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Tribunal Case Update

Some Acts grant members of a tribunal the immunity of a superior court judge. In *Queensland v Mr Stradford*, the High Court of Australia held that judges are immune from liability for acts done in the exercise, or purported exercise, of their judicial function or capacity. In that case, a judge who exceeded his jurisdiction to imprison a man for contempt was held immune from civil suit.

In an application to a court for leave for a lay 'McKenzie friend' to make oral submissions for a party, it was held that the court's discretion was not circumscribed by the party's Charter rights nor by anti-discrimination laws, and that the court may consider the friend's suitability to address the court: *Myers v VCAT*.

Alsheri v Minister for Immigration [etc] provides an instructive example of a tribunal misdirecting itself and making a material error by failing at the outset to correctly identify the 'statutory question' it had to address.

In *ASIC v Sunshine Loans Pty Ltd*, the NSW Court of Appeal considered the bias rule in bifurcated civil penalty proceedings. It held that a judge who had made an adverse finding as to the credit of a witness was not disqualified from evaluating the evidence of the same witness in a subsequent hearing at a second stage of the same proceeding.

In *Jaggi v Minister for Immigration* [etc] the Federal Court held that apprehended bias arose from the tribunal member's statements at the hearing. His generalisations from other similar cases raised an apprehension that he would not decide the case on the evidence before him.

In *Dickson v Real Estate Agents Authority*, the NZ High Court dismissed an argument by a real estate agent that a licensing authority breached her NZ Bill of Rights Act right to freedom of expression by mandating a short CPD course on Māori culture, language and custom and cancelling her licence for failure to comply.

In *Maazuddin v Minister for Immigration [etc]* it was held that a tribunal which had copied substantive material from the reasons for the decision under review had failed to discharge its statutory duty to consider the matter on review for itself afresh. The court also held that the tribunal had breached its duty of procedural fairness in failing to notify the parties that it was proposing to adopt the material as its own.

Contents

Scope of judicial immunity

In Issue 4/2023 of this publication we reported that, in *Stradford v Judge Vasta* [2023] FCA 1020, the Federal Court had held a judge liable for false imprisonment of a litigant and had awarded damages against him, the State of Queensland and the Commonwealth. Subsequently, all three respondents appealed the decision. The appeal was removed to the High Court and heard by a full bench.

The High Court considered the scope and application of judicial immunity. The case is important for tribunals as legislation has extended similar immunity to members of certain tribunals. For example, s 293(1)(a) of the *Administrative Review Tribunal Act 2024* (Cth) gives a member of the ART in the performance of the member's duties the same protection and immunity as a Justice of the High Court. Some Acts establishing the Civil and Administrative Tribunals of the states and territories grant members the same immunities and protections as a Supreme Court judge (eg, SAT Act s 163(2); VCAT Act s 143(1), TASCAT Act s 140(1)); NCAT Act sch 2 cl 4.

Queensland v Mr Stradford (a pseudonym) [2025] HCA 3

High Court of Australia (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), 12 Feb 2025

Mr Stradford was a party to proceedings before Judge Vasta in the (former) Federal Circuit Court against his wife seeking property adjustment orders. Judge Vasta ordered Mr Stradford to make 'full and frank disclosure' of various financial documents or be dealt with for contempt. When he failed to do so, Judge Vasta adjourned for the hearing of a contempt application. After 'a parody of a court hearing', Judge Vasta declared Mr Stradford to be in contempt and sentenced him to a term of imprisonment. He was detained by court security and Queensland police and correctional officers and taken into custody. He was released from imprisonment when the Full Court of the Federal Court upheld his appeal, setting aside the contempt decision and the imprisonment order.

Mr Stradford brought civil proceedings in the Federal Court, seeking damages for false imprisonment against Judge Vasta, the Commonwealth and the State of Queensland. The primary judge upheld his claims and awarded damages, including an award of $50,000 exemplary damages against Judge Vasta, finding that the Judge's conduct demonstrated 'an unacceptable abuse of judicial power'. The Commonwealth and Queensland were held liable for the actions of the court security, police and correctional officers who had acted on the imprisonment order and warrant. Judge Vasta, the Commonwealth and Queensland appealed those decisions, and the appeals were removed into the High Court and heard together.

Issues

The appeal before the High Court raised three issues:

1. Whether the effect of the Federal Circuit Court of Australia Act (Cth) ('FCCA Act') s 17 was that the imprisonment order was valid until set aside by a court, even though it was affected by jurisdictional error. (FCCA Act s 17(1) confers on the Federal Circuit Court 'the same power' to punish contempts of its authority as the High Court possesses in respect of contempts of the High Court).

2. The scope of judges' common law immunity from civil suits, including the immunity of judges of inferior (ie, lower) courts such as the Federal Circuit Court.
3. Assuming a negative answer to issue 1, whether the court security officers, Queensland police officers and correctional officers had a defence to Mr Stradford's suit against them ([10]).

1. Validity of order until set aside

The primary judge found, on multiple grounds, that the imprisonment order was affected by jurisdictional error. His Honour held that, as the order was made by an inferior court, the presence of jurisdictional error deprived the order of legal force as an order of the court and provided no legal justification for the imprisonment of Mr Stradford.

On appeal, the plurality (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) agreed with the primary judge's conclusion that 'an order of an inferior court that is affected by jurisdictional error has no legal force as an order of the court' ([53]). Their Honours further held that FCCA Act s 17 did not grant that court the same authority that a superior court possesses to 'make an order which remains valid unless and until set aside even if affected by jurisdictional error' ([68]).

Gordon and Edelman JJ disagreed with the latter conclusion. Gordon J reasoned that nothing in the language of s 17 nor the statutory context warranted reading the grant of power in FCCA Act s 17(1) as being limited to the *scope* of the court's contempt powers rather than their *legal effect* ([171])

2. Scope of judicial immunity

The plurality observed that judicial immunity is an institutional arrangement directed not for the benefit of judges, but to promote the public interest by enabling judges to adjudicate without fear or favour. Their Honours held that common law judicial immunity does not extend to 'the judge's private acts unrelated to their judicial office' nor to any attempt by a judge to exercise the judicial function of a court other than the one to which the judge is appointed ([88]).

Their Honours held that, as all Australian courts are subject to an appellate structure, have a defined jurisdiction and are constituted by qualified persons, there was no longer justification for differential treatment in the scope of immunity afforded to judges of superior and inferior courts ([107], [112], [113]). They explained that the significance of the distinction between inferior and superior courts for purposes of the scope of judicial immunity is 'untethered' from the circumstances (see above, issue 1) in which the order of an inferior court can be the subject of collateral challenge ([106]).

The plurality noted that the FCCA Act s 17 left the immunity of the court's judges to the common law, and that there was 'no established common law rule concerning the immunity of inferior court judges' ([104]). Their Honours addressed the scope of judicial immunity after considering the guarantee of judicial independence and impartiality in s 71 of the Australian Constitution, the need for courts to 'finally quell legal controversies', and the desirability for the scope of immunity to be 'clearly defined and capable of summary application' ([106], [109], [111]). They emphasised that the scope of immunity should not depend on 'any inquiry into the judicial officer's state of mind' ([110], [111]).

Based on these criteria, the plurality held that the scope of immunity as stated in *Re East: ex parte Nguyen* (1998) 196 CLR 354, 365-66 [30] ('*Re East*') applies to judges in both superior and inferior courts. The rule is that judges have 'immunity from actions arising out of acts done in the exercise, or purported exercise, of their judicial function or capacity' ([112]). The modification of the *Re East* formulation by the addition of the phrase 'or purported exercise' confirms that judicial immunity 'extends to the circumstances where the court to which the judge is appointed ceases to have jurisdiction over the relevant matter, or the judge commits a jurisdictional error in dealing with the relevant matter' ([112]).

Their Honours held that Judge Vasta was empowered to make an imprisonment order. Despite his 'many and egregious errors' in dealing with Mr Stradford, he was acting in the purported exercise of his judicial function when making the order. He was accordingly protected by judicial immunity and was not liable to Mr Stradford for false imprisonment ([114]).

3. Liability of those who enforced the order

As there was nothing on the face of the order or the warrant that could raise any doubt about its validity, the security guards and Queensland police and correctional officers were entitled to immunity from suit for their acts undertaken in discharge of their duty to enforce the order and execute the warrant ([156], [159]).

Order

The appeals were allowed, the orders of the primary judge set aside, and the actions brought by Mr Stradford against each appellant were dismissed.

'McKenzie friend': leave for oral submissions

A court or tribunal may, at its discretion, grant leave for an unrepresented party to be assisted by a lay person who is not a legal practitioner. A 'McKenzie friend', as the role is called (from the UK decision in *McKenzie v McKenzie* [1970] 3 All ER 1034), may sit with the party at the hearing and provide advice and assistance, but may not make oral submissions for the party unless the court or tribunal gives express leave on the ground of special or exceptional circumstances. In considering such an application, a court may take into account whether the unrepresented party is capable of making oral submissions on his or her own behalf, and whether the individual acting as McKenzie friend is a suitable person to address the court.

The case also discusses the scope of the tribunal's obligations towards a person who is not legally represented.

Myers v VCAT [2024] VSCA 206

Supreme Court of Victoria (Walker JA), 17 Sept 2024

Mr Myers lodged an application to the Trial Division of the Supreme Court to review on grounds of law a VCAT decision. After being refused pro bono legal assistance for a lawyer to represent him, Mr Myers applied to the Court for permission to have a 'McKenzie friend' ('MC'), make oral submissions on his behalf at the trial of his application for review. Watson J refused the application. Mr Myers applied for leave to appeal.

Proposed grounds of appeal

Walker JA summarised Mr Myers' 11 proposed grounds of appeal into four main issues—

a) Did Watson J err in concluding that Mr Myers had failed to establish special circumstances that warranted him being permitted the assistance of a 'McKenzie friend' to make oral submissions on his behalf?
b) Did the judge err in concluding that MC would not be a suitable person to make oral submissions as a McKenzie friend?
c) Did the judge contravene his obligations to Mr Myers under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') and the *Equal Opportunity Act 2010* (Vic) ('EO Act')?
d) Did the judge deny Mr Myers procedural fairness?

Her Honour reviewed the authorities on the principles to be applied by a court in determining whether to grant permission for a McKenzie friend to make oral submissions. Normally the role is confined to prompting the party, taking notes and giving advice. It was clear from the authorities that, in 'special' or 'exceptional' circumstances, the court is empowered to permit a McKenzie friend to make submissions on behalf of a party ([6]-[9], citing *Kiley v McMahon* [2024] VSC 228 [19]-[20]). Whether to grant the permission requested is at the discretion of the trial judge ([9], citing *Smith v The Queen* (1985) 159 CLR 532, 534 (Gibbs CJ)), and any appeal from the trial judge's decision would be decided according to the standards applied in *House v The King* (1936) 55 CLR 499.

(a) The finding that special circumstances did not exist

Mr Myers argued that the trial judge erred by imposing an evidentiary onus on him to persuade the court that special circumstances existed that warranted the grant of the permission sought. Dismissing his argument, Walker JA observed: 'It was Mr Myers' application and he bore the onus of persuading the judge' of the existence of special circumstances ([27].

(b) The finding that MC was not a suitable person to make oral submissions

Mr Myers argued that the trial judge erred in having regard to adverse remarks made by other judges concerning MC's behaviour as an advocate on his own behalf in other proceedings. Walker JA rejected the argument that the remarks were inadmissible by reason of ss 91, 97 and 98 of the *Evidence Act 2008* (Vic). Her Honour observed that, in proceedings to consider whether a person is to be declared a vexatious litigant, 'there is abundant authority' that the court may consider the observations of judges about the person's behaviour in other proceedings, and 'that course is not precluded by s 91 of the *Evidence Act*' ([34], citing *Attorney-General (NSW) v Chan* [2011] NSWSC 1315). The same principle, in Her Honour's view, applied in the present context, where MC's behaviour as a participant in other proceedings was centrally relevant to the assessment of his suitability to make oral submissions ([34]).

(c) did the judge fail to have regard to the Charter and the EO Act?

Mr Myers alleged that the trial judge's refusal to permit MC to make oral submissions was a breach of Mr Myer's human rights under the Charter and discriminated against him as a person with disabilities.

Walker JA rejected the proposition that the trial judge's discretion in relation to whether to permit a lay person to make oral submissions was circumscribed by the Charter or the EO Act. The question was 'whether the hearing will be fair and whether the party concerned will be treated equally before the law' ([49]). In view of the trial judge's finding of fact that Mr Myers had the ability to make oral submissions on his own behalf, Her Honour found no merit in this ground of appeal ([51]).

(d) did the judge deny Mr Myers procedural fairness?

Among the alleged breaches of procedural fairness, Mr Myers asserted that the trial judge failed in his 'duty' to assist a self-represented person. Walker JA observed—

> In truth, there is no such "duty". Rather, the judge's duty is to ensure that any hearing is fair to both parties. In some cases that may require a judge to give some assistance to a person who is not legally represented. … In determining the proper scope of assistance to be offered, the touchstones are fairness and balance [59]-[60].

As to the nature and extent of that assistance, Walker JA at [60] expressed her agreement with the following remarks of the Court of Appeal in *Trkulja v Markovic* [2015] VSCA 298 [39] (Kyrou and Kaye JJA and Ginnane AJA) (citations omitted):

> The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. In some cases it may be necessary for the judge to identify the issues and the state of the evidence in relation to them so as to enable the self-represented litigation to consider whether he or she wishes to adduce further evidence … [T] he judge should refrain from advising a litigant as to how or when he or she should exercise [his or her] rights.

Mr Myers had failed to specify in what respects the trial judge had failed to assist him ([62]). Walker JA noted that the trial judge had granted Mr Myers 'considerable leeway' and found that '[t]here was nothing more that the judge was required to do ([63]).

Her Honour found that all of the proposed grounds of appeal lacked merit and were 'doomed to fail' ([68]).

Order

Leave to appeal was refused.

Misstating the statutory test: when is the error 'material'?

In the following case, a judge quashed a decision of the AAT for material jurisdictional error, the AAT having misdirected itself by asking the wrong question. This misdirection caused the tribunal to overlook relevant inquiries in its fact-finding.

His Honour's judgment offers prefatory remarks in which he emphasizes the necessity for a tribunal, when applying a statute, to articulate the statutory question which it must address ([1]-[3]). That question will be derived from the legislation. Once the question has been clearly and correctly formulated, it will guide the tribunal in its fact-finding and decision making. If the tribunal misdirects itself by posing the wrong question, it commits a jurisdictional error. If the error is 'material', the usual result on judicial review will be that the tribunal's decision will be quashed and the matter remitted to the tribunal for reconsideration ([3]).

Alsheri v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2025] FedCFamC2G 242

Federal Circuit Court and Family Court of Australia (Div 2) (Judge B McCabe), 25 Feb 2025

The applicant, Mr Alsheri, was a citizen of Saudi Arabia. After working in Saudi Arabia for 17 or 18 months as an employee of the Saudi Ministry of Health ('the Ministry'), he came to Australia to undertake further career-related studies. The Ministry continued to pay him during his studies in Australia. He also undertook some other duties for his employer during this period.

Mr Alsheri then applied for a visa for skilled persons who can establish their eligibility for particular work in Australia using a points system set out in r 2.26AC of the *Migration Regulations 1994* (Cth) ('the Regulations'). The former Administrative Appeals Tribunal ('the AAT') determined that the applicant was not entitled to an allocation of points under pt 6D.3 of sch 6D to the Regulations because he did not meet the minimum period of at least 36 months' overseas employment experience (AAT *Reasons* [25] cited at [23]).

The applicant applied for judicial review on the ground that, in applying the 'overseas employment' points test in pt 6D.3, the AAT wrongly excluded the period after he arrived in Australia during which he continued to be employed by the Ministry. The effect of the finding was that he was not eligible to apply for the visa.

The Court's consideration

On review of the AAT's decision, Judge McCabe identified the issue as whether it had misdirected itself by failing to clearly articulate the legal test which it was required to apply ([1]). His Honour noted that the legislation provided as follows. First, item 6D31 in pt 6D.3 allocates five points to an applicant if, at the time of the invitation to apply for the visa, the applicant had been employed outside Australia in the applicant's nominated skilled occupation for a period totalling at least 36 months in the immediately preceding 10 years. Second, reg 2.26AC(6) defines the word 'employed' for the purpose of sch 6D as follows:

> *Employed* means engaged in an occupation for remuneration for at least 20 hours a week.

His Honour observed that the tribunal, in its reasons, did not directly quote the text of the provisions, nor did it expressly state the test it was applying ([25]). It referred to the applicant 'technically being employed' by the Ministry and found that his work in Australia did not amount to 'employment overseas' (18]). Neither of these terms are found in the legislation to be applied. The tribunal should have 'addressed the question whether the applicant was 'engaged', in the relevant sense, which required an exploration of whether he was '*engaged* in an *occupation* … for *remuneration*' ([26], original emphasis).

His Honour concluded (at [27]) that this was a material jurisdictional error in the sense that 'there is a realistic possibility that the decision that was made in fact could have been different if the error had not occurred' (citing *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 [7])). If the tribunal had addressed the correct question, its factual findings could have been different (26]).

Order

A writ of certiorari was issued to quash the tribunal's decision, and a writ of mandamus directed to the tribunal's successor (the ART) requiring it to remake the decision according to law.

Comment

In *Alsheri*, Judge McCabe said that the tribunal's failure to articulate the statutory test it was applying would not amount to a material error if it was clear from the reasons that the tribunal 'had in mind the correct (even if unarticulated) test' ([25]).

The case of *YJO v YJP* [2025] NSWCATAP 7 provides an example of the latter point. The NCAT Appeal Panel found that the tribunal had misstated the statutory test that it was required to apply but it had then proceeded to apply the correct test. This was evident from the tribunal's consideration of evidence in its reasons for decision. The Appeal Panel concluded that the tribunal's misstatement of the test was an error, but the error was not material to the decision 'in the sense that there is a realistic possibility, as distinct from a probability, that the decision could have been different as a matter of reasonable conjecture but for that error' ([44]). The Appeal Panel dismissed this ground of appeal.

Apprehended bias in two-stage proceeding

In proceedings by a regulator seeking civil penalties against a party for contravention of an Act, it is common practice to split the hearing into two stages. The initial stage is the hearing to determine whether there has been a contravention ('the liability hearing'). If a contravention is found to have taken place, the same judge conducts a further hearing on penalties ('the penalty hearing') at a later date.

In the following case where this practice was followed, the judge made adverse findings on the credit of a party's witness in his reasons for holding the party to be in contravention of the Act. The party proposed to rely on evidence from the same witness in relation to the hearing on penalty. On the party's application the judge recused himself from the proceeding on the question of penalty.

On appeal, the Full Court held by a majority that the recusal was done in error. The majority held that, for purposes of applying the *Ebner* test for apprehended bias, the fair-minded lay observer would be taken to know that views formed by the judge in the liability hearing, including as to the credit of a witness, would be considered in the penalty hearing. The judge in determining the penalty was 'permitted, and in some respects required, to have regard to and apply the findings made in the liability judgment' ([111]).

ASIC v Sunshine Loans Pty Ltd [2025] FCAFC 32

Federal Court of Australia, Full Court (Perram, Bromwich and Covin JJ), 24 March 2025

The Australian Securities and Investments Commission ('ASIC') alleged that Sunshine Loans Pty Ltd ('Sunshine Loans') had contravened the *National Consumer Credit Protection Act 2009* (Cth) ('the Act'). It sought declarations of contravention and orders imposing pecuniary penalties. A hearing was conducted on the usual basis that the question of contravention would be determined first ('the liability hearing'), with the terms of any penalty or relief to be addressed at a later hearing, if required ('the penalty hearing').

At the liability hearing, the judge determined that Sunshine Loans had contravened the Act. His reasons including findings that Mr Powe, a witness called by Sunshine Loans, was 'not credible', that parts of his evidence were 'preposterous', and that he was not trying to give evidence in an honest manner.

Sunshine Loans proposed to rely on evidence from the same witness at the penalty hearing. It asked the judge to recuse himself from the penalty hearing, on the basis that a fair-minded lay observer might reasonably apprehend that the judge, having already made adverse findings about the witness' credit, might not bring an impartial mind to his assessment of the witness' evidence. His Honour accepted the submission, recused himself from the penalty hearing and ordered that the proceeding be transferred for reallocation to another judge.

ASIC appealed this decision, arguing that there was no proper foundation for the primary judge to conclude that there was a reasonable basis for an apprehension of bias.

The court's consideration

Bromwich and Colvin JJ (Perram J dissenting) held that the appeal should be allowed.

Colvin J said that the fair-minded lay observer is taken to be aware of the context of ordinary judicial practice ([139]). It is ordinary judicial practice that, in successive proceedings, the first and second hearing are not separate adjudications and are conducted by the same judge. An observer aware of 'the particular nature of successive hearings' would know that views formed by the judge in the hearing on liability would be carried forward to the hearing on penalty. The observer would not reasonably apprehend, on the basis of credibility findings 'even if firmly expressed', that the judge would not bring an impartial mind to the conduct of the two staged hearing process' ([149], [152], [164]). His Honour determined that the appeal should be allowed.

Bromwich J agreed with Colvin J as to the order, for different reasons. His Honour held that each of the adverse findings that the primary judge made about Mr Powe's evidence and credit addressed issues relevant to both liability and penalty, such as findings as to the nature and extent of the contravention, and the circumstances in which the contravention took place ([72]). In determining ASIC's application for a pecuniary penalty, the judge was required by the Act to consider those findings and was entitled to have regard to any other findings that bear on the question of penalty. Bromwich J said that this conclusion was not confined to the particular statutory regime, but extends to other civil penalty proceedings that have been conducted in this bifurcated way ([111]).

His Honour said that it was a 'conceptual mistake' to treat the previous findings as part of a 'wholly distinct judicial inquiry and therefore capable of giving rise to an apprehension of bias' ([122]). The observer will be taken to understand the connection between the liability and penalty determinations. As the findings of the liability hearing are required or permitted to be considered in the penalty hearing, no 'logical connection' can be established between the credit findings in the liability judgment and the anticipated deviation from determining the penalty stage on its merits ([122]).

Perram J (dissenting) would have dismissed the appeal. His Honour agreed that the primary judge had misdirected himself in determining the application for his recusal but found that the error was not material ([14]). The correct principle to be applied here was set out in *Livesey v New South Wakes Bar Association* (1983) 57 ALJR ('*Livesey*') at 299-300, where it was held that, ordinarily, a fair-minded observer might reasonably apprehend bias by reason of prejudgment 'if a judge sits to hear a case after he has, in a previous case, expressed clear views about … the credit of a witness' whose evidence is of significance in resolving a live factual issue. In the view of Perram J, the principle from *Livesey* applied here even though the two hearings as to liability and penalty were interconnected ([25]).

Where it is necessary for the judge to make credit findings during a liability hearing, that will not, without more, result in disqualification for apprehended bias ([29]). In His Honour's view, the conclusions reached by the primary judge about the evidence of Mr Powe gave rise to a reasonable apprehension of bias because they were not expressed in moderate language ([35]).

Orders

The appeal was allowed and the proceedings remitted to the primary judge to conduct the further hearing as to penalty.

Apprehended bias: generalisation

To promote the efficient disposition of cases, larger tribunals commonly allocate members to hear and determine specialised classes of case within a jurisdictional area on a recurring basis. This may have the consequence that a member brings to the hearing and determination of a matter pre-formed conclusions about a class of persons, a representative or an argument, based on what they have observed in other cases.

In the following case, a member's statements were held to give rise to a reasonable apprehension that he might allow his concerns about the conduct of the applicant's representative and his generalised conclusions from other cases to affect his assessment of the case before him.

Jaggi v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FedCFamC2G 1267

Federal Circuit and Family Court of Australia (Div 2) (Judge D Humphries), 22 Nov 2024

Mr Jaggi, a citizen of India, arrived in Australia on a visitor's visa. Four months later he applied in Australia for a student visa to study a cooking course in Australia. The application was refused by the Minister's delegate on the ground that he did not satisfy the requirements of cl 500.212A of sch 2 to the *Migration Regulations 1994* (Cth) ('the Regulations').

The former AAT ('the tribunal'), constituted with a single member, affirmed the delegate's decision on the ground that the tribunal was not satisfied that the applicant was a genuine temporary entrant for the purposes of the visa as required by the Regulations. In particular, the tribunal 'was not satisfied that the student visa application was not a preconceived plan to come to Australia on a visitor visa and then lodge a student visa whilst onshore' which 'would have misled the Department of Home Affairs in the original visa application' (AAT *Reasons* [21], cited at [15]).

Mr Jaggi applied for judicial review of the tribunal's decision on grounds including apprehended bias said to arise from statements made by the member during the hearing to the Migration Agent who represented Mr Jaggi.

The Court's consideration

Judge Humphries observed that the tribunal had 'significant issues with the conduct of the applicant's Migration Agent as regards his involvement in the matter' ([64]). His Honour found, while the tribunal's concerns about the applicant's representative were justified, a fair-minded lay observer might reasonably conclude that the tribunal member might not approach the matter with an open mind as 'the criticisms of the representative spilled over into the assessment of the applicant' ([74]). In support of this conclusion, His Honour noted the following statements by the member during the hearing.

- At the start of the hearing, before the applicant's case had been opened, the member said he was 'highly likely' to affirm the delegate's decision ([75]).
- In asking questions of the representative the member said: 'I know that 99% of the cooks in India don't come here and study, or don't go offshore to study okay. Failing on the very first point'.

His Honour found that the latter statement suggested that the member was making his decision on the basis of a generalisation about all Indian cooks rather than on the evidence before him in this case ([76]). This apprehension gained additional force from the member's statement to the Migration Agent—

> You have someone who's been coaching him on a pathway. So I don't think he's got a genuine interest in cooking. I know how it works, Mr Singh, you know that. I do nine of these a week, predominantly in exactly the same situation. I can see through it' (AAT Reasons p 14, quoted by Court [76]).

The claim of apprehended bias was upheld.

Order

The tribunal's decision was quashed and the matter remitted to the tribunal for reconsideration.

Adopting copied material into reasons

In previous issues of this Bulletin we have reported appellate court decisions relating to the circumstances in which the copying of material from a party's submission or other sources into a judge's or tribunal member's reasons for decision may give rise to a finding of jurisdictional error. (See Issue 2 of 2023 reporting *Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia* [2023] FCAFC 23, and Issue 1 of 2025 reporting *Atanskovic Hartnell Corporate Services Pty Ltd v Kelly* [2024] FCAFC 137 ('*Atanskovic*')).

In the case noted below, a judge applied those principles to quash a decision of the former AAT for jurisdictional error, finding that the tribunal failed to discharge its statutory function to consider the matter afresh in the review. Significant portions of the tribunal's reasons for decision were found to have been copied from the delegate's decision without attribution or explanation. The copied material included important findings, reasoning and the attribution of weight to discretionary considerations for or against the cancellation of the student visa.

The Court also held that the tribunal's failure to inform the applicant that it proposed to adopt some 'not insignificant' parts of the delegate's findings and reasoning as its own deprived the applicant of the opportunity to comment and respond, thereby denying procedural fairness.

Maazuddin v Minister for Immigration and Multicultural Affairs [2024] FedCFamC2G 1349

Federal Circuit Federal Circuit and Family Court of Australia (Division 2) (Judge Gostencnik), 10 Dec 2024

The applicant Mr Maazuddin was the holder of a temporary student visa that was subject to a condition requiring him to maintain enrolment in a full-time registered course at or above a specified AQF qualification level. A delegate of the Minister found that Mr Maazuddin had breached the condition and that the grounds for cancelling his student visa outweighed the reasons for not cancelling it. The delegate's decision to cancel the student visa under s

116(1)(b) of the *Migration Act 1958* (Cth) ('the Act') was affirmed on review by the former Administrative Appeals Tribunal ('the AAT'). In his application to the Court for judicial review of the tribunal's decision, Mr Maazuddin argued that the AAT fell into jurisdictional error in two respects—

1. that the AAT had copied into its reasons, without attribution, significant parts of the reasons for decision of the delegate who made the decision under review, and had thereby failed to perform its statutory duty to consider the matter afresh; and
2. that the AAT had denied him procedural fairness by failing to inform him that it proposed to adopt specified parts of the delegate's decision as its own.

Ground 1: the copied material from the delegate's decision

His Honour referred to the principles set down in *Atanskovic* [32]-[37]; *Porter v The Queen* [2024] ACTCA 9 [28]-[51] and *MZZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133 at [30], [47]-[53] ('*MZZZW*') holding that—

> Extensive, uncritical and unattributed copying of a party's submission or another decision maker's decision by a tribunal (or by a judge) may amount to jurisdictional error or vitiate a decision where the reasons are such that it should be inferred that they are not the product of the active application of an independent and impartial mind ([33]).

The power to cancel a student visa under s 116(1)(b) involved a broad discretion to weigh considerations for and against cancellation of the visa for a breach of condition. The AAT on review was required to consider for itself whether it was satisfied that Mr Maazuddin's student visa should be cancelled ([35]). As the Full Court of the Federal Court explained in *MZZZW* (at [60], [66]), the tribunal is tasked by statute with considering the applicant's case afresh and exercising its own independent judgment in determining the review. It is also obliged to provide reasons for its own decision, not the reasons of some other decision maker ([6]).

In deciding whether the tribunal has discharged its statutory functions, the Court is required to consider all the circumstances and form an overall impression ([37], citing MZZZW at [54]). The Full Court in *MZZZW* (at [92]) provided a non-exhaustive checklist of factors which might assist in making this assessment.

His Honour found that the copied material included consideration of the same matters, common findings and language in respect of most matters considered, common or similar attribution of weight to the matters considered, common departures without explanation from an instruction in the Procedural Instruction referred to by the delegate, and common errors in the application of some of the considerations listed therein ([46]), [51]). From this analysis His Honour concluded that the material copied included important findings, reasoning and the weighing of considerations against cancellation, and that this material was applied in considering the applicant's individual circumstances. ([58], [59]).

With respect to the first ground of appeal, the Court concluded that the AAT 'failed to bring its own independent mind to the review', and therefore 'failed to discharge the statutory task imposed on it to consider the matter on review for itself afresh' ([59]). This ground of review was upheld.

Ground 2: denial of procedural fairness

Mr Maazuddin further contended that the AAT denied him procedural fairness by failing to give him, as required by s 359A(1)(a) of the Act, 'clear particulars of any information that the tribunal consider[ed] would be the reason, or a part of the reason, for affirming the decision … under review'. He argued that the information that should have been given included substantial parts of the delegate's decision as well as the parts of that decision that the tribunal proposed to adopt as its own. This ground relied upon the decision in *MZZZW* ([92])) where the Full Court of the Federal Court held that the 'information' that a member of the AAT was required to provide included that she proposed to adopt as her own substantial parts of the reasons for another decision of the tribunal.

The Court upheld this ground, holding that the information that the AAT was obliged by s 359(1(a) to provide to Mr Maazuddin was the fact that it proposed to adopt specified parts of the delegate's findings and reasoning as set out in the delegate's decision. The failure to provide this information deprived Mr Maazuddin of the opportunity to comment or respond to it, thereby denying him procedural fairness ([65]).

As the decision whether to cancel the student visa involves a broad discretion, His Honour held that the tribunal's errors were material ([66]).

Order

The Court granted a writ of certiorari to quash the decision of the AAT and a writ of mandamus directing the AAT's successor, the ART, to determine the application for review.

Duty to consider Charter rights

Queensland, the ACT and Victoria have each legislated to recognise specified human rights and to provide that a public authority (including a tribunal) when exercising administrative discretionary power must give proper consideration to any human right that is relevant to the decision to be made. While the *New Zealand Bill of Rights Act 1990* (NZBORA), which also protects human rights, lacks a corresponding provision, the courts have spelled out a similar duty.

In the following case, the Court held that a regulator's decisions to mandate a particular course as continuing professional development ('CPD') for licensees and to cancel an agent's licence for failure to comply did not breach her NZBORA right to freedom of expression, or alternatively, could be characterised as a justified restriction.

Dickson v Real Estate Agents Authority [2025] NZHC 50

NZ High Court (McQueen J), 4 Feb 2025

As the authority responsible for the administration of the *Real Estate Agents Act 2008* (NZ) ('the Act'), the Real Estate Agents Authority ('the Authority') made Practice Rules which required a real estate agency licensee to complete 20 hours of CPD per year. In 2023, the Authority determined that a new course, Te Kākano, was a mandatory course for CPD to be completed by licensees in that year. The 90-minute course was a practical introduction to Māori culture, language, custom and the Treaty of Waitangi.

Section 54 of the Act provides that the Authority is required to cancel a real estate agent's licence if he or she does not complete CPD requirements. A licensee whose licence is cancelled is ineligible to hold a real estate licence for the next 5 years.

A licensed real estate agent, Ms Dickson, applied to the Registrar of Licensed Real Estate Agents ('Registrar') for an exemption from completing the Te Kākano course. The Registrar refused the application on the ground that there were no 'exceptional circumstances' as set out in published guidelines.

Ms Dickson commenced judicial review proceedings against the Authority and the Registrar to challenge the validity of the Practice Rules, the Authority's decision to mandate Te Kākano as CPD, and the Registrar's decision to refuse to grant her an exemption.

The Court's consideration

Ms Dickson's application for judicial review of the Authority's decision to mandate Te Kākano alleged that the decision was illegal, made for an improper purpose, and inconsistent with the right of freedom of expression protected by NZBORA s 14. The first ground of review failed when the Court held that the Practice Rules were valid, rejecting Ms Dickson's narrow interpretation of s 15 of the Act ([122], [133]). The second ground also failed, His Honour holding that the decision to mandate Te Kākano fell within the purposes of the Act by ensuring that all licensees 'achieve a baseline of knowledge that would help consumers' ([155]).

Ms Dickson's third ground of review, that the Authority's decision breached her right to freedom of expression, also failed. His Honour cited *A v Minister of Internal Affairs* [2024] NZSC 63 [138] in which the Supreme Court explained the obligation of a statutory decision maker when making a discretionary decision that might restrict a right protected under the NZBORA. In the words of McQueen J, the decision maker must:

> consider whether the decision is a demonstrably justified restriction of the right in terms of s 5 of the Act and only go forward with the decision if they can, themselves, be satisfied that it is such a justified restriction ([162]).

His Honour held that the duty was not engaged in this case as ‘there was no reasonable prospect that mandating Te Kākano would restrict the right of licensees to freedom of expression’ ([163]). His Honour explained that, in mandating the course, the Authority did not restrict the ability of licensees to express their own opinions or access other information and opinions. It only required them to ‘receive information in a professional context’ ([164]). And even if the Authority’s decision to mandate the course could be characterised as a restriction on the right to freedom of expression, it was a justified restriction ([168]).

Ms Dickson’s cause of action against the Registrar for refusing her application for exemption also failed. She failed to establish her contention that the Registrar’s discretion was unlawfully fettered by a general policy of granting no exemptions.

The application for judicial review was dismissed.