COUNCIL OF AUSTRALASIAN TRIBUNALS

Issue 1
2022

Tribunal Case Update

This is the first of a series of quarterly case update bulletins for members of Australasian tribunals. Some tribunals publish online or make available for the use of their membership summaries of their significant cases, often selected for the guidance they may provide on issues relevant to a specific jurisdiction or its legislation. COAT has identified a need for an online case bulletin that focuses on 'tribunal craft' - the procedural and ethical aspects of tribunal practice, together with the associated knowledge and skills, that are relevant to a wider tribunal readership.

Such cases can be difficult to identify amid the high volume of decisions generated. To aid in selecting suitable cases, COAT has established an Editorial Committee consisting of members of various tribunals and has invited tribunals to draw to the Committee's attention recent decisions which may add to the developing literature on tribunal craft. All but one of the cases in this first issue were selected on the nomination of tribunal members, including members of the Editorial Committee.

It is envisaged that cases published in the Bulletin will include first instance decisions from a range of tribunals, decisions from appeal panels in multi-tier tribunals, and court decisions given on appeal or judicial review of tribunal decisions. The selection will include cases where actions of tribunal members have demonstrated excellence in tribunal craft, and other cases where judges or appellate tribunals have provided guidance on what tribunal craft might require in particular circumstances. The selection of cases will also highlight current and emerging challenges for tribunals. Some cases may be included because they have attracted significant public comment or deal with current controversies.

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Readers are encouraged to draw the attention of the editorial committee to any cases of interest via email to bulletin@coat.asn.au

Fairness in telephone hearings

Many tribunal hearings are conducted via telephone, particularly during the COVID-19 pandemic, and dropouts and technical disruptions can occur. In the following case a judge discusses the tribunal's obligations to ensure that technological glitches do not result in a denial to a participant of a reasonable opportunity to hear and be heard. In relation to the second of two hearings, his Honour praised the conduct of a tribunal member conducting a telephone hearing with 'Job-like patience' and scrupulous fairness in the face of rude and disruptive behaviour from a participant.

Cathcart v Wang [2021] VSC 685

Supreme Court of Victoria (Croucher J), 25 October 2021

On 18 January 2021 a member of the Victorian Civil and Administrative Tribunal ('VCAT') conducted a telephone hearing of an application by W (the landlord of residential premises) for an order terminating C's tenancy on the ground of unpaid rent ('the January hearing'). At the start of the hearing the member telephoned C using a 'No Caller ID' phone number. C initially refused to talk to the member unless he disclosed his first name, which he did not do, telling her to address him as 'Member [surname]' or 'Mister [surname]'. The member then took evidence from the landlord's agent, who testified that C had been granted a rental adjustment under COVID-19 relief arrangements and had not paid rent since August 2020.

C's phone connection dropped out less than a minute into the hearing. Attempting to regain the connection and unable to call the member back directly, C rang the tribunal. By the time she reached someone who could help her she was told that the hearing was over. Meantime the member was at first unaware that C was no longer on the line, but later thought she had hung up on him and decided not to ring her again. He continued to receive evidence and submissions from W's agent. He told W's agent that he would make only a termination order, and that W would need to make another application for possession if C failed to vacate within 28 days, stating that C 'must be given another opportunity to … put her case'.

At the end of the hearing, the member made an order terminating the tenancy. The order included an express finding that 'the tenant's failure to pay rent was not because of a COVID-19 reason'. On 9 February 2021, C filed an application for leave to appeal against the termination order.

On 23 February 2021, W applied to VCAT for an order for possession of the rented premises, in reliance on the termination order made on 18 January. The application was heard by a deputy president via telephone on 24 and 27 August 2021 ('the August hearing'). The tenant gave evidence and made submissions at that hearing.

The deputy president made an order for possession on 27 August 2021. The following day, C applied to the Supreme Court for leave to appeal against the possession order. The applications for leave to appeal against the termination order and the possession order were heard together. The sole ground of both appeals was that C had been denied a reasonable opportunity to be heard at the January and August hearings.

In relation to the January hearing, the Court heard evidence from C that she did not hang up on the member and attempted to restore her connection to the hearing by telephoning the tribunal. Her evidence was supported by telephone records and screenshots of her phone. His Honour accepted her account of these events, finding that she acted reasonably promptly in ringing the tribunal ([120], [124]). He also accepted her evidence that if she had been given the opportunity, C would have expressly challenged incorrect evidence given by W's agent that there had been a rent reduction because of COVID-19 ([126]-[128], [132], [133]).

Croucher J made the following remarks:

> Sometimes, what might appear to be a lack of procedural fairness will, in truth, be no such thing because the affected party may be the author of his or her own misfortune. A party might deliberately hang up during a phone hearing, or switch off a computer in a Zoom hearing, or walk out of the hearing room in a huff during an in-person hearing. While each case will turn on its own facts, this Court would be slow to countenance the grave step of setting aside an otherwise error-free order when a party

has behaved in that fashion but thought better of it later ([136]).

His Honour found that this case did not fall into any of those categories, nor was this a minor breach. C was denied a reasonable opportunity to hear the evidence of W's agent, to test it by cross-examination, to give her own sworn evidence and to make submissions ([133]). His Honour observed: 'Through no fault of hers, the tenant was denied these basic requirements of procedural fairness. The breach was a grave one. 'It is as if the tenant had no hearing at all' ([137]). The termination order was without legal foundation, and 'in no law, is no decision at all'. And it followed that the possession order, which was premised upon a valid termination order, must also be set aside ([142]).

Given the finding that the possession order must fall with the termination order, it was unnecessary to consider C's other ground of appeal relating to the possession order ([50]). Nevertheless, his Honour considered the fairness of the August hearing as potentially relevant to the discretion to grant relief and the form of relief [(51]). He found that C's behaviour at the August hearing was 'disgraceful'. She was rude, interrupted the deputy president repeatedly, refused to listen, accused him of not listening to her, hung up and rang back repeatedly and interrupted him while he was giving his reasons until he put her on mute ([75]). His Honour found that the deputy president had 'conducted a scrupulously fair hearing in trying circumstances', making every reasonable effort to afford the tenant procedural fairness' ([78]).

> [76] [T]he deputy president remained calm and focussed on the task at hand. He explained matters with courtesy and clarity. He treated the tenant with dignity and showed Job-like patience. Whenever the tenant hung up and then called back, he allowed her to join in immediately, and he did so with equanimity.
>
> [77] Only as a last resort did he place the tenant on mute. On each occasion, his decision to do so was justified and necessary for the orderly conduct of the hearing.

Held: In respect of both the termination order and the possession order,

1. the applications for leave were granted,
2. the appeals were allowed,
3. the orders and related findings were set aside, and
4. the landlord's applications were remitted to VCAT to be heard and decided again.

Applying procedural fairness – self-represented party

Tribunals occasionally encounter difficulties in deciding how to apply the requirements of natural justice in the face of challenging behaviour from a self-represented party. This decision of the Supreme Court of NSW evaluates the actions of NCAT's Guardianship Division to afford a fair hearing to a 'belligerent and confrontational' party who failed to comply with directions. It provides useful guidance on how the requirements of natural justice should be applied in such circumstances.

The following case note is based on *NCAT Legal Bulletin* Issue 10 of 2021.

Di Liristi v NSW Public Trustee [2021] NSWSC 1347

NSW Supreme Court (Sackar J), 22 October 2021

The plaintiff ('AL') appealed decisions of NCAT's Guardianship Division ('The Tribunal') to reappoint the Public Guardian as the guardian of his parents. He also appealed decisions of the Tribunal to dismiss his application to revoke financial management orders, committing the management of his parents' estates to the NSW Trustee and Guardian ('NSWTG'). A principal issue was whether, in the way in which it had conducted the proceedings, the Tribunal had denied the plaintiff procedural fairness or failed to comply with s 38(5) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') by failing to give him a reasonable opportunity to be heard.

Held:

(i) There was no denial of procedural fairness before the Tribunal, and, considering the Tribunal gave the plaintiff ample opportunity to be heard and his attitude in both cases, a further hearing would amount to a futility ([165]). Further,

> both Tribunal members acted with consummate professionalism… The plaintiff in both hearings displayed a clear contempt for the Tribunal and its workings ([164]).

(ii) The Tribunal's rejection of the plaintiff's request for an adjournment was not a breach of the rules of procedural fairness. The Tribunal gave comprehensive and compelling reasons why the adjournment was not granted. Central to the reasoning was the plaintiff's failure to comply with the directions to file documents by a specified date and to provide an adequate explanation for this failure ([124]-[126]). As an experienced litigant, the plaintiff would have understood the procedure and his obligations in terms of timing of any proposed evidence ([131]-[132]). The plaintiff gave every indication he believed he was wasting his time before a Tribunal which was biased ([138]).

(iii) The Court rejected the plaintiff's argument that he was denied ample opportunity to be heard, and the Tribunal failed to comply with the requirements of s38(5). The Court noted that the plaintiff used the time afforded to him in the hearing to attack

> the Tribunal, the member hearing the matter, his brother and in doing so deliberately chose to waste time on abuse, promising in any event to take the matter to the Supreme Court ([140]).

(iv) The plaintiff was not denied procedural fairness by the Tribunal's decision to limit the presentation time of the plaintiff's case to 30 minutes in chief and 5 minutes for final submissions. The imposition of a time limit in all the circumstances was entirely consistent with the nature of the hearing and a reasonable response to the manner adopted by the plaintiff in his approach to his submissions. It was in any event entirely consistent with s 38(6) of the NCAT Act ([141]).

(vi) The plaintiff was not denied a fair hearing by the Tribunal's decision to reject certain emails containing evidence on the basis that they were not received in accordance with the Tribunal's directions. The Tribunal was entitled to:

- determine that the materials put forward by the plaintiff would be received as submissions only because of the lateness of their service
- regulate its procedure given the informal nature of it and accord such evidentiary value to the materials supplied by the plaintiff
- inform itself as it sees fit as the rules of evidence do not apply ([161]-[162]).

Finding of actual bias by a tribunal member

In the following case, a deputy president exercising the State Administrative Tribunal (WA)'s review jurisdiction found that the conduct of a member went beyond apprehended bias and demonstrated actual bias. A finding of actual bias on the part of a tribunal member is rare.

Jetpoint Nominees Pty Ltd v Lee [2021] WASAT 10

State Administrative Tribunal WA (Judge Parry DP) 2 February 2021

[*The following summary was included by the Tribunal in its decision at pp 2-3. It has been redacted to focus on the bias issue.*]

Jetpoint Nominees Pty Ltd ('Jetpoint') sought leave to apply for internal review by the Tribunal of orders made by the Tribunal (original Tribunal) in building dispute proceedings between Ms Lee and Jetpoint relating to nine complaint items arising out of external building work at a residential property in Applecross. The original Tribunal made a monetary building remedy order requiring Jetpoint to pay to Ms Lee the costs of remedying the complaint items in the total amount of $83,490.

Held: The deputy president held that the original Tribunal erred in that, by its conduct at the hearing, it breached the hearing rule of natural justice by denying Jetpoint a reasonable opportunity to present its case and breached the bias rule of natural justice in that its conduct demonstrated, at least, a reasonable apprehension of bias and, indeed, ultimately

crossed the line to show actual bias against Jetpoint. The original Tribunal's frequent and, in many cases, unnecessary interruptions during the cross-examination of Ms Lee by Mr Sean O'Reilly, a director of Jetpoint, and its pejorative questioning and commentary during Mr O'Reilly's and his fellow director Mr Mario Andreou's evidence fundamentally undermined the fairness of the hearing and effectively denied Jetpoint a reasonable opportunity to properly present its case. Furthermore, gratuitous and extraordinary questioning and commentary by the original Tribunal during the evidence of Mr O'Reilly and Mr Andreou, including proffering a repeated analogy between Mr O'Reilly's conduct and that of the driver of 'the getaway car from a bank robbery', expressing 'amaze[ment]' at Mr O'Reilly's evidence and asking '[h]ow are any of you not embarrassed?' when reviewing WhatsApp messages in a group including Mr O'Reilly and Mr Andreou during Mr O'Reilly's evidence, asking Mr Andreou during his evidence '[a]re you trying to think of the answer that best fits the case that's been put forward by Mr O'Reilly on behalf of Jetpoint Nominees?' and commenting to him, after he said 'I can't recall' whether he submitted information to the City of Melville on a particular day, 'And just be careful you don't do the Alan Bond. Alright?', demonstrated, at least, a reasonable apprehension of bias against Jetpoint. Indeed, the original Tribunal's questioning and commentary during Mr O'Reilly's evidence ultimately crossed the line to show actual bias against Jetpoint.

The Tribunal determined that the denial of procedural fairness to Jetpoint vitiates the original Tribunal's decisions and, if leave were not granted to apply for internal review of the orders in the decisions made by the original Tribunal, Jetpoint would suffer a substantial injustice.

The Tribunal granted Jetpoint leave to apply for internal review and determined that the review should be conducted by the Tribunal constituted differently to the Tribunal constituted in the original proceeding.

Apppeal from discretionary decision – refusal to admit evidence

In the following case, an appellant failed to demonstrate grounds for appeal from a decision of the Tribunal refusing to admit at the hearing certain evidence that had not been served on the respondent as required by an order.

Transwest Fuels Pty Ltd v Knee [2021] NSWCATAP 330

NCAT Appeal Panel (G Blake AM SC, Senior Member, G Curtin SC, Senior Member), 26 Oct 2021

This was an appeal from a decision of NCAT's Consumer and Commercial Division ('the Tribunal') made after a hearing in which the Tribunal refused to admit the evidence relied on by the appellant. The appeal was concerned with the Tribunal's decision to refuse to admit the evidence.

The respondent had purchased fuel from the respondent's service station to fill the tank in her car. When the car broke down shortly after, the fuel in the tank was found to be contaminated with water. The respondent commenced proceedings against the appellant claiming that the appellant had breached the guarantees provided in the *Australian Consumer Law* in relation to the supply of fuel.

At a mediation conference, the Tribunal made an order that

> the respondent shall provide to the applicant and the Tribunal … a copy of all documents … on which the respondent intends to rely at the hearing …

The order further stated

> a failure by a party to provide documents in accordance with the Tribunal orders may result in the party not being able to rely on the documents at the hearing unless leave is granted to do so'.

(The 'respondent' referred to in those proceedings is the appellant, and the 'applicant' is the respondent in the appeal).

Contrary to the terms of the order, the appellant sent the documents upon which it intended to rely to the Tribunal but not to the respondent. The documents included evidence upon which the appellant relied to show that the fuel supplied to the respondent could not have been contaminated. At the hearing the appellant sought to tender this documentary evidence. The Tribunal refused to admit or consider this evidence because it had not been served on the respondent prior to the hearing as required by the Tribunal's order. No application was made for an adjournment to overcome the problem arising from this failure.

The Tribunal proceeded to accept the appellant's evidence, determined that the fuel supplied by the appellant to the respondent was contaminated with water, and awarded damages.

The appellant appealed on one ground, namely that it had been denied procedural fairness by the Tribunal in refusing to admit this evidence.

Held (dismissing the appeal)

1. To succeed in the appeal, the appellant needed to show that some error was made by the Tribunal in exercising the discretion to refuse to admit the evidence, in terms of the requirements in *House v King* (1936) 55 CLR 499; [1936] HCA 40. None of the five types of error described in *House v King* were demonstrated or apparent ([36]).
2. The type of error closest to what the appellant had argued is that the Tribunal arrived at a result so unreasonable or unjust as to suggest that the Tribunal must have made an error ([35]-[37]). That class of error was not found because first, the Tribunal did give a reason for its refusal to admit the evidence, and second, the test on appeal for the ground of legal unreasonableness was not satisfied because there was an evident and intelligible justification for the refusal ([38]-[40]). The reason given was that the documents had not been served on the respondent, as was required by the terms of the order and s 36(3) of the NCAT Act ([40], [41]). The purpose of the order was to ensure that the respondent would be provided with a fair opportunity to present her case in answer to that evidence ([49]).

Confidential evidence, natural justice and reasons

Tribunals are sometimes called upon to provide reasons for decision in a context where some of the evidence upon which it relies was given in confidence, or in closed session. In the following case, the Attorney-General issued a certificate obliging the AAT not to disclose the matters contained in certain records, which included confidential affidavits of the respondent's principal witnesses. The confidential nature of much of the evidence presented challenges in ensuring procedural fairness in the conduct of a hearing, and in providing an open and adequate statement of reasons for the Tribunal's decision. The AAT's Security Division demonstrates approaches to address these challenges.

Fernandes and Director-General, National Archives of Australia [2021] AATA 3990

Administrative Appeals Tribunal of Australia (McCabe DP, Rayment DP, Pascoe DP), 1 November 2021

The applicant made two applications under the *Archives Act 1983* (Cth) ('the Act') to the National Archives of Australia ('the Archives') for access to certain records of the Australian Secret Intelligence Service ('ASIS'). The first application was for records relating to ASIS presence and operations in Chile from 1971. The second application was for documents relating to the overthrow of President Salvatore Allende of Chile. The Archives granted access to certain documents but denied access to other documents on the basis that they were 'exempt records' within the meaning of s 33(1(a)) of the Act.

In the applicant's appeal to the Administrative Appeals Tribunal ('the Tribunal'), there were two questions to be decided. First, whether the exemption in s 33(1)(a) of the Act was correctly claimed. Second, if it is so, whether the Tribunal ought to exercise its discretion under s 44(7) of the Act to give access to, or to a copy of part of, the exempt records in a form that would

not disclose information or matter by reason of which the records are exempt.

The Tribunal prefaced its findings by explaining the role of administrative review by the Tribunal as an integrity measure under the Act ([7]). The Tribunal is not concerned with the motives of the person seeking access to the records, nor with the historical significance of the records. It is concerned with the content of the records only to the extent necessary to assess how the law should be applied. Its role is to give effect to the legislation and, where relevant, the policy evident in the Act ([8]). As an executive decision maker, the Tribunal acts on evidence – some of it given in closed session – from experts in national security and intelligence ([9]). In considering provisions of the Act relating to exempt records, it is important to appreciate that the provisions are concerned not only with preserving the secrecy of information in individual records. In many instances the concern is with preserving the Commonwealth's capacity to keep secrets, particularly where our security and intelligence services depend upon the assistance of others to provide us with information ([10]).

In open session, the Tribunal received open affidavit evidence from an ASIS officer, an officer of the Australian Security Intelligence Organisation ('ASIO') and a Deputy Secretary from the Department of Foreign Affairs and Trade. The applicant cross-examined the witnesses. Each witness also provided a confidential affidavit. The Attorney-General for the Commonwealth issued a certificate under s 36 of the *Administrative Appeals Tribunal Act 1975* (Cth) obliging the Tribunal not to disclose the matters contained in the confidential affidavits. In a closed session from which the applicant was excluded, the applicant had the opportunity to put questions to the witnesses through the Tribunal.

In its reasons, the Tribunal explained how it assessed the qualifications and reliability of each witness. It assessed the diligence, care and expertise with which the witness reviewed each record and formed a view, from the perspective of the agency with which they were associated, of the likely consequence of the release of the records, including the means by which the records might be used to damage Australia's security interests or international relations ([18]-[34]).

In its recital of the evidence, the Tribunal noted information that ASIS had put in the public domain regarding Australia's dependence on international intelligence-sharing partnerships, the reliance of government on assessments by ASIS in protecting Australia's interests, and the importance of secrecy in enabling ASIS to operate effectively ([23-25]). The Tribunal also referred to the opinions of the ASIS and ASIO witnesses in their open affidavit that even the passage of time in the case of the records dating back to the early 1970s did not reduce the risk that their public release could provide foreign intelligence agencies insights into the Australian security agencies' areas of interest, methods and capabilities ([25], [33]).

Held:

1. Based on the evidence in closed session the exemption in s 33(1)(a) of the Act was properly claimed [36].
2. The Tribunal decided not to exercise its discretion under s 44(7) of the Act as no useful purpose would be served by releasing the remaining non-exempt parts of the documents.

Consideration of human rights in review of mental health treatment order

The following case note and comment were provided by the author Kristin Giles, Principal Legal Officer, Mental Health Tribunal (Victoria).

While it is most directly concerned with the *Mental Health Act 2014* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') the following case may have broader relevance for other Tribunals, both in Victoria and interstate particularly:

- in determining whether they have jurisdiction to proceed with hearings despite omissions or errors in the preceding steps along the path to the Tribunal, and

- for those jurisdictions with Human Rights Charters, as it examines what constitutes proper consideration of human rights and whether the statement of reasons the Tribunal prepared adequately addressed the patient's Charter rights.

JL v Mental Health Tribunal [2021] VSC 868

Supreme Court of Victoria (Ginnane J), 23 December 2021

One of the central issues before the Supreme Court was whether the Tribunal had jurisdiction to conduct a hearing and make a Treatment Order despite the existence of an error in the Temporary Treatment Order (TTO) made by the authorised psychiatrist. The *Mental Health Act 2014* (Vic) (MHA) requires the Tribunal to conduct a hearing before the expiry of a TTO – in other words, the making of a TTO is one of the events triggering the Tribunal's jurisdiction. It was submitted on behalf of the plaintiff both before the Tribunal and in the Supreme Court that the omission in the TTO meant it failed to comply with a mandatory requirement in the MHA, was therefore invalid which in turn meant the Tribunal had no jurisdiction to conduct the hearing.

The judgment made it clear that it is not the Tribunal's role to investigate whether the TTO was validly made. When a person is placed under the operation of a TTO, they are subject to it as a matter of fact. When that occurs, the Tribunal has jurisdiction to hear the matter and to decide whether to make a Treatment Order. In this case the Supreme Court found the TTO was in fact invalid but that this did not affect the Tribunal's jurisdiction to proceed with the hearing. Accordingly, Ginnane J held that the Treatment Order the Tribunal made was valid even though the TTO that preceded it was found not to be.

As well as explaining how the scheme of the MHA supported the Tribunal hearing the matter despite the error in the TTO, Ginnane J also examined case law indicating that an invalid decision can nevertheless have legal consequences. His Honour cited (among other cases) the recent High Court decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270 as authority for the proposition that

> even when a decision is described as a nullity or invalid, it can still have legal consequences because of actions taken in reliance on it ([67]).

His Honour also briefly referred to case law that

> recognizes that in some circumstances decisions operating in fact, even though legally invalid, may be reviewed by a tribunal given statutory jurisdiction to review administrative decisions [75])

Ginnane J also held that by carefully considering the treatment criteria in the Mental Health Act, the setting and duration of the TTO and explaining its findings the Tribunal had given appropriate consideration to JL's human rights for the purposes of the Charter and that the reasons established the limitations imposed on JL's human rights were demonstrably justified. His Honour held the statement of reasons took into account JL's submissions and addressed the substance of the factors described in section 7(2) of the Charter even though it did not refer to them directly. (Section 7(2) involves deciding whether limits on human rights are demonstrably justified by taking into account factors including the nature of the right; the importance of the purpose of the limitation and its nature and extent; the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve).

His Honour reserved judgment as to whether the authorised psychiatrist, in making the TTO through his delegate, acted unlawfully for the purposes of the Charter. He concluded the TTO was unlawful because it did not comply with a mandatory requirement under the Act but noted the decision was made by the authorised psychiatrist's delegate who was not a party to the proceeding. His Honour indicated he wished to receive submissions about whether a declaration or other order can and should be made in these circumstances.

Refusal to extend time for appeal

In the following case, the NSW Court of Appeal considered whether, in refusing the appellant an extension of time to appeal a decision, NCAT made an appellable error in the exercise of discretionary power.

EFQ v Medical Council of New South Wales [2021] NSWCA 167

New South Wales Court of Appeal (Bell P, Macfarlan and Brereton JJA), 6 Aug 2021

The Medical Council of Australia ('the Council), acting pursuant to s 150 of the *Health Practitioner Regulation National Law (NSW)* ('the National Law') imposed a temporary condition on the registration of the applicant EFQ, a registered health practitioner. The condition provided that EFQ 'not practice medicine'. EFQ was notified of the Council's decision, and the Council provided its reasons for the decision, on 20 December 2018. On 9 January 2020, just over a year after the Council delivered its reasons, EFQ filed an External Appeal Form in NCAT's Occupational Division ('the Tribunal') identifying seven grounds of appeal from the Council's decision. On 20 February 2020, the Tribunal held that the applicant required an extension of time within which to appeal from the decision of the Council and made an interlocutory order refusing an extension of time. EFQ applied to the Court of Appeal for leave to appeal from the Tribunal's interlocutory order.

In her appeal to the Court, the applicant argued that there was no time limit for an appeal on a point of law to the Tribunal from the Council's decision under s 159B of the National Law, as the National Law specified no time limit for such an appeal. She further argued that the Tribunal's discretion miscarried in refusing her an extension of time to appeal in a way that would warrant a grant of leave to appeal to the Court.

In a judgment by Bell P (Macfarlan and Brereton JJA concurring), the Court granted leave to appeal but dismissed the appeal with costs.

Held:

1. The Tribunal correctly concluded that an extension of time was required for the applicant's appeal under s 159B of the National Law. The applicant's argument to the contrary, which relied entirely on reading s 161 of the National Law in isolation, was incorrect. This provision had to be read contextually with cognate legislation which included the definition of 'external decision-maker' in section 4 of the Civil and Administrative Tribunal Act 2013 (NSW) ('NCAT Act'), the conferral of 'external appeal jurisdiction' under the Act, the extension of time provisions under section 41 of the Act and the time limit for external appeals specified in Rule 25(4) of the Civil and Administrative Tribunal Rules 2014 (NSW) ([11]-[15]).
2. The Tribunal did not err in its decision to refuse an extension of time in which to appeal ([76]). The Council's refusal to grant the applicant's adjournment request in relation to the hearing before it, in circumstances where she had been given sufficient notice of the hearing, where an interim protective jurisdiction was being exercised and where the application for an adjournment was raised only the day before the hearing was scheduled, was not legally unreasonable, and the Tribunal's discretionary decision not to grant an extension of time was not vitiated by any error of law in this respect ([40]-[75]).
3. The Tribunal's decision not to grant an extension of time was not vitiated by a denial of procedural fairness by the Council ([41].) Procedural fairness requires an adequate opportunity to participate to have been given, and a denial of procedural fairness cannot be generated by a deliberate or conscious decision not to participate in a hearing of which sufficient notice has been given ([67]).
4. The Tribunal's decision to refuse an extension of time in which to challenge the Council's decision was open to it and not infected by any appellable error ([76]).

Lawfulness of vaccine mandates

In the context of the COVID-19 pandemic, courts and tribunals have been called upon to decide issues arising from government and employer-imposed vaccine mandates and work exclusions for the unvaccinated. The following decision of Australia's Fair Work Commission attracted media attention, particularly for certain statements made by Deputy President Dean in her dissenting reasons regarding the lawfulness of government-mandated COVID-19 vaccinations.

Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWCFB 6015

Fair Work Commission Full Bench (Hatcher VP, Dean DP, Commissioner Riordan), 27 Dec 2021

The appellant ('JK') lodged an appeal pursuant to s 604 of the *Fair Work Act 2009* (Cth), for which permission to appeal is required, against a decision of Commissioner McKenna ('the decision') dismissing Kimber's application for an unfair dismissal remedy against Sapphire Coast Community Aged Care Ltd ('Sapphire'). Sapphire operated an aged care facility in New South Wales where JK was, until her dismissal on 6 July 2020, employed as a receptionist. Her dismissal arose from her refusal to comply with a requirement to be vaccinated against influenza. In the decision, the Commissioner determined that the dismissal was for a valid reason, was procedurally fair, and was not harsh, unjust or unreasonable. JK contended in the appeal that the grant of permission to appeal would be in the public interest and that the decision was attended by appellable error.

Facts: In March 2020 the Minister for Health made the *Public Health (COVID-19 Aged Care Facilities) Order 2020* ('March PHO') which required an employee of the operator of an aged care facility not to enter the premises of the facility if they did not have an up-to-date vaccination against influenza. (At the time, there was no vaccine available against COVID-19). The March PHO also required that the operator of the facility take all reasonable steps to ensure that a person did not enter or remain on the premises in contravention of this requirement. The Minister was empowered under the March PHO to make an exemption if it was necessary to protect the health and well-being of the residents or staff of the facility.

Because of the March PHO, Sapphire advised their staff that from 1 May 2020, unvaccinated staff would not be allowed to work in aged care. JK did not take the vaccine and provided a letter from a Chinese medicine practitioner advising that JK preferred not to have the vaccine. She also provided a letter of support from her general practitioner which stated that she had a medical contraindication to the influenza vaccine based upon previous adverse reaction.

In June 2020 the Minister for Health made the *Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020* ('June PHO') which continued the requirements of the March PHO. The June PHO allowed for a medical exemption where the individual could provide a document in approved form ('IVMC') issued by a medical practitioner which certified that the individual had a medical contraindication to the influenza vaccine. Acting on the new PHO, and in the absence of a medical contraindication form, Sapphire informed JK that it considered that she was not able to perform the inherent requirements of her role.

JK then supplied her employer with the IVMC form completed by her doctor, in which the doctor certified that she had an 'other medical contraindication' which was said to be 'Severe Facial Swelling and rash lasting 10 months from vaccine'. Sapphire determined that JK's IVMC form did not establish a valid medical contraindication. In reaching this view, Sapphire relied on a media release by the Chief Medical Officer ('the Media Release') and the Australian Immunisation Handbook. ('the Handbook'). JK was then dismissed from her employment, and subsequently brought an unfair dismissal claim challenging her dismissal.

Decision at first instance

At first instance, the Commissioner found that Sapphire had a valid reason for the dismissal, being that:

- while Sapphire had not factually given a direction for JK to be vaccinated, Sapphire had nevertheless communicated vaccination as being a requirement for her attendance at the workplace as a result of the PHOs

- if a direction had been given to JK to be vaccinated such a direction would have been lawful and reasonable considering the PHOs, and
- because JK was not permitted to enter or remain at the workplace without vaccination due to the PHO, she could not perform her receptionist role or the inherent requirements of her position.

Accordingly, the Commissioner refused relief, holding that the dismissal was not harsh, unjust or unreasonable.

Decision on appeal

On 27 September 2021 the Full Bench of the Fair Work Commission determined an appeal in the matter, concluding by a majority of 2 (DP Dean dissenting) not to grant permission to appeal.

In their majority decision, VP Hatcher and DP Riordan held:

1. JK's contention before the Commissioner and on appeal was to the effect that the IVMC form signed by Dr Mackay was sufficient, by itself, to make the vaccination requirement inapplicable because it met the condition in clause 6(1)(d)(ii) of the June PHO. However, the proper construction of the exemption in the June PHO was that the exemption operated only where a medical practitioner certified that the relevant person actually has what is, in objective terms, a medical contraindication to the vaccination ([48]).
2. It was not sufficient for JK's doctor to certify her as meeting the exemption criteria on the basis of a medical condition that was not, objectively determined, a medical contraindication ([48]).
3. The evidence conclusively demonstrates that the condition JK's doctor had certified, being the 'Severe Facial Swelling and rash lasting 10 months from vaccine' was not a valid medical contraindication for the influenza vaccine, relying primarily upon the Handbook and expert evidence ([51]).
4. As a result of JK not having a valid exemption to the PHO, she was at the time of her dismissal legally prohibited from working at her workplace, and this made the continuation of her employment untenable ([55]).

In refusing leave to appeal, the majority also said in respect to whether the appeal was in the public interest:

> We consider that the public interest weighs entirely against the grant of permission to appeal. We do not intend, in the circumstances of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement: ([60]).

Dissent by Deputy President Dean

In dissent, DP Dean would have granted permission to appeal, upheld the appeal and quashed the decision, redetermined the application, found JK was unfairly dismissed and ordered her reinstatement ([66]). DP Dean expressed her dissent from the majority decision in strong terms:

> Never have I more strenuously disagreed with an outcome in an unfair dismissal application. The Decision manifests a serious injustice to Ms Kimber that required remedy. More egregious, however, is that the Majority Decision has denied Ms Kimber the protections afforded by the Fair Work Act in part because of "an inference that she holds a general anti-vaccination position ([65]).

DP Dean held that the Commissioner erred in finding that there was a basis on which Sapphire could have given JK a reasonable and lawful direction to have the influenza vaccination ([80]). JK satisfied the exemption provision in the June PHO, which required only that she present to Sapphire a certificate by a medical practitioner certifying a medical contraindication to the influenza vaccine ([82]). The form did not require the medical practitioner to state the evidence on which his medical opinion based ([94]). DP Dean observed that Sapphire was not entitled to disregard the opinion of a registered medical practitioner regarding what qualified as a contraindication nor to substitute its own opinion based on a reading of the Handbook and the Media Release ([86]).

DP Dean objected to the suggestion in the majority decision ([60]) that the current COVID-19 pandemic poses a context in which the public interest weighs against allowing an appeal against a vaccination requirement. She articulated arguments against mandatory COVID-19 vaccinations, including human rights instruments enshrining the principle of voluntary medical interventions, the 'experimental' nature

of the vaccines and their limited efficacy in preventing transmission, the availability of other mitigation measures, and the possibility of adverse reactions and consequences of various kinds. She concluded that:

> the powers to make PHOs cannot lawfully be used in a way that is punitive, and human rights are not suspended during states of emergency or disaster . . . It is not proportionate, reasonable or necessary to "lock out" those who are unvaccinated and remove their ability to work ([173]).

DP Dean further observed that an employer who dismisses a person because they do not have a COVID-19 vaccination will breach the *Disability Discrimination Act 1992* (Cth), as the definition of disability in s 4 of the Act includes 'the presence in the body of organisms capable of causing disease or illness' [(174]-[176]). She called on all Australians to 'vigorously oppose the introduction of a system of medical apartheid and segregation' and likewise 'the ongoing censorship of any views that question the current policies regarding COVID' ([182], [183]).

Further proceedings

The Applicant's subsequent application to the Federal Court was formally discontinued on 16 December 2021.

A postscript

The dissenting reasons of DP Dean were considered by Beech-Jones CJ in *Kassam v Hazard; Henry v Same* [2021] NSWSC 1320 ([64]-[70]), in proceedings brought by two groups of persons who sought to contend that public health orders made by the respondent Minister, under s 7(2) of the *Public Health Act 2010 (*NSW) to deal with the COVID-19 threat to public health, were invalid The orders limited the movement of 'authorised workers' residing in 'an affected area of concern' and prevented some people working in the construction, aged care and education sectors unless they had been vaccinated for COVID-19. All the asserted grounds of invalidity raised by the plaintiffs were rejected, and the proceedings dismissed.

The plaintiffs in the Henry case relied on the dissenting reasons of DP Dean in *Kimber v Sapphire Coast Community Aged Care Ltd.* In particular, they relied on her statements ([115]-[119]) that 'vaccine mandates' in various public health orders amount to a form of coercion that violates a person's right to bodily integrity.

Beech-Jones CJ observed that while DP Dean had opined on matters relating to the validity or the appropriateness of making the Aged Care Order under the Public Health Act ([147]-[173]),

> the function of determining its validity is for this Court to discharge and the function of determining whether it should have been made is for the political process ([68]).

Referring to DP Dean's 'clarion calls' ([182]-[183]) of her reasons to 'all Australians' for vigorous opposition to certain actions, His Honour remarked: 'Political pamphlets have their place but I doubt that the Fair Work Commission is one of them' ([69]).