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Tribunal Case Update

In this first year of publication, the Case Update has received very positive feedback from readers. It is an ongoing collaborative project in which tribunal members and registrars, by providing feedback and case suggestions, participate in creating a shared information resource focused on tribunal craft and practice.

Tribunal decisions are sometimes set aside by a court or an appeals division of the tribunal on the ground that a decision was affected by an error of law. We open this bulletin with two cases in which a tribunal was held to have made an error of law by constructive failure to perform its statutory duty.

In *Owners of 875 Wellington Street Strata Plan 13599 v Kamil* a tribunal which had a statutory jurisdiction to resolve a strata scheme owners dispute was found to have failed to exercise its broad powers, leaving a continuing owners dispute unresolved. The Court found it failed to determine a key issue that, on the material before it, it had jurisdiction, and was required, to determine.

In *EXW v Mulroney* the Supreme Court of Victoria found that the tribunal misunderstood the applicant's case, and therefore the question it was required to answer. The misunderstanding caused the tribunal to fail to perform its duty, committing an error of law.

Breaches of procedural fairness can amount to an error of law, which may be ground for an internal appeal. In *Your Local Plumbing Group Pty Ltd v Hirsch* an appeal panel of ACAT set aside the decision of the original tribunal for breaches arising from the last-

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minute filing of an expert report and the denial of opportunity to lead evidence to counter it or to cross-examine its author.

From New Zealand we have an egregious case of apparent bias. In *Rongotai Investments Ltd* a tribunal Chair was found to have demonstrated 'a hostile and adverse attitude' to a party and another witness. The court ordered the redaction of the tribunal's reasons to remove adverse comments unfairly made about the two witnesses.

Bromley v Ward involves a civil dispute arising from an unsolved heist from a jeweller's shop. QCAT applied principles of fact-finding and evidence to resolve the dispute without needing to identify the thief.

In *Brisbane Marine Pilots Pty Ltd v General Manager of Maritime Safety Queensland,* an applicant effectively sought to undertake a collateral challenge of non-reviewable decisions by seeking review of a subsequent decision which flowed inevitably from the prior decisions. QCAT resolved the matter by application of the standing test.

Error of law - failure to exercise jurisdiction

Tribunals commonly encourage the parties to narrow the issues in dispute and agree on a statement of facts. In the following case a court held that the tribunal should not have allowed the way the parties argued their case to confine its broader powers to decide a question that, on the material before it, the tribunal was required to determine in order to resolve the dispute.

Owners of 875 Wellington Street, Strata Plan 13599 v Kamil [2022] WASC 305

Supreme Court of Western Australia (Allanson J), 20 April 2022

The appellant was the strata company for a residential strata scheme comprising 80 lots. The respondent Kamil was the registered proprietor of 18 of the lots from which he ran a private hotel business.

The *Strata Titles Act 1985* (WA) ('the STA') s 7 provides for a strata titles scheme to physically divide a land parcel into lots, which may include common property. Common property vests in the owners of the lots as tenants in common in shares proportional to the unit entitlements of their respective lots (STA s 13). The strata company controls and manages the common property for the benefit of all the lot owners (STA s 91(1)). The STA provides for scheme by-laws to be made which are binding on the strata company and lot owners (STA s 45(2)).

Part 13 of the STA provides for resolution of 'scheme disputes' by the State Administrative Tribunal ('the tribunal') on the application of a party to the dispute.

A dispute arose between the strata company and Kamil about Kamil's use of the common property of the scheme. He had been charging and receiving fees from invitees for parking on the common property and had installed four CCTV cameras on the common property. The strata company sought orders from the State Administrative Tribunal ('the tribunal') that Kamil take action to remedy a contravention or prevent further contravention of the STA or the scheme by-laws. Specifically, the strata

company sought an order under s 200(2)(m) of the STA that Kamil 'immediately refrain from charging for and receiving parking fees for vehicles parked on common property at the strata scheme'. It also sought an order requiring Kamil to remove 4 CCTV cameras from the common property.

Before the tribunal

Before the tribunal, the parties agreed that the application came down to a question of law on admitted facts ('the factual matrix') and could be resolved without the need for any evidence ([65]). Kamil admitted that he had been receiving fees for invitees parking on the common property and had installed the four cameras on the common property. The question for the tribunal was whether that conduct contravened the Act or the by-laws ([44]-[45]).

Notwithstanding the parties' agreement as to the factual matrix, the strata company in its written submissions sought to rely on two factual allegations that were not agreed or admitted. Kamil objected to this material, saying that he had made his admissions on the basis of the parties' agreement to the factual matrix.

The tribunal said that it placed no weight on the non-admitted allegations in arriving at its decision as they were not relevant. It framed its consideration of the issues in terms of the orders sought. It declined to exercise its broader powers under s 200(1) of the STA to make any order it considers appropriate, on the basis that the strata company had not framed its case in that way.

The tribunal held that it was not persuaded to exercise its discretion to make the orders sought by the strata company. In reaching its decision it did not consider whether Kamil's admitted conduct was inconsistent with the Act ([55]).

Court's findings on appeal grounds

A party to a proceeding in the tribunal may appeal from a decision of the tribunal only if the court grants leave. The appeal can only be brought on a question of law (*State Administrative Tribunal Act 2004* (WA) ('SAT Act') s 32. The strata company sought leave to appeal the tribunal's decision on six grounds. The court held as follows on each ground:

Ground 1 – procedural fairness

The court did not uphold this ground, as 'the attempt to introduce factual issues (such as the obstruction of contractors) was inconsistent with the agreed process'. The tribunal was not 'required to hear further from [the strata company] before acting on the agreed position' ([65]).

Ground 2 – the onus of proof

The strata company submitted that the tribunal made an error of law in suggesting that the company failed to establish that Kamil was in breach of the STA or by-laws. The court agreed that to apply an onus of proof in tribunal proceedings may be an error of law, unless a statute provides otherwise ([70]-[71]).[1] However, that is not what the tribunal meant. In considering an application for an order requiring a person to remedy a contravention, the tribunal must be satisfied that the admitted conduct amounts to a contravention. The tribunal made no error in saying so ([73]).

Ground 3 – unreasonableness

Ground 3 alleged that the tribunal acted unreasonably in determining to place no weight on the documentary evidence outside the agreed factual matrix. The court said that, insofar as the tribunal was considering whether there was a contravention of the Act or by-laws, the documentary evidence was not relevant ([77]).

Ground 4 - failure to exercise jurisdiction

Ground 4 alleged that the tribunal constructively failed to exercise its jurisdiction to resolve the two matters referred to it. In relation to the first order sought, the tribunal left unresolved a continuing dispute about whether the use by Kamil of the common property for his own benefit was a permissible use of the common property ([84]). In relation to the second order sought, the tribunal found that the cameras were structures which may not be erected on common property without a resolution. There was no evidence of a resolution authorizing Kamil to erect his cameras. That matter was also left unresolved, the tribunal making neither a finding nor an order about it.

The court said that the tribunal's jurisdiction was not confined to deciding whether to make or not to make the orders applied for under s 200(2)(m) of the STA. The application was for the resolution of a scheme dispute. The tribunal had a broad discretion under s 200(1) to make any order it considers appropriate to resolve the

1 Citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 282 [54]

dispute. In exercising the broader power under s 200(1), the tribunal was not confined by the way the strata company framed its case and the orders it sought ([80], [82]). The tribunal also had power to make a declaration concerning any matter in the proceeding (STA s 199).

The court ruled that on the material before it, the tribunal was required to determine whether Kamil could use common property in the manner he admitted to using it. Its failure to do was a failure to exercise its statutory jurisdiction to resolve a scheme dispute, and an error of law ([88]). (The court noted that it might have been necessary to recall the parties before making orders, to ensure natural justice to Kamil ([89]).

Ground 4 was upheld and the appeal allowed ([90]).

Ground 5 – did the facts show a breach?

The strata company asserted an error of law in failing to find the established facts amounted to a breach of the Act or Regulations but failed to identify any provision that was breached. Alternatively, it asserted a breach of a strata by-law which forbade a use of the common property that interferes unreasonably with the use and enjoyment of other owners. Whether such interference occurred was a question of fact that could not be decided on the agreed facts ([94]-[95]).

This ground was not upheld ([96]).

Ground 6 - the statutory duty under s 32(2)(b) of the SAT Act

Ground six raised a question of construction which the court did not need to decide in order to dispose of the appeal ([97]).

Orders

The court granted leave to appeal and upheld ground 4. The matters were returned to the tribunal for determination.

Error of law – misunderstanding the question

In this appeal the Supreme Court of Victoria held that VCAT had made an error of law in misunderstanding the applicant's main argument. This caused it to make errors of law by failing to perform its duty and failing to consider relevant material and evidence.

EXW v Mulroney [2022] VSC 524

Supreme Court of Victoria (Ginnane J), 7 September 2022

The applicant EXW sought leave to appeal from orders made by the Victorian Civil and Administrative Tribunal ('the tribunal') on 13 April 2021. EXW alleged that the respondent, Dr Mulroney, interfered with her privacy by breaching the Health Privacy Principles ('HPPs') as contained in Sch 1 of the *Health Records Act 2002* (Vic) ('the HRA') in connection with her health records. Dr Mulroney was EXW's treating General Practitioner at a medical clinic between August 2017 and August 2018.

The dispute arose following EXW's application in May 2018 to increase her life insurance and disability insurance cover. As part of the application, Dr Mulroney, as her treating doctor, was asked to answer a questionnaire about her medical history. The insurer asked Dr Mulroney to provide information including about EXW's attention deficit hyperactivity disorder ('ADHD') and history of depression. Dr Mulroney described EXW's mental health diagnoses as '2016 ADHD' and '2017 Major Depressive Disorder' and indicated 'Depression resolved. ADHD lifelong'.

In August 2018 the insurer declined EXW's application for insurance cover 'due to the recency of the major depression'. EXW then learned from the insurer that Dr Mulroney had advised that she had been treated for Major Depressive Disorder ('MDD'). On 24 August 2018 EXW met with Dr Mulroney who checked her medical file and confirmed no history of depression was recorded. He wrote to the insurer saying he had made an error. He stated that EXW was being treated for Generalised Anxiety Disorder ('GAD') and not MDD.

EXW had never heard of GAD and, after researching it, she decided that she did not meet the diagnostic criteria for the condition. She wrote to Dr Mulroney, saying that she had never been diagnosed with GAD. In accordance with HPP 6.5, EXW requested corrections including any reference to GAD, to a 2003 history of depressive anxiety disorder, and to prescription of Brintellix as treatment for 'depressive anxiety disorder' (which medication she maintained was in fact prescribed for ADHD).

Before the tribunal

The dispute about the corrections that EXW requested was referred to the tribunal pursuant to s 63 of the HRA. Before the tribunal, EXW alleged that Dr Mulroney had contravened HPPs 4.2, 4.3 and 6.5 in making, or failing to make, the entries of which she sought correction. She alleged that the contraventions of the HPPs were an interference with her privacy under s 18 of the HRA.

Dr Mulroney submitted that the tribunal had no jurisdiction to consider the merits of a health diagnosis when hearing complaints under the HRA. The tribunal agreed, citing the tribunal's decision in *Kitson v Dennerstein (Human Rights)* [2015] VCAT 138 [55] ('*Kitson*'). The tribunal said that 'it is not for the Tribunal in this matter to make a decision about the appropriateness of a diagnosis or prescription' (cited at [40]).

The tribunal found EXW's main claims 'not proven' but found other claims 'proven' and ordered that Dr Mulroney make certain corrections to her health records and pay $2000 compensation for breach of HPP 4.3. The tribunal was not satisfied that Dr Mulroney had breached HPP 4.2 and HPP 6 and those claims were dismissed.

Appeal on question of law

EXW applied to the Supreme Court under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) for leave to appeal from the tribunal's order on a question of law. EXW's seven questions of law and associated grounds of appeal challenged three of the tribunal's findings. Her counsel summarised the errors of law and the associated grounds of appeal as

> falling into three categories: first, that the tribunal misunderstood her case, secondly that its reasons were inadequate, and thirdly grounds challenging how the tribunal reached its conclusions (cited at [35]).

EXW argued that the tribunal erred by misunderstanding her case, which did not involve a challenge to the merits of a diagnosis or medical opinion. Rather, her case was that Dr Mulroney never in fact made the diagnoses of DAD or GAD ([44]).

The Court's conclusion

A misunderstanding of the question that the tribunal is required to answer amounts to a failure to perform its duty and is an error of law ([55], [56]). The Court found that the tribunal did not address the substance of EXW's principal argument that Dr Mulroney did not make either of the diagnoses of DAD and GAD ([64]-[67]). As a result of that error the tribunal's reasoning process miscarried (see third category of appeal grounds) as it failed to consider the evidence and have regard to relevant considerations (69], [76], [82], [84]. The ground of inadequate reasons was not established as the tribunal's reasoning was clear ([70]).

Order

Leave to appeal was granted and the appeal was allowed.

Leave was granted to make further submissions about the appropriate form of other orders, following which the proceeding would be remitted to a differently constituted tribunal for rehearing.

Procedural fairness in the conduct of the hearing

[The following case note and comment were contributed by Ms Kristy Katovic, Senior Member of the ACT Civil and Administrative Tribunal (ACAT)].

The case is a decision of the ACAT Appeal Tribunal on an internal appeal from the tribunal's civil dispute jurisdiction ('the original tribunal') in relation to a debt claim. It was a small monetary claim with simple facts. However, on appeal, it raised significant issues fundamental to how a tribunal must operate, the conduct of members during a hearing and procedural fairness. The Appeal Tribunal's decision demonstrates that while some flexibility is expected in tribunal proceedings to achieve its objects, the tribunal is still required to conduct matters, procedurally and substantively, according to law.

Your Local Plumbing Group Pty Ltd v Hirsch (Appeal) [2021] ACAT 80

ACT Civil and Administrative Tribunal (Presidential Member G McCarthy), 10 October 2022

The respondent Ms Hirsch contracted with the appellant ('YLPG'), which carries on a plumbing business, to unblock a drain at her home. A plumber on behalf of YLPG performed investigative work under an agreed scope of works (contract 1), following which he informed Hirsch that further and more substantial work was required to unblock the drain. While carrying out the unblocking work (contract 2), YLPG's plumbers damaged a stormwater pipe which required further excavation and remediation. Hirsch requested the plumbers to cease work and engaged Mr Finley, a plumber from another business, to rectify the blockage. Finley completed the work and Hirsch paid him for it.

Hirsch filed an application with the ACAT ('the original tribunal') to recover from YLPG a refund for work not performed satisfactorily and a contribution towards the cost of Finley's work. YLPG counter-claimed for money it claimed was outstanding on the work contracts. Hirsch was successful before the original tribunal and YLPG's counterclaim was dismissed.

YLPG appealed the decision of the original tribunal via an internal appeal to the Appeal Tribunal, alleging eight appeal grounds. The Appeal Tribunal found that only two of the grounds were of material significance.

Ground 1: That the admission of Finley's report breached procedural fairness

The first of the two material grounds related to a report from Finley being admitted into evidence. Contrary to a procedural direction regarding the date for filing its documents, Hirsch filed and served Finley's report the day before the hearing. The report had been in Hirsch's possession for some time prior to the directed date for filing. No explanation for the delay was offered by Hirsch or sought by the original tribunal ([60]).

Counsel for YLPG raised objection to the report being tendered in evidence but was given no opportunity to state his objection ([50]). The Appeal Tribunal found that the late filing of the document 'denied the appellant any realistic opportunity to prepare its response to Mr Finley's claim that the work could have been done in a different manner and at significantly less cost' ([55]). It was procedurally unfair, the Appeal Tribunal found, for the original tribunal to accept the report in evidence, and to rely on it in reaching its decision, without giving YLPG any real opportunity to object to it or lead contrary evidence ([55], [56], [59]).

Having decided to admit Finley's report, the original tribunal rejected YLPG's request to cross-examine Finley. Instead, the original tribunal requested that Hirsch be called to answer questions about the report and the opinions expressed therein, even though she was not the author of the report and was not qualified to give any opinion about plumbing. In the view of the Appeal Tribunal, it was procedurally unfair to deny YLPG the opportunity to cross-examine Finley ([68]-[74]).

Were the breaches of procedural fairness material?

While the Appeal Tribunal found that there were multiple breaches of procedural fairness relating to the admission of Finley's report, that was not by itself enough to allow the appeal. It was necessary to also show that the error was

material, in the sense that it affected the result ([75]). The error was found to have affected the result because the report had a determinative effect on the outcome. The original tribunal took Finley's report to mean that YLPG's work was unnecessary. This led the tribunal to order the refund of the deposit paid by Hirsch ([75]).

Ground 7: denial of cross-examination on inconsistency

The second ground of significance arose from the original tribunal not permitting cross-examination of Hirsch on a critical aspect of her evidence. Hirsch had prepared an original claim and then later amended it using 'tracked changes', many of the changes being material differences of fact. The claim as amended was treated by the original tribunal as Hirsch's witness statement ([96]). The original tribunal did not permit YLPG's counsel to cross-examine Hirsch on the inconsistencies between the two versions of the claim document, even though no objection was taken by Hirsch's solicitor. On each attempt to cross-examine Hirsch, YLPG's counsel was directed by the original tribunal to 'move on' as the tribunal deemed the inconsistency not relevant ([97]-[102].

The Appeal Tribunal cited authority that in an appeal against a discretionary decision, it should intervene only if the original tribunal was 'clearly wrong' ([106]).[2] The Appeal Tribunal held the original tribunal was 'clearly wrong' in not permitting the cross-examination, because the inconsistencies went directly to Hirsch's claim about what work was authorised, which was a central issue in the case ([108]).

The refusal to permit the cross-examination clearly affected the result, as the tribunal relied on Hirsch's unchallenged evidence to deny part of YLPG's claim ([109]).

Grounds 1 and 7 having been established as errors of law made by the original tribunal, the Appeal Tribunal allowed the appeal.

Redetermination of the claim and counterclaim

Given the small quantum involved and the time and effort that had already been expended, the Appeal Tribunal with the agreement of the parties proceeded to deal with the claims and quantify the outcome instead of remitting the matter to the original tribunal.

Orders

The orders of the original tribunal were set aside. The appellant was ordered to pay the respondent $1173.77 in reimbursement of monies paid plus interest.

2 Citing *Australian Coal and Shale Employees' Federation v Commonwealth* (1953) 96 CLR 621 at 627.

Apparent bias and predetermination

There are minor differences between the law of bias in New Zealand and Australia. The concept of 'apparent bias' in New Zealand law is similar to the Australian concept of 'apprehended (or suspected) bias'. In Australia, prejudgment is usually dealt with as a category of apprehended bias or actual bias.

In this case the High Court found no prejudgment on the part of the tribunal but found that the tribunal conducted itself with apparent bias. The conduct of the tribunal Chair was found to demonstrate a 'hostile and adverse attitude' towards a party and another witness. The court evaluated some unusual conduct including the giving of repeated perjury warnings to a witness, suggestions to witnesses that there was an 'orchestration of evidence', and the tribunal pursuing an irrelevant inquiry of its own.

Rongotai Investments Ltd and Rongotai Estates Ltd v Land Valuation Tribunal [2022] NZHC 1669

New Zealand High Court (Cull J), 19 July 2022

Under s 36 of the *Rating Valuations Act 1998* (NZ), Land Valuation Tribunals have jurisdiction to hear and determine objections to land valuations following their review by a territorial authority. Every Land Valuation Tribunal consists of a Chair, who must be a District Court judge, and two other members, one or both of which must be registered valuers.

The applicants (collectively 'Rongotai') sought judicial review of the decision of the Land Valuation Tribunal ('the tribunal') following

a hearing of Rongotai's objections to rating assessments in four rating years. The application related to the process and decision-making of the tribunal in its interim and 'substantive' rating valuation decisions for the 2012 rating year ('the 2012 decisions').

Rongotai alleged that the conduct of the tribunal and its 2012 decisions were unfair and disclosed apparent bias and/or predetermination. Rongotai sought declarations accordingly and orders setting aside the 2012 decisions.

Tribunal hearing and decision

The background to the litigation was that Rongotai objected to the Pengelly sale being included as a comparator market sale in assessing the value of its properties for the 2012 rating year assessment. The Pengelly sale was a sale by Rongotai of two properties to Pengelly Properties Ltd ('Pengelly') in October 2012 for a total price of $2.375 million. Rongotai contended that this was effectively a forced or distressed sale.

At the hearing, Rongotai relied upon evidence of two witnesses who both contended that the Pengelly sale was problematic. Mr Aharoni was a director and ultimate beneficial owner of Rongotai, who had made a conditional offer to purchase the properties for $3.6 million. The $1.226 million difference between Mr Aharoni's offer and the price paid by Pengelly was a prominent issue in the hearing.

In its interim decision on the 2012 valuation appeal, the tribunal found that the Pengelly sale was a valid transaction which should be considered in the 2012 rating valuations as a relevant comparator. In rejecting Rongotai's contentions to the contrary, the tribunal made adverse comments about Mr Aharoni and another witness ([22]).

Having determined that the Pengelly sale should be included as a comparator sale ('the interim decision') the tribunal concluded that the valuation figures as determined for the 2012 rates assessment were substantially not in error ('the substantive decision').

Prejudgment and apparent bias – legal tests

The court referred to New Zealand authorities indicating that apparent bias and predetermination are distinct grounds of judicial review, albeit both were advanced on the same allegations and evidence ([31]).

The legal test for apparent bias, as set out by the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, is '[whether] a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is require to decide' ([32]).[3]

The court explained the ground of predetermination as arising '

> where a decisionmaker has approached a decision with a "closed mind", such that they are not amenable to persuasion on the issues engaged, or in other words, are "unwilling, honestly to consider changing their mind" ([35]).[4]

Did the tribunal act with predetermination?

The court was not satisfied that the tribunal had made the matter with a closed mind, nor that it had reached a decision in advance of the hearing. It had engaged with the evidence. The issue was not one of predetermination, but whether the way the tribunal conducted itself during the hearing gives rise to the perception that it did not act impartially in its 2012 rating assessment inquiry ([133]).

Did the tribunal act with apparent bias?

The court acknowledged that the tribunal is deemed by its enabling Act to be a Commission of Inquiry. Having power to determine its own process it may adopt an adversarial, inquisitorial or hybrid approach ([160]). It was open to the tribunal to question witnesses as to the sale price for the Pengelly transaction ([162]).

However, the court found that the Chair's interventions were substantial and included taking over extensive questioning of the witnesses. The interaction between the Chair and opposing counsel included the Chair asking counsel if he should give Mr Aharoni a perjury warning, encouraging derogatory questioning by Counsel and taking a joint approach with Counsel ([163]).

The court was particularly critical of the actions of the Chair in giving three perjury warnings to Mr Aharoni, without specifying why and without any basis for doing so. It was open to the tribunal to reject his evidence, but this did not require giving a warning against perjury ([172]).

3 [2009] NZSC 72 [3].
4 Citing *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982 [143].

The court was also concerned by the Chair's continued suggestions to witnesses 'that there was an orchestration of evidence by Mr Aharoni and they were simply repeating what he had told them'. Adverse comments of this kind can impede a witness's evidence ([174]).

The most concerning feature of the conduct of the hearing was the tribunal's pursuit of an irrelevant inquiry into Mr Aharoni's reasons for making his conditional offer. The tribunal itself recognised that this was irrelevant to the decision the tribunal was required to make ([177]). The proceeding was a rating valuation reassessment hearing in which Mr Aharoni's credibility was not at issue ([183]).

The overall impression given by the Chair's conduct was that he had 'a hostile and adverse attitude towards Mr Aharoni and his witnesses' ([181]), having regard to conduct including the following:

> He made excessive interventions in the oral evidence of Mr Aharoni and [his witness]; he made adverse remarks about Mr Aharoni during the hearing, excluded him from the hearing when relevant evidence was being adduced, leaving his Counsel with no client-party in his absence; and he participated in the opposing parties' cross-examination of Mr Aharoni [and other witnesses] ([179])

In assessing all aspects of the tribunal's conduct, the court found that

> a fair-minded and reasonably informed lay observer … might reasonably apprehend that there was a real and not remote possibility that the Chair might not bring an impartial mind to the tribunal's inquiry ([182])

The test of apparent bias had been met. The tribunal's conduct resulted in an unfair hearing for Rongotai and an interim decision which made 'damaging and unnecessary adverse findings against Mr Aharoni [and another witness] with reputational consequences' ([184]).

Orders

The application for review was granted. A declaration was made that the tribunal's conduct of the 2012 rating objection hearing and its interim 2012 decision disclosed apparent bias and that, as a result, the 2012 hearing was unfair. The tribunal's interim 2012 decision was set aside in part, and specified paragraphs redacted to remove the adverse comments about the two witnesses. The matter was not remitted for rehearing. The substantive decision was not set aside as the appeal by way of rehearing cured the denial of natural justice to Rongotai ([198]).

Stay application – standing to apply

A company which provides marine pilotage services applied for review of the regulator's decision to license two pilots employed by another company. The applicant sought to challenge changes which the regulator had approved for the training of new pilots, upon which were based the assessment criteria for the licencing of pilots.

In *Argos Pty Ltd v Corbell* (2014) 254 CLR [62]-[65], Hayne and Bell JJ said that in assessing whether the applicants in that case were 'persons aggrieved' by a decision, it was necessary to make a qualitative assessment of whether the decision had a direct or immediate effect on their interests. In the present case the tribunal concluded that the applicant's interests in this case 'were only indirectly affected if they were affected at all' ([105]-[107]).

Although the applicant was found to lack standing to apply for a stay, the tribunal proceeded to explain why it would not have granted a stay. Here again, the lack of direct or immediate effect of the decisions on the applicant's interests told against its case for a stay.

Brisbane Marine Pilots Pty Ltd v General Manager of Maritime Safety Queensland [2021] QCAT 436

Queensland Civil and Administrative Tribunal (Member Gordon), 20 Dec 2021

From 1989 to I January 2022, the applicant had been the sole pilotage provider for the Brisbane Pilotage area under contracts made with Maritime Safety Queensland ('MSQ'), a Queensland government agency. From 1 January 2022, the applicant would cease to be the pilotage provider and another provider, PSP, would become the sole pilotage provider for the

next 10 years. A pilotage provider must provide licensed pilots to navigate ships over 50 metres.

On 2 December 2021 the applicant applied to MSQ for internal review of its original decision to grant pilot licences to two of PSP's candidates. On 3 December, the applicant applied to the tribunal for a stay of the original decision pending the review. On the same day, MSQ refused to conduct an internal review on the ground that the applicant's interests were not affected by the decision. The applicant applied to the tribunal on 9 December for 'external review' of MSQ's decision, but the tribunal found that the application was not valid. However, the tribunal found it had jurisdiction to hear the application for a stay under s 32(1) of the *Transport Planning and Coordination Act* 1994 (Qld) ('TPCA') arising from the application of 3 December 2021 ([25]).

There were two main issues in the proceedings:

1. Did the applicant have sufficient standing to bring the application for a stay of MSQ' s original decision to grant licences to the PSP pilots?
2. Whether a stay should be granted pending internal review by MSQ ([7]).

Standing to apply for a stay

The tribunal's jurisdiction under TPCA s 32 to stay an original decision arises only upon the making of a lawful application for review of the decision. Accordingly, the applicant may apply for a stay of MSQ's decision to grant the licences only if the applicant is 'a person whose interests are affected by [the] decision' within the meaning of s 203B of the TPCA ([28]-[29]).

The first question was whether the sufficiency of the applicant's standing should be tested at the date of the application for a stay (3 December 2021), at the date of the tribunal hearing for the stay (15 December 2021), or the date of the tribunal's decision (20 December 2021) (([32]-[37]). As there was some doubt about this point,[5] the tribunal considered the issue of standing at all the relevant dates.

The applicant claimed to have 'interests affected' because it had concerns about the training and on-water experience of the PSP pilots, which it considered inadequate to ensure the safety of port users. The applicant had a particular concern about miscommunication causing a safety risk to its pilots during the period 6 to 31 December 2021 when they would be operating under a 'parallel pilotage plan' concurrently with the PSP pilots in the same waters ([41], [43]).

The tribunal held that the applicant's general concern as an interested member of the public about the training of PSP's pilots was an insufficient interest to give standing to apply for the stay of a decision to grant pilot licences to PSP's pilots ([42]). That left the applicant's concerns about the risk to its own pilots arising from the parallel pilotage plan in the period up to 31 December 2021 ([43]). By the time of the hearing, MSQ had abandoned the parallel pilotage plan, but the tribunal still needed to consider whether it with respect to the applicant's standing to apply for a stay on 3 December 2021.

In respect of standing as at the date of the hearing (15 December), the applicant claimed that it had 'interests affected' because it had sold four pilot boats which would need to be towed on a barge by a PSP pilot through the Brisbane Pilotage Area in January 2022. However, MSQ had offered the applicant a special exemption which would remove the need to rely on a PSP pilot. The exemption would remove any adverse effect on the applicant's interest ([56]-[60].

The tribunal concluded that the applicant did not have standing on either the date of hearing or the date of the tribunal's decision ([63]). That left the question whether it had standing at the date of the application for a stay on 3 December 2021, based on the adverse effect alleged to arise from the parallel pilotage plan in force at that date.

The tribunal said that for the applicant to claim standing on this ground exceeded the limits of an administrative review. The grant of the pilot licences was the natural and inevitable result of a series of earlier decisions which were non-reviewable ([66]-[67], [116]). These included decisions made by the Queensland Government and MSQ about the procurement policy, the decision to accept PSP's offer, the decision to adopt a particular training plan for pilots, and the decision to conduct the parallel pilotage plan ([114]). The interests which the applicant said had been adversely affected arose from the effect of those earlier decisions, not from

5 [33], citing *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 [80], [82] (Kirby J).

the grant of the licences to the two PSP pilots ([115]-[116]).

The tribunal concluded that at no time between 2 December and 20 December 2021 was the applicant 'a person whose interests are affected' by an original decision of MSQ to grant pilot licences to the two PSP pilots. Accordingly, the applicant did not have a right to apply to MSQ for review of the decision, nor a right to apply to the tribunal for a stay of MSQ's decision ([117]).

Should the decision be stayed pending a review?

Having found the applicant had no standing to apply for the stay of MSQ's original decision, the tribunal would not normally consider whether a stay should be granted. However, the applicant had applied for internal review of MSQ's original decision. In a few days s 34(5) of the TPCA would deem MSQ to have made a decision on that application. If the applicant were then to apply for review of that new decision and apply for it to be stayed, the tribunal would need to consider the same matters as had been fully argued in the present case ([118]). For these reasons the tribunal proceeded to state its assessment of the relevant considerations.

In an application for a stay, the tribunal was required to consider the factors set out in s 22(4) of the QCAT Act, an added factor in s 32(2) of the TPCA Act, the balance of convenience and whether there was an arguable case to overturn the impugned decision ([120]-[123]).

On the question of the public interest (s 22(4)(c) of the QCAT Act), the tribunal considered the evidence as to the existence of any risk to public safety posed by the new pilots. Some of the applicant's witnesses had strong concerns about the changes to training and assessment for new pilots, but this material was mainly based on hearsay and was contested by well qualified witnesses. While the evidence was yet to be fully tested, the tribunal considered that there did not appear to be a safety risk ([165]). The merits of the applicant's case for review appeared to be 'very poor' ([166]).

In considering the balance of convenience, the tribunal expressly assumed, first, that if a stay were granted the applicant would make similar applications in relation to all licences granted to PSP's pilots, and second, that the finalisation of the review would take some months.

During the period of the stay, the applicant's pilotage contract would have to be extended and PSP's contract suspended ([127]). The stay would therefore result in a significant interference with contractual arrangements made by the parties and have a damaging effect on PSP and its employees, some of whom had relocated to Brisbane to work.

The applicant, on the other hand, would gain 'a limited and only speculative benefit', which was outweighed by the 'extensive harm' to PSP and its employees if a stay were granted ([173]).

Order

The application for a stay of MSQ's original decision was dismissed.

Evidence, onus and standard of proof in civil cases

The following case from QCAT about a customer's diamonds that went missing in the custody of a jeweller raises interesting questions about onus and standard of proof in civil proceedings (including applying the *Briginshaw* standard), making findings as to a witness' credibility, and applying the principle in *Jones v Dunkel* (1959) 101 CLR 298 to draw inferences.

Bromley v Ward & Anor [2022] QCAT 275

Queensland Civil and Administrative Tribunal (Adjudicator A Walsh) 11 May 2022

The applicant, Mrs Bromley, sued Mr Ward, sole director of the second respondent CTJ Jewellery Pty Ltd ('CTJ'), and CTJ for the loss of diamonds left in the respondents' custody. She sought an order for the return or, in the alternative, for monetary compensation for 12 small loose diamonds and a solitaire engagement diamond which she alleged were not returned to her.

Both respondents denied any liability for the loss of the diamonds, said that there was no reliable evidence to establish the description of the diamonds in question, and alleged that Mrs Bromley signed a receipt acknowledging that

she had received back 'all (the) stones from CTJ' when she returned to collect them in May 2020.

Onus and standard of proof

The tribunal noted that in civil proceedings, parties bear the onus or burden of proving their allegations on the balance of probabilities. In this case the applicant and Ward each accused the other of bad faith, dishonesty and fraud ([6]). Such allegations would need to be proved on the balance of probabilities to the *Briginshaw* standard of reasonable satisfaction ([8]).[6]

When goods are left with a party (such as a jeweller), that party as bailee bears the onus (or 'reverse onus') to prove that appropriate care was taken to safeguard the goods. As Mrs Bromley was not seeking exemplary or punitive damages, all that she needed to establish on the balance of probabilities was that the loss of her diamonds was due to breach of contract, breach of duty of care, or breach of consumer protection provisions in the *Australian Consumer Law* (Qld) ('the ACL') ([10]). Intent, fraud or dishonesty are not essential preconditions for establishing civil liability under those laws ([11]).

Evidence

The tribunal noted that assessment of the credibility of witnesses would be crucial to findings on contested facts and liabilities in the case. Mrs Bromley was self-represented in the proceedings. The two respondents were represented by counsel.

The tribunal found Mr Ward to be an unsatisfactory witness, citing some inconsistencies in the evidence and incorrect statements, such as his false statement that police detectives had taken possession of CCTV store footage in disc format, and his false defence that Mr and Mrs Bromley signed a receipt for the return of all the diamonds ([77]). Ward and CTJ failed to provide corroborating documentary evidence to support Mr Ward's evidence on certain matters.

The respondents' unexplained failure to call a relevant witness and to provide specified records, in circumstances where they were legally represented, led the tribunal to draw the inference that the uncalled evidence would not have assisted their case (applying the principle in *Jones v Dunkel* (1959) 101 CLR 298) ([73]-[75]). However, those inferences by themselves proved nothing. ([74]-[76])

The tribunal found Mrs Bromley to be 'a credible, honest, reliable witness' whose evidence was not shaken by cross-examination, and was mostly supported with corroborative documentary evidence where available ([92]). With specified exceptions, the tribunal preferred Mrs Bromley's evidence where it conflicted with the evidence of Mr Ward and other CTJ witnesses. ([94]).

Findings of fact

On 13 February 2020, Mrs Bromley and her husband attended CTJ's shop where Mrs Bromley handed over to sales manager Ms Amor items of jewellery and diamonds to be unset and reset in a new ring to be made by CTJ. In handing over the jewellery for purposes of the resetting, Mrs Bromley relied upon an assurance, given by Ms Amor in the presence of Mr Ward, that the business could be trusted with her diamonds.

Having changed her mind about the resetting commission, Mrs Bromley and her husband met with Mr Ward at the CTJ shop on 12 May 2020 to retrieve her jewellery. Mr Ward produced plastic packets of jewellery from a drawer under the counter but did not open the packets to check the contents. At his request, Mr and Mrs Bromley signed a document which did not itemise the contents but merely stated: 'Client picked up her rings'. Mr and Mrs Bromley left with the sealed packets and returned several hours later the same day after opening them in the presence of another jeweller. On her return, Mrs Bromley demanded that Mr Ward hand over 12 small diamonds and a solitaire engagement diamond which she said were missing from the sealed packets returned to her.

The plastic bag that Mr Ward handed to Mrs Bromley on 12 May 2020 which should have contained her engagement solitaire diamond was found to contain a substituted brown diamond of lesser quality worth only $4,400. The tribunal assessed the retail replacement cost of Mrs Bromley's diamond at $14,500. Together with the 12 smaller diamonds that were not returned to Mrs Bromley, the tribunal assessed the total retail replacement cost of all Mrs Bromley's missing diamonds at $22,033.

The tribunal was not reasonably satisfied to the *Briginshaw* standard of proof that Mr Ward

6 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

substituted the brown diamond, as Mrs Bromley alleged. Others had access to the drawer in the CTJ shop in which the jewellery was stored for two months, and no motive for Mr Ward to risk his reputation by substituting diamonds had been shown ([107]). The tribunal found that an unidentified person substituted the brown diamond for Mrs Bromley's solitaire ([109]).

Liability

The tribunal found a consumer contract between Mrs Bromley as consumer and CTJ as trader for the supply of goods and services in trade and commerce. As such, Mrs Bromley was entitled to the protection of various provisions of the ACL.

By implication the services contracted for included keeping the rings and diamonds secure while in CTJ's custody. CTJ was contractually obliged to return Mrs Bromley's diamonds in due course as instructed by her ([15]).

CTJ had failed to discharge the reverse onus on it to prove that appropriate steps were taken to protect Mrs Bromley's property. On Mr Ward's evidence, he had kept them for two months in an unlocked drawer under the counter instead of in the jeweller's safe provided for the purpose ([131]).

The tribunal found CTJ liable to pay Mrs Bromley the sum of $24,226.30 being the total assessed retail value of the solitaire and smaller diamonds, plus interest and filing fee ([131]).

CTJ and Mr Ward were jointly and severally liable for the said sum of $24,226.30 breach of the ACL provisions

> because CTJ, with the knowledge and involvement of its then sole director, Mr Ward, breached ACL prohibitions of misleading and deceptive conduct and false and misleading representations about services by inducing Mrs Bromley to enter into the contract upon the representation by Ms Amor in the presence of Mr Ward that it could be trusted with her jewellery and diamonds, he all the whole knowing that it was not so … and staying silent about that risk ([132]).

The statutory guarantee under s 60 of the ACL that the services (including safe keeping of Mrs Bromley's property) would be performed with due care and skill included a guarantee that they would not be performed negligently. This brought into play the *Civil Liability Act 2003* (Qld) ([134]). Under that Act Mr Ward, as sole director, and CTJ, owed Mrs Bromley a duty of care in tort to not perform the services negligently, and were liable to her for the breach of their duty of care ([135]). As sole director, Mr Ward was responsible for the provision and oversight of effective security procedures for the preservation of customers' property. The risk of loss of Mrs Bromley's property by an easy and untraceable theft was a foreseeable one against which a reasonable person in Mr Ward's position would have taken precautions, such as placing the items in the existing safe instead of leaving them in an unlocked drawer ([134]).

Orders

The tribunal ordered the respondents to pay the applicant the sums totalling $24,226.30 and ordered the applicant to return the brown diamond to the respondent CTJ. That jewel, the property of an unidentified person, could not be offset in reduction of CTJ's liability to Mrs Bromley.