

The Contemporary Approach to Jurisdictional Error

Graeme Hill

The second session of the Conference was chaired by the Hon Justice Alan Robertson of the Federal Court, who introduced four speakers: Stephen McLeish SC (now the Hon Justice McLeish of the Victorian Court of Appeal), Margaret Allars SC, Richard Niall QC, and the Hon Justice Mark Weinberg of the Victorian Court of Appeal. Justice Robertson's introductory remarks, and the paper given by Justice McLeish, are reproduced earlier in this volume. Therefore, only questions and discussion are reproduced below.

Stephen McLeish SC, Solicitor-General for Victoria – 'Reasons, reasoning and jurisdictional error'¹

Question: The argument that an inadequacy of reasons does not affect the validity of the decision assumes that the reasons are drafted after the decision is already made. But if the reasons are the pathway by which the decision is made, it is harder to say there is no connection. If a decision-maker is bound to produce reasons, then, as stated in *Waterway Authorities v Fitzgibbon (Fitzgibbon)*,² the 'reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result'. Inadequate reasons therefore indicate that the decision is infected by error – cannot separate the two.

McLeish SC: I agree, but *Fitzgibbon* was addressing a different situation – where the reasons are so inadequate that it is not possible even to identify the error. In *Wingfoot Australia Partners Pty Ltd v Kocak*,³ the High Court appeared to suggest that the mere fact that reasons were part of the 'record' was sufficient to show an error of law on the record. But that may not always be the case.

1 This essay is reproduced at pp 66-73 of this volume.

2 [2005] HCA 57; 221 ALR 402 at [130] per Hayne J; see also *D'Amore v ICAC* [2013] NSWCA 187.

3 [2013] HCA 43; 303 ALR 64.

This is a preview. Not all pages are shown.