but are at “at large” in respect of the whole of the Part; had Parliament intended to limit

² M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) at 66. See also R Creyke and J McMillan, *Control of Government Action* (2005) at [7.4.6].

the provisions in respect of which courts and tribunals have functions, it would have been simple to do so;

- (3) the duties that courts and tribunals have in relation to the rights under Pt 2 arise as correlates of the rights granted to natural persons. That is, for each of the rights protected under Pt 2, a corresponding duty is imposed on any entity (including courts and tribunals) whose actions would interfere with the right, not to so interfere;
 - (4) that courts and tribunals are not public authorities (except when acting in an administrative capacity) reflects Parliament's recognition of courts and tribunals as independent and coordinate arms of government charged with upholding the law and that the imposition of an obligation such as s 38 of the *Charter* would be inconsistent with this recognition;
 - (5) whilst Parliament has enacted s 39 of the *Charter* to address the consequences of a public authority acting incompatibly with rights, no such provision applies to courts and tribunals and the appropriate remedy in the context of courts and tribunals is an appeal from the decision made.
9. Adopting a purposive construction of the Charter, and applying the interpretative obligation in s 32, courts and tribunals exercising judicial power should give full effect to the human rights in Part 2 when the right is engaged in a matter before the court or tribunal.

Dated: 20 November 2008

MARK MOSHINSKY

CHRIS YOUNG

Allens Arthur Robinson
Solicitors for the Human Rights
Law Resource Centre