JONES V MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL

Full Court of the Northern Territory of Australia

Kearney, Martin and Maurice JJ

13, 14 and 23 December 1988, at Darwin

ADMINISTRATIVE LAW - Discretionary power of Board not to consider claim made 6 months after event - power exercised on sole basis that 6 months had expired - significance to exercise of discretion of claimants' lack of awareness of rights to claim - McMillan guidelines on factors relevant to exercise of discretion - effect of failure to consider relevant factors - Motor Accidents (Compensation) Act, s.31(2).

ADMINISTRATIVE LAW - administration of no fault compensation scheme in respect of death as a result of motor vehicle accidents - function of Board in determining right to benefit - purpose of power of Board to review decisions of General manager - Motor Accidents (Compensation) Act, ss.12(1) and 36(3).

PRACTICE AND PROCEDURE - Title of proceedings for judicial review of decision of Tribunal.

STATUTORY INTERPRETATION - effect of privative clause when jurisdictional error by Tribunal in issue - Motor Accidents (Compensation) Act, s.30.

STATUTORY INTERPRETATION - Whether time limit mandatory or discretionary - Motor Accidents (Compensation) Act, s.29(1).

STATUTORY INTERPRETATION - Whether provision purely procedural or a substantive source of power for General Manager independent of powers delegated to him - Motor Accidents (Compensation) Act, s.27.

STATUTORY INTERPRETATION - Whether provision embraces determination both by Board and its delegate - Motor Accidents (Compensation) Act, s.29(1)(a).

STATUTORY INTERPRETATION - Whether provision confers on person aggrieved a right to appeal - Motor Accidents (Compensation) Act, s.29(2).

STATUTORY INTERPRETATION - Nature and purpose of provision - Motor Accidents (Compensation) Act, s.36(3).

Cases considered:

Hall v The Nominal Defendant (1966) 117 CLR 423
Jones v Territory Insurance Office (1988) 55 NTR 17

Cases followed:

Julius v Bishop of Oxford (1880) 5 App Cas 214
McMillan v Territory Insurance Office (unreported, Gallop J, 23 August 1988)
Murphyores Incorporated Pty Ltd v The Commonwealth (1976) 136 CLR 1
Padfield v Minister of Agriculture, Fisheries & Food (1968) AC 997
Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363
Anisminic v Foreign Compensation Commission (1966) 2 AC 147
Builders Licensing Board v B.J. Lindner Pty Ltd (1982) 1 NSWLR 561
Hockey v Yelland (1984) 157 CLR 124

Cases referred to:

Allsop v The Incorporated Law Institute (1944) 44 SR(NSW) 132
Drake v Minister for Immigration & Ethnic Affairs (1974) 24 ALR 577
Hunter Resources Ltd v Melville (1988) 62 ALJR 88
Irving v Carbines (1982) VR 861
Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 60 ALJR 560
Reg v Police Appeal Board; Ex parte McGee (1984) 36 SASR 455
Tasker v Fullwood [1987] 1 NSWLR 20
Ex Parte Tooheys' Ltd; Re Butler (1934) 34 SR(NSW) 277
Wood v Bates (1987) 7 NSWLR 560
Formosa v Secretary, Department of Social Security (1988) 81 ALR 687

Counsel for the plaintiff : C.R. McDonald,
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Solicitors for the plaintiff : Cridland & Bauer

Counsel for the 1st defendant : I. Bruninghausen
Solicitor for the 1st defendant : Solicitor for the NT

Counsel for 2nd defendant : G.E. Hiley QC
Solicitors for the 2nd defendant: Ward Keller

ORDER OF THE COURT

(1) That the title of the proceedings be amended to accord with the title in this judgment.

(2) That the proceedings be dismissed.

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IN THE FULL COURT OF
THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No.684 of 1988

BETWEEN:

GYPSY JONES

Plaintiff

AND:

MOTOR ACCIDENTS (COMPENSATION)
APPEAL TRIBUNAL

Defendant

No.685 of 1988

BETWEEN:

WENDY JONES

Plaintiff

AND:

MOTOR ACCIDENTS (COMPENSATION)
APPEAL TRIBUNAL

Defendant

CORAM: KEARNEY, MAURICE and MARTIN JJ

REASONS FOR DECISION

(delivered 23 December 1988)

KEARNEY J: We rule today on 2 proceedings by way of originating motions of 14 September 1988 which were heard together, by consent. The plaintiffs seek judicial review

of certain decisions of 28 July 1988 of the Motor Accidents (Compensation) Appeal Tribunal, by way of orders in the nature of certiorari and mandamus. As a result of the decisions the Tribunal concluded that it had no jurisdiction to hear the matters the plaintiffs had referred to it. The plaintiffs seek to have the decisions quashed on the basis that in making them the Tribunal erred in law and thus held that it lacked jurisdiction which in fact it possessed.

By Summons of 8 November 1988 the plaintiffs applied to have the proceedings heard by a Full Court; on 10 November Martin J granted the application and referred the proceedings accordingly. The Full Court accepted the reference under s.21 of the Supreme Court Act and heard argument on 13 and 14 December. The Tribunal submitted to the jurisdiction and the Territory Insurance Office (herein "the Office") was heard in opposition to the motions, as a body directly affected.

The history of events which led the plaintiffs to the Tribunal and then to this Court, is as follows.

The lodging of the claims for benefits

For the purposes of the jurisdictional argument before the Tribunal it was accepted that:-

(1) on 4 March 1985 one Gerry James Skinner, a resident of the Northern Territory, was killed in a motor vehicle accident on the Sandover Highway in the Northern Territory. He was a passenger in the motor vehicle.

(2) the deceased was a full-blood tribal Aboriginal, who left 2 tribal widows and a number of dependant children; and

(3) the plaintiffs are the 2 tribal widows of the deceased.

On 12 June 1986, that is, some 15 months after the deceased was killed, the plaintiffs' then solicitors forwarded to the Office applications by the plaintiffs for benefits under s.22 of the Motor Accidents (Compensation) Act (herein "the Act"). Section 22 of the Act provides:-

> "22. DEATH BENEFITS
>
> (1) Subject to section 37, where a qualifying person dies in an accident ... leaving a spouse who survives the deceased qualifying person for a period of 30 days, that spouse shall be paid the prescribed amount.
>
> (2) In addition to any amount payable under subsection (1), where the spouse of a deceased qualifying person referred to in that subsection survives him, there shall be paid to that spouse ... the prescribed amount per week in respect of each dependent child of the deceased qualifying person in the care and custody of the spouse ..."

The time for making claims for benefits is regulated by s.31 of the Act, viz:-

> "31. TIME FOR MAKING CLAIMS
>
> (1) A claim -
>
> (a) for a benefit
> ...
>
> under this Act shall be made as soon as practicable after the accident in ... which the death ... giving rise to the claim for a benefit ... occurred.
>
> (2) The Board may refuse to consider -
>
> (a) a claim in respect of an accident
> ...
>
> made later than 6 months after the date of the accident ..."

For the purposes of the jurisdictional questions raised before the Tribunal the deceased was taken to be a "qualifying person" under s.22 of the Act, and the plaintiffs his spouses. That is to say, it was accepted for the limited purpose of resolving the question of the jurisdiction of the Tribunal to hear the matters the plaintiffs had referred to it, that the plaintiffs fell within the category of persons entitled to death benefits under s.22. As will be seen the questions raised before the Tribunal (p.24) related solely to the effect of the statutory time limits in s.29 of the Act, and the effect of s.36(3) of the Act.

The material part of the plaintiffs' solicitors' letter of 12 June which accompanied the applications was as follows:-

> "Mr Skinner was a full blood Tribal Aboriginal person who had at the time of his death two wives and a number of dependent children. We enclose herewith two applications for benefits completed by both widows for your early attention. We advise that our clients were not aware that they had any right to make a claim in respect of this accident until they were notified of this fact by one of this Services Lawyers during a recent Field Trip to the Utopia area. We would be pleased if you could advise what further information you require in order to process these claims." (emphasis mine)

It appears from a later letter of 30 October 1986 (see p.21) that the plaintiffs' solicitors assert that the lawyer's "recent field trip" referred to above was undertaken on 7 May 1986; if this be so, the applications were forwarded to the Office by the plaintiffs' solicitors some 36 days after the plaintiffs became aware of their rights, and some 27 days after the plaintiffs signed their applications for benefits on 16 May. These alleged details were not known to the Office's decision-maker when the plaintiffs' applications for benefits were considered; all he had before him were the applications dated 16 May 1986 and the solicitors' covering letter of 12 June.

The General Manager's Determination of 5 August 1986

Under s.12(1) of the Act, the Board of the Office is empowered to determine "the right of any person to ... a benefit under [the Act]". However, under s.36(1) of the Act the Board may delegate its powers and functions to the General Manager of the Office. The Board had in fact in 1985 delegated its powers under s.12(1) of the Act to the General Manager.

On 5 August 1986 the General Manager dealt with each of the plaintiffs' applications in the following manner:-

TIO

"MOTOR ACCIDENTS (COMPENSATION) ACT 1979
DETERMINATION

Ref: MAC/104895

In the matter of an application by Wendy Jones (The Applicant) for benefits under the Act arising from an occurrence on the 4/3/85, which resulted in the death of her husband Gerry James Skinner.

Pursuant to the provisions of the Motor Accidents (Compensation) Act 1979 it is hereby determined:-

1. That the application for benefits was made 6 months after the date of the accident.

2. That the application for benefits was made later than 6 months after the date of the accident and, as such, the Board or it's (sic) delegate may decline to consider the claim pursuant to Section 31(2).

3. In this instance the Board Delegate declines to consider the claim.

Dated the 5th day of August 1986.

(indecipherable signature)
.....
for GENERAL MANAGER

NOTICE: Persons aggrieved by the decision of the General Manager may lodge an appeal in writing, to the Board of the Territory Insurance Office. Such an appeal must be made within 28 days of receipt of the General Manager's Determination."

Three aspects of this Determination may be noted: the General Manager made the Determination in his capacity as "Board Delegate"; the document sets out 3 determinations; on their face, determinations Nos 1 and 2 are inconsistent with each other. No light has been cast on this inconsistency; it is possible that determination No.1 is directed to s.31(1) of the Act - but that is mere speculation. The proceedings in the Tribunal were on the basis that the operative determinations were Nos 2 and 3, no doubt because by letter of 8 August forwarding the Determination to the plaintiffs' solicitors the Claims Officer of the Office stated -

> "Their [that is, the plaintiffs'] claims were denied as they were lodged well outside the usually permissible 6 month period".

By s.27(6) of the Act the General Manager is not required to give reasons for his decisions, but the reasons stated by the Claims Manager in his letter of 8 August

confirm what is already sufficiently explicit in the Determination, were not sought to be varied or contradicted, and bind the Office. That letter shows that the only reason the claims were not considered was, in terms of s.31(2) of the Act, that they were "made later than 6 months after the date of the accident". In August 1986 of course, the General Manager did not have the benefit of the analysis of the discretion in s.31(2) of the Act, set out in McMillan v Territory Insurance Office (unreported decision of the Tribunal (Gallop J), 23 August 1988). It is convenient to turn aside at this point to examine in detail what was laid down in McMillan for the guidance of the Board because although for the purpose of the jurisdictional issues agitated before the Tribunal the validity of the Determination of 5 August 1986 was assumed, that assumption can be seen from McMillan and the documents placed before the Tribunal to be very questionable. The bedrock which founded the reference to the Tribunal is more akin to shifting sand, and the agitation of jurisdictional issues before the Tribunal may be as useful an exercise as rearranging the deck-chairs on the Titanic.

The decision in McMillan v Territory Insurance Office

In McMillan the applicant for benefits under the Act was injured on 8 February 1981, became aware some 5 years

later on 15 January 1986 that she was entitled to claim, and applied for benefits some 3 months later on 21 April 1986. The General Manager on 30 June 1986 determined her application by declining to consider it under s.31(2) of the Act, just as he dealt with the plaintiffs' applications some 5 weeks later. On 29 July the applicant requested that the General Manager's Determination be referred under s.27(2) of the Act to the Board; by Determination dated 3 September 1986 the Board confirmed the General Manager's decision of 30 June. The applicant treated that as a decision that she was not entitled to receive benefits and referred that matter to the Board under s.29(1)(a) of the Act. That was not correct; what should have been referred was the Board's decision that the application not be considered. However, that error proved to be of no moment; see p.17.

Under s.29(4) of the Act the Tribunal hears matters de novo. The Tribunal (Gallop J) first considered what was involved in the exercise of the discretion under s.31(2) to consider a late claim; in the present case, this is relevant to the General Manager's function when he was considering the plaintiffs' applications as delegate of the Board, for the purpose of making his Determination of 5 August 1986. Gallop J noted that the Tribunal's function was administrative in nature and the question it had to decide was as stated in Drake v Minister for Immigration and Ethnic Affairs (1974) 24 ALR 577 at p.589 per Bowen CJ and Deane J, viz:-

"... whether that decision [that is, in the present context, the decision by the Board under s.31(2) of the Act not to consider McMillan's claim] was the correct or preferable one on the material before the Tribunal."

Gallop J dealt with this question by first considering the relevance of the "as soon as practicable" requirement in s.31(1) of the Act, to the exercise of the discretion in s.31(2). His Honour said at pp.5-6:-

"The phrase 'as soon as practicable' is designed to impose a reasonably practical time limit after the subject accident for making a claim under the Act. What is a reasonably practicable time must vary according to circumstances. No doubt all the surrounding circumstances relative to the claimant must be taken into consideration, as in every other case where it falls to a Tribunal to decide what is reasonable. Those circumstances would include the physical and mental capacity of the injured person at the time in question, his degree of business knowledge, the nature and time of his enquiries, the result of such enquiries, any difficulties encountered, the magnitude of any injuries, whether they had stabilised, and such similar matters.

Various situations are contemplated by s.31. A claim may have been made as soon as practicable after the accident and within the period of six months. In such a case the Board would be obliged to consider the claim. A claim may have been made within six months but not as soon as practicable. The Board would be obliged to consider such a claim and, if it deemed that the claim was not made as soon as practicable, to reject it as being out of time. But such a claim must be considered. The Board would have no discretion to refuse to consider it.

A claim may be made later than six months after an accident. The Act does not provide any guidelines for the exercise of the discretion to refuse to consider such a claim. The exercise of the discretion may be quite draconian where the Board refused to consider the claim. On the other hand, one could well understand a decision to consider such a claim, notwithstanding that it was made later than six months

after the accident. How then is the discretion to be exercised?

> It was submitted on behalf of the respondent [that is, the Office] that the discretion should only be exercised in favour of considering a claim where, notwithstanding the fact that the claim is made later than six months after the accident, the Board is satisfied on a consideration of all the factors prevailing that it was nevertheless made as soon as practicable after the accident. Otherwise, it was submitted, the Board should refuse to consider the claim. The factors relative to the person should be considered, but prejudice or detriment to the Board would be irrelevant.
>
> This submission has some superficial attraction and some judicial support ..." (emphasis mine).

It may be noted that there is no suggestion in the materials before the Tribunal in this case that the General Manager adverted to the matter put forward by his Office in McMillan (supra) as the only matter relevant to a decision under s.31(2) of the Act, namely, whether on a consideration of all the prevailing factors he was satisfied that the applications made more than 6 months after the accident were made as soon as practicable after the accident. It appears obvious from the letter of 8 August that the General Manager gave no consideration at all to the question whether the applications had been made as soon as practicable; he simply relied on the fact that they had been lodged outside the 6 month period, as a guillotine. To put it another way, he did not advert to the consideration which his own Office (later) advanced in McMillan (supra) as the only consideration relevant to the exercise of his discretionary decision under s.31(2) to refuse to consider the claims.

Gallop J then discussed and distinguished Allsop v The Incorporated Law Institute (1944) 44 SR (NSW) 132, and adopted the principles set out by Mason J in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 60 ALJR 560 at 565, as applicable to the construction of s.31(2) of the Act instead of the more limited "as soon as practicable" test. His Honour proceeded (at pp.8-9):-

> "Applying those principles to the construction of s.31 of the Act, one must have regard to the subject matter, scope and purpose of the Act. The preamble to the Act describes it as an Act to establish a no fault compensation scheme in respect of death or injury in or as a result of motor vehicle accidents, to prescribe the rates of benefits to be paid under the scheme, to abolish certain common law rights in relation to motor vehicle accidents, and for related purposes.
>
> The Act provides entitlements to various types of benefits, including compensation for loss of earning capacity. By its very nature the Act is designed to provide benefits for persons suffering injuries in motor vehicle accidents. Its emphasis and policy is that personal injuries in motor vehicle accidents should not go without compensation. Section 31 is designed to encourage prompt lodgment of claims for benefits under the Act. But as Barwick C.J. said in Hall v. The Nominal Defendant (1966) 117 CLR 423 at 435 in relation to the provisions of the Traffic Act 1925 (Tas), the ends which the Act seeks to serve require that the time limit shall not stand in the path of justice." (emphasis mine).

In Hall's case (supra) the Court was concerned with the propriety of the exercise of a statutory discretion to extend a mandatory time limit; while that is its context, the observation by Barwick CJ holds good in relation to the exercise of the parallel discretion in s.31(2) of the Act.

I consider that the remarks of Gallop J on the policy of the Act in relation to an accident victim apply equally to the dependents of an accident victim. The Act was passed because of the need to restrain the rapidly escalating level of third party premiums under the former common law fault-based insurance system, due to the Territory's high accident rate, low population and the increasing level of awards, combined with discontent at the failure of the fault-based system to compensate a significant number of road accident victims. In lieu of the common law system of the award of damages for negligence, the legislation provides for a self-funding scheme designed to keep motorists' insurance premiums (now called "compensation contributions") at what is considered to be a reasonable level, while the pool which these contributions constitute is used to provide most road accident victims with scheduled payments, on a no-fault basis, of limited and fixed amounts considered to be fair and equitable. The self-funding nature of the scheme requires a reasonably accurate actuarial assessment of claims payable from the year's pool of contributions so that the level of premiums for the next year may be so set as to meet current and expected outgoings. Hence, no doubt, the time limit in ss.31, 27 and 29 of the Act, to ensure an accurate record of annual claims. The Act should receive a broad and benign construction so as to prevent its obvious purpose from being defeated; see Builders Licensing Board v BJ Lindner Pty Ltd (1982) 1 NSWLR 561.

Gallop J then referred to various authorities dealing with the approach to the exercise of a discretionary power to extend a time limit, and noted the following observations by the Full Court of the Supreme Court of Victoria in Irving v Carbines (1982) VR 861 at p.866:-

> "Whether this tendency [that is, to relax rigid time limits where it is legally possible to do so and where it can be done without prejudice or injustice to other parties] is ultimately for the benefit of society may be debated, but we agree that it is clearly discernible and we think that we should give effect to it. The relaxation ... can only be where there is no undue prejudice or injustice to other parties but there is also discernible, or so it seems to us, a tendency to minimize the injustice caused to defendants by enlarging time limits, particularly when the defendant is an insurance company or entitled to be indemnified by an insurance company." (emphasis mine).

His Honour concluded his analysis of the approach to the discretion in s.31(2) of the Act at pp.10-11:-

> "As no hard and fast rule has been stated in the Act, the decision whether to consider the claim is unconfined and must be approached in a broad fashion, taking into account all the relevant matters. Amongst the relevant matters in this case, which are factually proved to my satisfaction, are that the applicant at the time of the accident was a middle aged Aboriginal woman in good health but with little or no formal education or command of the English language. She was brought up in a Roman Catholic Mission and lived on the Mission for most of her life. More recently she has lived in an Aboriginal camp on the fringe of Alice Springs. She is now about 58 years of age. She did not know about her right to make a claim until she consulted the Central Australian Aboriginal Legal Aid Service on or about 15 January 1986. The application was not made until 21 April 1986, [that is, some 3 months later] but no particular prejudice to the respondent has been alleged, either in relation to

> that short delay or generally in relation to the failure to make a claim before five and a half years after the accident. It was the applicant's ignorance of the law which explains completely the delay in making a claim for a benefit under the Act." (emphasis mine).

In the present case, of course, none of the matters proved before Gallop J or any matters to similar effect, have been proved before the General Manager,the Board or the Tribunal. They may not have been perceived by the General Manager or the Board as relevant considerations.

His Honour then considered the significance of the fact of "ignorance of the law" in relation to the exercise of the discretion in s.31 of the Act; it will be recalled that the plaintiffs had from the outset relied on this factor in this case. Gallop J applied the approach adopted in workers' compensation cases involving latent injury, in the following manner (at pp.11-12):-

> "Adapting that concept to the present case, one may ask: 'At what time did the applicant realise that she had a compensable claim under the Act?' ... Whether she made a claim as soon as practicable would depend upon the answer to such a question. The answer would, in my opinion, be a relevant consideration, having regard to the subject matter, scope and purpose of the Act.
>
> That an applicant's ignorance of the right to apply for an extension of time may be sufficient cause to grant the application has been laid down in relation to the Nominal Defendant provisions of the Motor Vehicles (Third Party Insurance) Act 1942 in Sophron v. Nominal Defendant (1957) SR(NSW) 59 per Herron J., as he then was, at p.86. His Honour approved the dicta of Bavin J. in Harris v.

Metropolitan Water, Sewerage and Drainage Board (1940) 57 W.N. (NSW) 42, that the fact that an applicant was ignorant of his rights does not in itself disqualify him from claiming that it is reasonable that the prescribed period should be extended. It seems clear that ignorance is not conclusive one way or the other, but it may amount to a sufficient cause for an extension of time. That observation by Herron J. was not referred to by the High Court when the matter went on appeal (Sophron v. The Nominal Defendant (1957) 96 CLR 469).

In Braedon v. Hynes (unreported decision delivered 24 July 1986) Maurice J., in considering an application for an extension of time under the Limitation of Suits and Actions Act 1866 of South Australia (since repealed), rejected a submission that ignorance of the law ought not to be taken into account in a plaintiff's favour. He said that in a community with the Northern Territory's cultural and ethnic diversity to apply any such dictum would inevitably lead to significant injustice in a potentially large number of cases. In my opinion, what his Honour said in relation to the legislation then under consideration applied with equal force to the exercise of the discretion set out in s.31(2) of the Act. The legislature has not said otherwise and has therefore left the decision-maker free to exercise the discretion after consideration of all the circumstances.

A submission was made on behalf of the applicant that before the decision-maker could properly exercise the discretion against entertaining the applicant's claim, the respondent would have to demonstrate by appropriate evidence that it had been so substantially prejudiced by the lateness of the claim that justice could not be done between the parties by entertaining the claim.

It is not strictly necessary to consider this submission for the purposes of the present case because it was common ground that the respondent had not suffered any prejudice by the lateness of the claim. But in my opinion prejudice must be relevant to the exercise of any discretion to extend time unless expressly deleted. The authorities quoted all embrace the concept of prejudice as a factor.

It may be of some assistance, however, if I make some comments about where the onus of proof lies. In cases of claims within 6 months after the date of accident, plainly the time for making claims is intended to be as soon as practicable, and in any

> event within 6 months of the date of the accident. Where a person makes a claim outside the 6 month period, the person is in default. He must excuse that default and, in my opinion, the burden of proof in the first instance rests upon him. But if he gives evidence from which it may be reasonably inferred that the Board has not been prejudiced, I think that the burden of proof, which is an evidentiary one, is shifted from his shoulders on to the shoulders of the Board, and if the Board is in a position to prove prejudice in some particular matter it is bound to do so. If the Board does not choose to prove prejudice, the matter is not open to conjecture (see generally Hayward v. Westleigh Colliery Co. Limited (1915) AC 540)." (emphasis mine).

It became common ground between the parties in McMillan that if the Tribunal decided (as it eventually did) that the claim should have been considered under s.31(2) of the Act, the Tribunal should then proceed to consider it. Accordingly, Gallop J proceeded to deal with the claim on its merits.

The application of McMillan to the Determination of 5 August 1986

I respectfully agree with Gallop J's approach to the exercise of the discretion in s.31(2) when an applicant contends that the delay in claiming was due to ignorance of rights. It is clear in this case that the General Manager was put on notice by the plaintiffs' solicitors' letter of 12 June 1986 forwarding the applications, that this was the alleged reason for the delay. The General Manager had been asked by the plaintiffs' solicitors in that letter what

'further information' he required. Properly to exercise his discretion in s.31(2) he had to enquire as to when the plaintiffs had first become aware of their rights to claim and, if they had thereafter delayed in making their claims, why that delay had occurred. The General Manager in fact seems to have made no such enquiries. The reason appears clear: he did not consider that the reason for the delay was a matter relevant to the exercise of his discretion. It seems quite clear on the material before the Tribunal that he regarded the discretion in s.31(2) as unconstrained by a factor such as ignorance of rights, and made his decision simply on the basis that the claims "were lodged well outside the usually permissible 6 month period". Such an approach is erroneous, as McMillan has now made clear. Accordingly, in making his Determination of 5 August 1986, the General Manager appears on the materials available, to have failed to take into account matters he was bound to take into account in order validly to exercise his discretionary decision. For that reason I consider - as far as the materials before the Tribunal go - that the General Manager appears to have acted ultra vires his discretionary power under s.31(2) when he purported to make the Determination on 5 August 1986 and that purported Determination is probably a nullity; see Sean Investments Pty Ltd v Mackeller (1981) 38 ALR 363 at 373-5. Whether this is so remains to be established.

I have dealt at length with McMillan because it appears to me to be a decision of vital practical importance, goes to the heart of proper decision-making when s.31(2) is involved as here, and appears to show that the institution of the proceedings before the Tribunal may have been misdirected. It is not to the point to seek to establish a right to have a matter referred to the Tribunal, if the reality is that there has never been a lawful Determination of a claim in the first place. No doubt, however, this question could properly be answered in mandamus proceedings directed to the Board, though in the light of McMillan such proceedings should not be necessary. On the face of the material in evidence, this appears to be a case in which the General Manager's refusal to consider the claim was wrong for reasons similar to those which established that the refusal was wrong in McMillan. The principles of good administration, and the necessity to maintain public confidence in the fair administration of the scheme, point to the desirability of administrative enquiries now being made to determine whether the claims should be considered, in the light of the McMillan guidelines. Section 36(3) of the Act confers ample authority of the Board to carry out such a review. McMillan deals with matters of prime importance for the proper functioning of the no-fault scheme.

I return to the narrative.

The reference to the Board of 30 October 1986

The plaintiffs' solicitors received the Determination of 5 August 1986 on or about 14 August. It will be noted that at the foot of the Determination (p.7) the recipient was advised that any "appeal" had to be "made within 28 days of receipt"; this was clearly a reference to the requirements of s.27(2) of the Act.

Section 27(2) of the Act provides:-

> "(2) Where the General Manager exercises a discretion under this Act, whether as a delegate of or with the authority of the Board ... a person aggrieved by his decision in the exercise of that discretion ... may, within 28 days after receiving written notice of that decision ... request in writing that the General Manager refer the matter to the Board for its determination and the General manager shall, as soon as practicable, refer the matter accordingly." (emphasis mine)

This meant that any "appeal" should have been made by about 11 September 1986. In fact, not until 30 October 1986, that is, some 77 days after receiving the Determination, did the plaintiffs' solicitors take action under s.27(2) of the Act to "appeal", by requesting that the General Manager's decision be referred to the Board. No explanation for that delay was made to the General Manager, the Board or the Tribunal. As to the lack of explanation to the Tribunal, no doubt that was because consideration was then immediately

devoted to the question whether the Tribunal had jurisdiction, an issue for the purpose of the resolution of which all prior steps were assumed to have been properly carried out.

Consonant with the views I have earlier expressed, I consider that the legal position as at 30 October 1986, on the material before the Tribunal, appears to be that the General Manager had failed lawfully to make a decision on the claims forwarded on 12 June. The plaintiffs were within the time prescribed by s.27(2) for requesting the matter to be referred to the Board for determination, and they can overcome the General Manager's subsequent refusal to do so, by mandamus.

The request by the plaintiffs' solicitors of 30 October 1986 stated, as far as is material:-

> "We advise that instructions in these matters were obtained by a solicitor from our office whilst on a field trip to Utopia Station on the 7th of May 1986. Our clients live at Cooky Bore which is an Outstation at Utopia.
>
> Mr Skinner was a full-blood tribal Aboriginal person and our clients were not aware that they had any claim in respect of his death until they were advised by the solicitor from this Service.
>
> We would be pleased if you would refer the decision of the General Manager to the Board of the Territory Insurance Office for further consideration."

The General Manager did not "refer the decision" to the Board. Instead, on 16 January 1987, the Claims Officer wrote to the plaintiffs' solicitors as follows:-

> "We advise as your Notice of Appeal was not received by this Office within 28 days of the General Manager's Determination, this matter will not be referred to the Board of the Territory Insurance Office."

It may be noted that this does not amount to a reason warranted by the Act for declining to refer the matter; s.27(2) provides that the request is to be made within 28 days after receiving notice of the General Manager's decision. It appears to be common ground that this decision not to refer the Determination of 5 August 1986 to the Board, was the General Manager's decision.

In its decision, reported as Jones v Territory Insurance Office (1988) 55 NTR 17, the Tribunal noted at p.19 of the report that the plaintiffs' solicitors' request of 30 October:-

> "... was outside the time limit of 28 days prescribed for referral to the Board [by s.27(2)], and ... that the respondent [the Office] claims it to be a nullity. That is not a question I am presently asked to determine."

The Tribunal was not at that time "asked to determine" the effect of the apparent breach of s.27(2) of the Act,

because for the purpose of testing its own jurisdiction under s.29, the fact that there had been a valid determination by the Board was assumed. It need not have been assumed, but that was the way the parties appear to have approached the jurisdictional issue. Considerable argument was directed before us to the question whether the time limit of 28 days in 27(2) is mandatory in its nature; I consider that it is, for the reasons set out by the Tribunal at pp.22-25 of the report, but a decision on that question is not germane to these proceedings.

The references to the Tribunal

Thereafter there was a pause. The plaintiffs engaged different solicitors. At pp.19-20 of the report the Tribunal traced the subsequent history, viz:-

> "Considerable time then elapsed, but on 8 December 1987 [that is, some 11 months after the General Manager had refused to refer the Determination of 5 August 1986 to the Board] solicitors now acting for the applicants requested that 'the Board refer the decision of the Board delegate to the tribunal pursuant to s.29(2) of the Act'. That was refused by letter of the Board of 15 March 1988. [The Board 'made a decision to decline the invitation'.]
>
> On 17 February 1988 the applicants' solicitors wrote to the Board requesting that it review the decision of the Board delegate pursuant to s.36(3). A further request was made in the alternative that the general manager refer the applications to the Board pursuant to s.27(1)(b).

Those requests were declined by letter of the Board dated 16 May 1988.

By notice of reference to the tribunal dated 4 March the applicants sought appeal to the tribunal by referring these matters to the tribunal pursuant to s.29. Those notices were twice amended by leave and in their present form are dated 16 June 1988.

In summary, the further amended references allege that the applicants are aggrieved:

(a) by the determination of the board delegate of 5 August 1986;

(b) further or in the alternative by the refusal of the Board on 16 January 1987 to determine the applicants' request of 30 October 1986 to refer the determination of the Board delegate of 5 August 1986 to the Board;

(c) further or in the alternative by the refusal of the Board on 15 March 1988 of the applicants' request of 8 December 1987 to refer the decision of the Board delegate to the tribunal pursuant to s.29(2);

(d) further or in the alternative by the refusal or failure of the Board on 16 May 1988 to review the determination of the Board delegate pursuant to s.36(3) of the Act as requested by the applicants on 17 February 1988.

The further amended references then seek determinations from the tribunal that the applicants are entitled to benefits pursuant to s.22 of the Act.

To these matters the respondent raises certain preliminary jurisdictional objections. If the objections are correct, then I, sitting as the tribunal, have no jurisdiction to hear or receive the further amended references."

His Honour then dealt in the remainder of his judgment with the "preliminary jurisdictional objections", ultimately upholding them and ruling that the Tribunal lacked jurisdiction to entertain any of the matters the applicants had referred to it.

It is desirable to set out the relevant parts of the plaintiffs' solicitors' letter of 17 February 1988 and the Board's reply of 16 May. The solicitors said in their first paragraph:-

> "We note that pursuant to Section 36(3) of the Motor Accidents (Compensation) Act the board may review the exercise of any delegated power. We hereby request that the Board review the determinations made by the Board delegate in relation to Wendy Jones and Gypsy Jones of 5 August 1986."

The Board replied:-

> "... the Board have declined your invitation made in the first paragraph of your letter dated 17 February 1988."

I turn to consider the Tribunal's decisions on the objections to its jurisdiction.

The Tribunal's decisions of 28 July 1988

First it is convenient to dispose of a preliminary argument that s.30 of the Act, a privative clause, prevents this Court from reviewing the Tribunal's decisions. Section 30 is in the following terms:-

> "30. TRIBUNAL'S DECISION IS FINAL

A decision of the Tribunal is final and shall not be capable of being reviewed in any court of law by prerogative writ or otherwise."

It is well recognized I think, that privative clauses expressed in this way do not oust review of any administrative decision on the basis of an error of law which goes to jurisdiction, since such a "decision" is not a decision of the Tribunal under the Act, but a nullity; see Hockey v Yelland (1984) 157 CLR 124 at pp.130-1, per Gibbs CJ, and Anisminic v Foreign Compensation Commission (1969) 2 AC 147. The decisions of the Tribunal, as an administrative body, are reviewable by this Court under Order 56 of the Supreme Court Rules. A person's right of recourse to the Courts is not to be taken away except by clear words. Counsel for the Office ultimately appeared to concede the jurisdiction of this Court to review.

The Tribunal dealt seriatim with the preliminary jurisdictional objections to hearing the 4 matters listed at (a), (b), (c) and (d) on p.24.

As to (a), the objection by the Office was that a Determination by the Board delegate cannot be dealt with by the Tribunal, unless the processes of s.27(2), involving a referral to the Board, have first been completed. The Tribunal upheld that objection for the reasons stated at pp.20-21 of the report. I respectfully agree. I agree with

Maurice J that s.27(1) is not an independent source of power for the General Manager. I have already indicated my view that on the materials before the Tribunal the Determination of 5 August 1986 was probably merely a purported Determination and of no effect.

As to (b), the objection related to the Tribunal's jurisdiction and therefore was raised only in terms of s.29. It will be recalled that it seemed clear that the time limited by s.27(2) for referring a determination to the Board had not been met, but it appears that the Tribunal was nevertheless compelled to assume, for the purposes of the jurisdictional argument, "that time limits of s.27(2) could in some way be overcome". The Tribunal observed at p.21 of the report:-

> "...the respondent's letter of 16 January 1987 may be construed for the present argument as a refusal to refer the matter to the Board and therefore a determination of the Board. If that was a determination of the Board pursuant to s.29(1)(a), then the applicants should have referred it to the Tribunal within 28 days of the determination of 16 January 1987. This was not done."

Some parts of this passage are not readily understood. The letter of 16 January 1987 emanated from the General Manager. It dealt with <u>his</u> decision not to refer the Determination of 5 August 1986 to the Board. His refusal could only be construed as a "determination of the Board" if the General

Manager was at the time exercising power as a delegate of the Board. Even so, s.29(1)(a) is clearly directed only to determinations made by the Board itself, and not to determinations made by a delegate of the Board. Just as in (a), there is no direct access to the Tribunal from a decision of the Board's delegate; there must be a Determination or a failure to determine, by the Board itself. This appears to be the answer to (b). I do not think that the 28 day time limit in s.29(1)(a) bears upon the resolution of (b), except that on any view of the matter the plaintiffs were well out of time in referring the matter to the Tribunal on 4 March 1988.

The Tribunal then dealt at length at pp.22-27 of the report with the effect of the time limits imposed by s.29 and concluded that they were mandatory not directory; I respectfully agree with the Tribunal's reasoning and conclusion, and the analysis by Maurice J herein. I also note the interesting discussion of the topic in Formosa v Secretary, Department of Social Security (1988) 81 ALR 687 at pp.691-3. At p.22 of the report the Tribunal said that if these time limits were mandatory:-

> "... it is, I think regrettable; for such a discretion [to extend the time limits] is frequently conferred to prevent injustice to the individual, and at the same time hedged about with sufficient safeguards to the public purse to punish or prohibit undue, unjustifiable or unexplained delay. But such a discretion cannot be imported merely on the grounds of public policy. Both counsel have touched on the

> separate philosophies of public weal and private woe and of course any sort of remedial legislation must steer a course between the two. But none of this is to the point in construing this Act. The ameliorating provisions are there or they are not; or cannot legitimately be found. The Act is what it is, not what it ought to be."

I respectfully agree with these observations. I should add that in my opinion the necessary provision to ensure that justice is done is provided for by the legislature in s.36(3).

As to (c), this turned upon s.29(2) of the Act which provides:-

> "(2) The Board may, at any time, refer to the Tribunal any matter affecting the right of any person to a benefit, ... under this Act."

The Tribunal considered that the plaintiffs had no right to appeal to the Tribunal against the Board's refusal to act under s.29(2) as that provision conferred no right on the plaintiff to do so. I respectfully agree.

As to (d), the Tribunal concluded at p.28 of the report that:-

> "In exercising its discretion [under s.36(3) of the Act] not to review the exercise of the delegate's power in these cases the Board was not making a determination or failing to make a determination but merely declining to proceed down a route which was designed for its own use as a means of governing the

> discretion of its General Manager. Indeed this seems to be the only way in which the Board could control the actions or decisions of its General Manager because the procedures under s.27 are not open to the Board but only to applicants. ... I agree with Mr Riley that s.36(3) is no more than a procedural option open to the Board only and an applicant cannot insist that it be taken, or refer the matter to the Tribunal if it is not." (emphasis mine)

I respectfully differ from this construction of s.36(3), but not from the conclusion that the Tribunal lacks jurisdiction. It is sufficient to say that I agree, for the reasons stated by Martin J, that a person aggrieved cannot refer the matter to the Tribunal if the Board declines to exercise its discretion under s.36(3). However, the discretionary power vested in the Board by s.36(3) carries with it, in my opinion, a duty to consider whether that power should be exercised, when the Board is requested to do so by a person aggrieved by the decision of the Board's delegate. That duty is enforceable by mandamus to the Board. The Board's consideration of whether to exercise the power must be based on relevant criteria and for proper purposes; see Padfield v Minister of Agriculture and Fisheries and Food (1968) AC 997 at p.1053 per Lord Pearce. I agree with the observations of Maurice J on the remedies open to the plaintiffs, the Board's function in relation to the no-fault scheme, and the manner of the exercise of that function. Here the plaintiffs were clearly persons aggrieved.

I note that the importance in the scheme of the Act of the appeal to the Tribunal under s.29 cannot be overstressed. It provides the only external window into the working of the no-fault scheme for a person aggrieved by the decisions of the Board. Section 29(2) is a valuable provision enabling the Board to obtain from the Tribunal a ruling on a person's right to benefits.

Conclusion

In the light of the foregoing, I consider that the Tribunal's decisions of 28 July 1988 were correct; the plaintiffs' proceedings instituted on 14 September 1988 seeking orders in the nature of certiorari and mandamus directed to the Tribunal in respect of those decisions, should be dismissed.

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 684 of 1988

BETWEEN:

GYPSY JONES
Plaintiff

AND:

THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL TRIBUNAL
Defendant

No. 685 of 1988

BETWEEN:

WENDY JONES
Plaintiff

AND:

THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL TRIBUNAL
Defendant

REASONS FOR JUDGMENT
(Delivered 23 December 1988)

MARTIN J.

These claims for orders in the nature of certiorari and mandamus directed to the Tribunal, arise from its finding that it lacked jurisdiction to entertain references made to it by each of the plaintiffs, pursuant to the provisions of the Motor Accidents (Compensation) Act ("the Act").

Section 30 of the Act provides that "the decision of the Tribunal is final and shall not be capable of being reviewed in any court of law by prerogative writ or otherwise." Ouster provisions have a long history and they have been variously formulated, but Courts have consistently held that a provision such as s. 30 does not operate so as to deprive a Court with appropriate jurisdiction from exercising that jurisdiction where an inferior tribunal has fallen into error in regard to its jurisdiction, either by exceeding it or declining to exercise a jurisdiction which it has and ought to exercise. Nor do I think the Parliament otherwise intended. It would be strange indeed if the Parliament were to protect any inferior tribunal from the remedies available should it act outside the bounds of what the Parliament has prescribed for it, or declined to exercise the power which was entrusted to it by the Parliament for the public good.

In these cases, as will be seen, I have no doubt that s. 30 has no operation and this Court's jurisdiction to make the orders sought is not effected in any way by it.

In essence, the Tribunal found that it lacked jurisdiction to entertain the references because, in one instance, the plaintiffs failed to comply with the requirement of the Act as to the time within which a reference to the Tribunal is to be made, and in others, that

they were not matters which could be lawfully referred to the Tribunal.

The Act is an "Act to establish a no fault compensation scheme in respect of death or injury in or as a result of motor vehicle accidents, to prescribe the rates of benefits to be paid under the scheme, to abolish certain common law rights in relation to motor vehicle accidents, and for related purposes." Amongst the related purposes evidenced by the Act are the establishment of procedures for making claims for benefits, for having decisions or determinations made and reviewed (those words are not used consistently, and I will henceforth refer to "determination") and the creation of the Tribunal, defining its powers, and regulating access to it. As it now stands many of the procedures provided for are hedged about with requirements that certain things be done within specified times. Read as a whole the Act not only provides for the benefits but also regulates the method by which those benefits might be claimed and pursued.

The Board of the Territory Insurance Office ("the Board") has the power to determine the right of any person to, and the amount of, benefits payable under the Act (s. 12). It has exercised the power given to it under s. 36 to delegate all of its powers and functions (with certain enumerated exceptions) to the General Manager of the Territory Insurance Office ("the General Manager").

Since the issues before this Court are not to be decided by reference to the subjective circumstances of the plaintiffs, nor the facts giving rise to their claim for benefits under the Act, it is not necessary to go into them. However it is necessary to go into some detail as to the history of their claims and ultimate reference to the Tribunal.

On 4 March 1985 an accident occurred which, on the face of it, gave rise to an entitlement in each of the plaintiffs to obtain a benefit under the Act.

Section 31(1) of the Act provides that a claim for a benefit shall be made as soon as practicable after an accident as a result of which a death or injury giving rise to a claim for a benefit, occurred. S. 32(2), however, enables the Board to refuse to consider a claim made later than 6 months after the date of the accident.

The plaintiffs solicitors wrote to the "Claim Manager" of the Board on 12 June 1986, that is some 15 months after the accident, enclosing applications for benefits completed by each plaintiff. They advised that their clients were not aware that they had any right to make a claim until recently beforehand, and sought any further information which was required in order to process the claims. On 5 August 1986 the General Manager declined to consider the claims as they were out of time.

The Tribunal, in a reference by Hilda McMillan, has recently and for the first time considered the principles applicable to the exercise of the discretion to refuse to consider a claim out of time. That guidance was not available to the General Manager at the time he received the application from the plaintiffs, but had he then properly considered the question he may well have not refused to consider the claims. I note that in all respects the determination in that case and these are identical and equally confusing, in holding that firstly the application for benefits was made 6 months after the date of the accident, and secondly that the applications were made later than 6 months after the date of the accident.

The General Manager made his decision, in my opinion, pursuant to the delegation of powers already referred to. It was suggested in argument that s. 27 of the Act, impliedly gave to the General Manager a source of power independent of the delegation, but I do not think that is so. S. 27(1) simply regulates what the General Manager shall do. He is obliged to make a decision or refer the matter to the Board for its determination, within the prescribed time after receiving an application for a benefit, and to give notice in writing to the applicant of what he has done. He could make a decision himself if he was empowered to do so under his delegation (or quaere if otherwise authorised by the Board) or, if he had no relevant

delegation, or having it decided not to exercise it, refer the matter to the Board.

Section 27(2) provides "that where the General Manager exercises a discretion, or refuses or fails to do so within the time prescribed in s. 27(1), a person aggrieved "may, within 28 days after receiving written notice of that decision, or the expiration of that period, as the case may be, request in writing, that the General Manager refer the matter to the Board for its determination."

Upon the General Manager's determination declining to consider the plaintiffs claim was endorsed "Notice. Persons aggrieved by the decision of the General Manager may lodge an appeal in writing to the Board of the Territory Insurance Office. Such an appeal must be made within 28 days of receipt of the General Manager's Determination." I consider that this notice effectively informed the plaintiffs of their rights and pointed to the time limit for their exercise, although not couched in terms of the Act.

The General Manager's determination was received by the solicitor for the plaintiffs on 24 August 1986. By letter dated 30 October 1986, that is, well outside the period of 28 days referred to in s. 27(2), they requested that the General Manager's decision be referred to the Board. By letter dated 16 January 1987, an officer of the

Territory Insurance Office advised those solicitors that "as your Notice of Appeal (sic) was not received by this office within 28 days of the General Manager's Determination, this matter will not be referred to the Board ...". I do not decide whether it is the date of receipt of the request to refer a matter to the Board which is relevant.

In the meantime it appears that other solicitors, instructed by the former solicitor, wrote to the Board on 8 December 1987, reviewing the history of the matter and pointing out that at that stage the request that the General Manager refer the matter to the Board had not been replied to. They proceeded upon the basis that the Board had apparently refused or ignored the request and went on to request that the Board refer "the decision of the Board delegate to the Tribunal pursuant to s. 29(2) of the Act." That subsection provides that the Board may, at any time, refer to the Tribunal any matter affecting the right of any person to a benefit, or the amount of a benefit under the Act. On 15 March 1988 those solicitors were advised by the Board Secretary that "At the TIO Board meeting of 25/26 February 1988, the Board made a decision to decline the invitation made in your letter of 21 (sic) December 1987". It has been assumed in these proceedings that there was an error in the reference to a letter of 21 December and that the letter of 8 December was that which was referred to.

In the meantime the agents for the solicitors for the plaintiffs, by letter dated 17 February 1988, wrote to the Territory Insurance Office, noting that s. 36(3) of the Act enabled the Board to review the exercise of any delegated power (and to substitute its own decision for the decision of the delegate), and requested the Board to do so. In the alternative they also requested that the General Manager refer the plaintiffs applications for benefits to the Board for its determination pursuant to s. 27(1)(b) of the Act. I will return to the request relating to s. 36(3), but the second request contained in that letter seems to me to have been mistakenly made. The General Manager had chosen to make a decision on the plaintiffs claim for benefits pursuant to s. 27(1)(a). The method provided by the Act whereby a person aggrieved by the General Manager's decision can seek to have it referred to the Board is set out in s. 27(2). The plaintiffs had previously sought to have that done in relation to the rejection of their claims by him. It was not open to them to seek to have their original applications for benefits referred to the Board, only the determination made in respect of them.

An officer, described as "Manager, Motor Accidents (Compensation) Scheme", wrote to the agents for the plaintiffs' solicitor on 16 May 1988 advising that the Board had declined the invitation to review the delegates decision, pursuant to s. 36(3). No specific response was

made to the request that the plaintiffs' applications be referred to the Board. However, that reply referred to another letter from the solicitors dated 3 May 1988 which was not before the Tribunal or this Court and I therefor pay no regard to that respect of the dispute.

Section 29 of the Act is as follows:

"APPEALS TO THE TRIBUNAL

(1) Any person who is aggrieved -

(a) by a determination of the Board under this Act; or

(b) by the failure of the Board to make a determination within the 60 days referred to in section 27(3),

may, within 28 days after being served under section 27(4) with a copy of the determination of the Board or the expiration of that time, as the case may be, refer the matter to the Tribunal.

(2) The Board may, at any time, refer to the Tribunal any matter affecting the right of any person to a benefit, or the amount of a benefit, under this Act.

(3) Where a matter is referred to the Tribunal, it shall conduct such hearings into the matter as it thinks fit and may make such determination as the Board could have made thereon as the Tribunal considers proper in the circumstances having regard to the intention of the Act, and such determination is binding on the Board.

(4) A hearing conducted under this Part by the Tribunal shall be a hearing de novo."

I do not doubt that the plaintiffs were persons aggrieved.

The scheme of the determination process under the Act is to enable the Board to make determinations (s. 12). It may delegate its functions (s. 36). That it has done in that regard. Where the General Manager has authority to determine a matter he may do so (s. 27(1)(a)), or refer it to the Board (s. 27(1)(b)). If the General Manager does not have relevant authority, determinations as to rights and benefits are made by the Board (s. 12). That a determination of the General Manager, is not a determination of the Board, for the purpose of a reference to the Tribunal, is shown by the structure of the referral process in relation to determinations of the General Manager provided for in s. 27. In its context, the reference to the Board in s. 29 is to the Board, not its delegate.

In my opinion it is not open to an aggrieved person to refer a matter to the Tribunal unless the Board has made a determination, s. 29(1)(a), or failed to do so within 60 days after the matter has been referred to the Board by the General Manager (ss. 29(1)(b) and s. 27(2) and (3)). The jurisdiction of the Tribunal is, on the face of it, confined to such a reference made within 28 days after the person aggrieved has been served with a determination of the Board made under s. 27(3). The reference in s. 29 to service under s. 27(4) and the reference in that subsection to a determination under s. 27(3), with its reference to a referral "under this section", makes it sufficiently clear

in my mind that a reference to the Tribunal can only be made as a consequence of the processes permitted by s. 27, and especially s. 27(2). Furthermore, s. 27(7) specifically provides that no matter shall be referred to the Tribunal unless it has been considered by the Board. The word "Board" does not in this context include a delegate of the Board.

The only relief sought in these proceedings is against the Tribunal, not against either the General Manager or the Board, and the only questions raised go to the Tribunal's jurisdiction, not theirs.

The plaintiffs reference to the Tribunal, as originally framed, was made on 4 March 1988. The grievance then expressed was that the delegate of the Board declined to consider their applications for benefits made on 5 August 1986. For reasons already given the determination of the delegate was not the determination of the Board. In any event that determination was made in August 1986, patently a considerable period beyond 28 days prior to 4 March 1988.

The reference was amended after 15 March 1988 to raise a further grievance. Just when that amendment was made does not appear, but it relates to the Board's refusal to refer the matter to the Tribunal under s. 29(2). Again, for reasons already given I do not consider that a refusal

by the Board to agree to such a request is a determination of the Board which may be referred to the Tribunal under s. 29(1). The Tribunal, in its decision, drew the distinction between s. 29(1) where the right to refer to the Tribunal is given to a person aggrieved and s. 29(2) where the right is given to the Board, and said that they are mutually exclusive. I agree. A refusal by the Board to accede to a request that it refer a matter to the Tribunal under s. 29(2) is not a determination referred to in s. 29(1). The Tribunal had no jurisdiction to consider that reference.

Consequent upon the Board's later refusal to review the delegates determination under s. 36(3), the plaintiffs' again amended the reference to the Tribunal, asserting they were aggrieved by that refusal. Again, I do not consider that a refusal to review the exercise of the delegate's power under s. 36 was a determination of the Board within its meaning in s. 29(1), for the reasons already given. I need not consider whether the Board is bound to review under s. 36(3), a delegate's determination upon request. No relief is sought against the Board. I do not necessarily adopt that part of the Tribunal's reasons or its conclusion therefrom that s. 36(3) does no more than provide "a procedural option open to the Board only and an applicant cannot insist that it be taken". The Tribunal held that it had no jurisdiction to entertain that reference and it was correct in that finding.

There remains, on the argument before this Court the question as to whether the Tribunal has jurisdiction to entertain a reference notwithstanding that an applicant fails to comply with the requirement that the reference to it be made within 28 days after being served under s. 27(4) with a determination of the Board. The only reference to the Tribunal which directly gives rise to this issue is that concerning the determination of the delegate of August 1986. I have already held that a determination by a delegate is not a determination of the Board and that it is only a determination of the Board which can be referred to the Tribunal, and in respect of which it has jurisdiction. There was no determination of the Board under s. 27 which could be properly referred to the Tribunal. The decision, by whomsoever made, that the General Manager's determination would not be referred to the Board, as the request was made outside the period of 28 days allowed for in s. 27(2), is not the subject of these proceedings.

It is not therefor strictly necessary for me to consider whether it is essential that a person aggrieved refer a matter to the Tribunal within the time prescribed by s. 29(1), if its jurisdiction to entertain the reference is to be invoked. However, in deference to counsels argument, and if I be wrong in any of the conclusions to which I have come, I should deal with the question. The delegate's determination was made and served in August 1986, the

reference to the Tribunal was in March 1988, the period referred to is 28 days from the service of the determination.

The question is whether it was open to the Tribunal to entertain the reference notwithstanding non-compliance with the requirements of s. 29(1) as to time. No question of substantial compliance could arise. There is no discretion expressly vested in the Tribunal to extend the time or otherwise overcome the defect. The plain words of the statute require the reference to be made within the time stipulated. The use of the word "may" does not avail the plaintiffs. It is facultative, providing the right to make the reference if the person aggrieved wishes to do so. It does not provide an option as to whether the right will be exercised within 28 days or any other time, it provides an option as to whether the right will be exercised or not. But the problem remains, upon the construction of the statute, as to whether the requirement is mandatory or directory only. This involves determination of the question whether the legislature intended that a failure to comply will invalidate a reference to the Tribunal, or whether validity will be preserved, notwithstanding non-compliance. The statutory intention is to be found in the language of s. 29(1), and the scope and object of the Act as a whole having regard to the requirements and its place in the legislative scheme. (Tasker v Fullwood (1978) 1 NSWLR 20).

In Woods v Bates (1987) 7 NSWLR 560, McHugh JA. with whom Hope JA. agreed, put it this way "If the purpose of the provision is to ensure that the act is done within the stipulated period, then the doing of the act outside that period is of no effect. If, however, the purpose of the provision is to state a direction but not an imperative requirement, then the doing of the act outside the period will not necessarily invalidate it. To determine the purpose of the provision, it is necessary to weigh the various consequences of a failure to comply with the statute" at p. 566 and the authorities there relied upon. At p. 567 it was suggested that the proper approach "is to regard the statutory requirement, expressed in positive language, as directory unless the purpose of the provision can only be achieved by invalidating the result of any departure from it, irrespective of the circumstances or resulting injustice". Their Honours went on at p. 569 to accept that the lodging of a Notice of Appeal within the period prescribed by the regulations then under consideration, was mandatory, it being required to invoke the jurisdiction of the Court.

My opinion is that cases that deal with the question of substantive compliance with directory requirements are of no assistance, when there is no question of substantial compliance involved in the interpretation of the statute. In this case, either there has been compliance

or not, and if not, the question is whether it was the intention of the Parliament that non-compliance shall be such that the Tribunal shall not have jurisdiction to entertain the reference. Mason CJ. and Gaudron J., in Hunter Resources v Melville (1988) 164 CLR 234, at p. 241 addressed the question as to whether it was open to the Tribunal in that case, to proceed to determine the issues between the parties where there had been non-compliance with the regulatory requirement. They held that it was not. Their Honours do not appear to have weighed in the balance the effect which their interpretation may have on the parties to the dispute, they appear to have decided the case upon the plain words of the statute. Wilson J. held that upon a proper construction of the statute, the question was whether it was obliged to refuse the application in question when it was shown that the applicant before the Tribunal had failed to comply with the statutory requirement (p. 245). His Honour pointed out that the requirement was not one with which it was difficult to comply.

As Dawson J. observed, it was a case in which substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not (p. 249). This is a not dissimilar case. There the requirement was that pegs be fixed along the boundary lines of a mining tenement at intervals not exceeding 300 metres.

At p. 250, His Honour drew attention to the distinction between the performance of a public duty and the acquisition and exercise of a private right. We are here concerned with the latter. At p. 251, His Honour said that if the concept of a directory enactment is extended to private rights, the question whether a provision is mandatory or directory must nevertheless be one of intent to be gleaned from the scope and object of the statute. "It is a question of what consequences, if any, were intended to flow from the failure to comply with the statutory requirement and even if the difference between the performance of a public duty and the acquisition or exercise of a private right is not conclusive, that distinction does at least provide some guidance in distinguishing those provisions with which strict compliance was intended from those which it was not". This is a case concerning the exercise of a private right.

Private rights to appeal, or in this case to refer a determination of the Board to the Tribunal, are created by the statute and governed by it.

The monies from which the benefits under the Act are payable, are contributed by people who register or renew the registration of motor vehicles and are paid by the Registrar of Motor Vehicles to the Territory Insurance Office (Motor Vehicles Act, Part V) and administered by the

Office (Territory Insurance Office Act, s. 5(c)). I consider that when the legislature enacted the current provisions governing references to the Tribunal it intended that there should be relatively speedy finality to claims against the fund, as an aid to good administration of it, and so that the level of contributions to the fund could be fixed from time to time with reasonable knowledge of claims pending against it.

The Tribunal held then it had no jurisdiction to entertain a reference made out of time. I agree.

In the course of these reasons reference has been made to the decision of the Tribunal in the case of Hilda McMillan. In that matter the Tribunal not only substituted its decision for that of the Tribunal in regard to consideration of the claim made out of time, but went on to consider and determine the plaintiffs claim for benefits on the merits. With respect, I doubt that that second matter was the subject of a proper reference to the Tribunal. I do not, of course, decide that issue. It does not arise in this case. I mention it only lest it be thought that in referring to that case I necessarily approve the course that was adopted in regard to that second aspect of the matter.

I would give judgment for the defendant.

IN THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA

No. 684 of 1988

BETWEEN:

GYPSY JONES

Plaintiff

AND:

THE MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL

Defendant

No. 635 of 1988

BETWEEN:

WENDY JONES

Plaintiff

AND:

THE MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL

Defendant

REASONS FOR JUDGMENT
(Delivered 23 December 1988)

MAURICE J.

These two matters come before the Court on originating motions seeking orders in the nature of certiorari and mandamus against the Motor Accidents (Compensation) Appeal Tribunal. They were referred to the Full Court by Martin J. under s.21 of the *Supreme Court Act*. In my opinion, the references should be accepted because what is involved is a review of a decision of a judge of this Court constituting the Tribunal.

There is another procedural matter that I think should be mentioned. It is neither necessary nor appropriate to name the judge constituting the Tribunal in the title to proceedings such as these: jurisdiction is conferred on the Tribunal, not members of this Bench.

The facts in both cases are identical. The plaintiffs are the widows under tribal law of an Aboriginal man from Utopia, Gerry James Skinner. The plaintiffs' husband was killed in a motor vehicle accident on the Sandover Highway on 4 March 1985. Under cover of a letter dated 12 June 1986, a solicitor in the employ of the Central Australian Legal Aid Service (C.A.A.L.A.S.) forwarded applications for benefits under the *Motor Accident (Compensation) Act* on behalf of the widows to the Claims Manager, Motor Accidents Compensation, care of a Territory Insurance Office (TIO) Post Office box in Darwin. On 14 August 1986 the solicitor received formal 'determinations', signed on behalf of the General Manager as a delegate of the Board of the TIO, in each case declining to consider the claim for benefits on the grounds that it was made (1) six months after the date of the accident; and (2) much later than six months after the date of the accident. Seventy-five days later, on 30 October 1986, another solicitor in the employ of C.A.A.L.A.S. wrote to the Claims Officer, TIO, requesting that he refer the decision of the General Manager to the Board of the TIO for further consideration. This letter was not responded to until 16 January 1987 when the Claims Officer wrote to C.A.A.L.A.S. stating: 'We advise as your Notice of Appeal was not received by this Office within 28 days of the General Manager's Determination, this matter will not be referred to the Board of the Territory Insurance Office'.

In the meantime, the plaintiffs had changed solicitors. Their new representatives wrote to the TIO on 8 December 1987, explaining the reasons why delay had occurred in

making the claims for benefits, referring to C.A.A.L.A.S.' request of 30 October 1986, and then making a further request in these terms: 'As the Board has apparently refused or ignored the request to reconsider the Board Delegates decision, we now request that the Board refer the decision of the Board Delegate to the Tribunal pursuant to section 29(2) of the Act'. To this letter a reply dated 15 March 1988 was sent by the Board Secretary stating: 'At the TIO Board Meeting of 25/26 February 1988, the Board made a decision to decline the invitation made in your letter of 21 December 1987'. (It was agreed by counsel before us that, despite the reference to 21 December, this letter was a response to the letter of 8 December.)

Two further alternative strategies were adopted by the plaintiffs' solicitors to get some action on their claims. On 17 February 1988 they wrote to the TIO in the following terms:

> We note that pursuant to Section 36(3) of the Motor Accidents (Compensation) Act the Board may review the exercise of any delegated power. We hereby request that the Board review the determinations made by the Board delegate in relation to Wendy Jones and Gypsy Jones of 5 August 1986.
>
> Further and in the alternative, we request that within thirty (30) business days of the date hereof, the General Manager refer the applications of Wendy Jones and Gypsy Jones for benefits to the Board for its determination pursuant to Section 27(1)(b) of the Act.

The response came in a letter dated 16 May 1988:

> We have been advised by the Board Secretary that the Board have declined your invitation made in the first paragraph of your letter dated 17 February 1988.
>
> It may be that the Act does not limit claimants to one application, but even so, further applications would need to be within the time

limits prescribed under the Act.

We refer to your letter dated 3 May 1988 and reiterate the second paragraph of our letter dated 22 April 1988. The request to refer the matter to the Board relevant to Section 27 is inconsistent with the "Act". The matter relevant to Section 27 was fully resolved consistent with that Section of the "Act" when actioned in 1986.

On 4 March 1988 notices were filed with the Registrar of the Tribunal purporting to refer three matters to the Tribunal: (1) the General Manager's original determinations; (2) the refusal to refer the General Manager's determinations to the Board; (3) the failure of the Board to refer the General Manager's decision to the Tribunal under s.29(2). Following further developments, the plaintiffs' solicitor swore and filed with the Registrar on 10 June 1988 an affidavit annexing various correspondence and a document described as a 'Further Amended Reference To Tribunal'. This document purported to refer two additional matters to the Tribunal: (4) the Board's decision declining to refer the General Manager's determinations to the Tribunal; and (5) the Board's decision not to review the General Manager's determinations under s.36(3). On 16 May 1988 the Tribunal made an order permitting the plaintiffs to amend their notices of reference as proposed in their solicitor's affidavit. In my opinion, it was not strictly necessary for the plaintiffs to amend their notices in order to effect a reference to the Tribunal. The third matter referred to the Tribunal appears to have become subsumed in the fourth in the proceedings before it.

The Tribunal declined to make any determination other than to decide that it lacked jurisdiction to hear any of the matters referred to it. From its published reasons the considerations which led the Tribunal to this conclusion appear. First, it was decided that the Act does not permit a reference directly from the General Manager to the

Tribunal. Second, the Tribunal held that the 28 day time limit stipulated by s.29(1) for referring a matter to the Board must be strictly adhered to. This was seen as 'the basic point which goes to the root of all the alternative ways in which the references are put ... the time limits imposed by s.29'. In my respectful opinion, no question about the significance of those time limits arose. Third, a decision of the Board refusing to refer a matter to the Tribunal under s.29(2) was in no sense a determination or a failure to make a determination for the purposes of s.29(1). Fourth, s.36(3) is 'no more than a procedural option open to the Board only and an applicant cannot insist that it be taken, or refer the matter to the Tribunal if it is not'.

All four points were agitated before this Court. It was conceded by counsel for the TIO that the provision in s.30 of the Act purporting to oust the jurisdiction of the Court is of no avail when what is alleged is jurisdictional error. It is well recognised that even privative clauses which purport to do away with review by prerogative writ are not ordinarily to be read as precluding the issue of those writs when the error alleged goes to the foundation of the inferior tribunal's jurisdiction: see, for example, the statement of Gibbs J. in *Hockey* v *Yelland* (1984) 157 CLR 124, at 130. I will deal with each of the four points in turn.

Can a decision of the General Manager be referred directly to the Tribunal?

Section 12(1) provides that the right of any person to, and the amount of, a benefit under the Act shall be determined by the Board. Under s.36(1), the Board is authorised to delegate any of its powers (except its power to delegate) to the General Manager. Sub-sections 27(1) & (2) are in the following terms:

> **(1) Subject to subsections (1A) and (4A), the General Manager shall, within 30 business days of the Office after being requested in writing so to do by a person who claims to be entitled to a benefit or the variation of a benefit under this Act and being provided with the prescribed information -**
>
> > **(a) make a decision on the person's claim; or**
> >
> > **(b) refer the matter to the Board for its determination,**
>
> **and by notice in writing served on the person, advise the person of his decision or of the fact and date of the referral of the matter to the Board.**
>
> **(2) Where the General Manager exercises a discretion under this Act, whether as a delegate of or with the authority of the Board, or, within the 30 days referred to in subsection (1) or any extension of that time limit under subsection (1A), refuses or fails to make a decision or refer the matter to the Board, a person aggrieved by his decision in the exercise of that discretion or by that refusal or failure may, within 28 days after receiving written notice of that decision or the expiration of that period, as the case may be, request in writing that the General Manager refer the matter to the Board for its determination and the General Manager shall, as soon as practicable, refer the matter accordingly.**

The plaintiffs contend that section 27(1) is an independent source of power giving the General Manager authority to make determinations regardless of what delegation he holds from the Board. I have no hesitation in rejecting this submission; in my view, the subsection is purely a procedural provision. To hold that it confers substantive power to deal with claims puts it in conflict with ss.12(1), 36(1) & (2), and with the words in parenthesis in subsection (2): 'whether as a delegate of or with the authority of the Board'. It is not an interpretation dictated by the language of the provision. The operation

of s.27(1) is this: claims upon the scheme are to come initially to the General Manager; if he holds a delegation authorising him to accept or reject them he may do so (but is not obliged to); otherwise he is bound to refer them to the Board. At no stage is he entitled to exercise the Board's power under s.12(1) except as its delegate.

Section 27(7) provides: 'Subject to section 29, no matter shall be referred to the Tribunal unless it has been considered by the Board'. The reference to s.29 is capable of being readily understood as a reference to the right given by s.29(1)(b) to persons aggrieved by 'the failure of the Board to make a determination within the 60 days referred to in s.27(3)' to refer the matter to the Tribunal. This last-mentioned subsection obliges *the Board* to review decisions of the *General Manager* within 60 days of those decisions being referred to it. It is clear then that when s.29(1)(b) refers to *the Board* it does so in contradistinction to the *General Manager* exercising the powers of the Board. From this it might also be implied that 'the Board' in par. (a) means *the Board* and not its delegate. This merely serves to confirm the impression independently to be reached from a reading of Part VI as a whole that, when s.27(7) mentions 'the Board', it means to exclude the General Manager exercising the powers of the Board (from whatever source they may be derived). Indeed, that provision would serve no purpose at all unless to require that the Board as such must consider a General Manager's ruling before it can go onto the Tribunal. The policy reasons for such a scheme are too obvious to require explication.

Did the refusal to refer the General Manager's decision to the Board constitute a determination for the purposes of s.29(1)?

The Tribunal held that either the letter from the Claims Officer of 16 January 1987 was a determination of the Board

or, in the circumstances, amounted to a failure of the Board to make a determination within the 60 days allowed by s.27(3). Whichever it was, the original reference to the Tribunal on 4 March 1988 exceeded the 28 day time limit set by s.29(1) for referring a matter to the Tribunal. It was this view of what had taken place which led the Tribunal to go on and consider at length whether that time limit must be strictly adhered to.

With great respect to the Tribunal, I am unable to see how this letter could possibly be construed as a determination of the Board. It does not purport to be written by or on behalf of the Board; unlike some of the other letters on TIO letterhead which were before the Tribunal, it does not attribute to the Board the decision not to refer the General Manager's determination to the Board; and it is clear from s.27(2) that a decision to refer a matter to the Board is one for the General Manager.

The Tribunal's alternative approach of treating the Board as having failed within 60 days to review the General Manager's determinations is a little more complicated. It appears that the Judge constituting the Tribunal felt constrained by the way in which the issues were presented to him to regard the request to the General Manager to refer his determinations to the Board as having been made within the 28 days allowed by s.27(2). Whether or not he was correct in this view was not canvassed before us. But the point, as I see it, is that no concession requiring him to assume the request was made in time of necessity entails the further step of obliging him to assume that the General Manager had, in fact, referred his determinations to the Board. On the contrary, the undisputed fact was that he had not. No doubt if he was obliged to and didn't, he was subject to the supervisory jurisdiction of this Court. But that was not an omission which the Tribunal could rectify; being a creature of statute the extent of its supervisory

role must be found within the four corners of the Act.

The point might be made here that the question of whether the limit of 28 days allowed by s.27(2) for having the General Manager refer his own decisions to the Board must be strictly complied with was not argued before the Tribunal or before us. It is not raised by the statement of claim endorsed on the originating motions in these proceedings. This is perhaps attributable to a recognition that failure of the General Manager to refer a matter to the Board under s.27(2) can only be dealt with by the Board itself under s.36(3) or by this Court in the exercise of its supervisory jurisdiction. The Tribunal itself only has jurisdiction to take on reference decisions of the Board as such, not those of its General Manager.

Is strict compliance with s.29(1) required?

If I am wrong in what I have just written, and I must say that I have the utmost difficulty in seeing that the plaintiffs' case on the points just discussed is even arguable, then I have come to the view that the Tribunal was correct in its decision that the 28 day time limit for referring matters to it must be strictly adhered to. The reasons given by the Tribunal for arriving at this conclusion are, in my opinion, sound. I desire to say little else in addition.

Section 29(1) provides:

> (1) Any person who is aggrieved -
>
> (a) by a determination of the Board under this Act; or
>
> (b) by the failure of the Board to make a determination within the 60 days referred to in section 27(3),
>
> may, within 28 days after being served under section 27(4) with a copy of the determination of

the Board or the expiration of that time, as the case may be, refer the matter to the Tribunal.

To ascertain what were the intended consequences of failure to refer a matter to the Tribunal within 28 days of the Board's determination, we were urged to consider the nature and scope of the legislation generally, and the consequences of treating s.29(1) as requiring strict compliance. Much authority was cited to support such a broad approach. However, one may say about all the cases in which this method of eliciting Parliament's intention was adopted, the language used left some scope for doubt as to the intended consequences of non-compliance. Most of the cases referred to in argument arose out of the failure to perform a public duty rather than the exercise of a private right (as to which see per Dawson J. in *Hunter Resources Ltd* v *Melville* (1988) 62 ALJR 88, at 94 to 96). No case parallel to the present was cited; those that do exist are all against the plaintiffs. (They are discussed in the Tribunal's reasons, and in the majority judgments in *Reg* v *Police Appeal Board; Ex Parte McGee* (1984) 36 SASR 455. See also *Woods* v *Bates* (1987) 7 NSWLR 560, per McHugh JA at 569: 'Now it may be accepted that the lodging of an appeal within twenty-one days is mandatory ...'; and *Tasker* v *Fullwood* [1978] 1 NSWLR 20, at 21: 'The provision is not so expressed to be an essential preliminary to the court's jurisdiction to hear the application', citing Sir Frederick Jordan in *Ex parte Toohey's Ltd; Re Butler* (1934) 34 SR(NSW) 277, at 283: 'When it is provided that an application must be made within a specified time, it is, I think, a condition precedent to the exercise of jurisdiction that proceedings should be begun within the time ...'.) The reason, in my opinion, is not so much that there is some special rule of construction applicable to provisions creating a right of review or appeal, but rather the way in which such provisions are usually cast. The starting point in this instance is that, without s.29, the Tribunal has no

jurisdiction to hear an appeal against a determination of the Board, nor does an aggrieved person have any right to refer a determination to the Tribunal. What the Legislature has done, in one and the same provision, is to invest the Tribunal with jurisdiction *and* give aggrieved persons the right to refer matters to it. But it has done so in a way which ties the vesting of that jurisdiction ineluctably to the conditions upon which it may be invoked. In other words, the Legislature has adopted a form of language which, far from creating rights and then, independently, specifying conditions for their exercise, so intrinsically relates the two as to make the pre-conditions of jurisdiction (and the right to invoke it) an integral part of its definition. The two are not severable. In the result, it cannot be said that the provision is silent as to the consequences of non-compliance: either the jurisdiction is invoked or it is not. In these circumstances, to embark upon a wide-ranging consideration of the nature and scope of the legislation and the consequences of non-compliance generally is not to determine Parliament's intention but to subject the wisdom of its action to judicial scrutiny and review.

Did the Tribunal have jurisdiction to entertain a reference from the Board's refusal to review the General Manager's determinations?

Section 36(3) states: 'The Board may review the exercise of any delegated power under this section and substitute for the decision of the delegate in respect of any matter its own decision'. Appeals to the Tribunal by claimants are governed by s.29(1) which is set out earlier in this judgment. The evidence before the Tribunal established that the plaintiffs requested the Board to exercise this power and the Board made a decision refusing to do so. The questions for the Tribunal were: (a) was this decision a determination of the Tribunal for the purposes of s.29(1);

and (b) were the plaintiffs persons 'aggrieved' by this decision?

In deciding these issues against the claimants, the Tribunal's reasons contain the following passage:

> In exercising its discretion not to review the exercise of the delegates power in these cases the Board was not making a determination but merely declining to proceed down a route which was designed for *its own use* as a means of governing the discretion of its General Manager. (My emphasis.)

With respect, it seems to me that the attempt to articulate the distinctions implicit in this statement reveals their weakness. In this and the short passage I have earlier quoted from the Tribunal's reasons the suggestion is plainly made that the power of review contained in s.36(3) exists somehow for the benefit of the Board.

The plaintiffs were notified, through their solicitor, of the Board's decision not to exercise its power of review on 17 May 1988. Twenty-four days later the solicitor filed his affidavit with the Registrar annexing a 'proposed' amended form of notice of reference which was not itself signed. Paragraphs 14 and 15 of this document clearly raised the Board's refusal to review under s.36(3) as a matter of reference to the Tribunal. If the affidavit with this annexure did not strictly comply with Rule 5 of the *Motor Accident (Compensation) Appeal Tribunal Rules*, then it did so substantially. Section 68 of the *Interpretation Act* makes strict compliance with forms unnecessary. In any event, neither counsel was able to assure us that any point was taken before the Tribunal about this further reference being out of time; if it was not raised then it should not be allowed to be raised now. What is both surprising and disappointing is that the TIO should take such a point. Finally, I should say that in my opinion the affidavit and

annexure form part of the record of the proceedings before the Tribunal because, in effect, they comprise the document initiating a reference to it.

The question for this Court is whether the plaintiffs were persons aggrieved by a determination of the Board. If they were, then s.29(1) gave them the right to refer that matter to the Tribunal. The words 'determination' and 'decision' are used indiscriminately in the Act (see, for example, subs.s. 27(5) & (6)). In its ordinary and natural sense, a 'determination' means no more than a decision. However, and, I confess, with some reluctance, I have come to the view that the meaning of 'determination' in s.29(1) is controlled by the concluding words of the subsection. These refer the reader back, ultimately, to a determination made under s.27(3). In other words, a decision reached after a matter is referred to the Board by the General Manager under that section; and not otherwise. This, it seems to me, is enough to dispose of these proceedings, but in light of the observations made by the Tribunal about the nature and purpose of the s.36(3) power (which were traversed in argument before this Court), and because it appears to be thought that the plaintiffs may be without remedy if they do not succeed in these proceedings, I will make some observations of my own about whether they are persons who might be seen to be aggrieved for the purposes of s.29(1).

Once it is recognised that the power of review given by s.36(3) is not regulated in its exercise by any other provision of the Act, certain things follow. For a start, the plaintiffs are persons for whose benefit the power of review in s.36(3) might be exercised (and from this the conclusion that they are persons 'aggrieved' by the Board's decision not to do so seems inescapable). The Board's function in relation to the scheme of accident compensation set up by the Act is to administer it, no more and no less.

It does not assume an adversary role as, for example, it may be required to do when following the dictum to be found in s.8 of the *Territory Insurance Office Act*: 'in the carrying out of the business of insurance the Office shall follow sound insurance principles'. The funds which it manages for the purposes of administering the scheme are public moneys, collected by the Registrar of Motor Vehicles under Part V of the *Motor Vehicles Act*. It is beyond argument that all powers vested in the Board under the *Motor Accidents (Compensation) Act* must be exercised fairly and impartially. To the extent that the provisions of the Act leave any room for discretion, it must be exercised in an even-handed way. In particular, a tight-fisted approach calculated to keep fund reserves at a maximum or to subserve any political objective of keeping compensation contributions down is not authorised by the legislation; on the contrary, if any overriding objective can be distilled from a consideration of the scope and purpose of the Act it is that technicalities should not stand in the way of bona fide claims to benefits. Section 31 (Time For Making Claims), as recently expounded by Gallop J. in *McMillan* v *TIO* (23 August 1988), amply demonstrates these points. The other matters I have mentioned are no concern of the General Manager or the Board, that is clear from Gallop J's decision. (It must not be forgotten that, having regard to s.29(3) & (4), principle and policy guiding the administration of the scheme are ultimately for the Tribunal to determine.)

The responsibility for ensuring that the scheme is adequately funded is placed on the Treasurer of the Northern Territory by s.47(1) of the *Motor Vehicles Act*; it gives him the power to specify the rates of compensation contributions from time to time, as may be recommended by the TIO. In this connection it should be noted that s.32 of the *Motor Accidents (Compensation) Act* provides: 'In the

performance of its function and the exercising of its powers under this Act the Board is not subject to the directions of any person'.

The discretion to review the General Manager's decision is not given to the Board for the benefit of the TIO as such, any more than it exists for the benefit of individual Board members. It is a power which the dictates of reason and justice will sometimes call to be exercised to the disadvantage - or so it may appear - of individual claimants, perhaps because the General Manager has been overly generous in his determinations. On the other hand, precisely the same considerations may call for its exercise in favour of particular claimants where those determinations have operated to their disadvantage and against the spirit and intendment of the scheme. We are afforded a perfect example of just such a state of affairs by Gallop J's judgment in *McMillan* where his Honour, constituting the Tribunal for the occasion, found that the General Manager had taken too narrow a view of the considerations of which he ought to take account under s.31 when dealing with late claims. That decision, as Kearney J's judgment reveals with compelling force, shows the General Manager's determinations with regard to the present claims to be prima facie unsustainable, yet we could extract no undertaking by the Board to review them. If the imperatives of justice and fairness require a review in such a situation, then it is but an easy step to imply a duty on the part of the Board to at least consider reviewing the General Manager's decision when asked to do so in cases lying outside s.27(2).

Viewed in the manner I have suggested, the power of review exists as much for the benefit of claimants as other potential beneficiaries of the scheme (i.e. the residents of the Northern Territory). Of course, s.27(2) affords a right of review to a claimant who acts within 28 days of

receiving notice of the General Manager's decision to have it referred to the Board. I am not talking about such a case. It was not contended that the existence of s.27(2) implied a restriction on the exercise of the s.36(3) power in favour of a claimant. Nor, in my opinion, should s.36(3) be so read. When a claimant is out of time to demand a review under s.27(2), the question of reviewing his claim enters the realm of discretion. And so it should - to cover the hard cases which will undoubtedly occur in the administration of a scheme of this character where no review is sought within the time constraints imposed by s.27(2).

The approach I have suggested is well supported by authority. Frequently cited in support of the implication of duty to exercise a statutory power is a passage from the judgment of Earl Cairn's LC in *Julius* v *Bishop of Oxford* (1880) 5 App. Cas. 214 at 212-223:

> The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the court of Queen's Bench to decide, on an application for a mandamus. And the words 'it shall be lawful' being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the

principles I have mentioned, creates this obligation.

See also *Padfield* v *Minister of Agriculture, Fisheries and Food* (1968) AC 997.

A recent example of the application of this principle is *Murphyores Incorporated Pty Ltd* v *The Commonwealth* (1976) 136 CLR 1. The occasion for its application may be seen from the following passages in Mason J's judgment:

> The Customs (Prohibited Export) Regulations make no provision for the making of applications for approval for exportation of goods. This circumstance, together with the form of reg. 9, is relied upon to support the submission that the regulation creates no duty to consider and determine an application for approval to export. The regulation, it will be noted, prohibits exportation unless a written approval issues and is produced to the Collector. With reference to the similarly worded provisions contained in the Customs (Prohibited Import) Regulations, Taylor and Owen JJ. said in *Reg.* v. *Anderson; Ex parte Ipec-Air Pty. Ltd.* (1965) 13 CLR 177, at pp. 197-199, that the language in which the condition is expressed did not create a duty the performance of which may be enforced by mandamus. However, a majority of the Court, Kitto, Menzies and Windeyer JJ., there held that the regulation, which was in all respects indistinguishable from reg. 9 in this case, created a duty to consider an application. Kitto J., in a judgment in which Menzies J. agreed, expressed the reason for reaching this conclusion in the following words (51):
>
> > 'It is a general principle of law, applied many times in this Court and not questioned by anyone in the present case, that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself: *Sharp* v. *Wakefield* (1891) AC 173, at p. 179. The courts, while claiming no authority in themselves to dictate the decision that ought to be

> made in the exercise of such a discretion in a given case, are yet in duty bound to declare invalid a purported exercise of the discretion where the proper limits have not been observed. Even then a court does not direct that the discretion be exercised in a particular manner not expressly required by law, but confines itself to commanding the officer by writ of mandamus to perform his duty by exercising the discretion according to law'.

This statement, in my view, correctly and authoritatively expresses the principle which should be applied to a power to approve exportation conferred in the form in which reg. 9 is expressed.

It is not to the point to say that the regulation makes no provision for the making of applications and still less that it does not explicitly impose on the Minister a duty to determine applications. The existence of the discretion attracts the principle of construction enunciated by Kitto J. It is implicit in what has been said that the existence of the discretion implies the existence of a duty to determine any application that is made. (17 to 18)

It will not have gone unnoticed that the Act does not attempt to oust the jurisdiction of this Court to review the actions (or inaction) of the General Manager or the Board. Where these cannot be reviewed by the Tribunal because of the limits inherent in ss.27 or 29, then major discretionary considerations against the grant of relief in the nature of certiorari, mandamus and prohibition will disappear. Mr Hiley QC, counsel for the TIO, informed the Court that the Board may well undertake a review of the General Manager's determinations in these two cases; at that stage his client still had not made up its mind. I regret to say that the Board's responsibilities are such that it seems to me that temporising with this Court in such a fashion is unacceptably audacious. Perhaps these observations may assist the Board to determine what it should do.

Was the Board's decision not to refer the General Manager's determinations to the Tribunal reviewable by the latter?

Section 29(2) is in these terms: 'The Board may, at any time, refer to the Tribunal any matter affecting the right of any person to a benefit, or the amount of a benefit, under this Act'. The exact scope of this power and the occasions for its exercise were not fully developed before us. However, having regard to the restricted meaning which 'determination' has in s.29(1), the Board's decision not to refer the General Manager's determinations to the Tribunal is not one which the plaintiffs may refer to it. There may be cases in which such a decision would be reviewable before this Court, but I have said enough on that account in relation to s.36(3).

Conclusion

The arguments that the Tribunal wrongly refused jurisdiction all fail with the result that both sets of proceedings before us must be dismissed.