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Tribunal Case Update

A challenge for tribunals is assessing what can be done to hear cases expeditiously without compromising fairness. In refusing a party's application to reconstitute the tribunal, the President of VCAT in *Chopra v Department of Education and Training* held that the directions given to limit the duration of the hearing were reasonable in the circumstances and did not deny the party procedural fairness. An interesting counterpoint to *Chopra is Security & Technology Services (NT) v Hurley*, in which a trial judge's decision was set aside on appeal. The judge had managed the hearing so actively as to impede the presentation of the party's case. The case includes a comment that time limits on cross-examination should take account of the importance of the witness and the nature of their evidence.

Tribunal members may proceed in different modes when disposing of cases. Legal errors can result where the tribunal does not apply the appropriate mode. In *ZWA v ZWB*, NCAT's Guardianship Division 'conducted what was essentially a dispute resolution exercise' and erred in failing to consider the statutory criteria when it appointed a guardian. And in *Gunter v Assistant Commissioner of Police*, the Queensland Court of Appeal observed that a QCAT member appeared to have proceeded on the basis that it was conducting a fresh hearing on the merits rather than an appeal by way of rehearing.

In *Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia* the Federal Court said that a Tribunal's reasons for decision, of which 65 paragraphs had been copied from a party's submissions unattributed, raised questions about whether the Tribunal had performed its independent functions.

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Procedural fairness – directions to limit hearing time

Chopra v Department of Education and Training [2022] VCAT 152

VCAT (Quigley J, President), 9 Feb 2022

Dr Chopra applied to the Victorian Civil and Administrative Tribunal ('VCAT') for review of the respondent's decision to refuse six freedom of information requests. On the final day of the hearing before Senior Member Judge Jenkins (Judge Jenkins), Chopra made an oral application for reconstitution of the tribunal pursuant to s 108(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1988* (Vic) ('VCAT Act') which would have the effect of removing Judge Jenkins from the proceedings.

Quigley J referred to authority stating that the power given by s 108 of the VCAT Act to reconstitute a proceeding:

- may be exercised at any time during the hearing of a proceeding,
- confers a broad discretion to order reconstitution 'for any proper means or proper reason', and
- may be exercised to ensure compliance with the rules of natural justice ([20], citing *Metrospan Developments Pty Ltd v Whitehorse City Council* [2000] VCAT 44 [11] (Kellam J)).

If an application raises an issue of a suspicion or apprehension of bias, the test is whether 'a fair-minded lay observer might reasonably apprehend that the [Tribunal member] … might not bring an impartial mind to the resolution of the question the [Tribunal]… is required to decide' ([24], citing *Ebner v Official Trustee in Bankruptcy* (2000) 201 CLR 488).

The applicant's arguments

The applicant submitted that:

- he was not given a real opportunity to speak, to present his case and to provide all his evidence such as by calling witnesses
- he was not permitted to make an oral opening statement
- he was required to summarise evidence in 45 minutes
- the listing time for the hearing was reduced from seven days to two and a half days without consultation with him
- Judge Jenkins directed him to file written submissions and affidavits
- Judge Jenkins denied him natural justice by continuing with the hearing of his application for review after he applied for reconstitution.

Consideration by the Tribunal

Having reviewed the material and listened to the recordings of the hearing, Quigley J was not satisfied that there was any basis to form the requisite opinion that reconstitution of the Tribunal was appropriate or warranted ([37]). In accordance with the test in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, neither bias nor suspicion of bias had been demonstrated. Her Honour found that the Tribunal had not only afforded procedural fairness to the applicant but 'gave ample opportunity for the applicant to be heard and made significant concessions to accommodate him' ([48]). The Tribunal's obligation was 'that there be a *reasonable* opportunity and not an open-ended one, to call evidence, cross-examine and make submissions' ([38] (emphasis in original)). This obligation had to be taken in conjunction with the general procedural obligations set out in s 98 of the VCAT Act, which included conducting the proceeding with appropriate expedition ([38]).

In relation to the matters raised by the applicant, Quigley J determined as follows:

- Judge Jenkins did not 'gag' the applicant but encouraged him to participate fully. While the applicant was muted on occasion, this was done to enable the Tribunal to deal with the competing demands on its time and resources ([39]).
- When the applicant was too ill to participate in day one of the hearing, Judge Jenkins proceeded with the hearing in order to facilitate a timely resolution of the dispute. Provision for the applicant to participate was made by inviting him to submit his opening in writing and providing him with a recording of what he missed on day one ([40, 41]).
- Given the nature of the case, the reduction in the time listed for the hearing was reasonable,

as was the decision by Judge Jenkins to terminate the applicant's cross-examination. The extent of time given to the applicant in the hearing and by written submissions and evidence had afforded him 'a more than extensive opportunity' to present his case ([44]).

- Section 108 of the VCAT Act does not require a hearing to be stopped until the reconstitution application is determined. As the application was made late in the hearing, and given the scheduling delays, it was appropriate in the circumstances for Judge Jenkins to permit the hearing to continue ([45]).

Applying the test of apprehended bias in *Ebner*, Quigley J was satisfied that 'none of the matters raised by the applicant would lead a fair minded lay observer to form the view that Judge Jenkins might not bring a fair mind to the determination of the matter' ([50]).

Order: The application for reconstitution was refused.

Procedural fairness - impeding the presentation of a party's case

The following casenote and comment was contributed by Jeremy Bonisch, Senior Associate, AAT.

The following case demonstrates the importance of ensuring procedural fairness when attempting to actively manage hearings to achieve an expeditious outcome. As the Court observed in this case, the parties can incur significant extra costs when well-intended efforts to manage a hearing go awry.

Security & Technology Services (NT) Pty Ltd v Hurley [2022] FCAFC 90

Federal Court of Australia Full Court (Katzmann, O'Callaghan and Thomas JJ), 18 May 2022

Security and Technology Services (NT) Pty Ltd ('STSNT') appealed orders of a judge of the Federal Circuit Court. STSNT was ultimately successful on Ground 13 of the amended notice of appeal, which claimed STSNT was not afforded procedural fairness because the trial judge 'excessively, unduly, and improperly intervened in the conduct of the trial' ([4]). Senior counsel for Mr Hurley (the respondent) conceded the substance of this ground and agreed the matter should be remitted for rehearing before another judge. Counsel for the respondent also complained that her client was denied procedural fairness or was 'equally badly treated.' ([12]).

The trial judge's conduct

The Court described the trial judge's conduct of the hearing as unsatisfactory and held that it:

> unfairly undermined the proper presentation of [STSNT's] case, gave rise to an appearance of bias, and was an egregious departure from the proper role of the judge ([7]).

In managing the trial, the trial judge erred in a number of ways. Not only did the trial judge, rather than counsel, initiate the cross examination of STSNT's leading witness, he also placed time limits on the cross-examination of witnesses by the parties. These time limits were described by the Court as arbitrary, as they were imposed without regard to the importance of the witness or the nature of their evidence ([8]). The trial judge also did not call on counsel for Mr Hurley to make closing submissions, and instead required counsel for STSNT to proceed directly to its submissions. The trial judge did not require or allow counsel for Mr Hurley to make closing submissions during the hearing.

The Court found the trial judge 'repeatedly and unjustifiably' impeded the conduct of cross examination ([8]). The trial judge was also found to have regularly, and at times aggressively, cross examined STSNT's witnesses, surprising both the parties and the witnesses. The Court held this was in pursuit of a case theory that favoured Mr Hurley but was neither proffered nor anticipated by either party ([10]). The Court suggested this meant the trial judge had 'preconceived views about important aspects of the case' ([9]). Further, there were several instances on the transcript where the trial judge abruptly intervened in closing submissions of counsel for STSNT, preventing them from fully developing the submissions they wished to make ([11]).

In allowing the ground of appeal, the Court held it was clear the trial judge's conduct 'struck at

the validity of the trial', requiring that the matter be remitted for retrial ([13]).

The Court regretted that, as an outcome of the appeal, both parties would through no fault of their own incur significant additional legal costs that were not recoverable in the Fair Work jurisdiction ([14]).

Orders

Ground 13 of the amended Notice of Appeal was allowed, the orders made by the trial judge were set aside and the matter was remitted for rehearing by a different judge. The court granted the respondent a certificate as to costs under the *Federal Proceedings (Costs) Act 1981* (Cth) ss 6(1) and 8(1) in respect of the appeal and the new trial.

Jeremy Bonisch

Appeal from non-recusal decision - new evidence

The following case is one in which a decision by a senior member refusing to recuse herself on the ground of apprehended bias was set aside on appeal after new evidence was admitted.

NSW Education Standards v Yeshiva College Bondi Ltd [2022] NSWCATAP 160

NSW Civil and Administrative Tribunal Appeal Panel (J Boland DP, A Suthers PM), 13 May 2022

Yeshiva College Bondi Ltd ('the College') applied under the *Administrative Decision Review Act 1997* (NSW) for a review of a decision by the NSW Education Standards Authority ('NESA') made under ss 59 and 56 of the *Education Act 1990* (NSW). This was a decision to recommend to the relevant Minister that the College's registration to conduct a school be cancelled and the renewal of its registration refused. The matter was heard by the NSW Civil and Administrative Tribunal ('NCAT') constituted by a single member.

The senior member, as she was about to commence hearing the application, made two disclosures to the parties as follows:

1. the senior member had attended a school called Yeshiva College for her primary school education and believed that the school she attended went into liquidation, and
2. a director of the College was known to the senior member as the husband of a primary school class-mate.

Following the disclosures, NESA asked the senior member to recuse herself from hearing the review application on the grounds of apprehended bias. The senior member declined to recuse herself, and provided reasons.

The review application had not yet been heard when NESA applied for leave to appeal the senior's member's decision to the NCAT Appeal Panel. NESA contended that the senior member made an error in refusing to disqualify herself in circumstances in which a fair-minded lay observer might reasonably have an apprehension of bias by reason of:

- the senior member having undertaken primary school at the predecessor of the College, and
- the senior member's association with the wife of a director of the College.

The College did not oppose the application for leave to appeal. The Appeal Panel granted leave on the basis that the proposed appeal raised a question of public importance, being the perception of fair administration of justice in the Tribunal ([41]).

The College opposed an application by NESA to admit new evidence that was not before the senior member. The new evidence was an affidavit by the solicitor for NESA annexing various documents which related to the corporate history, directors, personnel and teaching ethos of the College and its connections with the predecessor school. The Appeal Panel referred to *Polsen v Harrison* [2021] NSWCA 23 [46 (xiv)] where the Court of Appeal said: 'there is to be attributed to the fair-minded observer a broad knowledge of the material objective facts as ascertained by the appellant court and the actual circumstances of the case'. The Appeal Panel was satisfied that the new material should be admitted to enable it to

determine on an objective basis the issue of apprehended bias ([55]).

It was not in dispute that:

- the College known as Yeshiva College and attended by the senior member was located on the same site as the current College, and
- both the school attended by the senior member and the College provided education in accordance with the principles and beliefs of the Orthodox Jewish Hasidic movement known as Chabad ([26]).

Apprehended bias

The Appeal Panel applied the test for apprehended bias from *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, which asks whether a fair minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the issue to be decided ([73]).

The Appeal Panel accepted that a core issue in the application for review was whether NSW education standards were or could be adequately delivered in the context of the College's integrated curriculum. This was a teaching method which sought to integrate the NSW curriculum within a framework of orthodox Chabad religious beliefs, delivered by mixed teaching teams of non-NESA accredited religious educators and NESA-accredited teachers ([84]).

The Appeal Panel found that the present College, while operated by a different corporate entity, was 'in reality the successor of the earlier school' attended by the senior member. Each school operated on the same essential Chabad ethos and principles and delivered an integrated curriculum based on orthodox Chabad beliefs using mixed teaching teams ([80]).

While there was a lack of evidence about the strength of connection between the senior member and the wife of the director mentioned in the senior member's disclosures, the actions of the Board and directors and their capacity to rectify breaches were issues to be determined in the review. The Appeal Panel found that a fair minded observer might apprehend that the senior member might be influenced by relationships formed in the community of the predecessor school ([92])

The Appeal Panel concluded:

> The matters which might lead the reasonable observer to form the view that the senior member might decide the matter other than on the merits are the fact the senior member attended a predecessor school of the College and her childhood friendship with the wife of a current director of the College ([86])

Orders

Leave to appeal was granted and the appeal allowed. The decision of the senior member was set aside and the respondent's application for disqualification of the senior member was allowed. The matter was referred to the President for reconstitution of the tribunal.

Error resulting from the wrong process

In the following case, the NCAT Appeal Panel found that NCAT's Guardianship Division ('the Tribunal') had made an error of law as a consequence of applying an ADR approach when adjudication was required. By using the wrong process, the Tribunal failed to address the questions it was required to consider.

ZWA v ZWB [2022] NSWCATP 113

NSW Civil and Administrative Tribunal Appeal Panel (Senior Members JS Currie, J D'Arcy and S Taylor), 13 April 2022

[*Names of parties were anonymised by NCAT for privacy reasons.*]

ZWB ('the subject person') was an 87-year-old woman diagnosed as suffering significant loss of cognitive capacity due to dementia. She had four adult children, ZWA, ZWC, ZWD and a son. In 2017 she appointed ZWA and ZWC jointly as her enduring guardians.

On 22 June 2021 ZWA applied to NCAT for guardianship orders for the subject person and sought to be appointed as her guardian. NCAT heard the application and made a guardianship order appointing ZWA's sister ZWD as guardian. ZWA appealed from NCAT's decision. ZWC and ZWD and the Public Guardian were respondents to the appeal.

Section 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') provides that an internal appeal to the Appeal

Panel may be brought as of right on a question of law, or otherwise with the leave of the Panel.

Errors of law

The key issue in the appeal was whether the Tribunal had erred in appointing ZWD as guardian and refusing to appoint ZWA. ZWA was unrepresented at the appeal hearing and had been unable to clearly identify any legal error the Tribunal had made in reaching its decision ([34]). As it had done in other guardianship appeals by unrepresented persons,[1] the Appeal Panel endeavoured in discussion with ZWA to assist her to clarify the grounds of appeal and identify any alleged legal errors ([34]). The Appeal Panel identified for consideration two potential errors of law in relation to the appointment of ZWD as guardian and the failure to appoint ZWA:

1. whether, in determining the identity of the guardian, the Tribunal had failed to take into account mandatory considerations, and
2. whether the Tribunal failed to reach a decision on the identity of the guardian correctly in accordance with the guardianship legislation by identifying the wrong issue or asking the wrong question ([35]).

The *Guardianship Act 1987* (NSW) ss 4, 15(3), 16(1) and 17(1) provides statutory criteria which the Tribunal must apply in determining whether a particular person should be appointed as a guardian. A tribunal considering the suitability of a particular person for appointment as guardian must demonstrate in its reasons for decision that it has reached its conclusions by 'matching' its findings to the criteria in the 'general principles' in section 4 ([51], [55]). The Tribunal had failed to demonstrate in its reasons the observance of those principles ([66]).

The Appeal Panel determined that the Tribunal had committed a legal error by failing to take into account mandatory considerations, and that it failed to reach a decision on the identity of the guardian correctly by identifying the wrong issue or asking the wrong question ([59]. The Appeal Panel said that the Tribunal had:

> conducted what was essentially a dispute-resolution exercise in an attempt to identify a consensus or failing that a majority view within the family as to who should be appointed' ([60]).

As a consequence of choosing that approach, the Tribunal had failed to apply appropriately the criteria in the section 4 principles. Furthermore, the Tribunal had dismissed the option of appointing the Public Guardian because the appointment was opposed by family members (([60]). In the Panel's view, a dispute resolution approach to the question of who to appoint is a guardian was legally incorrect, as it involved a misapplication of statutory provisions, a failure to take into account mandatory considerations, identification of the wrong issue and asking the wrong question ([70]).

Orders

The Appeal Panel determined to allow the appeal because the Tribunal had fallen into legal error in deciding to appoint ZWD as guardian. The Appeal Panel allowed the appeal and remitted the guardianship orders for re-hearing by a differently constituted panel ([84]).

Appeal by way of rehearing – police discipline

In the following case, the Queensland Court of Appeal ('QCA') refused leave to appeal from a decision of the QCAT appeal tribunal in a police disciplinary matter because no arguable case of a substantial miscarriage of justice was demonstrated. The case is notable for the comment made about an error as to the nature of the appeal on the part of the QCAT member who heard the application for review. The error was not material to the case before the QCA because the member's decision had been set aside by the QCAT appeal tribunal [[3]).

Gunter v Assistant Commissioner Wilkins [2021] QCA 274

Queensland Court of Appeal (Sofronoff P, Morrison JA, Boddice J), 6 Sept 2021

The applicant, a sergeant of police, was charged under Part 7 of the *Police Service Administration Act 1990* (Qld) with having committed misconduct by accessing confidential information without having an official purpose related to the performance of his duties. Assistant Commissioner Wilkins ('the AC')

1 Such as *Cominos v Di Rico* [2016] NSWCATAP 5.

found that the applicant had committed this type of conduct and that his conduct was 'improper'. The applicant's payment level was reduced for a period of 6 months.

The applicant applied to the Queensland Civil and Administrative Tribunal ('QCAT') for a review of the AC's decision. The standard of review that applies in such an appeal is not a fresh (de novo) hearing on the merits, as generally applies to applications for review of decisions pursuant to s 20 of the QCAT Act. Pursuant to s 219H of the *Crime and Corruption Act 2001* (Qld), an application for review of the AC's decision is by way of a rehearing of the original evidence, subject to a power to admit additional evidence if certain conditions exist. In conducting such a review, QCAT is constrained in its freedom to interfere with findings of fact which were based upon the credit of a witness ([2]).

On the hearing of the application for review, QCAT (constituted with a single member) set aside the AC's decision on the ground that the member accepted the applicant's explanations for his conduct. The AC appealed to the QCAT Appeal Tribunal, which set aside the member's decision and confirmed the AC's original decision.

The applicant sought leave to appeal to the Queensland Court of Appeal from the decision of the QCAT Appeal Tribunal. The court refused leave, for the following reasons.

The court's reasons

Sofrnoff P (Morrison JA and Boddice J agreeing) said that the QCAT single member appeared to have proceeded on the basis that the appeal was a fresh hearing on the merits rather than an appeal by way of rehearing. The member had accepted the applicant's explanation notwithstanding the AC's findings as to his credit.

Sofronoff P said that leave to appeal a decision of QCAT to the court 'will not be granted unless there are reasonable prospects of establishing that there has been an error of law and that an appeal has reasonable prospects of success' ([8]). The President added that it is generally insufficient to demonstrate an error, and 'an applicant must show that an appeal is necessary to correct a substantial miscarriage of justice' ([8]).

In his application for leave to appeal, the applicant admitted he had accessed the information but denied the access was unrelated to the performance of his duties. Whether his actions amounted to misconduct depended on whether his excuses for his conduct were accepted ([6]). The factual basis of his contentions had been subject to forensic investigation. The tribunal's finding that the applicant lacked instruction or permission to pursue his inquiries was not a statement of law but an ultimate finding of fact ([9]). The finding depended upon a consideration of the applicant's excuses for his actions, which were matters of fact and were rejected as insufficient. The court found that no arguable case of a substantial miscarriage of justice had been demonstrated' (9])

Held: the application for leave to appeal was refused with costs.

Legal professional privilege - asking the wrong question

In this case a senior member of Western Australia's State Administrative Tribunal asked the wrong question, and thereby made an error of law, in determining whether documents were the subject of a claim for legal professional privilege and by whom. The court suggested that 'the senior member might have been assisted if he had inspected the documents as he was entitled to do' ([23]).

Owners of Queens River Strata Plan 55728 v Engwirda [2021] WASC 392

Western Australia Supreme Court (Tottle J), 19 Oct 2021

The appellant was the strata company for a scheme comprised in a strata plan, in which the respondent owned one lot. On 6 July 2021, a senior member of the State Administrative Tribunal ('SAT') made an order that the appellant provide to the respondent certain documents over which the appellant had claimed legal professional privilege. The appellant applied to the Supreme Court for leave to appeal on a question of law on the following grounds:

1. The senior member erred in law by considering only whether the documents were the subject of legal professional privilege held by the appellant when he should have also considered whether the strata manager

had a claim for legal professional privilege over the documents.

2. The senior member erred in law by failing to consider whether the strata manager's claim for legal professional privilege over the documents was maintained after it had provided the documents to the Council of Owners of the strata company or whether any waiver of privilege had occurred.

The court held that the first ground was made out. The senior member was required to consider whether the documents or any of them were the subject of a claim for legal professional privilege. The senior member misdirected himself when he failed to ask whether the documents were the subject of a claim for privilege by the strata manager. This was an error of law ([23]).

The second ground was not made out because the question of whether the claim for privilege was maintained after the provision of the documents to the Council of Owners does not arise until the first question is answered in the affirmative ([24]).

Orders

The court granted leave to appeal, allowed the appeal, set aside the orders of the Tribunal made on 6 July 2021, and remitted the matter for reconsideration by the Tribunal in accordance with the reasons.

Incorporation of submissions into reasons

The following casenote and comment was contributed by its author Jeremy Bonisch, Senior Associate, Administrative Appeals Tribunal.

Ultimate Vision Inventions Pty Ltd v Innovation & Science Australia [2022] FCA 606

Federal Court of Australia (Wheelahan J), 24 May 2022.

The applicant appealed a decision of the Administrative Appeals Tribunal ('the Tribunal') pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') upon questions of law. The Tribunal had affirmed a decision of the respondent ('ISA'), that the applicant ('Ultimate Vision') was not entitled under Division 355 of the *Income Tax Assessment Act 1997* (Cth) to claim research and development ('R & D') tax offsets in the relevant income years as it had not engaged in 'R & D activities' as defined in section 355.20 of the *Income Tax Assessment Act 1997* (Cth).

There were six questions of law raised by the appeal. Question six required the Court to consider '[whether the Tribunal made] an error of law as a result of the substantial reproduction, without attribution, of the [respondent's] submissions within the Tribunal's written statement of reasons' ([122]). Wheelahan J dealt with this question first because if it were substantiated, the Tribunal would have failed to discharge its review function, and the matter would have to be remitted to the Tribunal for re-hearing ([125]).

His Honour found that of the 100 paragraphs in the Tribunal's reasons, 65 were copied essentially verbatim and unattributed from ISA's closing submissions ([99], [100]). His Honour acknowledged the Tribunal's reasons also included other content not copied from ISA's submissions ([99]).

Ultimate Vision argued on appeal that the extent of the Tribunal's copying of ISA's closing submissions:

> could not give a reasonable observer confidence that the Tribunal fairly dealt with or considered the applicant's case ([127]).

In addition, the applicant submitted that the Tribunal:

- had failed to act independently and undertake its review in a way that engendered public trust and confidence as it was required to do by s 2A of the AAT Act ([128])
- had not given proper consideration to the applicant's evidence, and
- had not accorded procedural fairness ([128]-[130]).

In its response ISA:

- accepted that a significant portion of its submissions had been copied.
- submitted that a fair reading of the decision demonstrated that the Tribunal had 'brought its own independent mind to bear upon the correct or preferrable decision' ([132])

- disagreed with the applicant's submissions that the Tribunal had not considered the applicant's evidence, and.
- argued the applicant had not demonstrated any 'critical material before the Tribunal' that was not considered ([132]).

Court's consideration

Wheelahan J observed 'it was not ideal' that the Tribunal had copied substantial parts of ISA's submissions ([133]). His Honour reasoned that the unattributed copying raised three issues for consideration: ([134])

1. Do the reasons as a whole… give rise to an inference that the Tribunal failed to undertake the review independently and fairly?
2. Do the reasons… give rise to an inference that any particular matters that the Tribunal was required to consider were overlooked?
3. Is there a separate requirement of the lawful exercise of the Tribunal's jurisdiction that it must appear that the Tribunal independently and fairly dealt with the applicant's case such as to promote public trust and confidence in the Tribunal's decision-making?

Issue 1

In considering the first issue, Wheelahan J referred to sections s 2A9(d), 39, 43(1) and (2) of the AAT Act which establish that the Tribunal conducts its review independently of the respondent decision-maker [137]-[142]). The need for the Tribunal to reach its own findings and conclusions independently of the parties has been affirmed in *Minister for Immigration and Multicultural Affairs v Wang*,[2] and in *MZZZW v Minister for Immigration and Border Protection* ([143])[3]. His Honour also referred to a number of cases in which the adoption of a party's submissions had prompted a reviewing court to consider whether a court or tribunal had failed to give independent consideration to the matters in dispute. ([144]-[165]). His Honour concluded that it was necessary to consider on a case-by-case basis whether it was an error to copy submissions in the decision that had been made by a party during the proceedings. The adoption of parties' submissions is not inevitably objectionable, provided that it is obvious from the decision that the decision-maker has independently formed the views or opinions expressed in the reasons.

In applying the authorities to the present case, his Honour observed the Tribunal's function is administrative and not judicial ([166]). The standard for its reasons is set by the AAT Act ss 43(2) and (2B) ([166]) and is not the same as that required of a court. Further, it is for the Tribunal to determine what evidence is material to its decisions and there is no requirement for a tribunal member 'to refer to every piece of evidence and every contention made by an applicant in its written reasons' ([166]).[4]

The decisions of a tribunal member are to be reviewed with a mind to the initial decision maker's statutory requirement to use its best endeavours to assist the Tribunal to make its decisions (AAT Act s 33(1AA)).

In the present case, the Court was satisfied the Tribunal had not failed to independently review ISA's decision, notwithstanding the unattributed adoption of ISA's submissions. Wheelahan J pointed to three features of the decision that indicated the tribunal member had independently arrived at the reasons that were given:

1. the Tribunal's reasons contained paragraphs that did not appear in ISA's submissions which referred to the applicant's submissions with some comments upon them by the Tribunal, the framing of issues that arose on review, and some conclusions' ([167]),
2. the copied paragraphs were reordered, demonstrating 'independent consideration' ([167]), and
3. the reasons themselves indicated that the tribunal member had 'undertaken a thorough analysis of the documentary evidence and had considered the oral testimony' ([167]).

In those circumstances Wheelahan J held that a tribunal member can still act independently despite adopting the submissions of the primary decision maker.

Issue 2

In considering the second issue, Wheelahan J discussed the Tribunal's obligation to consider and inform itself of relevant material and

2 [2003] HCA 11; 215 CLR 513 [71] (Gummow and Hayne JJ).

3 [2015] FAFC 133; 234 FCR 154 [59] (Tracey, Murphy and Mortimer JJ).

4 Quoting *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2023] FCAFC 184; 236 FCR 593 [46] (French, Sackville and Hely JJ).

considerations. While acknowledging that in certain cases the apparently uncritical or unqualified adoption of submissions of one party may support an argument that relevant matters were not considered, it does not necessarily follow that a decision is flawed just because the Tribunal had adopted the submissions of one party verbatim ([169]).

Wheelahan J ultimately rejected Ultimate Vision's submissions on this issue. The submissions invited the court to engage in merits review, which was inconsistent with the court's functions in an appeal under s 44 of the AAT Act ([172]).

Wheelahan J discussed the Tribunal's obligation to inform itself of necessary considerations. His Honour held that:

> [a]lthough the Tribunal may make its own enquiries and may require the production of further material …[this] does not equate to a duty to make inquiries or to get information (emphasis in original) ([173]).

Whilst the Tribunal may err if it does not inform itself of an obviously critical fact, it is not for the Tribunal to construct the case for the applicant or inform them that there is inadequate material to overturn the decision ([173], [182]). In deciding that the Tribunal had not failed to inform itself of necessary considerations, his Honour had regard to the directions to both parties to provide statements of facts, issues and contentions, the fact the parties had filed significant amounts of evidence, and that the opportunity both parties had to make submissions and examine witnesses ([173]).

Issue 3

This issue arose due to Ultimate Vision's submissions that the Tribunal failed to carry out its statutory functions in a way that promoted public trust and confidence in the decision making of the Tribunal… [which] could not give a reasonable observer confidence that the Tribunal fairly dealt with or considered [Ultimate Vision's] case ([198]).

Wheelahan J characterised this as an argument that asks the Court to consider whether there is a requirement that administrative justice must be seen to be done ([198]). His Honour observed the AAT Act is the starting point for any such requirement, and held that no directly enforceable right or obligation arises from s 2A(d) of the AAT Act as the provision is merely 'aspirational or exhortatory in nature' ([199]). His Honour acknowledged that while s 2A was not binding, it was relevant to determining whether the Tribunal would err if it did not discharge its review function reasonably ([199]).

As Ultimate Inventions did not make a claim of apprehended bias, it was unnecessary for the court to determine whether the Tribunal had acted independently from the perspective of a reasonable law observer ([198]). Instead, the question was whether there is a separate requirement that a reasonable person must have confidence in the Tribunal's decision in order for the statutory function to be discharged. Wheelahan J discussed the decision of *Li v Attorney-General for New South Wales ('Li')* where the majority held there is no requirement that justice must be seen to have been done in administrative decision making ([200]).[5] As there were no submissions before the Court suggesting the majority reasoning in Li was wrong, his Honour accepted that as the test. His Honour added his own observation that the 'exercise of a review function free of a reasonable apprehension of bias' is an implied condition of the test ([200]).

Orders

The Court dismissed the appeal and reserved the question of costs.

Comments

It is apparent from this case that the adoption of submissions of the parties, particularly the primary decision maker, is not inevitably fatal in circumstances where it is clear the Tribunal has independently arrived at the views articulated in the submissions.

This case also provides guidance on the process in which trials are run to ensure that a tribunal is properly informed in making its decision. While the Court held that it is not a requirement of a tribunal to make positive inquiries about evidence in the absence of a statutory obligation to do so, decision makers should be alive to obvious gaps in the material that may favour one party. The tribunal can reduce the risk of any error by making clear directions that parties file the evidence they rely upon and by ensuring each has adequate opportunities to present their case.

Jeremy Bonisch

5 [2019] NSWCA 95, [56]-[63] (Basten JA), [69], [77-79] (White JA).

Discrimination in refusal of leave for stop work meeting

The Tasmanian Civil and Administrative Tribunal has considered whether Tasmanian government entities unlawfully discriminated by directing the refusal of applications by workers to use leave and flexible work arrangements for the purpose of attending an unauthorised stop work meeting.

Health Services Union v Tasmania (Dept of Health) [2022] TASCAT 56

Tasmanian Civil and Administrative Tribunal (Ordinary Members K Cuthbertson QC and R Winter), 3 June 2022

[Complaints of discrimination in employment by two unions against the government respondents were heard together as representative complaints and reported as *Health Services Union, Tasmania Branch v The State of Tasmania (Department of Health) & Ors; Australian Education Union, Tasmania Branch v The State of Tasmania (Department of Education) & Ors* [2022] TASCAT 56].

The complainant unions were negotiating a pay dispute with the respondent government departments and had called for stop work meetings to be held at various locations on 24 October 2021. On 18 October, the Director of the State Service Management Office ('SSMO') sent an email to heads of the respondent departments, instructing them to email their staff in specified terms. On 19 October, the heads each issued an email to their respective staff stating that, as the stop work meetings were unauthorised, no applications would be approved for leave of absence, use of flex time or time off in lieu ('TOIL') for the purpose of enabling staff to attend.

The complainants lodged complaints with the Anti-Discrimination Commissioner ('ADC'), alleging that the emails constituted 'direct discrimination' contrary to s 14 of the *Anti-Discrimination Act 1998* (Tas) ('the Act') because the direction involved a person treating an employee with a prescribed attribute less favourably than employees without that attribute. The complainants further alleged that the respondents were 'promoting discrimination' contrary to s 20 of the Act and 'aiding a contravention of the Act' contrary to s 21 by giving directions to managers which caused, induced or aided the managers to contravene the Act when dealing with employees who applied for leave to attend the stop work meeting.

On 15 May 2019, the ADC referred both complaints to the Tasmanian Civil and Administrative Tribunal ('the Tribunal') for inquiry pursuant to s 7(1)(c) of the Act.

Differential treatment

In relation to the allegation of 'direct discrimination', it was not disputed that employees in attending the stop work meeting and applying for leave to do so were undertaking activities in connection with their employment ([60]). The issue was whether the mandatory refusal of the affected employees' access to leave, TOIL or flex time in order to attend the stop work meeting amounted to 'differential treatment' on the basis of a protected attribute.

The Tribunal found that employees had utilised the leave, TOIL and flex time arrangements in the past without being questioned as to the purpose for which it was taken ([63]). The respondents argued that there was no differential treatment, as the employer is always entitled to consider the operational needs of the agency and the reasonableness of the requests when considering a request to take leave ([64]). The Tribunal did not accept the latter argument, noting the mandatory nature of the directions in the emails. Managers making decisions on applications for leave for the purpose of attending the stop work meeting 'were instructed, in effect, not to exercise any discretion when considering those applications', while other applications from employees for leave were to be assessed on merit, which required a balancing of discretionary considerations ([66]). The direction in the emails therefore had a differential impact on employees seeking to use their leave entitlements to attend the stop work meeting. The differential treatment constituted a detriment as those affected either had their pay reduced or were discouraged from attending the meeting ([67]).

Prescribed attributes

The respondents submitted that the differential treatment did not engage the prescribed

attributes under s 16 of the Act, namely industrial activity or political activity, because the proposed stop work meetings were not lawful. In rejecting this submission, the Tribunal held that employees proposing to attend the stop work meeting and applying for leave, flex time or TOIL to do so were proposing to engage in lawful industrial activity ([9]). The Tribunal was satisfied that direct discrimination on the basis of industrial activity was substantiated ([80]).

The Tribunal next considered whether there was direct discrimination on the ground of political activity. The respondent argued that the relevant activity was industrial, not political, in the sense that it was concerned with industrial relations rather than with the processes of government. The Tribunal rejected the respondents' contention that activities with an industrial character could not also be political activities. The stop work meeting was organised in an attempt to bring about a change in the Tasmanian government's public sector wages policy which set a 2% cap on wage rises. The Tribunal determined that the stop work meeting was an activity of a political as well as an industrial character ([85]-[87]). The refusal of applications for leave, TOIL and flex time in order to attend the meeting amounted to differential treatment of affected employees on the basis of political activity ([90]).

Promoting discrimination or prohibited conduct

The complainants alleged that in sending the email of 18 October to the heads of the respondent departments, the Director of the SSMO engaged in conduct contrary to s 20(1) of the Act, and the heads engaged in similar conduct in sending the emails to their staff on 19 October.

The Tribunal was satisfied that the sending of the emails amounted to the publication of a notice promoting discrimination in that it encouraged those required to make decisions in relation to applications for leave (etc) to do so in a manner that amounts to direct discrimination. The Tribunal further found that the respondents knowingly caused and/or induced another person to contravene section 21 of the Act by directing employees with responsibility for making decisions in relation to leave applications to refuse such applications where the purpose was to attend a stop work meeting ([103]).

Orders

The Tribunal made an order pursuant to s 92(1) of the Act requiring the Director of the SSMO and the State of Tasmania to issue an apology to every employee of the affected departments ([105]).

Federal Matters in State Tribunal

The following High Court of Australia decision concerns an issue that relates to a subset of State tribunals – those which exercise judicial power and are not a court. In *Burns v Corbett* [2018] HCA 15 the High Court decided that, by operation of s 77(iii) of the *Constitution* and s 39(2) of the *Judiciary Act 1903* (Cth), only a 'court of a State' can exercise the judicial power of the Commonwealth in 'federal matters' as defined by ss 75 and 76 of the Constitution. When establishing non-court tribunals, State Parliaments can grant them State but not Commonwealth judicial power. A State Act granting jurisdiction to a tribunal is to be interpreted as excluding jurisdiction over 'federal matters'. (See further, COAT, *Practice Manual for Tribunals* (5th ed, 2020) [1.3.3]).

In the following case the 'federal matter' arose when a complaint under a State Act was countered with a defence that relied on a Commonwealth law. A key issue in the case is whether the 'federal matter' raised by way of defence must meet some 'threshold of arguability' before it can be said to require federal adjudication.

Citta Hawthorn Pty Ltd v Cawthorn [2022] HCA 16

High Court of Australia (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson, Edelman JJ), 4 May 2022

The appellants were the developer and owner of land for Parliament Square, a major building development in Hobart. They proposed that the completed site would have three entrances, of which one would be accessible only by stairs. The respondent, a man with a disability who relies on a wheelchair for mobility, made a

complaint to Tasmania's Anti-Discrimination Tribunal ('the Tribunal') in respect of the stairs-only entrance. He claimed that the appellants had discriminated on the ground of disability in the provision of a facility, contrary to the *Anti-Discrimination Act 1998* (Tas) ('AD Act') by failing to provide adequate disability access.

Both the Commonwealth and the State had legislated in relation to disability discrimination. In their defence, the appellants claimed that they had complied with the Disability (Access to Premises – Building) Standards 2010 made under s 31(1) of the *Disability Discrimination Act 1992* (Cth) ('DD Act'). They argued as follows:

1. The Commonwealth, in enacting the DD Act, had legislated exhaustively on the subject.
2. To the extent that Tasmania's AD Act imposed any requirements that exceeded those of the Commonwealth's DD Act, it was inconsistent with the Commonwealth Act.
3. By force of s 109 of the Constitution, the AD Act was invalid (inoperative) to the extent of the inconsistency.
4. Because the defence relied upon s 109 of the Constitution, it involved a 'matter arising under [the] Constitution or its interpretation' within the meaning of s 76(i) of the Constitution or s 76(ii) which refers to a matter 'arising under any laws made the [Commonwealth] Parliament'.
5. The scheme of the Constitution requires that matters arising under ss 75 and 76 of the Constitution can only be determined by a court invested with federal adjudicative power.
6. The Tribunal is not a court and cannot exercise the power.

The Tribunal accepted the appellants' arguments and dismissed the complaint on the ground that it lacked jurisdiction to determine the complaint.

The respondent appealed to the Full Court of the Supreme Court of Tasmania, which found that the appellants' constitutional defence failed on its merits. The Full Court set aside the order of the Tribunal and remitted the claim to the Tribunal to determine.

The appellants appealed to the High Court, which granted leave to appeal and unanimously set aside the Full Court's decision, declaring that the Tribunal had correctly decided that it lacked jurisdiction to hear the case.

A joint judgment was delivered by Kiefel CJ and five justices ('the plurality'). Edelman J delivered a separate concurring judgment.

The Court's consideration

The Court first held that the Anti-Discrimination Tribunal, in determining complaints of disability discrimination, exercises the judicial power of the State ([12]-[16]). This is because section 89(1) of the AD Act makes it clear that an order made by the Tribunal upon finding a complaint made out is immediately binding on the parties ([16]).

The High Court also accepted that, as the Tribunal must comply with the limits of its own jurisdiction, it must have power to determine for itself whether it has jurisdiction to determine a complaint ([21]-[26]). However, the Tribunal cannot determine the limits of its jurisdiction conclusively. If the Tribunal wrongly determines it has jurisdiction and makes an order determining the complaint, its order would be 'wholly lacking in legal force' ([27]).

The question the Full Court should have addressed was whether the Tribunal correctly decided that the case involved a 'matter arising under [the] Constitution or involving its interpretation' under s 76(ii) and was therefore beyond its jurisdiction ([28]-[31]). The plurality made the following points about the existence and scope of a matter within ss 75 or 76 of the Constitution:

- Where a Commonwealth law is relied on as the source of a claim or a defence asserted, that may meet the description in s 76(ii) of a matter 'arising under a law made by the Commonwealth Parliament'.
- Where the invalidity or inoperability of a Commonwealth or State law under the Constitution is asserted, that may be characterised as a 'matter arising' under the Constitution within the meaning of s 76(i).
- In each case, the assertion operates to characterise the whole of the controversy, even when the assertion is later resolved or withdrawn ([31], [33]).

In the present case, the appellants' assertion in its defence that the AD Act was in relevant part inoperative by force of s 109 of the Constitution formed part of a single controversy with the claim, because the determination of

the constitutional defence was essential to the determination of the claim ([33]). That single controversy met the descriptions of a 'federal matter' for purposes of s 76(i) and s 76(ii) of the Constitution ([31]).

The plurality expressly rejected a submission that for a dispute to warrant the description of a 'matter arising under [the] Constitution', the constitutional claim or defence would need to meet 'some threshold of arguability consistent with [its] raising not amounting to an abuse of process of that court' ([34]-[41]). The preferred formulation was that 'it is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument' ([35]). The plurality accepted that the constitutional defence in the present case clearly met this standard ([45]). Accordingly, the Tribunal was correct to decide that it had no jurisdiction to determine the single controversy that included the complaint and the constitutional defence ([46]).

Edelman J agreed with the plurality's conclusion but appeared to propose a lower bar. He said that must be a 'real question' of a matter of the kind described in ss 75 or 76, and not a claim or defence that would constitute an abuse of process or be manifestly hopeless [69]-[73], [77]).

Order: the appeal was allowed, the orders of the Full Court set aside, and the appeal from the Tribunal dismissed.