COUNCIL OF AUSTRALASIAN TRIBUNALS

Issue 2
2024

Tribunal Case Update

A key question for tribunals undertaking administrative review on the merits is to ascertain the scope and limits of the review. We begin with a trio of recent cases which examine different ways in which this issue can present.

In *Frugtniet v ASIC* the legislation had changed between the date of the original decision and the date of review by the AAT. Ordinarily, the AAT would apply the legislation in force at the date of the original decision, but in this instance it was held that transitional provisions provided otherwise.

In *Secretary, Dept of Environment, Energy and Climate Action v Hanson Construction Materials Pty Ltd*, the question was whether the plan upon which an application for review was based was substantially different from the plan that was the subject of the original decision, to the extent that it would raise a 'different controversy'.

And in *Townshend v ASIC*, an applicant who had been disqualified from professional registration asked the AAT to instead impose conditions on her registration. The AAT declined to exercise this power of ASIC because it would 'impermissibly change the question before [it] on review'.

The issue also includes:

- *Nugawela v Medical Board of Australia*, in which a judge discussed how the SAT demonstrates that it is satisfied of the appropriateness of decisions embodied in consent orders which include a finding of professional misconduct against a party.
- *YDW v YDZ*, in which the NCAT Appeal Panel held that it was in the circumstances reasonably open to the Tribunal to dispense with an oral hearing of an interlocutory application for the issue of summonses.
- In *New South Wales v Madden* the Court of Appeal rejected allegations of apprehended bias on the basis of robust questioning of counsel by a judge couched in terms of 'are you serious?

Contents

Editorial Committee

Anne Britton COAT Chair,
Deputy President NCAT (Chair)

Pamela O'Connor Editor,
Adjunct Professor, Victorian University

Garth Blake AM SC Co-editor,
Senior Member NCAT

Stephen Willey Co-editor,
Senior member SAT (WA)

Bernard McCabe, Deputy President, AAT

Brett Carter, Chair of the Student Allowance Appeals Authority; Convenor of NZ Chapter of COAT

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

The scope of merits review

Tribunals that undertake merits review of administrative decisions are commonly vested with statutory powers of review in similar terms to the powers conferred on the AAT by s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) s 43 ('AAT Act').

Where the legislation governing the review makes no special provision, the general limits to the scope of merits review under provisions such as s 43 of the AAT Act are as set out in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 31 ('*Shi*') and in *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250; [2019] HCA 16 ('*Frugtniet HCA*').

In *Shi*, the High Court endorsed a line of AAT and Federal Court cases which held that in its review function, the AAT steps into the shoes of the decision maker to remake the decision according to law. Subject to any contrary statutory indication, the AAT may have regard to relevant evidence that was not before the original decision maker, even if it relates to subsequent events. But, 'subject to any clearly expressed contrary indication', the AAT cannot take this new material into account 'where to do so would change the nature of the decision or ... the question before the original decision maker': *Frugtniet HCA* [15].

In *Frugtniet HCA*, the High Court made it clear that, subject to the terms of the legislation, the AAT in reviewing a decision exercises the same statutory powers as were vested in the original decision maker and is subject to the same limits. This ordinarily includes:

> performing the relevant function of the original decision maker in accordance with the law as it applied to the decision maker at the time of the original decision ([Frugtniet HCA [15])

Where the legislation is amended after the original decision

As acknowledged in *Frugtniet HCA*, it is open to Parliament to legislate in terms that empower a review tribunal to exercise powers that were not available to the original decision maker at the time the original decision was made. In the following decision ['*Frugtniet FCAFC*'] the Full Court of the Federal Court considered the effect of transitional provisions on that question.

Frugtniet v Australian Securities and Investment Commission [(2023) 296 FCR 77; [2023] FCAFC 14

Full Court of the Federal Court (Markovic, McElwaine and McEvoy JJ), 17 February 2023

On 26 June 2014 a delegate of the Respondent ('ASIC') made a banning order under s 80(1) and s 81 of the *National Consumer Credit Protection Act 2009* (Cth) ('NCCP Act') which permanently banned the Appellant (Mr Frugtniet) from engaging in credit activities ('Banning Order'). Mr Frugtniet applied to the AAT for review of that decision. In *Frugtniet HCA*, the High Court set aside the AAT's decision affirming the Banning Order and remitted the matter to the AAT for redetermination.

In the remitted proceeding, the AAT varied the decision under review so as to prohibit Mr Frugtniet from engaging in a broader and more detailed range of conduct than was specified in the original decision (Banning Order). In doing so the AAT relied upon additional powers conferred on ASIC by amendments to the NCCP Act made *after* the original decision.

Mr Frugtniet appealed under s 44(1) of the AAT Act from that decision. He pleaded various grounds of appeal and was unsuccessful on all of them. This case-note deals only with the first ground of appeal, in which he argued that the AAT had erred in applying the NCCP Act as in force at the date of its decision on review, rather than in the form in which it stood at the time that ASIC made the Banning Order.

The application of amendments to the NCCP Act

After ASIC made the Banning Order, the relevant provisions of the NCCP Act were amended. The *Financial Sector Reform (Hayne Royal Commission Response — Stronger Regulators (2019 Measures) Act 2020* (Cth) ('the Amending Act') introduced changes which included expanding the breadth of the conduct which ASIC can prohibit in a banning order issued under s 80(1).

Section 2(1) of sch 14 of the *National Consumer Protection (Transitional and Consequential Provisions) Act 2009* ('NCCP Transitional Provisions Act') sets out the transitional provisions for the amendments made to s 80(1) of the NCCP Act. It provides that an order made under s 80(1) of the NCCP Act that is in force immediately before the commencement of pt 2 of sch 4 to the Amending Act 'continues in force and may be dealt with as if it had been made under that subsection as amended by that Part'.

In reaching its decision on the remitted application for review, the AAT had concluded that s 2(1) of sch 14 of the NCCP Transitional Provisions Act authorised it to treat the Banning Order as if it had been made under the NCCP as amended. The AAT relied on the reasoning in *Schroeder v Australian Securities and Investment Commission* [2020] AAT 2453, in which the AAT had reached a similar conclusion about the corresponding transitional provisions relating to ASIC's power to make a banning order under the *Corporations Act 2001* (Cth) s 920A(1)(d).

Mr Frugtniet argued that, in the absence of express provision that the Amending Act applied retrospectively, there was no reason for the AAT to depart from the generally accepted principle that it conducts its review in accordance with the legislation as it applied at the date of the original decision.

The Full Court's consideration of the legislation

The Full Court considered that the expression 'may be dealt with' in s 2(1) of sch 14 of the NCCP Transitional Provisions Act encompasses all of the ways in which a banning order 'may be dealt with' under the NCCP Act. This includes an application under s 327 of the Act for review of a decision by ASIC made under the Act ([43], [44]). The AAT when undertaking review of a decision may exercise all the statutory powers of the person who made the decision: AAT Act s 43(1). The AAT was therefore entitled to make a banning order in the terms of s 81(1) of the NCPP Act as amended by the Amending Act ([45]).

The Full Court held that the NCCP Transitional Provisions Act 'compelled the Tribunal to apply the NCCP Act as amended, rather than the more general principles discussed in *Shi* and in *Frugtniet HCA* ([15], references omitted).

The Full Court also rejected Mr Frugtniet's argument that to apply the law in force at the date of the AAT review was contrary to s 7(2) of the *Acts Interpretation Act 1901* (Cth). The application of s 7(2) was displaced by the contrary intention evinced by the NCCP Transitional Provisions Act ([53]-[56]).

The Full Court found no error in the AAT's conclusion that it was authorised to deal with the Banning Order as if it had been made under s 80(1) of the NCCP Act as amended, and that it was authorised, to make a banning order in the broader terms of s 81(1) as amended. Ground One of the appeal was not made out.

After considering the other appeal grounds, the Court dismissed the appeal.

Where the subject of the review is changed

Sometimes a tribunal is asked to consider on review an application that is in different terms from the application that was before the primary decision maker. The question then is whether the tribunal is being asked to review the decision already made, or to act as a primary decision maker by determining a different controversy. While the tribunal must make this assessment in the first instance, the issue goes to jurisdiction and is subject to review for error of law.

In the *Hanson Constructions* case noted below, Gorton J observed that it is possible to define the decision under review at different levels of generality. His Honour identified considerations which assist a court to formulate the decision for the purposes of determining the scope of the tribunal's powers on review.

Secretary, Dept of Environment, Energy and Climate Action v Hanson Construction Materials Pty Ltd (2023) 71 VR 137; [2023] VSC 353

Supreme Court of Victoria (Gorton J), 26 June 2023

The Respondent company ('Hanson') was required to rehabilitate a disused quarry site in accordance with a work plan that had been endorsed by the Appellant ('Department'). Hanson applied to the Department to endorse a proposed variation to the rehabilitation plan ('the first work plan variation'). On 7 July 2021 a delegate of the Department Head refused to endorse the first work plan variation and notified Hanson of matters to be addressed for the plan to be endorsed.

Instead of responding to the Department, Hanson applied to the Victorian Civil and Administrative Tribunal (VCAT) for review of the delegate's decision. Hanson then prepared a different proposed variation to the approved rehabilitation plan ('the second work plan variation') and applied to VCAT to have that document substituted for the first work plan variation for the purposes of the review.

VCAT determined that it had power under s 127(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the VCAT Act') to amend the first work plan variation by substituting the second work plan variation for the purposes of its review. The Department applied to the Supreme Court of Victoria under s 148 of the VCAT Act for leave to appeal against VCAT's order amending the first work plan variation.

The question before the Supreme Court was:

> whether when the Tribunal is conducting a merits review of the Department Head's decision to refuse to endorse the first work plan variation, the Tribunal is able to decide instead whether or not to endorse the second work plan variation ([9]).

The Court's consideration

Gorton J observed that VCAT has only the powers conferred upon it by the VCAT Act and the enabling Act which was the *Mineral Resources (Sustainable Development) Act 1990* (Vic) ('the MRSD Act'). [VCAT's functions on review are defined in s 51 of the VCAT Act (in very similar terms to those conferred on the Administrative Appeals Tribunal by s 43(1) of the AAT Act].

His Honour held that the power of amendment in s 127 of the VCAT Act was a procedural provision and could not be used to confer additional jurisdiction on VCAT ([16].

His Honour considered the scope of the review jurisdiction conferred on VCAT. The source of its jurisdiction in this case was the MRSD Act. Section 51 of the VCAT Act set out the powers that VCAT may exercise with respect to matters where it has jurisdiction.

His Honour noted that the MRSD Act provided for a 'complex' and 'sophisticated' application process before the Department endorses a proposed work variation. The process included notifying a range of specialist referral authorities and giving them opportunity to object or to request conditions. There was good reason, His Honour said, for the legislature to have given the Department rather than VCAT the function of evaluating a proposed work plan variation in the first instance ([22]).

Scope of the tribunal's review jurisdiction

His Honour reviewed the authorities relevant to determining the scope of the review jurisdiction given to VCAT and other similar tribunals. He noted that some planning legislation expressly empowers a review tribunal to decide an application for a planning permit that has been amended to the extent that it may be substantially different from that which was considered by the original decision-maker ([24]), [35]). No such provision applied in the present case.

His Honour concluded that the authorities support the view that VCAT 'only has jurisdiction to review on its merits the decision that was actually made by the Department Head' ([36], [37]). The question then is how 'the decision' is defined.

Defining the decision under review

His Honour noted Kiefel J's remark in *Shi* [142] that:

> the decision [under review]' and the statutory question it answers, should be identified with some precision, for it marks the boundaries of the review.

He reviewed the case authorities to identify the elements which courts and tribunals had

considered in formulating the decision under review.

His Honour observed that it is possible to articulate the 'decision' at different levels of generality, with different consequences for the scope of the review. In the present case, if 'the decision' is taken to be 'the refusal to endorse the variation in the precise terms of the first work variation', this may preclude minor changes to the document. Alternatively, if the 'decision' is identified as '[the refusal] to endorse a variation to the approved work plan', VCAT would be able to review any proposed variation even if substantially different to the first works plan variation refused by the Department. This broad formulation of 'the decision' could blur the distinction between VCAT acting as a review body and acting as a primary decision-maker ([38]).

Other cases had raised this dilemma, including *Addicoat v Fox (No 2)* [1979] VR 347, 363, in which Brooking J distinguished between '"modification" of an application, which is permissible, and "transformation" of an application, which is not' ([42]-[44]).

His Honour concluded that VCAT was required to consider whether to endorse the second variation of the plan if it is in substance a modified version of the plan before the original decision maker, but not if it is in in substance a new plan ([45]). While noting that 'the issue cannot be black and white', His Honour proposed that:

> [s]ome form of assessment has to be made as to whether VCAT is truly reviewing a decision already made, or is instead being asked to act as a primary decision-maker.

The question is not what is or is not an 'amendment', but what role VCAT is being asked to perform ([48]).

As VCAT had failed to ask itself this question and apply the correct test, His Honour found an error of law.

Order

His Honour granted leave to appeal, allowed the appeal, set aside the order of VCAT and remitted the matter to VCAT for further determination in accordance with the Reasons.

Where the tribunal is asked to exercise a different power

Another way in which the question of defining the scope of review can arise is where the tribunal on review is asked to exercise a power conferred on the original decision maker that was not exercised or considered in making the original decision.

Townshend v Australian Securities and Investments Commission [2023] AATA 3810

Administrative Appeals Tribunal (BJ McCabe DP), 23 November 2023)

Ms Townshend had been registered under s 128B of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SISA') as an auditor of self-managed superannuation funds ('SMSF'). She appealed to the AAT from a decision of the Australian Securities and Investment Commission (ASIC) to disqualify her as an approved SMSF auditor.

Ms Townshend accepted (and the AAT found) that she had breached the auditor independence requirements, which were a condition of her registration, when she audited a SMSF for which her husband was a director of the corporate trustee. In consequence of the breach, ASIC was empowered to disqualify her under s 130F(2) of SISA. Arguing that the breach resulted from a misunderstanding for which disqualification was too harsh an outcome, Ms Townshend asked the AAT to instead impose conditions upon her registration pursuant to s 128D of SISA.

While ASIC was empowered to impose conditions on registration at any time, the AAT decided that it could not 'step into the shoes' of ASIC for the purpose of exercising that power in the proceedings, for the following reasons ([24]):

> Doing so would impermissibly change the question before me on review so that it was different in nature to the question before the original decision-maker … I will therefore not further consider whether the imposition of conditions under s 128D is an available alternative.

The AAT proceeded to decide that, as the AAT had determined in relation to a similar

breach in *Whittle and ASIC* [2018] AATA 1861, 'the importance of the audit independence requirements means that disqualification is the appropriate response'. The AAT found no mitigating circumstances that would make disqualification 'disproportionate or otherwise inappropriate' ([44]).

Order

The decision under review was affirmed.

The editors acknowledge the assistance of Ms Eva Douventzidis, AAT executive associate, in noting this case series.

Procedure for making consent orders after mediation – disciplinary proceeding

Some tribunal statutes expressly empower a member who presides at a mediation or conciliation meeting between the parties to make orders by consent for the purpose of giving effect to a settlement. In the following case, a legally represented party to a disciplinary proceeding in the State Administrative Tribunal (SAT) signed a minute of consent orders which were then made by the member who had presided at the mediation. The appellant appealed from the consent order on multiple grounds, all of which were unsuccessful.

The judge made some instructive remarks about the procedure which the SAT followed and indicated ways that the process might be clarified for the purposes of any subsequent appeal.

Nugawela v Medical Board of Australia (WA Branch) [No 2] [2024] WASC 15

Supreme Court of Western Australia (Lemonis J), 25 January 2024

The Appellant was registered as a medical practitioner. He lodged an appeal from orders made by the State Administrative Tribunal (SAT) in vocational disciplinary proceedings brought against him by the Respondent ('Medical Board'). The orders contained a finding that the Appellant had behaved in a way that constitutes professional misconduct under the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) ('HPL'). The orders imposed a reprimand and conditions as to supervision on his continued registration as a medical practitioner.

The appeal was treated as an application for leave to appeal under s 105 of the *State Administrative Tribunal Act (2004)* (WA) ('SAT Act'). Such an appeal, if leave is granted, is similar to judicial review for all errors of law ([86]). He was unsuccessful on all appeal grounds.

Background to the appeal

After the Appellant was declared bankrupt and he was evicted from the premises at which he conducted his medical practice, the Medical Board became concerned about his ability to appropriately store and manage patient records and medication and his failure to provide a contact address. Acting under s 193 of the HPL, the Medical Board made a referral to the SAT on the ground that it reasonably believed that the practitioner had behaved in a way that constitutes professional misconduct. Under s 196(1) of the HPL, the SAT can decide that the practitioner has behaved in a way that constitutes professional misconduct. If it makes such a decision, it can impose certain regulatory sanctions under s 196(2).

An eight-hour mediation was conducted by a member of SAT at which the Appellant had the assistance of lawyers acting on a pro bono basis. At the end of the mediation, the parties signed a minute of consent orders putting forward an agreed resolution. The signed minute was presented by the parties to the SAT member who presided at the mediation, who said she would make orders to give effect to it. The final orders were in identical terms to the signed minute of consent orders. The orders imposed a supervision condition on the Appellant's registration. He was required to nominate another medical practitioner to supervise him. When the Appellant failed to nominate a supervisor, the Medical Board suspended his registration.

The Appellant appealed against the orders made by the SAT on 8 September 2022 on multiple grounds including denial of procedural fairness. The Appellant was self-represented in the appeal.

The judge accepted as correct the Medical Board's concession that a ground of appeal can lie notwithstanding that the orders were made by consent ([105]).

Power to make the orders

The SAT Act s 54(2) provides that if the mediator is a Tribunal member and it appears that settlement has been reached, the mediator may reduce the terms of settlement to writing and make any orders necessary to give effect to the settlement.

Section 56(1) provides that if the parties agree in writing to settle a proceeding, the Tribunal may make any orders necessary to give effect to the settlement, subject to the qualification that the Tribunal cannot make such an order unless satisfied it has the power to do so.

The court found that the power in s 56(1) must be exercised in accordance with pt 8 div 12 of the HPL, which means that the member making the order must independently satisfy themselves of the appropriateness of the decisions embodied in the agreed orders.

Where the parties set out agreed facts in the annexure to the orders these facts do not require proof ([49]).

His Honour also held that for the purpose of deciding whether to make orders agreed by the parties at a mediation, the member is permitted by ss 52(6) and 54(8) to have regard to their own knowledge acquired in the course of the mediation ([50]).

Comments on the orders and the process of making them

In finding that the Appellant had engaged in professional misconduct, the orders referenced the conduct set out in Annexure A but failed to identify any specific instances of conduct in the agreed facts as constituting professional misconduct. His Honour took this to mean that it was *all* the incidents of the Appellant's conduct detailed in Annexure A which constituted professional misconduct ([70]).

The judge was satisfied that the SAT member made an independent decision to make the orders set out in the signed minute, as required by the HPL. The requirements included finding that the settlement is appropriate ([123]). In evaluating the member's consideration of the minute presented to her, the judge inferred that the member was familiar with the terms agreed at the mediation at which she presided ([71]). It was also relevant to note that the consent orders were presented as an application to the member, and that the orders were expressed in terms that indicated that her approval of the application was required ([72]).

While accepting the validity of the orders as decisions duly made under the HPL, His Honour considered that the position would have been clearer if:

- the SAT member had stated that she was satisfied of the relevant requirements at the time she said she would make the orders; and
- the orders had expressly stated the basis upon which the conduct detailed in Annexure A constituted professional misconduct.

Orders

In the interests of justice His Honour granted leave to appeal on Appeal Ground 1 (breach of procedural fairness) and proceeded to find the ground not made out. He refused leave to appeal in respect of all other grounds and dismissed the appeal.

Dispensing with hearing in interlocutory application

In the following case, the NCAT Appeal Tribunal refused leave to appeal from a decision of NCAT's Guardianship Division to dispense with an oral hearing in reviewing an interlocutory decision. The Appeal Panel approved the Tribunal's reasons for exercising its discretion to dispense with a hearing in reviewing the refusal of an application for the issue of summonses. The decision sets out relevant considerations and how they were assessed by the Tribunal in arriving at its decision.

YDW v YDZ [2023] NSWCATAP 332

NSW Civil and Administrative Tribunal Appeal Panel, (I R Coleman SC, ADCJ, Principal Member, L Organ, Legal Member, M Spencer, General Member), 7 December 2023

The Appellant (YDW) appealed against interlocutory orders made by the Civil and Administrative Tribunal (NCAT) on 23 June 2023 dismissing his application for review of

the Registrar's decision to refuse his request to issue summonses. The question on appeal was whether leave to appeal the interlocutory orders should be granted.

The background was that on 6 June 2023 the Appellant filed applications for summonses to four recipients, namely the New South Wales Trustee and Guardian ('NSWTAG'), the Public Guardian and the operators of the care homes in which the subject persons lived. On 7 June the Registrar refused each of the applications on the ground that they were substantially the same as the summonses about which the Tribunal had previously made directions. The Appellant sought a review of that decision, which the Tribunal, pursuant to s 55(1)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('CAT Act'), dismissed as 'misconceived'. The Appellant then sought an 'oral hearing' to determine his application to set aside the Tribunal's orders relating to his applications of 6 June 2023 for the issue of further summonses.

On 23 June 2023 the Tribunal refused the Appellant's review application for the following reasons (which were set out in the Appeal Panel's Reasons).

The Tribunal's reasons

The issue of a summons is an interlocutory decision (CAT Act s 4(c)). The Tribunal found that as the decision for which the Appellant sought review was interlocutory, the power to dispense with a hearing under clause 6(1)(b) of Schedule 6 of the CAT Act was enlivened ([39]).

Schedule 6 of the CAT Act, which is the Divisional Schedule applicable to the Guardianship Division provides:

> 6. Hearing required except for making of ancillary or interlocutory decisions
>
> (1) Despite section 50 of this Act, the Tribunal is required to hold a hearing in proceedings that involve the exercise of a substantive Division function.
>
> (2) However, the Tribunal may dispense with a hearing for the purposes of making an ancillary or interlocutory decision of the Tribunal.'

The Tribunal proceeded to consider whether or not to dispense with a hearing before determining the matter. (Dispensing with a hearing effectively means determining the matter solely on the papers). The Tribunal found and weighed the following considerations in exercising its discretion:

1. The Tribunal took into account [40] as a 'factor weighing in favour of a hearing' the Appellant's request to have 'an opportunity to put his case to support his application'. The Tribunal found that conducting a hearing would not have changed the Tribunal's findings, because cl 9(1) of the NCAT Regulations limits the decisions which are able to be set aside to a decision which 'determines proceedings'.
2. The Tribunal referred to s 36(1) of the CAT Act, which obliges the Tribunal to conduct proceedings in a manner that facilitates the just, quick and cheap resolution of the real issues in the proceedings. The Tribunal also had regard to the requirement of s 36(3) of the CAT Act which provides that the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of issues between parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject matter of the proceedings ([42]). The Tribunal held that conducting a hearing 'would have resulted in additional and unnecessary time, cost and expense to the parties and the Tribunal' and that 'importantly' the 'welfare and interests of the [subject persons] parents would not have been served by having a hearing of a matter 'that could only fail' ([43]).
3. The Tribunal then considered the merits of the Appellant's review application ([45]-[71]). With respect to the applications for summonses to three of the recipients, the Tribunal found that the change in the end date for a date range specified for a certain class of documents 'does not materially alter the description of the documents sought' (52]).

The Tribunal exercised its discretion under s 6(2) of the CAT Act to dispense with a hearing of the application of 6 June 2023 for the issue of summonses.

The Appellant sought leave to appeal that decision.

Consideration by the Appeal Panel

The Appeal Panel noted that if the Tribunal exercises its discretion under cl 6(2) of sch 6 of the CAT Act to dispense with a hearing, it is held to the same standard of consideration as would

apply in a matter in which there was an oral hearing ([30], citing *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33).

The Appeal Panel found that 'it was reasonably open to the Tribunal to dispense with a hearing, and to do so for the reasons it recorded' ([52]). The Tribunal did not dispense with a hearing 'without proper consideration'. The practical effect of the Tribunal's decision was limited. It did not preclude the Appellant from applying for further summonses to the same parties if they failed to produce documents that they should have produced in response to summonses already issued ([53]).

The Appeal Panel was not persuaded that the Tribunal's decision was in error, nor that it denied the applicant procedural fairness. It had not been shown that the Appellant missed an opportunity to add anything of relevance at an oral hearing that might have changed the result of his applications for the issue of the summonses ([55]).

Order

The Appeal Panel refused leave to appeal against the decisions.

Apprehended bias: judge questions counsel 'robustly'

In the following case, a trial judge pressed counsel for the State on an argument which appeared to 'fly in the face of common sense'. The exchange was found not to give rise to apprehended bias. Moreover, the State had waived the right to complain of apprehended bias as counsel for the State had refused an opportunity afforded by the judge to raise it.

State of New South Wales v Madden [2024] NSWCA 40

NSW Court of Appeal (Bell CJ, Leeming and Stern JJA), 29 Feb 2024

The State of New South Wales ('the State') appealed the decision of a District Court judge (the trial judge) in which the State was found vicariously liable in tort for battery, false imprisonment and malicious prosecution on the basis of conduct by certain police officers and was ordered to pay the Respondent $320,000 damages. By its first ground of appeal, the State alleged that the conduct of the trial judge gave rise to an apprehension of bias in the following ways:

- by his interjections when witnesses were giving evidence;
- by his 'vigorous questioning' of the State's witnesses;
- by making 'belittling' comments in relation to the submissions of the State's counsel; and
- by limiting of the nature and scope of cross-examination of the Respondent.

In the appeal, the State referred the Court to various passages in the transcript of the trial, in which it asserted that the judge had manifested apprehended bias.

In relation to the trial judge's interventions during the cross-examination of a State witness, the Court accepted the Respondent's submission that the interventions amounted to:

> nothing more than the judge's wish properly to explore the issues that were being ventilated before him, both in exchanges with witnesses and with counsel ([107]).

The State referred the Court to a passage in which the trial judge asked counsel for the State whether he was 'seriously making that submission on behalf of the State'. The State contended that the trial judge in that exchange was 'belittling, combative, dismissive, condescending and unduly animated'. The tenor of the judge's comments are indicated by this excerpt from the exchange ([108]):

> HIS HONOUR: Do you seriously put a submission that I need evidence that at the time he [the police witness] prepared the COTS entry, I need evidence that he had some training in how to access that body-worn footage that he was using that day?
>
> COFFEY: His evidence, your Honour, is that body-worn cameras were new to him--
>
> HIS HONOUR: No, answer my question. Do you say that I need evidence that Senior Constable Darnton knew how to access the footage before I can do anything with that submission?

The Court disagreed with the State's characterisation of His Honour's remarks. While the judge's questions were 'robust',

> ‘[i]t is not inappropriate for a judge seeking to focus on key issues to question submissions by counsel that appear to fly in the face of commonsense or which are excessively technical’ ([109]).

In the view of the Court, the trial judge’s remarks to which the State objected were ‘understandable and clearly part of the dialogue between bench and bar aimed at clarifying the issues in the case’ ([111], quoting Kirby and Crennan JJ in *Concrete Pty Limited v Paramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; [2006] HCA 55 [105]).

The first appeal ground was rejected for the reasons above, and also because the State had waived any entitlement it might have to apply to the trial judge to disqualify himself. The trial judge had enquired, towards the end of the hearing, whether the State wished to make any such application and counsel for the State had ruled it out ([110]-[112]; [210]-[211].

The Court of Appeal held that no case of apprehended bias was established, and that moreover the State had waived any right to complain of bias.

The appeal was dismissed.