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Tribunal Case Update

This issue opens with a case from QCAT examining the difficulties of balancing the Tribunal's duties when dealing with self-represented parties. In *Van Zyl v Rentstar*, the issue was the boundary between effective case management and giving legal advice. A major theme of the cases noted in this issue is finality of decisions and the challenges of meeting entry requirements for reconsideration, rehearing or appeal, particularly where the applicant is self-represented. We have examples from the internal appeal levels of Civil and Administrative Tribunals of Queensland (QCAT), the Australian Capital Territory (ACAT) and New South Wales (NCAT), each operating under different requirements. We also have a judicial review case from New Zealand in which a disciplinary tribunal was held to have acted unlawfully in deciding to reopen its final decision which may have been affected by an error of law.

Other cases of interest in this issue include *New South Wales v Devries*, in which expert assistance was used to frame behavioural orders to be better understood by a person with a cognitive impairment. And *La Mancha Africa SARL v Commissioner of Taxation* concerns the circumstances in which a regulator is bound by a *Harman* undertaking, being an implied undertaking not to use confidential documents produced in court or tribunal proceedings for other purposes related to functions of a party who is a regulator.

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Conducting case management without giving legal advice

The following internal appeal in QCAT concerns the point at which the Tribunal's efforts to case manage a matter in a hearing, including explaining to the parties the evidence required and how the tribunal will approach the matter, may demonstrate bias or breach of procedural fairness. The case also considers how to balance the Tribunal's obligations in the context of section 29 of the QCAT Act, which requires the tribunal to take all reasonable steps to ensure the parties' proper understanding.

Van Zyl v Rentstar [2021] QCATA 120

Queensland Civil and Administrative Tribunal Appeal Tribunal (Member J Gordon), 29 Sept 2021

The applicant Mr Van Zyl ('the tenant') asked the Tribunal to make an order terminating his tenancy following the alleged failure of Rentstar ('the lessor') to remedy breaches of the tenancy agreement, and to award him compensation for the breaches. The tenant had vacated the premises before lease expiry on the ground of an unremedied breach by the lessor. The lessor denied any breach and lodged a counter application claiming that the tenant was liable to pay compensation to the lessor for breaking the lease.

During the hearing, which was conducted by telephone, the Tribunal discussed with the self-represented parties how the lessor's counter application would be handled, including procedural steps to be undertaken prior to resumption of an adjourned hearing. It was during this discussion that the Tribunal first became aware that the counter application had not been submitted to the required conciliation process. This failure meant that the Tribunal lacked jurisdiction to hear the counter application. The Tribunal proceeded to make orders declaring that the lease agreement was not validly terminated and dismissing the tenant's claim for compensation.

The tenant sought leave to appeal on three grounds, only one of which was thought by the Appeal Tribunal to afford a 'reasonably arguable case on appeal which could result in substantial relief' and for which leave to appeal could be granted ([22], [23]). The ground was alleged bias, or alternatively a breach of procedural fairness, arising from an allegation that in the hearing the Tribunal explained in detail how the lessor could bring a claim for break lease compensation against the tenant, but did not help the tenant in the same way. The tenant's objection was that the Tribunal had explained to the lessor what they had to do to make a claim for break lease compensation, when there was in fact no such claim before the Tribunal.

Having granted leave to appeal, the Appeal Tribunal proceeded to consider whether the Tribunal's statements demonstrated bias or breach of natural justice. The Appeal Tribunal referred to two provisions of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'). First, section 29(1) places a duty on the Tribunal to take all reasonable steps to ensure that each party understands the practices and procedures of the Tribunal and the nature and legal implications of assertions made in the proceeding. Second, the Tribunal must also comply with s 28(3)(d) which includes that it must act with as little formality and technicality and with as much speed as the legislation and proper consideration of the dispute permits. The Appeal Tribunal observed that, as many parties are unrepresented and lack knowledge of the law and evidence, balancing the requirements of s 29(1) and s 28(3)(d) 'is one of the most difficult things faced by the tribunal's decision makers' ([31]).

The Appeal Tribunal acknowledged a stream of authorities warning that the Tribunal must not give legal advice ([31]-[37]). The authorities include *Harrison v Meehan* [2017] QCA 315 ('*Harrison*') where Sofrnoff P said that nothing in the two QCAT provisions 'permits the Tribunal to assist parties to provide their respective cases or to give advice to parties about how to conduct the proceedings' (at [13]). The Appeals Tribunal observed:

> It seems to me however, that in practice there are many circumstances where the tribunal will intervene entirely properly where the result is that one party or both parties are assisted to prove their cases, or effectively receive advice about how to conduct the proceedings ([38]).

The Appeal Tribunal gave several examples in support of this proposition, including the following:

- In the present appeal, the unrepresented applicant made no reference to *Harrison* or other authorities, nor to the relevant statutory provisions, and made only general references to the Tribunal's statements. In specifying detail about those statements and referring to those authorities, the Appeal Tribunal acknowledged that it was assisting the tenant in his appeal [(38]).
- The Appeal Tribunal in *Rowan v Beck* [2021] QCATA 20 considered that the member hearing a matter who effectively cross examined a witness had not displayed bias but was merely testing the evidence and giving the witness an opportunity to demonstrate that it was truthful ([41]).

Application of law to the facts

In the present case, the Appeal Tribunal considered that it would have been obvious to anyone attending the hearing that the Tribunal's statements referenced in the ground of appeal were made while the Tribunal was under the misapprehension that there was a valid counter application by the lessor for break lease compensation. At that time the Tribunal was proposing to adjourn the proceedings because of missing particulars of the counter application and the failure of service. That is the context in which the statements should be considered, and knowledge of that context would be imputed to the hypothetical lay observer when applying the test for apprehended bias ([84]-[88]).

With respect to the fairness of the Tribunal's remarks, the Appeal Tribunal said that the Tribunal was merely case managing the dispute, ensuring that all relevant material was disclosed in preparation for a final hearing by telephone, and explaining the legal implications of any claim for break lease compensation, including the likely approach the tribunal would take to such claims. Accordingly, the Tribunal was not giving legal advice to the lessor ([89]-[92], [96]). The Tribunal's statements were consistent with its duties under ss 28 and 29 of the QCAT Act [89]-[92]). Moreover, the need to preserve the appearance of neutrality was served by the Tribunal's explanation to the parties of the reason for the intervention ([94]-[95]).

Orders: Leave to appeal was granted but the appeal was dismissed.

Re-opening final decision not decided on the merits

In the following case, QCAT distinguished prior authorities which appeared to say that a final decision of the Tribunal in a minor civil dispute cannot be reopened unless it was heard and determined on the merits. The decision also includes an example of an explanatory note, given to assist the self-represented parties in preparation for the rehearing, as contemplated by s 29 of the QCAT Act. Section 29 is also discussed and applied in *Van Zyl v Rentstar*, noted in this issue of the Update.

Marino Law v VC [2021] QCAT 341

Queensland Civil and Administrative Tribunal, Adjudicator A Walsh (27 Oct 2021)

Marino Law commenced proceedings in QCAT to recover monies due to the law firm for legal work performed for the respondent VC pursuant to a client costs agreement. The Adjudicator heard and finally determined the dispute in favour of Marino Law on 19 August 2021, in the unexplained absence of VC, pursuant to s 48(1)(g) of the QCAT Act. Read with s 48(2)(b)(i), the section permits a final decision in favour of an applicant where a respondent fails without explanation to attend a hearing.

The self-represented applicant VC filed a timely application to reopen the proceedings. To succeed in obtaining a reopening, VC had to establish that a 'reopening ground' exists, and that the Tribunal should exercise its discretion to reopen the proceedings ([14]). To establish a 'reopening ground', as relevantly defined in sch 3 of the QCAT Act, the applicant must have had a reasonable excuse for not attending the final hearing. The Tribunal could then exercise its discretion to reopen under s 139(4) only if it considers that 'the ground could be effectively or conveniently dealt with by reopening the proceedings under this division'.

Having regard to new evidence about the circumstances of VC's failure to attend the final hearing on 19 August 2021, the Tribunal was satisfied that a reopening ground had been made out.

The Tribunal noted that there is a conflict in Tribunal case law presently on whether reopening is possible where a case has not been decided on the merits ([11]). The issue turned on the interpretation of provisions of the QCAT Act, and particularly s 140(2) which requires that a reopened proceeding be heard and decided again by a fresh hearing *on the merits* [emphasis added]. The question was whether the reopening provisions should be interpreted as implying that the original final decision must itself have been adjudicated on the merits, as had been held in *Darragh v Davies* [2017] QCAT 181 (*Darragh*). In the present case, the dispute was heard and determined, but not on the merits, when the Tribunal ordered VC to pay Marino Law's claim. If the Tribunal were to follow *Darragh*, it would have had to dismiss VC's reopening application notwithstanding that a ground for reopening had been made out ([43]).

The Tribunal examined the case authorities relating to this interpretation ([33]). Both *Darragh* and *Barry-O'Neill v Masters* [2018] QCAT 414 were cases in which one party unsuccessfully applied to reopen a dismissal order agreed to by the parties under a settlement. In each case the dispute had not been heard and determined. Both *Ramke Constructions Pty Ltd v Queensland Building Services Authority* [2012] QCAT 417 and *Queensland Building Services Authority v QCAT* [2013] QSC 167 were cases in which reopening was denied where there had been a purely procedural dismissal without the case having been heard and determined ([33]-[44]). In the Tribunal's view, all were distinguishable from the present case, as none involved a 'hearing and determination' ([53]).

The Tribunal further advanced several reasons against the interpretation proposed in *Darragh* that the original decision must have been made on the merits ([44]). The Tribunal observed that nothing in the wording of the statute requires the limitation, and to imply it would be inconsistent with QCAT's stated functions as set out in the QCAT Act ss 4(c) and 28(3)(d)[46]). Moreover, the reopening provisions provide important procedural efficiencies, and the restrictive interpretation in *Darragh* would limit their utility ([47]-[51]).

Orders

The proceedings were reopened, the orders of 19 August 2021 were set aside, and a fresh hearing on the merits was ordered.

Section 29 Explanation

As the reopened matter would be returning to the Tribunal for a fresh hearing on the merits, the Tribunal took the opportunity to include with the Reasons an explanatory note to the parties to satisfy the requirements of s 29 of the QCAT Act ([24]). The section requires the Tribunal to take all reasonable steps to ensure that each party understands the practices and procedures of the Tribunal and the nature of the assertions and their legal implications. It also requires the Tribunal to conduct proceedings in a way that is responsive to the needs of a party who (such as VC) is from another cultural or linguistic background by, inter alia, explaining the matters to the person or supplying an explanatory note in English.

The explanatory note to the parties explains

i. which party has the onus of proving which material assertions of fact,

ii. the need for VC to limit his case to what he says in his Response and to rely only on documents that he has filed and served,

iii. the limitations in the procedure and jurisdiction of the Tribunal and how they affect any claim for a refund for legal costs previously paid and any application for an order to set aside the cost agreement, and

iv. the inability of the Tribunal to otherwise advise VC, and the sources of advice and assistance available to him ([52]-[58]).

Reconsidering a final decision without a re-opening provision

As QCAT observed in *Marino Law v VC* (noted in this issue of the Update), statutory provisions allowing a tribunal to re-open its decisions avoid some complexities that might arise in the absence of such a provision. In the following case the New Zealand High Court examined the common law principle of *functus officio* and applied it to prevent a disciplinary body from reconsidering its own final decision which may have been affected by an error of law. The Court considered the application of Interpretation Act provisions similar to those found in the Australian jurisdictions which

provide that, subject to a contrary intention in the conferring Act, a statutory power or duty can be exercised more than once.

The following case note was provided by Olivia Clark, Legal and Research Adviser, Ministry of Justice, New Zealand.

K v Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand [2021] NZHC 307

New Zealand High Court (Gwyn J), 22 Nov 2021

The Teaching Council of Aotearoa New Zealand ('the Teaching Council') received a complaint from the parents ('the complainants') of a student at a secondary college relating to the alleged conduct of the principal of the college, K (the applicant). The complaint included an allegation ('allegation three') that an illegal or improper process had been used to suspend the student from the college. The Teaching Council referred the complaint to the Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand ('the CAC'), a statutory body constituted under the *Education and Training Act 2020* (NZ). An investigator was appointed to inquire into the complaint and report to the CAC. The appellant was given an opportunity to comment on the report before the CAC made a decision under s 401 of the *Education Act 1989* (NZ) (Education Act) to resolve to take the matter no further ('the December decision'). [1]

Subsequently, after K had been notified of the December decision, the CAC received further information from the complainants and formed the view that the decision with respect to allegation three may have been made in error. It invited submissions from the parties on whether it should reopen the December decision. K opposed the re-opening of the decision.

The CAC subsequently notified the parties that it had decided to reconsider the December decision on the ground that it may have been affected by a material error of law ('the redetermination decision'). The CAC invited the parties to make further submissions relating to allegation three of the complaint.

In the High Court, K sought orders declaring the redetermination decision unlawful, setting it aside and prohibiting the CAC from reopening the decision or the complaint.

K argued that from the time he was notified by CAC of its December decision to take no further action, the CAC was functus officio and had no power to reconsider the decision. While the principle of finality is subject to s 16 of the *Interpretation Act 1999* (NZ) which says that a power duty or function conferred by legislation may be exercised or performed from time to time, K argued that s 16 was not applicable in this case due to contrary indications in the Education Act and Rules. [2]

In response, the CAC contended that, while the Education Act and Rules are silent on the point, the power to reopen an investigation in exceptional circumstances (in this case, a clear error) can be inferred, and to do so is consistent with the public interest objectives of the disciplinary regime. Inferring such a power was necessary for the CAC to be able to discharge its disciplinary functions under ss 398-409 of the *Education Act*.

Held:

The Court noted that the validity of the December decision was not itself directly in issue in the proceedings ([98]). The central issue in the case was whether the CAC was functus officio at the time of the redetermination decision ([44]). The Court explained the principle of functus officio as follows:

> The starting point is the general principle that once an authority has made its decision it has exhausted its jurisdiction and has no power to act further in the matter. An authority becomes functus at the point that its decision is perfected by communication in a final form to those affected ([72]).

His Honour accepted K's submission that the CAC had made an adjudicative and final decision on the complaint in its December decision ([86]). The decision resolving that the CAC would take the matter no further was one that affected K's rights, as he was no longer subject to the prospect of a disciplinary process and outcomes (87]). In such a case, finality may be the paramount consideration ([78]).

1 Provisions of the repealed *Education Act 1989* applied to this case under transitional provisions.

2 This Act has been repealed and the relevant provisions re-enacted in Legislation Act 2019 (NZ) ss 9, 51.

The principle of finality is not absolute. The grant of a statutory power or conferral of a duty can be construed as one to be exercised more than once, pursuant to s 16 of the Interpretation Act. Read with s 4, s 16 does not apply if the context of the Act requires a different interpretation.

His Honour identified aspects of the language and context of the disciplinary provision in the Education Act which, taken together, point towards the decision being a final one that is not open to be reconsidered. The indications included the absence of an appeal or rehearing provision, the use of the term 'final decision' and the definition of 'resolve' in the legislation, and the nature of the process that the CAC is required to follow ([94]-[95]).

His Honour was not persuaded that the public interest objectives of the Education Act require that he infer a power to reopen the decision, given the prejudice to K, the lapse of time (four years) since the relevant events took place, and the fact that the student in question had left the college ([108]-[[110]).

His Honour therefore held that CAC was functus in relation to the complaint at the point at which it perfected its decision by communicating it to the parties ([111]).

> The respondent was functus officio in relation to all aspects of the complaint, and not simply allegation three which was the subject of the redetermination decision ([116]).

Orders

The Court made three declarations:

1. the CAC redetermination decision and steps taken in furtherance of that decision are unlawful,
2. the redetermination decision is set aside and
3. the CAC is prohibited from reopening its decision ([117]).

Suppression order

K also applied for permanent orders suppressing the identity of the college and the individuals involved. The Court said there is a prima facie presumption in favour of openness in reporting to allow for open justice [130]. The Court cited the 7-step approach which arose from the Supreme Court decision in *Erceg v Erceg* [2016] NZSC 135 for applications of non-publication orders in civil proceedings in *Commissioner of Police v F (L) C* [2016] NZHC 2852.

After applying the 7-step test, the Court held there was a high risk that publishing any of the identifying information could lead to the identification of the parties ([131-132]). Therefore, the Court held that names, including that of the college, and the names of the individuals involved, were to be suppressed and anonymised. A permanent suppression order was granted.

Note

Australian case law on whether a tribunal can redetermine a decision which is affected by an error of law has diverged from the approach of the New Zealand courts. See COAT Practice Manual for Tribunals (5th ed, 2020) [6.6.1]

ACAT appeal on error of law

The ACT Civil and Administrative Tribunal (ACAT) also has an Appeal Tribunal for internal appeals. A party to an original application may apply to appeal the decision 'on a question of fact or law'. Section 82 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) ('ACAT Act') provides that an appeal tribunal may, as the tribunal considers appropriate, deal with an appeal as a new application or as a review of all or part of the original decision. In the following case, the Appeal Tribunal proceeded as a review, after finding an error of law in the original decision.

The following case note was written and contributed by Senior Member Kirsty Kastavic of ACAT.

Icon Retail Investments Ltd & Anor v Eighani (Appeal) [2021] ACAT 118

ACT Civil and Administrative Tribunal (M-T Daniel P, H Robinson Presidential Member), 6 December 2021

(Note, in this report a reference to 'the Original Tribunal' refers to the ACT Civil and Administrative Tribunal ('ACAT'), whereas 'the Appeal Tribunal' refers to the panel which heard the appeal from the ACAT decision.)

This was a decision on an internal appeal from a decision of the Original Tribunal. The Original Tribunal found that the appellant, a utility provider, had failed to meet the statutory notice requirements before reporting the respondent, a debtor, to a credit reporting company. The original tribunal had found that an email sent to the respondent by a debt collection agency was invalid for non-compliance with certain requirements under the *Privacy Act 1988* (Cth), and consequently ordered the appellant to remove a record of payment default from the credit file of the respondent. On appeal, the appellant argued that the original tribunal erred in law and therefore had no proper basis for holding the notice to be invalid.

For a credit provider to validly disclose the credit information of a debtor to a credit reporting agency, a utility provider must comply with the requirements of section 21D of the *Privacy Act 1988* (Cth). This section requires that a notice states, amongst other things, that the credit provider "intends to disclose the information to the credit reporting body." The key issue in the appeal was whether the email met those requirements. If it did not, there was no lawful basis to disclose the credit information.

The original tribunal found that the notice relied upon by the utility provider in this case, which was in the form of an email, was invalid as it contained inaccuracies and misleading information and that it must be construed strictly as it attracts a "penalty" in the form of an adverse credit report. On review, the Appeal Tribunal accepted there was an error of law regarding the original tribunal's characterisation of the notice as attracting a 'penalty' but was not satisfied this was a sufficient basis to overturn the original tribunal's decision. Instead, the Appeal Tribunal concluded that the email was so deficient that it did not constitute a notice in compliance with section 21D(3)(d)(i) of the Privacy Act ([59]). This was because the email did not contain a clear and unambiguous statement that the utility provider intended to disclose the credit information to the credit reporting agency ([61]-[71]). The Appeal Tribunal was satisfied it was more accurate to say that the email was, in law, no notice at all. However, the practical consequences of these conclusions were the same. On either view, the utility provider was prohibited from disclosing the information to the credit reporting body ([71]).

Order: The order of the Original Tribunal was amended, and the appeal was otherwise dismissed.

Liability under anti-discrimination law for social media posts

Some tribunals are increasingly dealing with claims that individuals and groups have been subject to forms of discrimination on social media. Difficult questions can arise as to when posted comments contravene the various anti-discrimination statutes, and the extent to which persons whose social media sites are used by third parties to verbally attack others can be held responsible.
In the following case an Appeal Tribunal took a narrower view than the Original Tribunal as to the scope of liability under the *Discrimination Act 1991* (ACT).

The rulings in this decision turned on the interpretation of the ACT legislation. The relevant provisions of anti-discrimination statutes of other jurisdictions may differ.

Rep v Clinch (Appeal) [2021] ACAT 106

ACT Civil and Administrative Tribunal Appeal Tribunal (Acting President Member R Orr QC, Senior Member Prof P Spender), 2 Nov 2021

(Note, in this report a reference to 'the Original Tribunal' refers to the ACT Civil and Administrative Tribunal ('ACAT'), and 'the Appeal Tribunal' refers to the panel which heard the appeal from the ACAT decision.)

Ms Clinch, who lives in Queensland and describes herself as a trans woman, lodged a complaint with the ACT Human Rights Commission against Ms Rep, who lives in the ACT, alleging vilification on the basis of gender identity under section 67A, and victimisation under section 68, of the *Discrimination Act 1991* (ACT), in relation to a range of social media posts made by Ms Rep and by third parties on Ms Rep's Facebook page. The complaints were referred to ACAT under s 53A of the *Human Rights Commission Act 2005* (ACT). The Original Tribunal found that there was

unlawful vilification or victimisation by all the posts the subject of the complaint and made orders that Ms Rep remove all the posts, refrain from making similar posts, and pay $10,000 compensation to Ms Clinch.

Ms Rep appealed the decision of the Original Tribunal to the Appeal Tribunal. The Appeal Tribunal first resolved a jurisdictional issue raised by Ms Rep. It held that although Ms Cinch resides in Queensland, the Human Rights Commission and ACAT had jurisdiction to consider the matter as the posts were published in the ACT and accessible to ACT residents and related to trans women generally in the ACT. Moreover, Ms Rep posted and managed the material on her site in the ACT ([90]-[92]).

Other grounds of appeal related to whether the posts or all of them constituted unlawful vilification or victimisation, whether Ms Rep was responsible for such posts by other persons, and whether the remedies (compensation and injunctive orders) were appropriate.

Vilification

In relation to the vilification ground of appeal, Ms Rep argued that the Original Tribunal had given reasons why some of the posts were vilification, and then included other posts indicating they were the same. The Appeal Tribunal agreed that there were differences among the posts which should have been considered ([105]-[107]). Moreover, the Original Tribunal had at times applied a different standard than the statute required for vilification. The correct test in s 67A of the Discrimination Act required 'more than insults, invective, abuse or even expression of hatred, contempt or ridicule' ([161]). For a post to amount to vilification, it needs to 'incite hatred toward, revulsion of, serious contempt for, or severe ridicule of, Ms Clinch or the group of trans women on the ground of gender identity' a person or group of persons, objectively assessed' ([163], [164]). It can include posts using 'strong and abusive language about the person or group which is likely to incite hatred etc', such as suggesting that 'because of being a trans woman a person is inherently inferior, a threat or a criminal' [[163]).

It was then necessary to consider whether the post comes within the exception to vilification for discussion or debate in the public interest provided by s 67A(2)(c) of the Discrimination Act. The context needs to be considered. The Appeal Tribunal found that the general posts were mostly made in the context of a vigorous discussion or debate and were less likely to amount to vilification ([128]). But the posts directed personally and specifically at Ms Clinch were more likely to incite hatred etc ([131]).

One group of posts were made in response to an apology which Ms Rep was required by an earlier settlement to provide to Ms Clinch. In relation to those apology response posts, the Appeal Tribunal held that Ms Rep had a particular responsibility not to allow vilification of Ms Clinch in the context of her apology ([166]). The Appeal Tribunal agreed with the Original Tribunal that Ms Rep was responsible for the apology response posts even though they were made by third parties ([169]-[174]).

On the bases outlined above, the Appeal Tribunal found that certain of the apology response posts, and certain of the general posts amounted to unlawful vilification for which Ms Rep was responsible.

Victimisation

While the Original Tribunal had found that all the posts were victimisation within the meaning of the Discrimination Act s 68, the Appeal Tribunal found that none were, and the Original Tribunal's findings in this regard involve error ([201]). To establish victimisation, the Act requires that Ms Rep subjected, or threatened to subject, Ms Clinch to a detriment because Ms Clinch had taken or proposed to take discrimination action. None of the posts did so ([198]).

Remedies

The Appeal Tribunal said that the purpose of a compensation order is not to punish Ms Rep but to compensate Ms Clinch for the personal distress and hurt caused to her. As only a significantly reduced number of posts were found by the Appeal Tribunal to be vilification, and none were found to be victimisation, the amount of compensation assessed by the Original Tribunal was reduced to $5,000 ([217]).

The Original Tribunal made very broad orders in the nature of injunctions. They included that Ms Rep refrain from making any statements on any website or social media that she owns or controls posts which are the same or similar to those which were the subject of the complaint. The Appeal Tribunal made orders in relation to the posts which it found to be vilification,

and posts substantially the same, but did not consider it appropriate to make orders in relation to posts of similar effect ([221]). It ordered that Ms Rep remove the designated posts from any website, social media or other publication that she owns or controls and must not repeat or continue the publication of those posts, or posts in substantially the same terms (227]-[229]).

Order: The appeal was upheld in part.

Internal appeal on limited grounds

Some tribunal statutes provide for internal appeal to an Appeal Panel or Division. The appeal may be as of right or subject to a requirement to obtain leave. In the case of NCAT, the making of internal appeals is governed by Pt 6 Div 2 of *the Civil and Administrative Tribunal Act 2013* (NSW). The effect of s 80, and specifically s 80(2)(b), is that an appeal from certain decisions of the Tribunal may be made as of right on a question of law, or with the leave of the Appeal Panel on any other grounds. The fact-law distinction is murky, and unrepresented appellants may struggle to assist the Panel in identifying a discrete question of law as a ground for appeal. Absent a question of law, general principles for the grant of leave to appeal on other grounds are well-established (see eg, *Collins v Urban* [2014] NSWCATAP 17, [80]-[84]). The following cases, both involving unrepresented appellants, show how the Appeal Panel applies the appeal provisions. It shows how the Panel attempts proactively to discern and evaluate all arguable errors of law and other arguable grounds of appeal which self-represented appellants may have difficulty in specifying.

ZVN v ZVO [2022] NSWCATAP 57

New South Wales Civil and Administrative Tribunal Appeal Panel (CP Fougere, Principal Member, J S Currie, Senior Member, J Le Breton, General Member), 2 March 2022

This was an internal appeal to the NCAT Appeal Panel from a decision of the Tribunal's Guardianship Division on a guardianship review concerning a 90-year-old woman who had been diagnosed with dementia ('the subject person'), whose name was anonymised as ZVO. The appellant, whose name was anonymised as ZVN, was a friend of ZVO who objected to the Tribunal's decision of 19 May 2021 to renew the order placing ZVO under guardianship and to reappoint the Public Guardian as sole guardian.

The appellant challenged the reappointment of the Public Guardian and sought appointment herself. The sole issue was the validity of the Tribunal's finding that the appellant was not suitable for appointment as guardian by reference to the factors in s 17(1) of the *Guardianship Act 1987* (NSW) (Guardianship Act).

The Public Guardian and a person who had been appointed as ZVO's financial manager were co-respondents to the appeal. ZVO did not participate in the appeal but was separately represented by counsel.

The Appeal Panel had first to decide whether in reaching its decision to reappoint the Public Guardian, which involved a decision that the respondent was not suitable for appointment as a guardian, the Tribunal had made an error of law, in which case the appeal would proceed as of right. Otherwise, the Panel had to decide whether it should in any case grant the respondent leave to appeal ([12]).

The Appeal Panel noted that in appeals such as this where the appellant was neither legally represented nor a practising lawyer, it can be difficult for the appellant to identify an error of law. In accordance with previous Appeal Panel decisions involving appeals from the Guardianship Division, the Panel endeavoured to assist the appellant to formulate and clarify grounds of appeal. Following the practice in *Cominos v Di Rico* [2016] NSWCATAP 5 and other appeals from the Guardianship Division, the Appeal Panel reviewed the appellant's stated grounds of appeal, the material provided and the decision of the Tribunal to ascertain whether a question of law or the basis for the grant of leave could be discerned therein ([32]-[35]).

The Appeal Panel noted that, while there is no universal test for identifying errors of law, the Appeal Panel in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 had set out a non-exclusive list of eight types of questions of law ([25]). The Panel discerned that

the appellant's case was that the Tribunal had made six different errors of law, and that three possible grounds for leave to appeal could be discerned from her submissions ([36]-[44]). The Panel proceeded to consider them seriatim.

Errors of law

1. The appellant asserted that the Tribunal had failed to set out a reasoning process for its decision, particularly its conclusion that she was not suitable to be appointed as guardian. The Panel concluded that the Tribunal's reasons for decision met the standards of adequacy set by the leading authorities, and there was no error of law in this regard ([54]-[56])).
2. The appellant asserted that she was denied procedural fairness at the hearing in that she was not given sufficient time to state her case. The Panel reviewed the sound recording and found that the 34 minutes given to the appellant for her oral submissions, in a hearing which lasted approximately 75 minutes (noting that that was reasonably usual for a review hearing) was a reasonable time. ([57]-[62]). The Panel also noted that on a number of occasions the Member had asked ZVN to clarify or summarise her contentions and to address the main issues, in doing so making it clear that an important issue was ZVN's own suitability to be appointed as guardian. It also took into account her substantial written submissions to the Tribunal.
3. The appellant contended that in failing to find the appellant 'willing and able to exercise the functions conferred or imposed by the proposed guardianship order' for the purposes of s 17(1)(c) of the Guardianship Act, the Tribunal had misapplied the provision. The Appeal Panel said that the three findings of fact relied upon by the appellant would not give rise to the error of law asserted unless there was no evidence at all upon which each finding could have been made. The Panel found that there was appropriate evidence to justify each finding.
4. The fourth possible error of law was that a finding of material fact was against the weight of evidence. The finding in issue was that the subject person ZVO is open to suggestion and her views can vary. The Panel said there was no error of law in this regard as there was evidence to support the finding ([80]-[81]).
5. The fifth possible error of law was failure to take mandatory considerations into account. While the appellant did not make it clear which mandatory considerations were meant, the Panel found that the recording and Reasons indicated that the principles set out in s 4 of the Guardianship Act were considered ([83]-[85]).
6. The sixth type of error, unreasonableness, was not found. The Panel noted that while the appellant strongly disputed the decision, it was not unreasonable to the standard required to establish an error of law ([86]).

Leave to appeal on other grounds

Having found no error of law, the Panel applied the principles governing an application for leave to appeal ([26]-[27]). In *Collins v Urban [2014]* NSWCATAP 17 the Appeal Panel said that an appellant seeking a grant of leave must demonstrate more than that the decision was arguably wrong or that an issue of fact is open to challenge ([20]). The Panel in that case added that ordinarily, it is appropriate to grant leave only in matters that involve issues of principle, questions of public importance or matters of administration or policy which might have general application, a clear injustice, a factual error that was unreasonably or mistakenly arrived at, or where the Tribunal has undertaken fact finding in such an unorthodox or unfair manner that it would be in the interests of justice to have it reviewed ([84]).

The Appeal Panel was unable in the present case to discern any of the circumstances identified in the general principles in *Collins v Urban* ([87]-[90]).

The Panel accordingly refused leave to appeal and dismissed the appeal.

Access to police record of interview with third party

Some tribunals deal with multiple sequential applications, often involving similar or related factual or legal issues, from the same applicant. Managing the evidence

and fact finding where a self-represented applicant seeks to rely on substantial material, sometimes deriving from earlier matters, can be challenging.

Danis v Commissioner of Police [2022] NSWCATAP 68

New South Wales Civil and Administrative Tribunal Appeal Panel (R Dubler SC, Senior Member, G Furness SC, Senior Member), 15 March 2022

Mr Danis (the appellant) applied under the *Government Information (Public Access) Act 2009* (NSW) (the Act) to the Commissioner of Police (the respondent) for access to a DVD on which was recorded an interview conducted by the NSW Police with a named Third Party. The Third Party was the then partner of Mr Danis' former wife, and the interview related to an alleged assault upon Mr Danis' young son. At the time, Mr Danis was involved in contested legal proceedings before another court over parenting arrangements for the son and another child. The allegation of assault did not result in the laying of charges against the Third Party.

The Commissioner refused Mr Danis' application for access to the DVD. Mr Danis then applied to the Tribunal for administrative review of the Commissioner's decision. The Tribunal affirmed the Commissioner's decision. It found that in balancing the personal circumstances of the appellant, the public interest considerations in favour of disclosure and the public interest considerations against disclosure, the balance weighed against disclosure, to ensure that the community may continue to provide confidential information to the police.

Mr Danis lodged an internal appeal from the decision of the Tribunal, alleging various kinds of errors. Under s 80(2)(b) of the NCAT Act, the decision could be appealed as of right on a question of law or, with the leave of Appeal Panel, on any other ground.

The appellant's first ground was that the Tribunal ignored evidence critical to disputed issues contrary to assertions of fact made by the appellant. That evidence was a transcript of the appellant's cross examination of the Commissioner's witness and the appellant's affidavit in previous proceedings. Neither was formally tendered into evidence in the present proceedings. The Appeal Panel found that the transcript and affidavit were used by the appellant in his cross-examination of the same witness in these proceedings, and that the Tribunal had not overlooked and must have taken that into account in its careful analysis of the allegations put to the witness ([28]).

The second ground of appeal was that the reasons for decision are inadequate or insufficient. The Appeal Panel found that the Tribunal made no error in finding that certain documents which included criticism of the family law system and recent cases of police misconduct, included in the 26 annexures to the appellant's affidavit, were not relevant to the public interest test and other matters required to be considered under the Act ([32]-[35]). There was no error in the Tribunal in not regarding the recent cases of police misconduct as of significance or in failing to specifically refer to them ([35]).

The third ground was that the Tribunal had misconstrued or misapplied the law and case authorities. The Appeal Panel found no error in the way the Tribunal construed and applied the public interest test, nor in its construction of s 121 of the Family Law Act, nor in its application of the principle in *Commissioner of Police (NSW) v Barett* [2015] NSWCATAP 68 on consideration of an allegation of agency misconduct as a public interest consideration in favour of disclosure.

The fourth ground was that the Tribunal made findings without evidence by failing to deal with each of the documents itemised and tendered by the appellant. The substance of this ground was the same as the first ground, and the Appeal Panel dealt with it by referring to its reasons for rejecting the first ground.

The fifth ground was that the Tribunal made an error in its fact-finding process, in accepting the evidence of a particular witness. Unlike the preceding grounds which alleged errors of law, this ground could be entertained only by leave to appeal under s 80(2)(b) of the NCAT Act. The Appeal Panel applied the principles in *Collins v Urban* [2014] NSWCATAP 17 which guide a determination as to whether leave to appeal should be granted. In the view of the Appeal Panel, the Tribunal 'clearly dealt with the evidence before it with care' and its conclusion in accepting the evidence of the relevant witness was plainly open to it ([60]). Moreover, the

Tribunal's fact-finding process was orthodox, the Tribunal did not have regard to any wrong principles, and the Tribunal's decision did not involve issues of principle or questions of public importance ([62]). Accordingly leave to raise this ground of appeal was refused.

Leave to appeal was refused and the appeal was dismissed.

Framing clear and culturally appropriate orders

While the following decision does not involve a tribunal, it deals with issues and approaches in framing behavioural orders in clear terms that can be understood by a person with cognitive disability. It also deals with the use of expert evidence, including from an Aboriginal elder as a guide to how behavioural conditions in an order could best be formulated and expressed to take a person's Aboriginal heritage and culture into account in an appropriate way.

New South Wales v Devries [2022] NSWSC 247

NSW Supreme Court (Wright J), 11 March 2022

The State of New South Wales sought an extended supervision order ('ESO') under *the Crimes (High Risk Offenders) Act* 2006 (NSW) ('CHRO Act') in respect of the defendant, a 32-year-old Aboriginal man who had spent almost the whole of his adult life in custody because of convictions for serious offences. The order was sought on the statutory ground that the Court 'is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence if not kept under supervision' (CHRO Act s 5B).

At a preliminary hearing on 2 August 2021 the Court made an interim supervision order and directed the defendant to comply with the conditions therein, the conditions being based upon the defendant's then current conditions of parole, to be settled by the parties. An order was made for the defendant to be examined and reports prepared by psychiatrists or psychologists as agreed by the parties.

Subsequently, reports were provided to the Court in accordance with the order. Additionally, the defendant provided a report by a neuropsychologist who suggested forms of language for expressing the proposed conditions of an ESO that would be more readily comprehensible for the defendant given the diagnosed limitations of his cognitive functioning and his ability to understand, recall and comply with the conditions. The defendant also filed an expert report from Auntie Glendra Stubbs, an Aboriginal woman of the Wiradjuri People with long experience in issues affecting the wellbeing of Aboriginal people. Her report included information and insights into the types of conditions that might be appropriate and inappropriate for an Aboriginal person such as the defendant, and the support and management that might assist him to comply with any conditions imposed.

At the final hearing on 28 October 2021, the defendant was legally represented. Having regard to the evidence before the Court as to the defendant's risk of recidivism, the Court was satisfied that an ESO should be made for a period of three years ([30]-[51]).

The parties conferred with the benefit of the expert reports to frame the terms of the conditions with which the defendant should be required to comply as conditions of the ESO. The revised conditions were approved by the Court on 11 March 2022.

In his reasons relating to the form of the conditions, Wright J made several observations. First, he noted that the wording of the proposed conditions 'deliberately did not mirror the wording of [the CHRO Act] or the standard formulations of some conditions often seen in ESOs' (53]). His Honour acknowledged the opinion of the neuropsychologist that, due to the defendant's cognitive limitations, he would be more likely to be able to comply with the conditions if they were expressed in a form which he was able to understand and recall. Therefore, the experts and the parties had co-operated in developing a form of conditions with simplified language and pictures to illustrate what the conditions required ([52]-[53]).

Second, his Honour observed that the evidence of Aunty Glendra Stubbs 'was particularly helpful in coming to an appreciation of the cultural, family and social implications of the defendant's Aboriginal heritage and background'

and how the conditions could best be formulated to take account of those considerations ([54]). Aunty Glendra's evidence was of particular assistance in determining the nature of the defendant's obligation in relation to the planning and scheduling of his activities.

Third, his Honour noted that the agreed conditions include features that were tailored to the defendant's circumstances. A preamble was included which explained in simple language the nature and purpose of the conditions and indicated several persons from whom the defendant can obtain assistance in understanding what they require. The preamble also made it clear that there would be adverse legal consequences if the defendant does not comply with the conditions ([55]). Having regard to Aunty Glendra's evidence about the cultural appreciation of time, the cultural and social significance of family, and the expert evidence about the defendant's cognitive limitations, the conditions did not include the usual requirement to adhere to a weekly schedule. Instead, the defendant was required to work with his Departmental Supervising Officer on developing a case management plan dealing with 'things he might do during the day', and to make every effort to take part in or attend the activities in the plan ([57]).

[The conditions are set out in full in the attachment to the judgment]

Harman implied undertaking in tribunal proceedings

The following case note and comments were contributed by Adam Bundy, Executive Adviser in the General and Other Divisions at the Administrative Appeals Tribunal.

The note concerns a single judge Federal Court decision, however the implied undertaking (also referred to as a *Harman* undertaking) considered by the Court in the decision could have widespread consequences for statutory agencies appearing in State and Federal Tribunals. Questions concerning the operation of the implied undertaking, and whether a release from the undertaking ought to be granted upon application by a party, are issues arising in Tribunal proceedings and the decision in *La Mancha* is directly relevant to how those questions could be approached.

A typical scenario would be when a party obtains documents through the processes of the tribunal, such as through the issuing of summonses to produce documents. The party who sought the documents through the use of the tribunal process then wants to use the documents for a purpose not connected to the tribunal proceeding. That party will need to seek leave from the tribunal, by reason of the implied undertaking, to use the documents for another purpose not connected to the tribunal proceeding.

Some tribunals seek to restrict the use of documents and other things produced under summons, to prevent their use for any other purpose or publication of the contents. See, for example, NCAT's Procedural Direction No 2-Summons [41], which suggests that such conduct may constitute a contempt of the Tribunal.

La Mancha Africa SARL v Commissioner of Taxation [2021] FCA 1564

Federal Court of Australia (Davies J), 15 December 2021

The Federal Court of Australia determined that a document produced to the Court by Ernest Henry Mining Pty Ltd (EHM) pursuant to a subpoena issued at the request of the applicant, La Mancha Africa SARL (La Mancha), could be used by the Commissioner of Taxation (Commissioner) outside of the proceeding without obtaining leave from the Court to do so.

Facts

Upon producing documents to the Court in answer to the subpoena, EHM requested confidentiality orders limiting the use of the documents to the proceeding in which they were produced. The confidentiality orders were sought to avoid doubt as to the limits on the Commissioner's use of the documents beyond the proceeding in which they were produced. The question for the Court was whether the undertaking (or obligation) known as a Harman[3] undertaking, or implied undertaking, was

3 See *Harman v Secretary of State for Home Department* [1983] 1 AC 280; *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125, 131 [3], 154-5 [96], 160-2 [109]-[112].

sufficient to limit the Commissioner's use of the documents to the proceeding in which they were produced, unless the Court has granted leave for use in another proceeding.

The Commissioner contended that the Harman undertaking does not operate to constrain the lawful exercise of his statutory functions and powers on the basis that the undertaking yields to inconsistent legal obligations. The corollary of the Commissioner's argument was that he would not have to seek leave of the Court to use the documents outside of the proceeding in the course of exercising his statutory powers and duties under the taxation laws.

Decision

The Court accepted the Commissioner's argument and determined that the Harman undertaking did not restrict the Commissioner's use of the documents obtained through the Court's processes. In reliance on *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38 ('Rennie') EHM argued that the Commissioner was bound by the Harman undertaking as a litigant in the proceeding, as distinct from the Commissioner using his statutory information gathering powers as a regulator to compel a person who is subject to the undertaking to produce a document for the Commissioner's use. The Court rejected this argument and emphasised that the content of the Harman undertaking recognises inconsistent legal obligations, such as the Commissioner's statutory duty to act upon information in his possession to fulfil his obligations as a regulator. Specifically, the Court focused on the Commissioner's duty under section 166 of the Income Tax Assessment Act 1936 (Cth) which requires him to determine taxpayers' liabilities under the tax laws based on information in the Commissioner's possession. The Court referred to the wealth of appellate authority (including *Rennie*) for the proposition that the Commissioner must act on information in his possession to fulfill his statutory duties, regardless of how the Commissioner came into possession of that information.

The Court found that EHM's reliance on *Rennie* was misconceived, drawing attention to the Full Court's conclusion that a Harman undertaking will not excuse a failure to comply with an obligation to provide the Commissioner information in response to a lawful exercise of his statutory information gathering powers. In *Rennie* the Commissioner issued a statutory notice to the respondent company to produce documents obtained through the curial process in prior litigation. Whether the Harman undertaking applied in the circumstances was not in issue (because the documents were obtained in an earlier proceeding). Rather the issue was whether the undertaking precluded the respondent company from producing documents to the Commissioner in accordance with the statutory notice so as to not breach the implied undertaking. The Full Court in *Rennie* said the undertaking did not preclude the respondent producing the documents to the Commissioner because the respondent was not using the documents for an ulterior purpose. Rather, the respondent was complying with a lawful exercise of the Commissioner's statutory information gathering powers.

Comment on the implications

The case opens the possibility that other regulators in addition to the Commissioner of Taxation are not bound by the Harman undertaking if the statutory framework giving rise to a regulator's duties and obligations is inconsistent with the principles underlying the Harman undertaking: see the majority judgment (Hayne, Heydon And Crennan JJ) in *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125. Taking the Administrative Appeals Tribunal as an example, *La Mancha Africa* draws into focus previous decisions of the AAT that consider the operation of the Harman undertaking: see for example *Chin and Comcare* [2017] AATA 634 ('*Chin*'); *Newey and Comcare* [2019] AATA 1772 ('*Newey*'). In *Chin* and *Newey* the AAT considered whether the Harman undertaking applied to medical reports prepared with the use of documents obtained by summonses issued in AAT proceedings. Both cases also considered whether Comcare ought to be released from the undertaking (if one was found to exist) to use the medical reports for internal claims management purposes relating to other claims each applicant had made or may make.

The AAT in both *Chin* and *Newey* decided that the undertaking applied to the medical reports because the reports were prepared using documents obtained by Comcare through the issuing of summonses in the AAT proceedings. The undertaking in both matters was said to apply only to the parts of the report that were

prepared utilising the documents obtained through the issuing of summonses. The outcome in *Chin* and *Newey* turned on whether Comcare should or needed to be released from the undertaking by reference to the proposed use of the medical reports by Comcare, namely for considering other claims for compensation made by each of the applicants under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth).

In *Chin* the AAT said Comcare did not need to be released from the undertaking because the proposed use of the reports for claims management purposes was not ulterior to the purpose for which Comcare came into receipt of the reports. However, in *Newey* the AAT said Comcare would need to be released from the undertaking to use the medical reports for claims management purposes. This conclusion was predicated on the medical reports being used for assessing a separate injury giving rise to another claim for compensation that was distinct from the injury that was the subject of the review before the Tribunal.

Having arrived at the conclusion that Comcare did not need to be released from its undertaking, the AAT in *Chin* noted that it did not need to consider whether the *Harman* undertaking must yield to inconsistent statutory provisions. Similarly, in *Newey* the AAT was not required to consider whether the undertaking must yield to any inconsistent statutory duties owed by Comcare.

In light of the Court's agreement with the Commissioner's contention in *La Mancha Africa* that the *Harman* undertaking does not constrain his lawful exercise of statutory functions and powers, tribunals may encounter a similar argument raised by regulators in the future who seek to clarify the limits on their use of documents obtained through the curial process. A close consideration of the statutory framework within which each regulator operates will no doubt be required, and for this reason it is not inconceivable that how the *Harman* undertaking applies to limit the use of documents by different regulators will differ to varying extents.