COAT

COUNCIL OF AUSTRALASIAN TRIBUNALS

Guide to Tribunal Practice

6th Edition

Guide to Tribunal Practice

6th Edition

The content of the first edition of this Guide was produced for the Council of Australasian Tribunals by the following team from Monash University:

Authors:	Pamela O'Connor Ian Freckelton Peter Sallmann
Editor:	Bill Potter
Project Manager:	Bernadette McSherry
Research Assistant:	Joanna Kyriakakis

The content of the Guide was revised for the second edition by Professor Andrew Clarke (Head of Victoria Law School, Faculty of Business and Law, Victoria University) with assistance from Zoe Moses.

The content of the Guide was revised for the third and fourth editions by Mark Smyth (Solicitor, Herbert Smith Freehills and co-author of the latest edition of *Control of Government Action*). Anne Britton, Justin Toohey and Emeritus Professor Robin Creyke also reviewed and commented on the fourth edition.

The content of the Guide was revised for the fifth and sixth editions by Dr Pamela O'Connor (Adjunct Professor with the Sir Zelman Cowan Centre, Victoria University and the University of the Sunshine Coast) with the assistance of a COAT committee comprising Mr Malcolm Schyvens, Dr Juliet Lucy, and Justice Kate Glancy.

Published May 2025

ISBN 978-1-7640953-0-3 (printed book)

ISBN 978-1-7640953-1-0 (digital e-book)

›

Contents

Preface to the Sixth Edition .... **ix**
About the Guide .... **xi**
Comments .... **xi**
Abbreviations .... **xii**

CHAPTER 1: THE NATURE OF TRIBUNALS **1**

1.1. Key points **1**
1.2. Jurisdiction and powers **3**
1.2.1. What is a tribunal? 3
1.2.2. Jurisdiction 6
1.2.3. Powers 6
1.2.4 Immunities and protections 8
1.3. Commonwealth and state tribunals in Australia **10**
1.3.1. Separation of judicial and administrative powers 10
1.3.2. Implications for Commonwealth tribunals 10
1.3.3. Implications for state tribunals 10
1.4. Types of tribunals **14**
1.4.1. Administrative, civil and appeal jurisdictions 14
1.4.2. Civil and Administrative Tribunals 17
1.4.3. Diversity of tribunals 18
1.4.4. Tribunal Excellence Framework 19
1.5. Member roles and key competencies **20**
1.5.1. Core skills and abilities—the ARC model 20
1.5.2. Key competencies: the COAT Framework 21
1.6. Appeals, judicial review and administrative law **22**
1.6.1. Types of appeals 22
1.6.2. Nature and grounds of judicial review 23
1.6.3. Judicial review of tribunal decisions 24
1.6.4. Outcomes of judicial review 24

CHAPTER 2: THE LEGAL FRAMEWORK **26**

2.1. Key points **26**
2.2. Sources of law **27**
2.3. Legislation and delegated legislation **28**
2.3.1. Statutes 28
2.3.2. Subordinate or delegated legislation 30
2.4. Statutory interpretation **33**
2.4.1. The role of tribunals in interpreting statutes 33
2.4.2. The Interpretation Acts 34
2.4.3 General approaches to interpretation 35
2.4.4. Use of extrinsic materials 36

2.4.5. The role of legal presumptions ... 37
2.4.6. A method for interpreting a statute ... 40

2.5. Case law as a source of law ... 41
2.5.1. Rules of precedent ... 41
2.5.2 Tribunal decisions as precedent ... 42
2.5.3. Assessing the persuasive value of a non-binding precedent ... 44

3.1. Key points ... 46

3.2. Procedural fairness ... 48
3.2.1. What is procedural fairness? ... 48
3.2.2. What are the justifications for the rules? ... 48
3.2.3. What is the source of the duty? ... 49
3.2.4. What are the consequences of a breach? ... 50

3.3. The hearing rule ... 51
3.3.1. Implication: when does the rule apply? ... 51
3.3.2. Exclusion: when is the rule excluded or modified by statute? ... 51
3.3.3. Content: what procedures does the rule require? ... 53

3.4. The bias rule ... 56
3.4.1. Bias—actual and apprehended ... 56
3.4.2. Disqualifying circumstances ... 57
3.4.3. Operation of the bias rule ... 58
3.4.4. Conflict of interest ... 59
3.4.5. Bias by prejudgment ... 62
3.4.6. Bias by association ... 64
3.4.7. Bias by extraneous communication ... 67
3.4.8. Bias by previous involvement in proceedings ... 67
3.4.9. Management of bias issues ... 69

3.5. Procedural fairness in administrative review and civil proceedings ... 73
3.5.1. Procedural fairness and obtaining information ... 73
3.5.2. Tribunal relying on its own knowledge ... 74

CHAPTER 4: PRE-HEARING AND ADR ... 76

4.1. Key points ... 76

4.2. Case management ... 78
4.2.1. Case management process ... 79
4.2.2. Applications ... 80
4.2.3. Directions hearings ... 84
4.2.4. Conferences ... 85

4.3. Alternative dispute resolution processes ... 86
4.3.1. Definitions of ADR processes ... 86
4.3.2. Tribunal practice ... 88

4.4. Standards for ADR practice and accreditation ... 88
4.4.1 AMDRAS Standards ... 88
4.4.2 Codes of Ethics ... 89

4.4.3. Knowledge, skills and ethics for mediators 90

4.5 Referral to ADR **90**

4.5.1. Referral criteria.. 91

4.5.2 Guides for parties 92

4.5.3. Self-represented parties and ADR 92

4.5.4. Confidentiality and admissibility of evidence 93

4.5.6. Liability of ADR practitioners... 94

CHAPTER 5: HEARINGS **95**

5.1. Key points **95**

5.2. Tribunal proceedings **96**

5.2.1 Inquisitorial powers of tribunals 96

5.2.2. Scope of duty to inquire 97

5.2.3. Duty to disclose adverse information 98

5.3. Preparation and organisation **99**

5.4. Tribunal member's conduct at the hearing **99**

5.4.1. Punctuality 100

5.4.2. Members' attire 100

5.4.3. Members' demeanour 100

5.5. Procedures and processes at hearings **102**

5.5.1. Security procedures 102

5.5.2. Communication 102

5.5.3. Legal representation 108

5.5.4. Preliminary matters 110

5.5.5. Disqualification for bias 112

5.5.6. Non-appearance of parties 113

5.5.7. Adjournments 114

5.5.8. Self-represented parties 116

5.5.9. Managing the hearing 118

5.5.10. Managing disruptions during a hearing 120

5.6. Evidence at hearings **122**

5.6.1. Administration of oath and affirmation 122

5.6.2. Examination-in-chief 123

5.6.3. Cross-examination 123

5.6.4. Questioning by the tribunal 124

5.6.5 Re-examination 125

5.6.6. Telephone evidence 125

5.6.7. Giving evidence via VCT 126

5.6.8. Documentary evidence 127

5.6.9. Closing submissions 128

5.7. Evidentiary issues **128**

5.7.1. Dispensation from the rules of evidence 128

5.7.2. Expert evidence 132

5.7.3. Privilege against self-incrimination 134
5.7.4. Legal professional privilege 135
5.7.5. Receipt of additional material after the hearing 136

CHAPTER 6: DECISION-MAKING AND REASONS 137

6.1. Key points 137

6.2. Decision-making process 139
6.2.1. Preliminary questions 139
6.2.2. Decisions by majority 139
6.2.3. Scope of merits review 140
6.2.4. Formal requirements of a decision 143
6.2.5. Burden and standard of proof 144
6.2.6. Using tribunal knowledge 146
6.2.7. Structuring the decision-making process 147
6.2.8. Making findings of fact 148
6.2.9. Assessing credibility 148
6.2.10. Evaluating expert information 150
6.2.11. Weighing evidence 151
6.2.12. Exercising discretionary powers 152

6.3. Giving reasons 155
6.3.1. Oral reasons 155
6.3.2. Reserved decisions 155
6.3.3 The purposes of reasons 157
6.3.4. Content of reasons 158
6.3.5. Adequacy of reasons 163

6.4. Costs 168

6.5. Orders 169

6.6. Finality 170
6.6.1. *Functus officio* 170
6.6.2. *Res judicata* and issue estoppel 172

CHAPTER 7: COMMUNICATION 177

7.1. Key points 177

7.2. Introduction 178
7.2.1. Communication and tribunal values 178
7.2.2. Innovations in communication 179

7.3. Communication as a competency 180
7.3.1. Communication and fairness 180
7.3.2. Dealing with difference 181
7.3.3. Resources 183

7.4. Dealing with the media 185
7.4.1. General aspects 185
7.4.2. Responding to criticism 186

7.4.3. Media arrangements and protocols 187
7.4.4. Judicial Conference of Australia media booklet 187

CHAPTER 8: CONDUCT 189

8.1. Key points 189

8.2. Introduction 191
8.2.1. Importance of good behaviour 191
8.2.2. On-duty and off-duty activity 192

8.3. Tribunal codes of conduct 192
8.3.1 Content of a code: the ART *Code of Conduct* 193

8.4 Conduct guides 194
8.4.1 Conduct guides—overview 194
8.4.2. The ARC Guide 195
8.4.3 The *Guide to Judicial Conduct* 198
8.4.4 The Judicial Commission of Victoria Guidelines 201

8.5. Performance standards and development 202
8.5.1 Member competency framework 202
8.5.2 Performance standards 203
8.5.3 Education and training 203

8.6 Removal of a member from office 204
8.6.1 Removal under the Judicial Commission Acts 204
8.6.2 Removal under the tribunal's governing Act 207
8.6.3 Process for removal 209

CHAPTER 9: COMPLAINTS 210

9.1 Key points 210

9.2 Who receives complaints about members? 212
9.2.1 Judicial and non-judicial members 212
9.2.2 The Ombudsman 212

9.3 Making a complaint 213
9.3.1 Who can make a complaint? 213
9.3.2 About what matters can a complaint be made? 214
9.3.3 Formal requirements 216

9.4 Complaint handling in tribunals 217
9.4.1 Who handles complaints in tribunals? 217
9.4.2 What standards apply? 217
9.4.3 Principles of complaint handling 218

9.5 The complaint handling process 219
9.5.1 Initial Assessment 219
9.5.2 Notifying the subject person 219
9.5.3 Potential outcomes of complaints process 221
9.5.4 Action outside the complaints process 221
9.5.5 Reporting of complaints 223

CHAPTER 10: RESOURCES, GLOSSARY AND INDEX ... 224

10.1 General references: Law ... 224
10.2 General references: Administrative Law ... 224
10.2.1 Textbooks and casebooks ... 224
10.2.2 Electronic resources ... 225
10.2.3 Government papers and reports ... 225
10.2.4 Guides ... 226
10.2.5 Journals ... 226
10.3 Tribunal education providers ... 227
10.4 Glossary ... 230
10.5 Index ... 233

Preface to the Sixth Edition

The Council of Australasian Tribunals (COAT) was established in 2002 to:

- support the work of tribunals and promote excellence in administrative justice;
- provide a forum and act as a catalyst for discussion, education, research, policy development and law reform in the field of administrative justice;
- promote and encourage tribunals to develop best practice models and standards of behaviour and conduct; and
- develop and provide training material to support tribunal members.

The first edition of the *Guide to Tribunal Practice* ('the Guide'), under the title *Practice Manual for Tribunals*, was produced by COAT in 2005 with financial support from the Standing Committee of Attorneys-General and the Australasian Institute of Judicial Administration Inc. It was envisaged as an accessible, practical and reliable resource to assist members of tribunals to undertake their challenging work.

In the 20 years since the first edition, the Guide has developed into a more comprehensive and detailed work that addresses the increasing complexity of issues presenting in tribunal practice and the changing expectations of tribunal performance. For this sixth edition, it was decided to change the title of the work from 'manual' to 'guide'. The term 'manual' carries the connotation of a set of prescriptive instructions. It was considered that 'Guide' better describes a work that clarifies the issues, principles and techniques from which tribunal members craft solutions to the issues they encounter in their practice.

The sixth edition builds upon the previous editions, and incorporates new material covering, among other topics—

- jurisdictional issues for state tribunals arising from constitutional limits on the exercise of Commonwealth judicial power, as determined in cases including *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16
- the repeal of the Administrative Appeals Tribunal Act 1975 (Cth) and its replacement with the innovative Administrative Review Tribunal Act 2024 (Cth)
- an added commentary on member immunities and protections, in light of recent case developments including *Queensland v Mr Stradford (a pseudonym)* [2025] HCA 3
- a guide to resources for developing trauma-informed and culturally responsive practice, including added material on indigenous disadvantage in Australia and New Zealand
- opportunities and challenges in taking evidence and conducting hearings with the aid of video-conferencing technology

- a new chapter on complaints about tribunal members.

This edition has been achieved under the authorship of Dr Pamela O'Connor, and under the supervision of a COAT committee comprising Justice Kathleen Glancy, President of the State Administrative Tribunal, Dr Juliet Lucy, Presidential member of the ACT Civil and Administrative Tribunal and myself. Dr O'Connor is an Adjunct Professor with the University of the Sunshine Coast, Queensland and the Sir Zelman Cowan Centre at Victoria University, Melbourne.

Since 2022, COAT has published on its website the quarterly *Tribunal Update Bulletin* that reports on significant cases and comments on current issues of interest to tribunal members in all jurisdictions. The Bulletin is directed by a COAT editorial committee, chaired by Ms Anne Britton from its inception until 2024 and currently by Mr Brett Carter. The Bulletin has provided and continues to provide a valuable resource for updating the Guide.

This edition of the Guide is updated by a single editor but, as with previous editions, its content has drawn on the work of many dedicated contributors from across the tribunal sector. COAT warmly acknowledges all of their intellectual contributions to the Guide, including through their publications and presentations to conferences and seminars. Many of these contributions have been made available, with the authors' permission, on the Council's website. Without members' input the Guide would not exist. Members are encouraged to consider how they might contribute to future editions.

Malcolm Schyvens
Chair, Council of Australasian Tribunals

May 2025

About the Guide

Currency of information and updating

This edition was completed in March 2025 and is current to 31 December 2024, although several important cases from early 2025 were received in time to be included.

Comments

The Guide is designed to be a practical resource that assists tribunal members to undertake their duties. The Council welcomes feedback in relation to the form and content of the Guide and, in particular, any suggestions for additional areas that should be covered in it.

Comments may be directed to the following email address: bulletin@coat.asn.au

Abbreviations

ACAT	ACT Civil and Administrative Tribunal
ACAT Act	*ACT Civil and Administrative Tribunal Act 2008* (ACT)
AAT	Administrative Appeals Tribunal (now disestablished)
AAT Act	*Administrative Appeals Tribunal 1975* (Cth) (repealed)
ADR	Alternative Dispute Resolution
AGAC	Australian Guardianship and Administration Council
AIAL	Australasian Institute of Administrative Law Inc
AIJA	Australasian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
AMDRAS	Australian Mediator and Dispute Resolution Accreditation Standards
ARC	Administrative Review Council (Cth)
ART	Administrative Review Tribunal
ART Act	*Administrative Review Tribunal Act 2024* (Cth)
COAT	Council of Australasian Tribunals
NADRAC	National Alternative Dispute Resolution Advisory Council (disestablished)
NCAT	New South Wales Civil and Administrative Tribunal
NCAT Act	*Civil and Administrative Tribunal Act 2013* (NSW)
NMAS	National Mediator Accreditation System
NTCAT	Northern Territory Civil and Administrative Tribunal
NTCAT Act	*Northern Territory Civil and Administrative Tribunal Act 2014* (NT)
ODR	Online dispute resolution
QCAT	Queensland Civil and Administrative Tribunal
QCAT Act	*Queensland Civil and Administrative Tribunal Act 2009* (Qld)
SACAT	South Australia Civil and Administrative Tribunal
SACAT Act	*South Australia Civil and Administrative Tribunal Act 2013* (SA)
SAT	State Administrative Tribunal (WA)
SAT Act	*State Administrative Tribunal Act 2004* (WA)
TASCAT	Tasmanian Civil and Administrative Tribunal
TASCAT Act	*Tasmanian Civil and Administrative Tribunal Act 2020* (Tas)
VCAT	Victorian Civil and Administrative Tribunal
VCAT Act	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)
VCT	Video-conferencing technology

Chapter 1: The Nature of Tribunals

1.1. Key points

- This chapter introduces key concepts, terminology and categories used in the Guide.

Jurisdiction and powers:

- The meaning of 'tribunal' is broad and elusive. The Guide uses COAT's definition, which excludes 'domestic tribunals' which derive their powers from contract, and tribunals which do not have dispute resolution functions.
- Most tribunals are established by, and derive their powers from, legislation.
- As the Australian Constitution requires a separation of the administrative and judicial powers of the Commonwealth, federal tribunals have only administrative jurisdiction.
- The lack of a strict separation of powers in the constitutions of the Australian states and territories and in New Zealand has enabled legislatures to transfer from the courts to tribunals the function of hearing and determining many types of civil claims.
- Each Australian state and territory has amalgamated most of its specialised administrative and civil tribunals into a large multi-jurisdictional tribunal or 'CAT'.
- The separation of powers under the Australian Constitution entails significant limitations on the powers of state tribunals in cases that raise issues of federal law.

Nature and variety of tribunals:

- In all jurisdictions, administrative tribunals are empowered to make certain administrative decisions or review certain administrative decisions made by an official or body as primary decision-maker.
- State, territory and New Zealand tribunals may be empowered to hear and determine civil claims by determining the legal rights and liabilities of the parties.
- Tribunals operate in a broad range of subject areas.
- Tribunals are also diverse in their membership and mode of operation.
- Many administrative tribunals review decisions on the merits by way of a hearing de novo, following the model pioneered by the former Administrative Appeals Tribunal.
- A right to apply to a tribunal for review of a decision must be given by a statute, and the powers of the tribunal on review are defined by different statutes in varying terms.

Role of tribunal members:

- While their professional backgrounds may be diverse, tribunal members require a common set of core skills and abilities. The Council of Australasian Tribunals

(‘COAT’) has identified eight key competencies for tribunal members, listed in this chapter.

Judicial review and administrative law

- Apart from appeals or reviews under statute, a person affected by a decision of an administrative agency, court or tribunal may have a right to apply to a court for judicial review.
- The power of the courts to undertake judicial review derives from the common law and is also recognised by legislation in each jurisdiction.
- Judicial review is only available on a limited basis, confined to the established grounds of review.
- The principles of administrative law largely derive from decisions of courts undertaking judicial review.

1.2. Jurisdiction and powers

1.2.1. What is a tribunal?

There is no single definition of the term 'tribunal' which can adequately describe the range of bodies to which the term is applied, and that can distinguish tribunals from courts and from the ordinary agencies of government.[1]

The legal meaning of the term 'tribunal' is broader than its use in ordinary or everyday speech. A court can be called a tribunal—and so can any official or body with power to make decisions affecting the rights and interests of individuals or corporations in accordance with procedures laid down by law. The term needs to be understood and applied in its particular context and setting.

Pearson has identified the following common features of Australian tribunals.[2]

- They are established by statute, with legal authority to make decisions.
- When exercising the function of reviewing administrative decisions, they are independent of the original decision-maker.
- They are obliged to give reasons for their decision.
- They may be constituted by members with expertise in the matters coming before the particular tribunal.
- They are subject to the supervisory or appellate powers of a court.
- Their procedures are intended to be less formal than those of the courts, with an emphasis on negotiated dispute resolution.

Not all tribunals are established by government or will exhibit all of these features. Many tribunals arise in the private 'for profit' and the 'not-for-profit' sectors. Private sector tribunals may arise in various areas of endeavour. For example, sporting, religious, professional, industrial and cultural associations often establish tribunals to deal with complaints and disputes arising under their particular rules. These are often referred to as 'domestic tribunals'.[3] They differ from statutory tribunals in that they derive their powers from contract rather than from legislation. That is, their authority comes from the members' agreement to abide by the association's rules. The tribunals must comply with the rules of the association but are not subject to the general legal requirements that apply to statutory tribunals.

---

1 The meaning of 'tribunal' in s 17(2) of the *Disputes Tribunal Act 1988* (NZ) was judicially considered in *Parry Field Lawyers Ltd v Disputes Tribunal at Christchurch* [2023] NZHC 1829.

2 L Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' (paper presented at the ANU's Public Law in the Age of Statutes Conference, ANU, 24 October 2014).

3 Domestic tribunals are not covered in this Guide. For coverage, see JRS Forbes, *Justice in Tribunals* (6th ed, Federation Press, 2024).

A discussion of courts and tribunals in Australia requires consideration of the federal context. Australia has nine separate parliaments, comprising:

- the Australian Parliament based in Canberra
- the six state parliaments for New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania
- the territory parliaments of the Northern Territory and the Australian Capital Territory.

There is a functional distinction between courts and tribunals at the Commonwealth (federal) level, as the Australian Constitution requires a separation of administrative from judicial powers. At the federal level, only courts may exercise judicial power under the Constitution (Chapter III, ss 71–80).[4] Section 71 provides:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

In the states and territories of Australia, and in New Zealand (which has a unitary rather than a federal system of government), there is not the same strict constitutional separation of form and function as there is at the federal level of government in Australia.[5] Courts and tribunals may be less easy to distinguish. For example, the Disputes Tribunal is established as a division of the District Court,[6] and QCAT and the Dust Diseases Tribunal are each established as 'a court of record'.[7]

As sovereign law-making bodies, and subject to the constitutional restrictions noted above, Parliaments may choose to give a function to a tribunal rather than a court. It will usually be for one or more of the following reasons.

- *Limitations of judicial review.* Courts are tasked with judicial review of administrative decisions. Judicial review is, broadly speaking, concerned with the legality of a decision. Administrative review tribunals tasked with merits review can, by contrast, re-exercise the powers of the original decision-maker, and can therefore offer external review of both the legality and the merits of an administrative decision.[8]

---

4 Judicial power in relation to Chapter III is a power to make a conclusive determination of a dispute between parties about existing rights: *Huddart, Parker & Co Pty Ltd v Moorehead* [1909] 8 CLR 36; (1909) 8 CLR 330, 357 (Griffiths CJ).

5 Although state parliaments cannot confer powers on a state Supreme Court that would impermissibly undermine the institutional integrity of that court: *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

6 *Disputes Tribunal Act 1988* (NZ) s 4.

7 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') s 164; *Dust Diseases Tribunal Act 1989* (NSW) s 4(2).

8 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 327. The distinction between judicial review and administrative review on the merits is explained further in this chapter at **1.4.1.4** and **1.6.2.**

- *Informality of process and economy.* Tribunals are able to operate more flexibly and informally than courts. This makes them more accessible to parties and saves costs by reducing the practical need for parties to have legal representation.
- Many tribunals are 'no costs' jurisdictions where parties are not at risk of an adverse costs order if they are unsuccessful.
- *Specialist members.* Tribunals may be staffed with members with specialist skills and expertise in areas other than law, as well as those with legal qualifications. This makes tribunals an attractive forum for decision-making in specialised areas, such as planning and disability assessments.
- *Members on flexible terms*. From the government's point of view, the membership of tribunals is more flexible than for the courts. The government may appoint part-time members on fixed-term contracts, whereas judges are appointed until a specified retirement age and can generally be removed only upon a vote of both Houses of Parliament.

At the other end of the spectrum of powers, the functions of tribunals and administrative agencies overlap. Where the Parliament wants to provide for a body to make administrative decisions or to review decisions made by an official, it can give the function to a tribunal or to an administrative agency of government, such as a department of state. If Parliament chooses to give the function to a tribunal, the usual reason is that it wants the decision making or review carried out with some degree of independence from a Minister. In some cases, governments have established tribunals to exercise regulatory functions. An example is the Independent Pricing and Regulatory Tribunal of New South Wales (IPART), which oversees the regulation and pricing of industries operating as state monopolies and provides policy advice to the government.

Since there is no agreed definition of 'tribunal', it is necessary to specify the categories of tribunals to which this Guide refers. The Guide is written for and about tribunals that are eligible for membership of COAT. Under clause 2(1) of the COAT Constitution,[9] an 'eligible tribunal' is:

> [A]ny Commonwealth, State, Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.

This definition excludes domestic tribunals (see above), which operate in the private sector under contractual powers. It also excludes government bodies whose functions are primarily regulatory, advisory, policy making or investigatory.

---

[9] *Constitution of the Council of Australasian Tribunals* (9 June 2017) <coat.asn.au>. Most Australian and New Zealand tribunals fitting COAT's qualification for membership are listed in COAT's *Register of Tribunals* <coat.asn.au>.

1.2.2. Jurisdiction

There is an important difference between a tribunal's jurisdiction and its powers. The word 'jurisdiction' has different meanings according to context.

- *Geographic territory*. *Jurisdiction* can refer to the territory within which a power extends. Because of Australia's federal structure of government, each state and territory and the Commonwealth is a separate jurisdiction in the territorial sense. New Zealand is one jurisdiction, and there are nine Australian jurisdictions.
- *Subject matter: Jurisdiction* can describe, in a general way, the kinds of matters that a tribunal is authorised to decide. For example, the *taxation jurisdiction* of a tribunal can mean its powers to determine taxation matters. If a tribunal purports to determine a matter that it has no power to decide, it lacks jurisdiction and its decision, if challenged, may be invalidated.
- *Form of review: Jurisdiction* may refer to the form of decision-making, review or appeal that the tribunal is tasked with undertaking. For example, the *review jurisdiction* and the *original jurisdiction* of the Civil and Administrative Tribunals (CATs) of the states and territories refer to different kinds of powers. The CATs exercise 'review jurisdiction' when they review decisions made by another administrator or tribunal, and 'original jurisdiction' in all other matters.

The scope of a power. A narrower meaning of *jurisdiction* refers to the scope of a particular power given to a tribunal. Whenever Parliament gives a power to a tribunal, it sets limits to the power. The limits may be express (that is, stated in writing) or implied (as a result of, or flowing from, the written power). The limits may relate to the procedures for exercising power or to the type of orders the tribunal can make.

1.2.3. Powers

A tribunal's powers refer to the actions the tribunal may take and the decisions it may make within the scope of its jurisdiction. It is conventional to refer to a tribunal's powers to make a decision, rather than its power to act, because actions are based upon decisions.

1.2.3.1. Sources of power

Most tribunals are established by statute, and their powers are conferred by statute. More rarely, public sector tribunals may be established under executive power of government. For example, a Minister who has the function of reviewing government decisions may establish a tribunal to hear the applications and to make recommendations.

Statutory tribunals have only the powers that parliament has given them. A tribunal must be able to point to a legislative provision authorising any decision that it makes. The provision may be found in the tribunal's 'governing Act'—the particular Act of parliament (and any rules or regulations made under it) that establishes the tribunal and sets out its general powers, membership and procedures. Powers may also be given to the tribunal by another Act, called an 'enabling Act' or an 'empowering Act' to determine or review specified classes of decision or matter. For example, the *Freedom of Information Act 1982* (Vic) gives the VCAT power to review certain decisions of government agencies made under the Act.

Most powers are given expressly by legislation, but there may also be an 'incidental' power to do anything that is reasonably necessary to make the express power effective. An example of an incidental power is given in **Chapter 1** at **1.3.3.2**. Certain powers may also be implied from a statute. For example, a tribunal exercising merits review functions may consider evidence received up to the time of its decision, because that is inherent in its statutory function of re-exercising the power of the primary decision-maker.

1.2.3.2. Duties and discretionary powers

Some powers of a tribunal are duties, often indicated by words like 'the Tribunal shall (or must) [do something]'. Other powers given to tribunals have an element of discretion. They require the tribunal to exercise judgment and/or to make a choice between different decision outcomes or ways of proceeding where more than one course of action is available. A *discretionary power* is commonly indicated by the form of words: 'the Tribunal *may* [do something]'.

The discretion given to tribunals is not boundless.[10] The High Court of Australia has explained that:

- '[T]he extent of ... discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment'.[11]
- The discretion conferred by statute is 'intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour'.[12]
- '[T]he requirement that officials exercising discretion comply with the canons of rationality means, inter alia, that their decisions must be reached by reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes of the power. Those canons also attract requirements of impartiality and "a certain continuity and consistency in making decisions".'[13]

A tribunal which has a discretionary power must—

- follow the required statutory process and afford the parties procedural fairness (see **Chapter 3**)
- consider relevant criteria
- ignore any irrelevant considerations

---

10 *Wotton v Queensland* (2012) 246 CLR 10 [10].

11 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 368 (Mason J).

12 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189 (Kitto J).

13 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [25] (French CJ).

- reach its decision following a reasoned and intelligible reasoning process.

Broadly speaking, there are three useful types of operating model for tribunals in this regard.[14]

- *Fully structured discretion*. Sometimes the Act itself sets out an exhaustive list of the relevant considerations. In this case, the discretion is said to be 'fully structured' by the Act.
- *Partial discretion.* More commonly the Act specifies a list of matters to be considered, leaving the tribunal free to consider other relevant matters. This is a 'partly structured' discretion.
- *Unstructured discretion.* The Act might specify no criteria at all. If the discretion is unstructured or partly structured by the statute, it does not mean that the discretion is at large. The discretion is confined by the scope and purposes of the statute.[15]

Apart from the enabling Act, another Act may specify a relevant criterion that the tribunal must consider. For example, human rights Acts in Victoria, Queensland and the Australian Capital Territory provide that public authorities (which for some purposes include administrative tribunals) must act consistently with human rights and must give due consideration to a relevant human right when exercising administrative powers.[16]

1.2.4 Immunities and protections

Judges of the Supreme Courts have long enjoyed immunity from civil liability and criminal prosecution for anything they do while acting judicially. 'Acting judicially' means acting bona fide as a judge with the belief (or mistaken belief) that they have jurisdiction.[17] The purpose of these immunities and protections is to preserve the independence of judges.

Legislation has extended similar immunities and protections to judicial officers of 'inferior courts' (that is, lower courts) and to members of some tribunals. For example, section 44B of the *Judicial Officers Act 1986* (NSW) gives all judicial officers the same protection as a judge of the NSW Supreme Court. Section 293(1)(a) of the *Administrative Review Tribunal Act 2024* (Cth) ('ART Act') gives a member of the tribunal 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.[18] Some other tribunal Acts confer similar protection on members, such as the *Personal Injury Commission Act 2020* (NSW) sch 2

---

14 KC Davis, *Discretionary Power: A Preliminary Inquiry* (Baltimore, Md and, Baton Rouge, La, 1969, revised 1979), 50–1, 216–18.

15 *O'Sullivan v Farrer* (1989) 168 CLR 210, 216.

16 See **Chapter 6** at **6.2.12.2**.

17 *Sirros v Moore* [1975] QB 118 R, 135D (Lord Denning MR).

18 Eg SAT Act s 163(2); VCAT Act s 143(1), TASCAT Act s 140(1). In *Singh v Charles* [2022] NSWSC 743 a senior member of NCAT was held entitled to rely on his statutory judicial immunity under the NCAT Act sch 2 cl 4 to secure the dismissal of actions in tort brought against him by a party to an NCAT proceeding.

s 4, and the *Mental Health and Wellbeing Act 2022* (Vic) s 335(1) (for members of the Mental Health Tribunal).

Some tribunal Acts confer protection on members in terms of the conditions under which they enjoy immunity, rather than by analogy with the immunity of judges. This type of provision is exemplified by the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (‘NTCAT Act’) s 147, which provides that ‘a person is not civilly or criminally liable for an act done or omitted to be done in good faith in the actual or purported exercise of a power or function as a member or under the Act or any other Act’.[19] A similar formulation is found in the *Immigration Act 2009* (NZ) sch 2 s 6 with respect to the Immigration and Protection Tribunal.

Some Acts are more detailed in defining the subjective element in the condition. The *ACT Civil and Administrative Tribunal Act 2008* (ACT) (‘ACAT Act’) s 116 protects members from personal liability ‘for conduct done honestly and without recklessness in the exercise of a function under th[e] Act or in the reasonable belief that the conduct was in exercise of a function under th[e] Act’.

Following a 2025 decision of the High Court, it is now clear that a judge of an inferior court may rely on common law judicial immunity to the same extent as a judge of a superior court.[20] In *Stradford v Judge Vasta* [2023] FCA 1020, a judge of the Federal Circuit Court of Australia had ordered the imprisonment of Mr Stradford for contempt. Mr Stradford sued the judge, the Commonwealth and the State of Queensland in tort. The Federal Court (Wigney J) held that in making the imprisonment order the judge acted ‘without or in excess of jurisdiction’.[21] His Honour held that the ‘manifest jurisdictional error’ deprived the judge of his common law judicial immunity in making the imprisonment order and proceeded to hold the judge liable in damages for the tort of false imprisonment.[22]

The High Court of Australia allowed an appeal from that decision. The plurality observed that the purpose of judicial immunity ‘is to facilitate the independent performance of the judicial function free from the spectre of litigation, as well as to enhance the finality of judgments quelling legal controversies.[23] Those objectives apply equally to inferior and superior courts.

See also **Chapter 4** at **4.5.6** on the liability of ADR practitioners.

---

19 See also ACAT Act) s 116.

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

21 *Stradford v Judge Vasta* [2023] FCA 1020 [17], [361] – [372], [374].

22 Ibid [2023] FCA 1020 [375].

23 *Queensland v Mr Stradford (a pseudonym)* [2025] HCA 3 [2], Gageler CJ, Gleeson, Jagot and Beech-Jones JJ [footnotes in citation omitted]

1.3. Commonwealth and state tribunals in Australia

1.3.1. Separation of judicial and administrative powers

The Australian Constitution incorporates the principle of separation of powers. Chapter I of the Constitution vests the legislative power of the Commonwealth in the Commonwealth Parliament, Chapter II establishes the Executive Government as the administrative or executive arm of the Commonwealth, and Chapter III vests the judicial power of the Commonwealth in the High Court of Australia and the federal court system.

The High Court strictly enforces the separation of Commonwealth judicial power from the other powers and has spelled out two related consequences. The first is that only a 'court' for the purposes of Chapter III of the Constitution may exercise the judicial power of the Commonwealth.[24] The second is that federal courts cannot exercise executive or administrative power.[25] In *R v Kirby; Ex parte the Boilermakers' Society of Australia*, the High Court applied these principles to hold that a tribunal established to arbitrate industrial disputes could not fine a union that had breached its order.[26] Imposing a fine is a judicial function, which could not be given to a non-judicial body or combined with non-judicial powers.

1.3.2. Implications for Commonwealth tribunals

The strict separation of Commonwealth judicial power from non-judicial power has important implications for the structure of the Commonwealth administrative justice system. Courts can review an administrative decision to determine if it is lawful, since this is a judicial function. But if the Australian Parliament wishes to empower somebody to review administrative decisions on the merits and re-exercise the powers of the original decision-maker, it cannot give the function to a court. Since the re-exercise of an administrative power is administrative in nature, it cannot be given to a federal court but it can be given to a federal tribunal.

A Commonwealth tribunal may also be given a range of alternative dispute resolution functions, such as mediation, conciliation and arbitration, as they do not involve an exercise of judicial power.

1.3.3. Implications for state tribunals

In the Australian states and territories, as in New Zealand, no constitutional barrier prevents the Parliament giving judicial powers of a state or New Zealand to tribunals that are not part of a court.[27] For example, state tribunals have been held to exercise judicial power when they make

---

24 *R v Kirby; Ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254, 270.

25 Ibid 296.

26 Ibid.

27 See, eg *Medical Board of Australia v Kemp* (2018) VR 51; [2018] VSCA 168 [74].

an order for vacant possession on termination of a residential tenancy,[28] determine a consumer dispute under the *Fair Trading Act 1999* (Vic),[29] and make a determination of unlawful discrimination against a person under the *Equal Opportunity Act 2010* (Vic).[30] State and territory and New Zealand tribunals can be given power to make binding adjudications of disputes between private parties, to enforce their own decisions, and to grant 'judicial' remedies such as an injunction.

1.3.3.1 Diversity jurisdiction

The conferral of judicial powers on state tribunals by legislation is subject to an important limitation. As a result of the operation of s 77(iii) of the Constitution and s 39(2) of the *Judiciary Act 1903* (Cth), only a 'court of a state' can hear and determine a 'federal matter' arising under ss 75 and 76 of the Constitution.[31] The question of what is a 'matter' is complex but is closely related to the exercise of judicial power.[32]

Adjudication of disputes between residents of different states ('diversity jurisdiction') is a 'matter' under s 75(iv) of Constitution, which can be heard by a 'court of a state' within the meaning of the *Judiciary Act 1903* (Cth). To determine whether a state body is 'a court of a state' requires evaluation of multiple criteria. QCAT, which is established as a court of record, has been held to be a court of a state,[33] while VCAT, NCAT and SAT have been held not to be.[34]

A federal 'diversity jurisdiction' problem arises when the tribunal is asked to adjudicate a dispute between residents of different states.[35] This means, for example, that a State tribunal such as NCAT cannot adjudicate a residential tenancy dispute between a resident of New South Wales and a resident of another state.[36] Each state tribunal seeks to identify such cases at the earliest stage, so that they can be dealt with by referral to a court or under other arrangements.

---

28 *Attorney-General South Australia v Raschke* (2019) 133 SASR 215; [2019] SASCFC 83; *Director of Housing v Sudi* [2010] VCAT 328 [119].

29 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [275]. See, generally, E Nekvapil, *Pizer's Annotated VCAT Act* (6th ed, Lawbook Co, 2017) [VCAT 8.50].

30 *Meringnage v Interstate Enterprises Pty Ltd* [2020] VSCA 30 [109] ('*Meringnage*'). (VCAT was established as a tribunal, not as a court of record: at [36]).

31 *Burns v Corbett* (2018) 265 CLR 304; (2018) 353 ALR 386; [2018] HCA 15 ('*Burns v Corbett*'); *Judiciary Act 1903* (Cth) s 39.

32 The Hon Robert Beech-Jones CJ, 'The Constitution and State Tribunals' (2023 Whitmore Lecture, 17 May 2023), 5 <coat.asn.au>. In *Burns v Corbett*, ibid [70], Gageler J defined 'matter' as 'a concrete controversy about legal rights existing independently of the forum in which [it] might be adjudicated'. It is not a legal proceeding but a justiciable controversy about immediate rights or liabilities: *BHP Group Ltd v Impiombato* [2022] HCA 33 [50] (Gordon, Edelman and Steward JJ).

33 *Owen v Menzies* (2012) 265 FLR 392; [2012] QCA 170: see QCAT Act s 164(1).

34 *Attorney-General for NSW v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254; *Meringnage*, above n 30 [80]-[98]; *GS v MS* (2019) 344 FLR 386; [2019] WASC 255 [23].

35 This means natural persons who are permanent residents of other states at the date of the application.

36 *Attorney-General for NSW v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254. And see *Meringnage*, above n 30 .

Following the decision in *Burns v Corbett*,[37] the states legislated new provisions for the transfer of proceedings which invoke federal diversity from tribunals to the courts, and also allow a party to file certain proceedings in a court. For example, the *South Australian Civil and Administrative Tribunal Act 2013* (SA) ('SACAT Act') Part 3A provides for the transfer from the tribunal to the Magistrates Court of applications involving federal diversity jurisdiction, and in relation to the transferred proceeding gives the court all the powers that SACAT would have had if it could exercise federal diversity jurisdiction.[38]

1.3.3.2 Issue arising under the Constitution or a Commonwealth law

The diversity jurisdiction involving interstate parties is not the only way in which a federal jurisdiction issue can arise for state tribunals. A state tribunal which is not a 'court of a state' cannot exercise Commonwealth judicial power in any class of 'matter' listed in ss 75 and 76 of the Constitution.[39] This includes a matter arising under the Constitution or its interpretation,[40] or under a Commonwealth statute,[41] or where the Commonwealth is a party.[42]

In *Citta Hobart Pty Ltd v Cawthorn* ('*Citta Hobart*'),[43] Mr Cawthorn, who used a wheelchair, made a complaint to a Tasmanian Anti-Discrimination Tribunal that the appellants (the developer and the owner of a building) had discriminated against him by failing to provide adequate disability access contrary to the *Anti-Discrimination Act 1998* (Tas). In their defence the appellants claimed that they had complied with building standards made under s 31(1) of the *Disability Discrimination Act 1992* (Cth). Both the State and the Commonwealth had legislated in relation to discrimination against people with disabilities. The appellants argued that this raised an inconsistency between State and Commonwealth laws under s 109 of the Constitution, which was a matter that could be determined only by a court recognised under Chapter III of the Constitution.

The High Court held that the case involved a 'matter arising under the Constitution or involving its interpretation' under s 76(ii) of the Constitution and was therefore beyond the jurisdiction of a state tribunal. The Court made the following points about the existence and scope of a 'matter' for the purposes of ss 75 or 76 of the Constitution:

---

37 Above n 31.

38 SACAT Act s 38C. A similar amendment was made to the *South Australian Employment Tribunal Act 2014* (SA) pt 6AB.

39 *Burns v Corbett*, above n 31; *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216; [2022] HCA 16 ('*Citta Hobart*').

40 Such as whether a state law is inconsistent with a Commonwealth law for purposes of s 109 of the Constitution: *Citta Hobart*, ibid.

41 See example in *Murphy v Trustees of Catholic Aged Care Sydney* [2018] NSWCATAP 275.

42 As in *Meringnage*, above n 30 where the Victorian Court of Appeal held that VCAT lacked jurisdiction to make a determination of unlawful discrimination against a Commonwealth department.

43 (2022) 276 CLR 216; [2022] HCA 16.

- Where a Commonwealth law is relied on as the source of a claim or a defence asserted, that may meet the description in s 76(ii) of a matter 'arising under a law made by the Commonwealth Parliament'.
- Where the invalidity or inoperability of a Commonwealth or State law under the Constitution is asserted, that may be characterised as a 'matter arising' under the Constitution within the meaning of s 76(i).
- In each case, the assertion operates to characterise the whole of the controversy, even when the assertion is later resolved or withdrawn.[44]

In *Citta Hobart*, the appellants' defence that the State law was inoperable for inconsistency with a Commonwealth law formed a single controversy with Mr Cawthorn's claim, rendering the whole controversy a federal 'matter'.[45]

The Court offered some additional comment which may be helpful to tribunals:

- Provisions in state Interpretation Acts provide that an Act 'shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State'.[46] In some cases, inconsistency of a state law with a Commonwealth law might be avoided by applying the interpretation provisions to construe 'a State law conferring State jurisdiction on a State tribunal' as excluding jurisdiction in a federal matter.[47] That is, the grant of jurisdiction to the tribunal is 'read down' so far as possible to deny jurisdiction to the state tribunal in respect of the matter.[48]
- While it cannot do so conclusively, a state tribunal has an incidental jurisdiction to determine for itself whether it has jurisdiction to hear and determine an application.[49] This is true whether it exercises state judicial or administrative power.[50] If the tribunal wrongly decides it has jurisdiction to hear the application, any order it makes in the proceeding will be 'wholly without legal effect'.[51]
- The threshold for raising a claim or defence under federal law is low. 'It is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument'.[52] It

44 Ibid [31], [33].

45 Ibid [33].

46 *Interpretation of Legislation Act 1984* (Vic) s 6(1), *Acts Interpretation Act 1954* (Qld) s 9; *Acts Interpretation Act 1915* (SA) s 22A; *Interpretation Act 1987* (NSW) s 31; *Acts Interpretation Act 1931* (Tas) s 3; *Interpretation Act 1984* (WA) s 7.

47 *Citta Hobart*, above n 39 [1]. Robin Creyke AO comments that this proposed solution to the problem posed by the decision in *Citta* remains to be tested: Creyke, 'From sewers to "super" adjudicators: What next for tribunals?' (2023) 107 *AIAL Forum* 31, 33.

48 See also, *Burns v Corbett* [2018] HCA 15 [64], [120]

49 *Citta Hobart*, above n 47 [21]-[24], [62] – [65].

50 Ibid [25]-[27]; *Qantas Airways v Lustig* [2018] FCA 253 [62].

51 Ibid [27].

52 Ibid [35].

is not for a state tribunal to make its own assessment of the merits of the claim or defence, unless it is mere nonsense.[53]

1.4. Types of tribunals

For certain purposes under Australian law, it is important to determine whether a jurisdiction exercised by a particular tribunal is administrative in character. For example, a tribunal exercising administrative powers is subject to certain duties under human rights legislation in some jurisdictions (see **Chapter 6** at **6.2.12.2**).

1.4.1. Administrative, civil and appeal jurisdictions

1.4.1.1 Administrative jurisdiction

Administrative tribunals are empowered to exercise statutory powers of an administrative nature.[54] They may be the decision maker at first instance (eg, in granting an exemption under anti-discrimination legislation), or they may re-exercise powers in reviewing decisions made by an administrative body or official (eg, reviewing a planning decision of a local authority).

Tribunals with administrative jurisdiction exist at Commonwealth, state and territory levels of government in Australia, and in New Zealand. In Australia, the different range of subject matters dealt with by state and territory and Commonwealth tribunals reflects the division of legislative power under the Australian Constitution. The types of matters which an administrative tribunal may determine vary by jurisdiction. They may include review of decisions in one or more of the following areas: planning and environment, land valuation and compensation, migration, determination of refugee status, taxation assessment, licensing, broadcasting regulation, freedom of information, allocation of mining rights, resources and development, film and literature classification, parole, pensions and benefits, public housing, compensation for crimes, and administration of benefits under financial assistance programs.

Tribunals exercising disciplinary powers hear proceedings brought against practitioners of a particular profession, occupation or industry and exercise 'quasi-penal' powers,[55] for example, by suspending or terminating an individual's right to practise, imposing conditions on practice, or administering a fine or reprimand. While the order may be experienced by the individual as penal, disciplinary powers serve the administrative purpose of regulating an activity to protect the public.[56]

---

53 Ibid [37].

54 In this Guide, the term 'administrative tribunal' is used in an elliptical manner to mean a tribunal exercising administrative jurisdiction. A 'disciplinary tribunal' exercises a disciplinary jurisdiction, and so on. This may be just one function conferred on a tribunal which possesses multiple jurisdictions.

55 Forbes, above n 3, 1.

56 In *Sabet v Medical Practitioners Board* (2008) 20 VR 414; [2008] VSC 346 at [127], the Board was found to be acting in an administrative capacity when it disciplined a practitioner for misconduct.

Tribunals making guardianship and administration decisions and mental health decisions exercise a 'protective' jurisdiction. They are empowered to make orders to safeguard the interests of vulnerable persons in special need of the protection of the state.[57]

1.4.1.2 Civil jurisdiction

In the states and territories and in New Zealand, tribunals have taken over from the courts the determination of some 'civil' *inter partes* disputes in which the tribunal makes an enforceable determination of the legal rights of parties following an adjudicative process.

Due to the separation of powers described in this Chapter at **1.3.1**, Commonwealth tribunals cannot make a binding determination of the legal rights of parties to a controversy through an adjudicative process. It is 'constitutionally impossible' for the Commonwealth Parliament to establish a tribunal to adjudicate 'disputes about existing rights under federal law between citizens or between citizens and the state'.[58]

The classes of civil disputes determined by tribunals vary and may include matters such as motor vehicle accident compensation, workers compensation, insurance, superannuation, consumer credit, building disputes, mining activity, discrimination, strata title, retirement village, co-owned land and goods, residential, retail and commercial tenancy disputes, fences and neighbour issues and consumer disputes. In general, the civil jurisdiction of tribunals was formerly exercised by courts.

1.4.1.3. Original, review jurisdiction and appeal jurisdiction

Some of the tribunal Acts distinguish between 'original' and 'review' jurisdiction. In its original jurisdiction, both civil and administrative matters may be determined by a tribunal at first instance.

Administrative powers that may be exercised by a tribunal in its original jurisdiction include applications for guardianship and administration orders, compensation for crimes, mental health orders, and some occupational licensing and disciplinary matters.[59]

In its review jurisdiction the tribunal determines applications for review of administrative decisions made by government bodies or officials under statutory power. (These matters are

---

[57] The powers of tribunals to make guardianship and administration orders were characterised as administrative in *PJB v Melbourne Health* [2011] VSC 327 at [125], [129]. See also *GS v MS* [2019] WASC 255 at [103], [104]. In *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [312], [315], the Mental Health Review Board was held to act administratively when making involuntary treatment orders. The characterisation of a tribunal's powers as administrative or judicial can vary according to the jurisdiction and the terms of the Act which confers the powers in question: E Nekvapil, *Pizer's Annotated VCAT Act* (6th ed, Lawbook Co, 2017) at [8.50].

[58] Beech-Jones, above n 32, 2, 6.

[59] Some matters arise in the review jurisdiction. For an overview of what disciplinary tribunals do, see E Wentworth, 'Disciplinary Hearings in the Regulated profession: Procedural Fairness Issues' (paper presented to COAT Conference 'Tribunals Boards and Panels—Issues of Procedural Fairness, Melbourne, April 2016) [6]–[12] <coat.asn.au>.

also sometimes referred to as 'administrative appeals'). The decision that is the subject of the review is the 'original' or the 'primary' decision.

There is no review jurisdiction for civil matters, as the tribunal determines the dispute at first instance.

Some tribunals have an appeal division or panel vested with an 'appeal jurisdiction' to hear an appeal from a decision of a member or panel of the tribunal sitting at first instance in a civil or administrative matter.[60] In some cases the appeal may be heard only by leave of the appeal panel.[61] The grounds for appeal may be limited. The scope of an appeal from a first instance decision, and the decision outcomes open to the appeal panel, vary according to the legislation. The Act that gives the right to appeal usually specifies a time for lodging the appeal and empowers the appeal panel to grant an extension of the time on application.

1.4.1.4. De novo merits review tribunals

The scope of each tribunal's review function varies. The High Court has observed that 'the word "review" has no settled pre-determined meaning; it takes its meaning from the context in which it appears'.[62]

'Merits review' is a type of administrative appeal in which a tribunal reviews the decision of a government official or body (the 'original' or 'primary' decision maker) 'on the merits'. Ordinarily the tribunal must make its own assessment of the merits of the matter in dispute (rather than just the lawfulness or correctness of the primary decision), and re-exercises the powers of the original decision maker.[63]

The fullest type of merits review is by way of rehearing de novo, in which the tribunal rehears the matter afresh, is not confined to the evidence or other material that was before the primary decision maker and may consider new submissions and arguments.

Whether a merits review is to be by way of a hearing de novo depends on the statute. A common kind of legislative provision in tribunal legislation is one which gives a tribunal power to exercise all the powers and discretions of the primary decision-maker. This provision has been interpreted as indicating a legislative intention to provide for de novo merits review.[64]

If the tribunal is able to re-exercise the powers of the primary decision-maker, the question is what standards or criteria should guide its review. In an early decision on the interpretation of

---

60 NCAT Act s 80(2); QCAT Act s 142; ACAT Act s 79; SACAT Act ss 70, 71. There is a limited form of internal appeal under the ART Act s 123.

61 See eg NCAT Act s 80(2).

62 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261 (Mason CJ, Brennan and Toohey JJ).

63 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 31 ('*Shi*') [30] (Kirby J, Crennan J agreeing,), [102]-[104] (Hayne and Hayden JJ).

64 *Re Greenham and Minister for the Capital Territory* (1979) 2 ALD 137; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 ('*Drake No 1*').

the *Administrative Appeals Tribunal Act 1975*, a majority of the Federal Court held that the Administrative Appeals Tribunal was required to consider the material before it and arrive at the 'correct or preferable decision'.[65] This standard has been widely applied to other Commonwealth, state and territory tribunals that undertake merits review. Some tribunal legislation expresses the standard as the 'correct and preferable decision', but the meaning is the same. The tribunal must reach a decision that is legally and factually correct; but if more than one decision is lawfully open, it must reach the preferable decision.[66]

For more on merits review tribunals, see **Chapter 6** at **6.2.3**.

1.4.2. Civil and Administrative Tribunals

A feature of the development of tribunals in Australia over the past 30 years has been the amalgamation of smaller, specialist tribunals into 'super-tribunals' exercising both civil and administrative jurisdiction under many different Acts. Legislation establishing the multi-jurisdictional Civil and Administrative Tribunals ('CATs') generally provides that they are not required to comply with the rules of evidence, are empowered to inform themselves as they see fit and must operate quickly, cheaply and informally. The CATs are designed as central, multi-jurisdictional tribunals for less formal and less expensive civil and administrative dispute resolution.[67]

The CATs in the states and territories now comprise the ACT Civil and Administrative Tribunal ('ACAT'), the New South Wales Civil and Administrative Tribunal ('NCAT'), the Northern Territory Civil and Administrative Tribunal ('NTCAT'), the Queensland Civil and Administrative Tribunal ('QCAT'), the South Australian Civil and Administrative Tribunal ('SACAT'), the Victorian Civil and Administrative Tribunal ('VCAT'), the Tasmanian Civil and Administrative Tribunal ('TASCAT') and the State Administrative Tribunal of Western Australia ('SAT').[68]

The Administrative Review Tribunal ('ART'), like its predecessor, the Administrative Appeals Tribunal ('AAT'), is a multi-jurisdictional Commonwealth tribunal which exercises only administrative powers.

In this Guide, these tribunals and their establishing Acts are referred to by their acronyms (see **Table of Abbreviations** in the front matter).

---

65 *Drake No 1*, ibid 68 (Bowen CJ and Deane J); approved in *Shi*, above n 63 [35], [72], [98], [140].

66 *Shi*, above n 63 [140] (Kiefel CJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 (French CJ).

67 On the reasons for establishing the CATs, and their advantages and disadvantages, see Hon. Justice Janine Pritchard, 'Australian civil and administrative tribunals: challenges and opportunities' (2020) 100 *AIAL Forum* 100, 253-152.

68 Although the SAT's name does not include 'civil', SAT does have jurisdiction in some disputes of a civil nature, eg under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA): Pritchard, ibid 154-55, and is therefore identified in this Guide as a CAT.

Creyke reports that in 2021-22, Australia's multi-jurisdictional tribunals dealt with more than 227,000 cases under more than 1,300 pieces of legislation.[69] Civil cases make up a large majority of the caseload of the CATs.[70]

New Zealand has around 50 tribunals, each established under its own Act. There is no current proposal to amalgamate them into multi-jurisdictional tribunals like the Australian CATs or ART.

1.4.3. Diversity of tribunals

Apart from the differences in their jurisdiction by subject area and the powers and functions given to them, tribunals are diverse in the way they are constituted and operate.

- The size and jurisdictional range of tribunals vary widely. The dominant model in Australia is that each jurisdiction has one large, multi-jurisdictional tribunal (the ART or a CAT), and also has a few smaller tribunals exercising powers in a single field of jurisdiction. In New Zealand, single jurisdiction tribunals are the norm, with the exception of the Disputes Tribunal.[71]
- Tribunals may be free-standing, established within a Courts Service, a division of a court, entities within the overall governance of the Attorney-General or Justice Departments, or within a portfolio department such as health, finance or housing.[72]
- Tribunals may or may not have members who are judicial officers (judges or magistrates) holding a concurrent appointment in a court.
- In multi-jurisdictional tribunals such as CATs and the ART, members may be appointed to one or more different lists or divisions responsible for a jurisdiction defined by subject matter, each with its own head.
- Members may be full-time, part-time (with regular days) or sessional (casual).
- Tribunals may have a case management system which includes pre-trial directions hearings, conferences or other processes to explore settlement opportunities, resolve preliminary matters and ensure that matters are prepared for hearing.
- Tribunal members may perform functions as 'third party neutral' in managing other dispute resolution processes such as mediation, conciliation and arbitration (see **Chapter 4** at **4.3.1.**

---

69 Robin Creyke AO, 'From sewers to 'super' adjudicators: What next for tribunals?' (2023) 107 *AIAL Forum* 31, 31-32.

70 Pritchard, above n 67, 153.

71 A good indication of the number, type and jurisdiction of tribunals in each jurisdiction can be gleaned from COAT's *Register of Member Tribunals* <coat.asn.au>.

72 This arrangement is more common in the case of New Zealand tribunals.

- Matters may be dealt with at an oral hearing (which may be conducted in the presence of the parties or by videoconference or telephone conference) or determined 'on the papers' without an oral hearing, or both forms of hearing may be used according to circumstances.
- Tribunals that conduct oral hearings operate with varying degrees of formality, depending on the nature of the proceedings. For example, disciplinary proceedings involving serious allegations against a person are often heard in a more formal and adversarial or 'court-like' manner, while social security appeals and guardianship matters are usually dealt with in a less formal manner.
- Legal representation is more common in some tribunals or jurisdictions that in others. This may be due to the requirements of the legislation, the legal complexity of the issues or the type of interests that are at stake.
- Tribunals that conduct oral hearings may operate in an adversarial manner closely resembling a court or may operate more informally. The extent to which this occurs is influenced by the tribunal's culture, its statutory powers, whether legal representation is permitted and the availability of staffing and resources.

In interpreting what is said in this Guide, it is important to bear in mind the diversity of tribunals and to make allowances for the differences.

1.4.4. Tribunal Excellence Framework

The Council of Australasian Tribunals was formed in 2002 to facilitate liaison and discussion between the heads of Commonwealth, state, territory and New Zealand tribunals. It supports the development of best practice models and procedures, standards of performance and professional conduct for members, and increased capacity for training and support for members. Drawing upon the *International Framework for Court Excellence*,[73] COAT has developed its *Tribunal Excellence Framework* which defines and describes the concept of excellence to which its member tribunals aspire.[74] This means that the document defines areas and indicators against which the institutional performance of tribunals can be measured.

The Framework is a quality management tool for continuous evaluation and performance for use by tribunals. It is based on ten core tribunal values that tribunals should uphold and apply in performing their functions: equality before the law, fairness, impartiality, independence, respect for the law, accessibility, competence, integrity, accountability and efficiency.

Aspects of the Framework are be referenced in the Guide. Of particular relevance to the following section of this Chapter is the core tribunal value of competence.

---

73 International Consortium for Court Excellence, *International Framework for Court Excellence* (3rd ed, May 2020) <courtexcellence.com>. The first edition of the *International Framework for Court Excellence* was released in 2008.

74 COAT, *Australia and New Zealand Excellence Framework* (June 2017) <coat.asn.au/>. A new version of the framework is forthcoming in 2025.

1.5. Member roles and key competencies

The focus now shifts from the tribunal as an institution to the tribunal's members. Tribunals sometimes have different categories of member. There may be—

- 'presidential' members (the President, Vice-President and Deputy Presidents)
- 'judicial' members (holding appointments in a court as a judge or magistrate) and 'non-judicial' or 'ordinary' members
- members named for their functional specialisation in the tribunal, eg, 'adjudicator', 'referee', 'mediator', 'conciliator'.

In some tribunals, the Registrar and Deputy Registrars are empowered by legislation to exercise functions that would otherwise be exercisable by a member, such as conducting a directions hearing.

For the purposes of this Guide, the term 'member' is used to incorporate all categories of member, except as otherwise indicated in a particular context. For example, judicial members are sometimes given additional powers that they can exercise in tribunal proceedings,[75] and are subject to a different regulatory regime for the judiciary in matters such as training and professional development and complaint processes.

One of the features that distinguishes tribunals from courts is that the membership of administrative tribunals commonly includes persons with a wider range of qualifications and expertise than law—people such as valuers, psychologists, accountants, medical practitioners and planners. The diversity of membership broadens the skills and knowledge base of tribunals, enhancing their capacity to make decisions in specialised areas of administration.

1.5.1. Core skills and abilities—the ARC model

Defining the skills and knowledge expected of members has important benefits for their recruitment, induction and training and for management of their performance and professional development.

While their professional backgrounds may be diverse, tribunal members all require a common set of core skills and abilities. The Administrative Review Council (ARC) suggested that the following key competencies are essential or desirable for members of Australian administrative review tribunals:[76]

- understanding of merits review and its place in public administration
- knowledge of administrative review principles (which includes a general knowledge of administrative law)

---

[75] Eg the VCAT Act s 137(10) reserves to a 'presidential member' the power to punish a person for contempt of the Tribunal. Presidential members must be judges or senior lawyers.

[76] Administrative Review Council, Report 39 *Better Decisions*: *Review of Commonwealth Merits Review Tribunals* (2005) 31 < webarchive.nla.gov.au>.

- knowledge of principles underlying the review of administrative decisions, including the requirements of procedural fairness and knowledge of the rules of evidence (even though tribunals are generally not bound by the latter)
- analytical skills (including the capacity to interpret legislation and to analyse evidence)
- personal skills and attributes (such as interpersonal skills, gender and cultural awareness)
- communication skills (including ability to write reasons in a clear and concise fashion).

1.5.2. Key competencies: the COAT Framework

COAT's *Tribunal Excellence Framework* recognises the importance of a competency framework for members to ensure professionalism and integrity. In 2013, COAT published its *Tribunal Competency Framework: Promoting Professional Excellence*, now in its second edition (2017) ('Competency Framework').[77] It identifies eight headline competencies, each being a core attribute of professional excellence in a tribunal member, together with associated member qualities, as follows:

- *Knowledge and technical skills*— conscientious, commitment to high standards.
- *Fair treatment* — fairness, courtesy, tolerance and compassion.
- *Communication;* — firmness without arrogance. Courtesy, patience, tolerance, fairness, sensitivity, compassion and self-discipline.
- *Conduct of hearings* — conducts hearings in a manner that establishes and maintains the independence and authority of the tribunal and enables proper participation by all involved.
- *Dispute resolution*: *decision-making and alternative dispute resolution* — relevant qualities include decisiveness, confidence, courage, independence and impartiality.
- *Efficiency* — commitment to serving the public, commitment to efficient case management, use of resources and timeliness.
- *Professionalism and integrity* — capacity to maintain personal and tribunal independence, integrity and reputation, and to be ethical, patient, honest, tolerant, responsible, collegiate and considerate.
- *Leadership and management* — planning and organisation, teamwork, initiative, problem-solving and capacity to manage one's own performance.

The Competency Framework provides examples of how each competency may be demonstrated in a member's tribunal practice and performance. Tribunals may use the document to generate selection criteria for recruitment, to guide performance development and to identify training needs. COAT envisaged that individual tribunals would use the document to develop their own competency frameworks adapted to their circumstances. In contrast to the

---

77 <coat.asn.au> ('*Tribunal Competency Framework*').

ARC Model at **1.5.1**, the COAT Framework is designed for members exercising the full spectrum of jurisdictions that can be conferred on a tribunal by legislation.

To complement its Competency Framework, COAT has published a *Training Needs Analysis* report which identifies the training needs of new tribunal members, and the continuing professional development needs of all members, based on surveys and interviews of tribunal heads and members.[78]

Information on member training programs and resources provided by COAT and other providers can be found in **Chapter 8** at **8.5.3** and in **Chapter 10** at **10.3**

1.6. Appeals, judicial review and administrative law

1.6.1. Types of appeals

The tribunals for which this Guide are written are established under legislation. A right to appeal from an administrative decision, or to have it externally reviewed, does not exist at common law and is given only by legislation. The Act that establishes a tribunal to hear administrative appeals (or reviews) may provide for different types of appeal process.

1.6.6.1 Review on the merits by hearing de novo

Many administrative tribunals are required to review decisions on the merits by way of a hearing de novo. This type of merits review is modelled upon the system of administrative review set up by the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') (repealed). Similar provisions have been adopted in Acts establishing many other Australian tribunals. De novo merits review is discussed in this Chapter at **1.6.6.1** and **in Chapter 6** at **6.2.3**.

1.6.6.2 Review on the merits by way of rehearing

An alternative to the review by hearing de novo is the review by way of rehearing. Some governing Acts for tribunals provide for the tribunal to review decisions by way of rehearing. For example, s 34(3) of the SACAT Act provides that in exercising its review jurisdiction, the tribunal shall proceed by way of rehearing. Section 34(4) provides:

> On a rehearing, the Tribunal must reach the correct or preferable decision but in doing so must have regard to, and give appropriate weight to, the decision of the original decision-maker.

Similar provisions are found in the SACAT Act s 70 (internal review of a SACAT decision) and other Acts including TASCAT Act s 75(4) and the *South Australian Employment Tribunal Act 2014* (SA) s 27. In *Re AKS*, Parker P noted that the requirement in SACAT Act s 70(5) to 'give appropriate weight' to the decision under review differs from the procedure of an appeal

---

[78] ibid.

de novo.[79] However, SACAT's fundamental task under s 70(5) is 'to reach the correct or preferable decision'.[80] SACAT is empowered to quash or vary the decision or remit the matter for rehearing without having identified any error in it, if SACAT considers that it is not the preferable decision. In this respect, SACAT's powers differ from the powers of a court deciding an appeal by way of rehearing.[81]

As this example shows, the type of review depends on the terms of the legislation under which the tribunal is conducting its review.

1.6.2. Nature and grounds of judicial review

Quite apart from appeals and reviews under statute, a person affected by a decision of an administrative agency, court or tribunal may have a right to apply to a court for judicial review. The power of the courts to undertake judicial review derives from very old common law powers of the English courts. As the judicial arm of the Crown, the courts exercised power to restrain unlawful actions by lower courts and officials purporting to act on behalf of the Crown. This power was called the 'supervisory jurisdiction'.

Generally, only superior courts (such as the Supreme Court of a state or territory) is empowered to exercise supervisory jurisdiction, A court exercising supervisory jurisdiction may make various orders. It may quash (set aside) a decision taken contrary to law, restrain a decision-maker from acting beyond power, compel a decision-maker to carry out a duty in accordance with the law, or declare an action or proposed action to be unlawful.

A court engaged in judicial review may not examine the merits of the decision but instead considers whether the decision or the process leading to it was legally flawed. Only certain kinds of legal flaws are grounds for judicial review. A court may grant an order in an application for judicial review on a limited range of grounds which include the following—

- the decision-maker had no power to embark on making the decision in the first place, and therefore no power to make the decision
- the decision-maker had power at the outset but made an error of law in the course of making the decision
- the decision-maker was disqualified from making the decision by reason of bias
- the decision-maker failed to give a fair hearing to persons with interests at stake.

Usually only *material* errors will result in a court setting aside an administrative decision or granting other relief. For a decision to be material in this sense, there must be a realistic possibility that the decision could have been different if the error had not occurred.[82]

---

79 [2016] SACAT 19 [35] (Parker P).

80 Ibid.

81 Ibid. The remarks of Parker P were cited with approval by the Court of Appeal in *Henderson v South Australia Housing Trust* [2024] SASCA 55 [22].

82 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 [7].

The grounds for judicial review are too many to list here but are discussed at length in general textbooks and commentaries on administrative law (see **Chapter 10** at **10.2**).[83] Judgments given by courts in judicial review cases lay down principles that apply to administrators and adjudicators generally, including courts, tribunals and administrative agencies. These principles form the major part of administrative law and set the boundaries for lawful adjudication and administrative decision making.

1.6.3. Judicial review of tribunal decisions

Tribunals that make decisions directly affecting the rights and interests of individuals are generally subject to judicial review. If the tribunal acts unlawfully a court may, on application by an aggrieved person, set aside the decision of the tribunal, or restrain it from proceeding with a given course of action. Where this happens, the court identifies the tribunal's error and usually refers the matter back to the tribunal to make a new decision in accordance with the law.

Some parliaments have legislated to regulate, limit or extend the supervisory powers of their courts. A statute that establishes a tribunal may restrict or exclude judicial review of the tribunal's decisions,[84] or provide the alternative of an appeal to a court on a question of law. In an appeal on a question of law from a discretionary decision, the appeal is decided according to the principles set out in *House v The King*.[85] The appellant would need to show that the tribunal made a specific legal error (eg, taking into account an irrelevant consideration, or making a material error of fact) or that the decision is 'so unreasonable or plainly unjust' as to suggest that such an error must have occurred.

Where the legislation provides for a right of appeal from a tribunal decision, a superior court may in its discretion decline to exercise its supervisory jurisdiction if it considers that an appeal would have provided an adequate avenue of redress.[86]

1.6.4. Outcomes of judicial review

In judicial review, the court, acting judicially, reviews the legality of a decision but not its merits. If the tribunal has made no error of law, a court will not set its decision aside simply because the court considers that another decision is preferable, or that it would have weighed

---

[83] The key grounds of judicial review are substantially set out in s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT), s 20 of the *Judicial Review Act 1991* (Qld), and s 17 of the *Judicial Review Act 2000* (Tas). For a general discussion of the approach courts have adopted in judicial review of tribunal decisions, see generally, R Creyke, J McMillan and M Smyth, *Control of Government Action* (5th ed, LexisNexis, Sydney, 2018) at [10.4].

[84] The *New Zealand Bill of Rights Act 1990* (NZ) s 27(2) protects the right of people affected by a determination of a tribunal to apply for judicial review of the determination. This right is subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', in accordance with s 5 of the Act.

[85] (1936) 55 CLR 499; [1936] HCA 40. This is applied by the NCAT Appeal Panel in an appeal under NCAT Act ss 80, 81: see eg, *Transwest Fuels Pty Ltd v Knee* [2021] NSWCATAP 330 [35].

[86] *Commissioner of Police New South Wales v Gray* [2009] NSWCA 49 [128].

the evidence or the considerations differently. This limitation on the scope of judicial review derives from the principle of separation of powers. It is not for the court, a judicial body, to re-exercise the administrative powers and discretions that Parliament has given to an executive body.

These limits to judicial review are observed even by courts in the states and territories, and in New Zealand where there is no strict constitutional separation of powers.

1.6.4.1 Judicial review compared with merits review

Prior to the establishment of merits review tribunals, judicial review was the only legal avenue for an aggrieved person to challenge an administrative decision by a primary decision-maker. Merits review was introduced to provide a more satisfactory form of justice, as Boughey, Rock and Weeks explain:[87]

> To put it simply, the hallmark of tribunal justice is the capacity to ask for (and stand a chance of obtaining) the thing you want; the licence, or the visa, and so forth. While it is an oversimplification, there is nevertheless some truth to the statement that judicial review only gives a successful applicant the chance to go back to the start and do it all over again.

The difference was explained in another way by Justice Duncan Kerr AO:[88]

> Judicial review can set flawed decisions aside and can compel unperformed legal duties to be performed but it cannot substitute for a flawed decision the decision what the court considers to be the correct or preferable decision. That is a step beyond judicial power. Only merits review can achieve that outcome.

In some cases an aggrieved person may wish to challenge a decision by applying for judicial review by a court rather than merits review by a tribunal. In such cases, the court has a discretion to refuse relief if merits review would provide an adequate remedy.[89] Statutes may also restrict access to judicial review for certain classes of decision or type of applicant.

---

87 J Boughey, E Rock and G Weeks, 'Remedies for Government Liability: Beyond Administrative Law' (2019) 97 *AIAL Forum* 57, 62.

88 The Hon. Justice Duncan Kerr AO, 'A Freedom to be Fair' (paper presented to the AGS Symposium 'Excellence in Government Decision-making', Canberra, 21 June 2013) 3.

89 See, for example, *Administrative Decisions Judicial Review Act 1977* (Cth) s 10.

Chapter 2: The Legal Framework

2.1. Key points

Sources of law:

- Most tribunals are established by statute and are required to apply Acts of Parliament, delegated legislation made by the executive and the common law made by judges.

Interpreting legislation:

- All tribunals interpret legislation to ascertain the extent of their jurisdiction and powers.
- Care must be taken to ensure that the legislation applied by the tribunal is the version in force at the relevant time.
- The object of statutory interpretation is to ascertain the 'legislative intent'.
- The task requires application of a body of legal knowledge and practical skills.
- There are rules, presumptions and interpretive principles under the Interpretation Acts of each jurisdiction and common law that must be considered where relevant.
- Some jurisdictions have human rights legislation which affects the interpretation of other legislation.
- Statutory provisions are to be interpreted in the context of the Act as a whole and given the meaning that would best achieve the purpose or object of the Act.

Precedent as a source of law

- Tribunals are bound by the ratio decidendi of decisions given by appellate courts and may also be bound by seriously considered obiter dicta.
- A tribunal is generally bound to follow a prior interpretation of the particular legislation by an appellate court but is not bound by their interpretations of different legislation.
- No formal doctrine of precedent requires tribunals to follow their own earlier decisions.
- For consistency and comity, some tribunals adopt the practice of following previous decisions of their tribunal unless they are clearly wrong.

2.2. Sources of law

As we noted in **Chapter 1** at **1.2.3.1**, most tribunals are established by parliaments under statutes or Acts of Parliament. Their source of power is therefore statutory. Tribunals established under statute and exercising statutory powers operate within a framework of laws that derive principally from legislation, and also from common law.

Legislation is a term that includes—

- laws made by Parliament called 'statutes', 'Acts' or 'enactments'
- laws made by someone to whom Parliament has delegated legislative powers, usually the relevant Minister. This kind of law is called 'subordinate' or 'delegated' legislation.

The term 'common law' is complex because it has at least three distinct meanings, depending on context.

Common law as a source of law: Common law refers to the body of law that has its roots in ancient custom and is embodied in the judicial rulings made by judges. It is judge-made law, as opposed to laws made by Parliament and its delegates, such as Ministers.

Common law as a national system of law: The term 'common law' refers to the system of laws which applies in the United Kingdom and in former colonies such as Australia. In this context, it covers not just the legal principles developed by courts and tribunals but also the countries' legislation and includes the conventional method of legal reasoning that characterises the Anglo–Australian and Anglo–New Zealand legal systems based on precedent. In essence, the methodology is that like cases are decided alike and depends on a hierarchy of courts where lower courts follow the rulings of higher courts in prior cases. In the Australian system, the High Court of Australia sits at the apex of the court system; in New Zealand, it is the Supreme Court.

Common law as opposed to equity: A third use of 'common law' within Anglo–Australian systems is to distinguish it from equity. The courts of equity developed in England in the 1500s to alleviate the strictures of the common law courts. The courts of equity were more flexible, and the two systems operated in parallel until they were fused or joined in the nineteenth century.

While tribunals derive their powers from statute, common law principles and methods are, however, relevant to tribunals in several different ways.

- The rules and principles which determine whether an administrative power has been lawfully exercised by an executive agency or tribunal are largely of common law origin in that they have been developed over time by courts and tribunals in the UK and Australia and New Zealand. These include the principles of judicial review discussed in **Chapter 1** at **1.6.2–1.6.4**.

- When they interpret their governing legislation, tribunals and executive agencies use the common law principles of statutory interpretation that have been developed by judges.
- Only courts can rule *authoritatively* on the interpretation of a particular statute or provision. Once a court has declared what the statute means, lower courts and tribunals are bound by the ruling in accordance with the common law rules of precedent as they are applied to the interpretation of statutes.

2.3. Legislation and delegated legislation

2.3.1. Statutes

In this part, we consider Acts and delegated legislation'). Both types of legislation for all Australian jurisdictions can be accessed at <austlii.edu.au> and for New Zealand at <nzlii.org>. Legislation is also available on official sites maintained by the Parliament or a government agency for each jurisdiction.[1]

2.3.1.1. What laws can Parliament make?

The Australian system of government involves a formal tripartite separation of powers between the legislature, the executive and the judiciary. Under this system, it is assumed that the legislature makes legislation, the executive administers and is bound by legislation, and the judiciary resolves disputes regarding the interpretation and application of legislation.

Australia and New Zealand adopted the principle of parliamentary sovereignty from the United Kingdom. This means that, subject to any constitutional restrictions, Parliament may make any law it thinks fit. The usual formula in the various constitutions allows them to make laws for the peace, order and good government of the people within their jurisdiction. The judiciary (the courts) and the executive government must give effect to a constitutionally valid statute even if it offends many people's conceptions of common sense or appears contrary to human rights or notions of justice.

The *New Zealand Bill of Rights Act 1990* (NZ), the *Human Rights Act 2004* (ACT), the *Human Rights Act 2019* (Qld), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) each establish a system for reporting on whether Bills are compatible with the rights and freedoms affirmed in the relevant Act. The Acts do not limit the sovereignty of Parliament. Parliament may still pass a law that is incompatible with human rights despite the incompatibility having been brought to its attention. The Acts each contain a list of the specific human rights to which the Act refer. The list of human rights and the way they are expressed in each Act overlap but they are not identical.

---

[1] For more on how to find, update and 'note up' legislation, see C Matthies, 'Legal Research Refresher' (presentation to COAT conference 'Deliberations and Dilemmas in the Digital Age', Sydney, August 2016) <coat.asn.au>.

Australia has a federal system of government in which each state and the Commonwealth has its own legislature. The Australian Constitution confers and limits the subjects on which the Commonwealth is empowered to make laws. The subjects are set out as the 'heads of power' in s 51 of the Constitution. A Commonwealth law purporting to be made beyond the limits of the heads of power is unconstitutional. There have been many High Court cases related to the scope of Commonwealth and state legislative powers in relation to various subjects.

States have their own constitutions which, as noted above, usually provide that the State Parliament has the power to make laws for the peace, order and good government of the state.

Another kind of constitutional issue arises where a state statute conflicts with a Commonwealth statute on a matter in which the states and Commonwealth have concurrent legislative powers. Section 109 of the Australian Constitution provides that in such cases, the Commonwealth law prevails, and the state law is invalid, to the extent of the inconsistency.

2.3.1.2. When does an Act change the law?

A Bill becomes an Act (statute) when it is passed by the Parliament and is assented to by the Crown's representative, which may be the Governor-General or Australia or New Zealand, the Governor of a state or the Administrator or Chief Minister of a territory. Once it receives that 'Royal Assent', it is said to be 'enacted'. However, it does not change the law until it 'commences' (comes into force). Sometimes different parts of an Act commence on different dates.

Tribunals often need to establish whether and when a particular Act or part of an Act commenced, so that they can ascertain which law applies. The commencement date (or dates for different parts) may be set out in the Act itself or be fixed by later proclamation. Otherwise, all jurisdictions have a default provision specifying that if an Act does not provide for its own commencement it commences on the date of Royal Assent or a specified period after.[2] Even so, there may be a provision which enables the automatic commencement of the Act to be postponed by making a regulation.[3]

Usually a statute operates *prospectively*, that is, it comes into effect (commences) from a date on or after the Royal Assent. A Parliament may decide to give a statute an effect that is both *retrospective and prospective*, by specifying that the statute commences from a date earlier than the date of Royal Assent.[4] This may occur, for example, when the Treasurer's Budget Speech announces a change in the tax law. When the Budget legislation is subsequently enacted, it may be expressed to commence on the date of the Budget Speech.

---

2 The provisions are normally found in the interpretation legislation of each jurisdiction. See, for example, *Acts Interpretation Act 1901* (Cth), Part 3; *Interpretation Act 2019* (NZ) s 25. The Acts of other Australia jurisdictions are listed in Chapter 1 at n 46.

3 See, eg *Acts Interpretation Act 1954* (Qld) s 15DA(3) (a regulation can postpone commencement).

4 *Legislation Act 2019* (NZ) s 12 provides: 'Legislation does not have retrospective effect', but this is subject to contrary intention: s 9.

2.3.1.3. When does an Act cease to be the law?

Once it has commenced, a statute (or Act) continues to have effect until it expires, is amended or is repealed. Expiry can also occur because a section in a statute ('sunset clause') states that the statute, or part of it, will cease to operate on a certain date.

A statute may be amended by another statute, which repeals parts of it, inserts new words or provisions into it, or 'omits' (deletes) words or provisions. The amending provisions become part of the original statute (called 'the principal Act'), and the two Acts are read as one statute. Where an amending Act has been passed, it is necessary to check that the whole Act, or at least the relevant parts of it, have commenced.

A statute, or part of it, may be repealed expressly, as where a later Act passed by the same legislature says: 'The *Firearms Act 1958* is hereby repealed'. In rare cases, a statute may be repealed by implication rather than by express words, where a later statute is passed that is inconsistent with it. This may occur due to inadvertence, where the apparent inconsistency was overlooked at the time the later statute was passed. Usually, any implied repeal affects only so much of the earlier Act as is inconsistent with the later Act.

In such cases, judges look for an interpretation that will allow both laws to operate within their respective spheres. Where there is an apparent inconsistency between two Acts of the same legislature applying to the same subject matter, a more specific provision is to be read as prevailing over a general provision.[5] In this way the Acts are reconciled and the apparent inconsistency is removed.

2.3.2. Subordinate or delegated legislation

2.3.2.1. Delegation of law-making power

Notwithstanding the formal separation of powers, much legislation is made by executive bodies to whom Parliament has delegated its law-making authority. The most common and substantial forms of delegated legislation are *regulations*, which usually provide the detail for a legislative scheme. There are other names for delegated legislation including:

- statutory rules
- disallowable instruments
- ordinances
- local laws and
- proclamations.

The labels are assigned to particular instruments for reasons of convention, and do not usefully distinguish them. Each jurisdiction uses a generic catch-all term, but the choice of term varies

---

[5] *Mitsubishi Motors Aust Ltd v Begovic* [2023] HCA 43 [67].

from one jurisdiction to another: 'statutory instrument', 'subordinate instrument' 'subordinate legislation', 'secondary legislation' and 'legislative instrument'.[6] In this Guide, the generic terms 'subordinate instrument' or 'subordinate legislation' are used. (The term 'instrument' is a generic term for a document that has legal effect.)

While the doctrine of separation of powers holds that law-making is a function of the legislature, parliamentary time is too scarce for legislators to make all the necessary laws. Delegation of law-making power to the executive is a practical necessity for efficient government and is not considered to offend the constitutional separation of the powers of the Commonwealth.[7] There are currently estimated to be more than 30,000 Commonwealth legislative instruments in force. Commonly, the law-making power is delegated to:

- the Governor-in-Council (or the Governor-General in Council, in the case of Commonwealth and New Zealand Acts)
- a Minister of the Crown
- a local authority
- the Rules Committee of a court or tribunal or
- some other statutory body.

There are provisions for the most important types of subordinate instrument to be tabled in Parliament and scrutinised by parliamentary committees in accordance with general standards laid down by the Parliament. Parliament considers the committees' reports and may pass a resolution to 'disallow' a subordinate instrument. This has the effect of repealing it.

Each subordinate instrument is made under power delegated by a specific Act, called the 'parent' or 'empowering' Act. Its title usually incorporates the title of the parent Act, which simplifies the task of searching for it. For example, regulations made under the *Residential Tenancies Act 1986* (NZ) may be called the *Residential Tenancies Regulations*. If there is more than one set of regulations, they will usually have a more specific title added in brackets, for example, the *Residential Tenancies (Caravan Parks) Regulations.* A set of regulations will include an authorising provision which identifies the provision of the parent Act under which they are made, for example, 'These Regulations are made under s 140 of the *Residential Tenancies Act 1986*'.

An Act establishing a tribunal commonly provides for the establishment of a 'Rules Committee' which is empowered by the Act to make rules of practice and procedure. These are forms of subordinate legislation, made under legislative powers delegated by Parliament.

---

6 The term 'legislative instrument' is defined in the *Legislation Act 2003* (Cth) s 8.

7 *Victorian Stevedoring and Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35 (1992) [1.6].

2.3.2.2. Validity of subordinate legislation

Subordinate legislation is valid only if it is authorised by an empowering Act. Courts may review an exercise of delegated law-making power by the executive in much the same way as they can review an exercise of administrative power (see **Chapter 1** at **1.6.2**). A court may declare a subordinate instrument wholly or partly invalid on specified grounds.[8] It may be found to be *ultra vires* (beyond power) because, for example:

- it goes beyond the terms and scope of the law-making power delegated by the parent Act
- it is unreasonable, irrational,[9] or disproportionate to the statutory purpose of the delegation,[10] or
- it is inconsistent with the parent Act or another Act.

The process for determining the validity of subordinate legislation is one of statutory construction and generally involves three steps:

- determine the meaning of the words used in the parent Act to describe the subordinate legislation which the authority is authorised to make
- determine the meaning of the subordinate legislation, and
- decide whether the subordinate legislation made by the authority complies with the description in the parent Act.[11]

Where only a provision or part of the instrument is ultra vires, it may in some cases be possible to sever (disregard) the offending part without affecting the legal effect of the rest. For example, assume that s 15 of the *Fisheries Act* gives the Governor-in-Council power to make regulations to regulate the taking of shellfish in Lobster Bay. Regulations are made under s 15 which set up a permit system to regulate the taking of shellfish in Lobster Bay and Stingray Bay. The regulations are invalid insofar as they purport to apply to Stingray Bay. Severance is possible, so the regulations are valid insofar as they apply to Lobster Bay. If severance is not possible such that the document loses its meaning or cannot operate without the severed section, the whole instrument is invalid.

An issue may arise as to whether a subordinate instrument (for example, a regulation) is beyond the law-making power of the Act under which it is made. Provisions in the Interpretation Acts state that a subordinate instrument 'shall be construed as operating to the full extent, but not so as to exceed, the power conferred by the Act under which it is made'.[12] To apply the

---

8 For a comprehensive discussion of how the courts apply the grounds, see D Pearce and S Argument, *Delegated Legislation in Australia*, 6th ed, Lexis Nexis, 2023) chs 12–17; PA Joseph, *Constitutional and Administrative Law* (5th ed) (Thomson Reuters, Wellington NZ, 2021) ch 24.

9 *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.

10 *Vanstone v Clark* (2005) 147 FCR 299; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1.

11 *McEldowney v Forde* [1971] AC 632, 658 (Lord Diplock).

12 For example, *Interpretation Act 1987* (NSW) s 32(1).

interpretation provision, the tribunal may need to form an opinion as to the scope and limits of the law-making power delegated by the Act.

The validity of a subordinate instrument is a question of law, so only a court can give a binding or authoritative ruling on whether the law is ultra vires.[13] However, since tribunals are required to comply with the limits of their own jurisdiction, they are entitled to determine for themselves whether they have jurisdiction.[14] There would need to be the 'most compelling grounds' before a tribunal would treat a subordinate instrument as invalid.[15] Alternatively, the tribunal may refer the question of law to a court, if the tribunal's governing statute provides for it. This power of referral is sparingly exercised.[16]

If, in any type of proceedings before a state tribunal, or an issue is raised as to the constitutional validity of a state or Commonwealth law the tribunal must consider the matters discussed in **Chapter 1** at **1.3.3**.

2.3.2.3. When does a subordinate instrument cease operation?

There are various ways that a subordinate instrument may cease operation.

- It may be expressly repealed or revoked, or it may be disallowed by a resolution of Parliament before or after it commences operation.
- A subordinate instrument is deemed to be repealed when its empowering Act is repealed, unless the repealing Act or another Act provides that the instrument is to remain in force.
- An instrument may be repealed (in whole or in part) by implication, where a later statute or subordinate instrument makes provisions that are inconsistent with it and the two cannot be reconciled.

In some jurisdictions there is provision for certain categories of subordinate instrument to expire on a specified date, or on the expiry of a specified period that runs from when they are made. This is known as a 'sunset clause'.

2.4. Statutory interpretation

2.4.1. The role of tribunals in interpreting statutes

All tribunals interpret legislation to ascertain the extent of their jurisdiction and powers. If a tribunal is required to apply a legislative provision that has been interpreted by a court of

---

13 *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 939 ('Costello')

14 Ibid; *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239, 245 (Brennan J); *Director of Housing v Sudi* [2011] VSCA 266 [285]. See also *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 [21]-[27], [63].

15 *Costello*, above n 14 , 939; *Director of Housing v Sudi* [2011] VSCA 266 [212].

16 For discussion of considerations for and against making a referral to a court, see *Independent Liquor and Gaming Authority v Auld* [2018] NSWCATAP 68.

binding authority,[17] it will follow the court's interpretation. Due to the pace of legislative change, tribunals are regularly in the position of having to interpret legislation in a form that has not yet been considered by a court.

Administering agencies commonly provide their staff or the public with summaries or statements of what the agency takes the legislation to mean. Tribunals are not bound to follow the agency's interpretation if they think it is incorrect. It is the legislation, not the agency's interpretation, which is authoritative.

While tribunals and administering agencies interpret legislation in order to implement it, only a court can authoritatively determine the meaning of legislation. Once a court has interpreted a provision in a statute, the provision must be read in the light of what the court has said about its meaning.[18] As the words of a statute derive meaning from context, what a court has said about the meaning of a provision in one statutory context is not binding in the interpretation of the same or similar words in another statutory context.[19]

Until a court has authoritatively ruled on the meaning of a statute or provision, there may be no 'right answer' to the question of how it should be interpreted. A tribunal's interpretation does not establish a binding precedent. Other tribunal members and the administering agency are not bound to follow it if they think it is incorrect. However, different interpretations can lead to inconsistent decisions — an outcome which conflicts with the public expectation that like cases will be decided alike. Many tribunals have established informal processes to foster collegial discussion and to promote consistent interpretation. See below at **2.5.2.1**.

If, in any type of proceedings before a state tribunal, an issue is raised as to the constitutional validity of a state or Commonwealth law or the interpretation of a Commonwealth law, the tribunal must consider the limits of its jurisdiction.[20] See **Chapter 1** at **1.3.3**.

2.4.2. The Interpretation Acts

The principles of statutory interpretation were mainly developed by judges in the course of deciding court cases. In addition, each jurisdiction in Australia and New Zealand has passed an Interpretation Act, which sets out principles to be applied in the interpretation of its statutes and subordinate legislation.[21] They provide some definitions of common words and expressions used in legislation, aids to interpretation, and rules relating to the delegation and exercise of

---

17 As to which court decisions are binding, see below at **2.5.1.2**.

18 There are online resources to assist in checking if a case has been 'judicially considered'. See J Emmett, 'Statutory Interpretation Refresher' (presentation to COAT conference 'Efficient, Informal and Fair', Sydney, Sept 2018) <www.coat.asn.au>.

19 Justice Duncan Kerr AO, 'Statutes as formal literature: choice and constraints in their reading' explains rules of precedent in statutory interpretation' (presentation to COAT National Conference, June 2022) 10.

20 *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 [21]-[26].

21 This is a category of Acts, the actual titles of which vary among jurisdictions.

power. In general, the interpretation legislation applies the same interpretive principles to subordinate legislation as to Acts.

Most of the principles in the Interpretation Acts are expressed to be subject to contrary intention in the legislation to be interpreted. Each Interpretation Act includes a general provision stating that another Act may exclude or modify the operation by the Interpretation Act in its application to the other Act.

The Interpretation Acts in each jurisdiction are largely similar, but there are a number of important differences.

2.4.3 General approaches to interpretation

Traditionally, there were two main approaches to interpreting statutes adopted by the courts, the literal and the purposive approaches. The literal approach focuses on the lexical and grammatical meaning of words, phrases and provisions. The purposive approach interprets the words of the statute in the light of its purpose or objects.

The Interpretation Acts of each Australian jurisdiction now provide in general terms that:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.[22]

The New Zealand provision requires the meaning of an Act to be 'ascertained from its text and in the light of its purpose and its context'.[23]

The 'purpose' that is relevant is the intention of Parliament in passing the Act. This is assessed objectively, not by considering what individual legislators may have subjectively intended. Express indications of purpose may be found in the 'objects' or 'purposes' clause, which is usually included in the opening sections of the more recent statutes. Commonly, though, the objects clause states what the Act is doing rather than explaining why. It is often preferable to infer the purpose by considering the Act as a whole and by analysing the legislative scheme to see what effect it was intended to have.[24]

The 'modern approach' to statutory interpretation in Australia was stated as follows in *Project Blue Sky v Australian Broadcasting Authority*—

---

22 Commonwealth: s 15AA of the *Acts Interpretation Act 1901*; New South Wales: s 33 of the *Interpretation Act 1987*; Victoria: s 35(a) of the *Interpretation of Legislation Act 1984*; Queensland: s 14A of the *Acts Interpretation Act 1954*; Tasmania: s 8A of the *Acts Interpretation Act 1931*; South Australia: s 22 of the *Acts Interpretation Act 1915*; Western Australia: s 18 of the *Interpretation Act 1984*; Australian Capital Territory: s 139 of the *Legislation Act 2001*; Northern Territory: s 62A of the *Interpretation Act 1978.*

23 *Interpretation Act 2019* (NZ) s 10(1).

24 See the approach to interpretation set out in the Hon Michael Kirby AC, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113.

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'… [T]he process of construction must always begin by examining the context of the provision that is being construed.[25]

The purpose is part of the context. 'Context is understood in wide sense to include not just the text of the Act but also the existing state of the law and the mischief which the statute was meant to remedy'.[26] That is, the context includes the legislative history of the provision, and how the legislation was intended to confirm or change the previous law.[27]

While the process of construction begins with the text of the statute, regard must be had to its context and purpose.[28] The context of the words, the consequences of applying that meaning, or conflict with the purposes of the statute may indicate that a different meaning was intended.[29] The object of construction is 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[30] This may or may not be the literal meaning that the words would ordinarily bear, but it must be a meaning that is open on the wording.

2.4.4. Use of extrinsic materials

In interpreting statutory provisions, it is permissible in some circumstances to consider certain (usually parliamentary) documents outside the statute itself, called 'extrinsic materials'. These include—

- the speech made by the Minister when the Act (then a Bill) received its second reading in Parliament
- the Explanatory Memorandum that was circulated with the Bill after its introduction into Parliament
- reports of committees whose recommendations the Bill was intended to implement
- words which appear in the Act but which are sometimes deemed not to be part of the Act, such as headings or notes.

The extrinsic materials that may be consulted do not include legislative summaries of the Act prepared *after* it was passed.

---

25 (1998) 194 CLR 355; [1998] HCA 28, at [69] (McHugh, Gummow, Kirby and Hayne JJ). For a useful overview of general approaches to interpretation, see Emmett, above n 18.

26 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

27 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 [124].

28 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 [14]

29 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, at [70], [78].

30 Ibid.

The Interpretation Act for each jurisdiction, except New Zealand and South Australia, sets out the ways that the material can be used in interpreting statutes. Extrinsic materials are most often used to identify the problem that the statute was intended to address, or to confirm that the ordinary or literal meaning of the words is the intended meaning. In some circumstances, they can also be used to resolve difficulties in interpreting a provision.

The Interpretation Acts of the jurisdictions are not uniform as to the ways in which the materials can be used to resolve difficulties.[31] In some jurisdictions, extrinsic materials can be used to prefer one interpretation to another, but they do not overcome the need to carefully construe the text of the statute to ascertain its meaning.[32]

The following points are worth noting—

- The ordinary principles of statutory construction should be exhausted before extrinsic materials are considered.[33]
- It is worth checking whether the provision in question was in the Bill when it was introduced in the Parliament, or whether it was inserted as a 'House amendment' during the debates or inserted by a later statute. If it was not in the Bill as introduced, extrinsic materials prepared before the amendment may be of little use in interpreting it.
- The modern trend is for a diminished role for extrinsic materials, with greater emphasis on indications of legislative intent gleaned from the Act itself.[34]
- Extrinsic materials are at best an aid to interpretation and cannot be used to contradict the 'plain meaning' of the text, even if that meaning was not what was intended.[35]
- A second reading speech cannot be determinative nor can it be substituted for the text of the Act.[36]

2.4.5. The role of legal presumptions

2.4.5.1 The principle of legality

Courts apply a variety of principles and presumptions when interpreting statutes. Some relate to the meaning of words and phrases. For example, expressions used in a subordinate instrument are presumed to have the same meaning as in the parent Act, unless the contrary intention appears. Another set of legal assumptions gives protection to human rights and other values recognised by the common law.

---

31 See DC Pearce, *Statutory Interpretation in Australia* (10th ed, LexisNexis, Sydney, 2023) ch 3.

32 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 [31]-[33].

33 *Catlow v Accident Compensation Commission* (1989) 1989] HCA 43; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 [33].

34 The Hon. Justice John Basten, 'Choosing Principles of Interpretation' (2017) 91 *ALJ* 881, at 881.

35 *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 517–18 (Mason CJ, Wilson, Deane and Dawson JJ); *Harvey v Minister for Primary Industry and Resources* [2024] HCA 1 [109] (Edelman J).

36 *R v Bolton; Ex parte Beane*, ibid; *South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2)* [2024] NSWCA 113, [115] (Griffiths AJA).

The *New Zealand Bill of Rights Act 1990* affirms 21 rights of legal persons specified in Part 2 of the Act. Section 6 provides that where another Act can be given a meaning that is consistent with the rights and freedoms affirmed in the *Bill of Rights Act*, that meaning must be preferred. Victoria, ACT and Queensland have human rights statutes that affirm specified rights and freedoms of individuals and provide that other legislation in those jurisdictions is to be interpreted, so far as is possible, in a way that preserve the human rights and freedoms.[37]

Even without such human rights legislation, courts and tribunals in all Australian jurisdictions read statutes with the presumption that Parliament does not intend to restrict fundamental common law rights and liberties, such as freedom of movement, access to the courts, the right to privacy, the right to procedural fairness, and the right of one in possession of premises to prevent the entry of others. Courts also presume that Parliament did not intend to interfere with legal professional privilege, the privilege against self-incrimination, enforcement of contract rights or vested property rights without compensation.[38]

Legal presumptions do not constrain the legislative power of parliaments. They can be rebutted, if the statute gives 'a clear expression of an unmistakable and unambiguous intention' to the contrary.[39] Usually, the contrary intention requires express words, but it may be implied if the statute would otherwise be inoperative or meaningless.[40] For example, in *Coco v The Queen*, the High Court of Australia held that a warrant issued under a statutory provision that authorised police 'to use a listening device' did not authorise police to make a clandestine entry onto private premises to install the device.[41] The court was not prepared to imply from the statute that it authorised an entry that would otherwise be a trespass. There were no express words to extend the authority so far, and it was not necessary to imply it in order to give effect to the statute.[42]

Courts now use the term 'the principle of legality' as an over-arching term to encompass these presumptions. 'The "principle of legality" holds that, in the absence of clear words or necessary implication, the courts will not interpret legislation as abrogating or contracting fundamental

---

37 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2019* (Qld) s 48; *Human Rights Act 2004* (ACT) s 30. On the application of these provisions, see Pearce, above n 31 [5.56] - [5.58].31

38 See generally, Pearce, ibid ch 5.

39 *Coco v The Queen* (1994) 179 CLR 427 at 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

40 Ibid.

41 Ibid.

42 See also *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

rights or freedoms'.[43] The class of presumptions covered by the principle of legality is not fixed,[44] and some are more 'treasured' (and harder to rebut) than others.[45]

The principle of legality, and the specific presumptions it incorporates, are used to interpret the scope of statutory powers. The case of *Nursing and Midwifery Board of Australia v HSK* provides an example of its application by a tribunal.[46] A registered nurse applied to QCAT for review of the Board's decision to impose conditions on her registration. The Board applied to QCAT to give a direction under s 62 of the QCAT Act that the nurse attend a further health assessment. The Queensland Court of Appeal found that QCAT had made no error of law in refusing to make the direction. QCAT's power to direct under s 62 was merely procedural. A direction interfering with the liberty of a person by compelling her to undergo a health assessment would require specific statutory authority, the court reasoned.[47]

2.4.5.2. Other rebuttable presumptions

Apart from presumptions of non-interference with common law rights and freedoms, a number of other rebuttable presumptions are used in the interpretation of statutes. Some of the other main common law presumptions of interpretation are:[48]

- statutes do not operate retrospectively
- legislation does not bind the Crown
- penal (criminal) provisions are strictly construed
- removal of property rights is subject to compensation
- legislation does not have effect beyond the legislature's territory
- legislation is presumed not to violate rules of international law and treaty obligations
- a discretionary power given by a statute is to be exercised reasonably.[49]

While presumptions are not rules in the ordinary sense, they are legally binding in the sense that they must be considered where relevant to the construction of a statute.[50]

---

43 *Attorney-General of South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1; [2013] HCA 3, [148] (Heydon J). For New Zealand, see PA Joseph, 'The Principle of Legality: Constitutional Innovation' in D Meagher and M Groves, *The Principle of Legality in Australia and New Zealand* (Federation Press, Sydney, 2017) 27.

44 For a list of the presumptions, see Pearce, above n 31 [5.60]; M Sanson, *Statutory Interpretation* (2nd ed, Oxford Uni Press, 2016) at 255–6; *Momcilovic v The Queen* (2011) 245 CLR 1, 177–8.

45 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 (McHugh J).

46 [2019] QCA 144.

47 Ibid [34]. The decision preceded the commencement of the *Human Rights Act 2019* and was decided by reference to the common law presumptions.

48 See the Hon. James Spigelman AC, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769.

49 This presumption was first recognised as such in *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618.

50 J Barnes, J Dharnananda, E Moran (eds), *Modern Statutory Interpretation: Framework, Principles and Practice* (CUP, Port Melb, 2023) [1.2], [1.3]: *Maunsell v Olins* [1975] AC 373, 382.

2.4.6. A method for interpreting a statute

Statutory interpretation is more than a body of legal rules and presumptions. It requires the application of a set of skills and techniques to craft the interpretation of a provision in a statute which the legislature is taken to have intended. The process of determining what a statute means is a distinct task from applying that meaning to a factual scenario.

There is no formula for interpreting a statute, but the general approach can be outlined.[51] In interpreting a provision of a statute or subordinate legislation that has not been authoritatively interpreted by a court, it is suggested that tribunal members proceed as follows.

1. Check that you have the right version of the legislation, that it is or was in force at the relevant date for your review (see **6.2.3)**, and that it is the version that all parties are working from.
2. Read the relevant legislation closely, to grasp the whole scheme of the Act and the context of the provisions to be interpreted. If the Act is too long, read all parts of it that are closely associated with the provision you wish to interpret.[52]
3. Check the definition section or the definitions in any relevant parts or sections of the Act, and the jurisdiction's Interpretation legislation, to see whether a special meaning has been given to particular words.
4. Ascertain the literal meaning of the words, using English and/or technical dictionaries, if necessary.
5. Identify the purposes of the Act, the way in which the Act seeks to promote them, and how the provision in question fits into the overall scheme of the Act.
6. Formulate alternative available interpretations in the light of the indications gathered above.
7. Test the alternative meanings to see which best fits the language, context and purposes of the statute, taking into account any relevant legal presumptions, human rights legislation,[53] and extrinsic materials.
8. Justify the preferred interpretation and apply it.

The same principles and methods of statutory interpretation apply both to Acts and subordinate instruments.

---

51 For other models for approaching the task of statutory interpretation, see J Barnes, 'Is there an Overall Method to Interpreting Legislation? in J Barnes (ed), *The Coherence of Statutory Interpretation*, (2019, Federation Press) ch 8; N Williams SC, C Burnett, S Planiappan, 'Statutory Construction: A Method' in N Williams (ed), *Key Issues in Public Law* (Federation Press, 2018) ch 6.

52 Kerr, above n 19, 3

53 See discussion of human rights interpretive provisions in New Zealand, Queensland, ACT, Victoria at **2.4.5.1**.

2.5. Case law as a source of law

Common law for the purposes of this discussion is the law developed by judges when deciding cases that come before them for adjudication. Rulings of judges in decided cases, or precedents, are an authoritative source of law in accordance with the following rules.

2.5.1. Rules of precedent

2.5.1.1 Judicial hierarchy

Courts are arranged in hierarchies, to provide a structure for appeals and to reserve more complex or important cases for more senior judges. Each jurisdiction—New Zealand, the Commonwealth and each state and territory—has its own hierarchy of courts. The High Court of Australia stands at the apex of all the Australian hierarchies. The Supreme Court of New Zealand stands at the apex of the New Zealand court hierarchy.

2.5.1.2 What is binding in a decision of a court?

A judgment of a court commonly contains many statements about the law. Common law method draws a distinction between the 'ratio decidendi' (reason for deciding) and 'obiter dicta' (things said by the way). Only the former is on binding courts lower in the hierarchy. The ratio decidendi of a court's decision is a statement of law that was essential or necessary to the court's decision. It is 'a statement which if not made or if decided differently, would not alter the outcome.[54] For example, assume that a judge says:

> The documents in question were brought into existence for the purpose of being presented to Cabinet and are therefore exempt from disclosure under the Freedom of Information Act. It would be otherwise if they were brought into being for a departmental purpose, and it was subsequently decided to present them to Cabinet, but that is not the case here. I find the documents here to be exempt from disclosure.

In this example, the ratio decidendi is embedded in the first sentence. The statement in the second sentence is obiter dicta because it is neither necessary nor essential to the outcome of the case. If in a later case the scenario hypothesized in the second sentence is found to exist, no court sitting at first instance is bound by the obiter dicta.

Sometimes a majority of the High Court of Australia states a legal proposition that does not form part of the ratio decidendi. The Court has cautioned that lower courts should not depart from these statements if they were 'seriously considered'.[55] It is not clear how a court or tribunal determines whether a statement about the law is 'seriously considered dicta'.[56] It would

---

[54] *AC v R* [2023] NSWCA 133, [137] (Beech-Jones CJ).

[55] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, [134]).

[56] See B Chen, 'Seriously Considering "Seriously Considered" Dicta: Precedent after *Farah Constructions*' (2021) 95 Aust Law Journal 186.

be relevant to consider, among other things, whether the point was fully argued before the court and what legal authorities were considered.[57]

Although they are not courts, the tribunals of an Australian state or territory are bound by the ratio decidendi in the decisions of a majority of the Supreme Court or Court of Appeal of that state or territory.[58] This is the law that the courts will apply if a decision of the tribunal is the subject of an application for judicial review or a statutory appeal. If the tribunal departs from that law, a reviewing court may find that the tribunal has made an error of law.

In addition, the NCAT Appeal Panel has held itself to be bound by 'seriously considered dicta' of the NSW Supreme Court and the NSW Court of Appeal, unless it considers the dicta to be 'plainly wrong'.[59]

In one context, decisions of courts in another jurisdiction are to be treated as binding. When interpreting Commonwealth legislation or legislation that forms part of a national uniform scheme, the High Court has said that courts should follow the interpretation given to the legislation by an appellate court in another Australian jurisdiction, unless it is 'plainly wrong'.[60] This principle must be applied with caution. Some supposedly 'uniform' national legislative schemes are not legislated in identical terms in every jurisdiction.[61]

The rules of precedent that apply to decisions about the common law have a more limited application to rulings about the meaning of legislation. A ruling of a court on the meaning of a legislative provision does not bind a tribunal which is interpreting a different provision, even if the same word or phrase is used.[62]

2.5.2 Tribunal decisions as precedent

2.5.2.1 Consistency in tribunal decisions

Tribunal legislation generally says nothing about whether the rules of precedent operate within tribunals. Tribunals that undertake administrative review or exercise administrative power at

57 See eg *YJC v Public Guardian* [2024] NSWCATAP 160 [48] – [52].

58 *YJC v Public Guardian* [2024] NSWCATAP 160 [37] and authorities cited.

59 Ibid [35], [37],]38]; *Henadeck Pty Ltd v Independent Liquor and Gaming Authority; Niraula v Independent Liquor and Gaming Authority* [2020] NSWCATAP 200 at [94].

60 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) CLR 89: [2007] HCA 22, [135]. An example of uniform national legislation is the *Health Practitioner National Registration Law*. Appellate courts include the Supreme Court and Court of Appeal of another state or territory, and the Federal Court of Australia.

61 J Barnes, J Dharnananda, E Moran (eds), *Modern Statutory Interpretation: Framework, Principles and Practice* (CUP, Port Melbourne, 2023 [30.6].

62 Ibid [30.4]; *Carter v Bradbeer* [1975] 1 WLR 1204, 1206; Pearce, above n 31 [1.7], ch 6.

first instance are not bound by the doctrine of precedent to follow their earlier decisions.[63] This gap can lead to inconsistent decision making, particularly if decisions are not published.[64]

Tribunals have used various methods to encourage consistent decision making. For example, a case which determines an issue of significance for administrative decision making may be allocated for hearing by a panel comprising the President or other senior members, and the panel's decision circulated among the members.

The *Administrative Review Tribunal Act 2024* (Cth) ('ART Act') provides for novel arrangements to promote fair, lawful and consistent decision making by the ART. The Act creates duties and mechanisms for flagging systemic issues of significance for administrative decision-making.[65] The President is empowered to allocate an application for review to a Guidance and Assistance Panel of the ART to hear and determine at first instance, or to conduct a second merits review following a first instance decision.[66] The resulting decision of the panel is a 'tribunal guidance decision'.[67] When making a decision, a Tribunal member (other than a presidential member) must have regard to a relevant Tribunal guidance decision.[68]

It is desirable that tribunals place value on consistency of decision-making within the tribunal, particularly where consistency is one of the tribunal's objects.[69] Former VCAT President Justice Kevin observed, in relation to VCAT, that

> … where there is a properly considered decision on point, especially on a legal question and by a presidential member, considerations of consistency and predictability of decision-making and maintaining public confidence in the legal process come into play.[70]

Even though not bound to do so by the doctrine of precedent, a judge will consider following a decision of another judge in the same hierarchy under the principle of *judicial comity*. The NCAT Appeal Panel has expressed the view that, although the principle does not apply in tribunals, there are compelling reasons why tribunals might adopt a similar approach.[71]

It has been suggested that a tribunal member sitting at first instance should follow decisions of the tribunal's appeal panel. NCAT's Appeal Panel has said—

---

63 *Independent Liquor and Gaming Authority v D & D Natural Health Pty Ltd* [2021] NSWCATAP 170 [51]. On the types of tribunals, see chapter 1 at **1.4.**

64 As was found to have occurred with certain AAT Tier 1 decisions between 2016 and 2022 which were not brought to the attention of other AAT panels: Robodebt Royal Commission*: Royal Commission into the Robodebt Scheme Final Report* (July 2023) ch 20, [3.2].

65 ART Act ss 197(5)(f), 237(4)(e), 242(2)(hc)(i), 264(2)(a).

66 ART Act pt 5. The panel must be constituted by two or three members one of whom is the President or a deputy President: (s 40).

67 ART Act s 109.

68 ART Act s 110(1).

69 Eg QCAT Act s 3(d); NCAT Act s 3(e).

70 *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 [107].

71 *Australian Postal Corporation v Williams* [2024] NSWCATAP 168 -28]-[29].

> Considerations of consistency and maintaining public confidence in the legal process weigh heavily in favour of tribunals at first instance and on appeal following [the] Appeal Panel's substantive decision.[72]

A differently constituted NCAT Appeal Panel expressed the view that NCAT should ordinarily follow decisions of the Appeal Panel and decisions of NCAT when constituted by the President or a Deputy President, unless the decisions are clearly wrong.[73]

It is open to a member of a tribunal to express their own view for the record, even if they are not able to find that a previous decision is 'clearly wrong'.[74]

2.5.2.2 Civil tribunals exercising judicial power

The NCAT Appeal Panel has suggested that where a state tribunal exercises judicial power in a civil jurisdiction, it is not necessarily correct to say that the tribunal is not bound to follow precedents made by the tribunal.[75] The doctrine of precedent may apply even if the tribunal Act does not give the tribunal the status of a court.[76] What matters is the nature of the power being exercised by the tribunal. See **chapter 1** at **1.2** and **1.4.1** where the different kinds of power vested in tribunals are discussed.

The doctrine of precedent will apply if the tribunal is exercising judicial power, in the sense of making a binding determination between defined parties of existing rights and liabilities by reference to the facts as found and the law as it stands.[77] The NCAT Appeal Panel has suggested that as most decisions of NCAT that can be appealed to the Appeal Panel involve the exercise of judicial power, NCAT members at first instance should consider themselves bound to follow decisions of the Appeal Panel on questions of law.[78]

2.5.3. Assessing the persuasive value of a non-binding precedent

Even if a ruling in a prior decision is not binding because:

- it is obiter dicta
- it interprets a different statute
- it is from a tribunal, or a court in the hierarchy of another jurisdiction

---

72 *Owners of Strata Plan No 80412 v Vickery* [2020] NSWCATAP 48 [15]

73 *Independent Liquor and Gaming Authority v D & D Natural Health Pty Ltd* [2021] NSWCATAP 170 [51]

74 *Re Ganchev and Comcare* (1990) 19 ALD 541; *Powell v Queensland Police Service - Weapons Licensing* [2023] QCAT 504 [12], [13].

75 *Lam v Steve Jarvin Motors Pty Ltd* [2016] NSWCATAP 186 [190] ('*Lam*")

76 *Lam,* ibid [191], citing *Babaniaris v Lutony Fashions Pty Ltd* [1987] HCA 19, (1987) 163 CLR 1 at 12 ('*Babaniaris*').

77 *Lam*, ibid, citing *Babaniaris* ibid, 12, 31-32; *The Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* [1970] HCA 8: 123 CLR 361 at 374-75 (Kitto J).

78 *Lam*, ibid [196].

it may still be persuasive, provided that it does not conflict with another precedent that is binding. A number of factors affect a tribunal's assessment of how persuasive a precedent is, including—

- the quality of the reasoning and analysis to be found in it
- the extent to which it takes account of relevant precedents and related principles of law
- the standing of the court or tribunal which handed down the decision
- whether other courts or tribunals have applied it
- where the precedent relates to the interpretation of a different statute—the similarity of that statute to the one being interpreted in terms of its subject matter, purpose and language.

It is good practice to refer to any relevant precedent that is known to the tribunal, whether binding or not, and to discuss whether it should be followed.

Chapter 3: Procedural Fairness

3.1. Key points

Procedural fairness:

- Tribunals are under a duty to afford the parties procedural fairness (natural justice).
- Procedural fairness requires that a tribunal:
  - give the parties a fair hearing
  - is free from actual or apprehended bias.
- The duty to accord procedural fairness arises from common law or will be implied into any statute unless the statute displays a clear and unequivocal intention to exclude it.
- A breach of procedural fairness is an error of law which may provide grounds for the decision to be set aside by a court in judicial review or an appeal on a question of law.

Fair hearing rule:

- A tribunal is under a duty of procedural fairness when making decisions which affect a person's rights or interests in a direct and immediate way.
- The requirements of the hearing rule vary according to the terms of the statute, the nature of the interests at stake and the circumstances of the decision. Generally, it requires at the minimum:
  - notice of the date and place of the proceeding, the case against the individual and disclosure of all information that is credible, relevant and significant to the decision
  - a reasonable time to prepare the case
  - an adequate opportunity for the parties to put their case and test the case against them. This need not be in a formal oral hearing and may in some circumstances be achievable by means of written submissions.

Bias rule:

- The tribunal has a duty to hear and decide without bias or the appearance of bias.
- Actual bias arises when a decision-maker's mind is so closed to persuasion that contrary argument or evidence is ineffectual.
- The test of apprehended bias (apparent bias in New Zealand) is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the determination of the issues.

- Bias may be inferred from a member's behaviour, statements, personal interests and past or present associations, or from the way the decision-making process is structured.
- Where a member perceives a logical connection between such an interest or association and the merits of the matter to be decided, the member should disclose the interest to the parties.
- A party may object or may waive the right to object to the decision-maker proceeding to hear and determine the case.
- After hearing the submissions of the parties, the member must decide whether to recuse themselves from hearing the matter.

3.2. Procedural fairness

3.2.1. What is procedural fairness?

In determining disputes, tribunals are under a duty to comply with the legal requirements of procedural fairness. *Procedural fairness*, or the duty to act fairly, is synonymous with *natural justice* (the term preferred in New Zealand). Australian law now prefers the term *procedural fairness* because it ‘more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case’.[1]

The duty to accord procedural fairness finds common ground with ethical and human rights norms. Fair treatment is one of the eight core tribunal values identified by the *Framework for Tribunal Excellence*.[2] Central to fair treatment is the provision of a fair hearing. The Framework identifies various elements of a fair hearing, which are discussed in subsequent chapters of this Guide.

The duty to act fairly applies to courts, administrative agencies and tribunals (both civil and administrative) which are empowered to determine matters affecting the rights and interests of persons.

Procedural fairness is a flexible doctrine whose specific requirements as to procedure vary according to the nature of the decision and other circumstances. In general, the more serious the decision and its consequences for a person, the higher the standard of procedure required.

There are two rules of procedural fairness.

- *The hearing rule*: a person or body having power to decide a matter must give affected persons a reasonable opportunity to be heard.
- *The bias rule*: the decision-maker must not be actually biased and there must be no reasonable apprehension of bias.

3.2.2. What are the justifications for the rules?

Commentators generally distinguish two kinds of justifications for the rules of procedural fairness: ethical and instrumental.[3] *Ethical* justifications include human rights, the recognition of human dignity and personal autonomy by showing respect for persons affected by government decisions, and the promotion of democratic principles by enabling people to participate in decision-making processes that affect them. *Instrumental* justifications emphasise the practical benefits flowing from fair procedures.

---

1 *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J); *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 489 (Gleeson CJ).

2 Council of Australasian Tribunals Inc, *Tribunal Excellence Framework* (2017) 8 <coat.asn.au> .

3 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action* (6th ed, Thomson Reuters, Sydney, 2017) 376–8, n 64.

1. By allowing affected persons to have a say in the decision-making process, procedural fairness can be expected to produce more informed and considered (and therefore better) decisions
2. The opportunity to participate and the impartiality of the adjudicator promote acceptance of the decisions by affected persons and is likely to reduce enforcement costs.

Fair procedures and impartial decision-making enhance public confidence in tribunals, enabling them to command the public support and resources needed for the performance of their functions.

After considering what procedural fairness requires in various circumstances, consideration should be given to what may additionally be required by any applicable human rights legislation, codes of conduct, the tribunal's Client Service Charter (if any) and ethical guides applicable to the tribunal and its members. The nature and sources of the various conduct standards relevant to tribunals and their members are discussed in **Chapter 8** at **8.3–8.4**.

3.2.3. What is the source of the duty?

In **Chapter 2** at **2.4.5**, it was noted that courts apply certain value-based presumptions when interpreting statutes. The principle of legality holds that Parliament is presumed not to intend to interfere with fundamental rights and principles recognised by the common law, such as the right to a fair trial and freedom of movement. The presumption can be displaced only if Parliament expresses that intention 'with irresistible clearness'.[4] Procedural fairness is one of these fundamental common law principles.[5] So in construing legislation, the common law will normally imply that the exercise of a power is subject to a duty to provide procedural fairness to someone whose rights or interests may be adversely affected.[6]

Some tribunal statutes include a provision such as 'the tribunal is bound by the rules of natural justice except to the extent that the Act, or other Acts conferring jurisdiction on the tribunal, authorise a departure from the rules'. This provision simply states the common law, which applies even if the tribunal's governing legislation is silent on the matter. In each case, the tribunal will be under a common law obligation to observe procedural fairness, subject to any modifications made by the Act or subordinate legislation.

---

4 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 [15].

5 Ibid [58]– [59].

6 *S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 [97]. Until recently, the test for implication of a duty of procedural fairness referred to 'rights, interests and legitimate expectations': *Kioa v West* (1985) 159 CLR 550 at 584 (Mason J). The High Court has since disapproved the concept of 'legitimate expectation', both in deciding when the duty is to be implied (*S10/2011*) and in deciding what will satisfy the duty in particular circumstances (*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30], [61]). For the position in New Zealand, see Joseph, 'Law of Legitimate Expectations in New Zealand' in M Groves and G Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, Oxford, 2017) 189.

The common law presumption is given added statutory force in the human rights legislation of four jurisdictions. The *New Zealand Bill of Rights Act 1990* (NZ) s 27(1) recognises the right of a person 'to the observance of natural justice by any tribunal which has the power to make a determination in relation to the person's right, obligations or interests protected or recognised by law'. Legislation in Victoria, Queensland and the Australian Capital Territory recognises the right of a party to a civil proceeding to have the proceeding 'decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.[7] The legislation in each of these jurisdictions is to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.[8]

The Victorian, Queensland and Australian Capital Territory Acts also require public authorities, including administrative tribunals, to give proper consideration to human rights when making decisions and to act in a way that is compatible with human rights.[9] (See **Chapter 6** at **6.2.12.2**).

3.2.4. What are the consequences of a breach?

In **Chapter 1** at **1.6.2** and **1.6.3**, it was noted that, subject to any statutory limitation, a person aggrieved by a decision of a tribunal can apply to a court of supervisory jurisdiction for judicial review. Generally, an application for judicial review may be made as soon as the requirements of procedural fairness are breached; an affected party does not have to wait until the tribunal has made its final decision. In this situation, the court may restrain the tribunal from continuing to breach procedural fairness.[10]

In Australia, a tribunal that fails to comply with the legal requirements of procedural fairness commits a legal error, but it will be a jurisdictional error only if the breach is material. A breach is material to a decision if 'there is a realistic possibility that the decision that was made in fact could have been different if the error had not occurred'.[11] One consequence of an error being jurisdictional is that, while legislation can deprive the courts of the power to review decisions on other grounds, judicial review on the ground of jurisdictional error by the High Court and the State Supreme Courts is protected by the Australian Constitution.[12]

A decision affected by a jurisdictional error is not automatically 'null and void' for all purposes, but a court may declare it to be so.[13]

---

7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1); *Human Rights Act 2019* (Qld) s 31(1). *Human Rights Act 2013* (ACT) s 21(1) is in broader terms, referring to 'rights and obligations recognised by law'. Subsection (2) of each provision allows exceptions to the public hearing requirement.

8 Ibid, Vic s 32(1), Qld s 48, ACT s 3; see also NZ s 6.

9 Vic ss 4, 38; Qld ss 9, 58; ACT ss 40, 40B. See J Boughey and A Fletcher, 'Administrative Decision-Making under Victoria's Charter' (2018) 25 *Aust Journal of Administrative Law* 10.

10 *Re Refugee Review Tribunal Ex parte Aala* (2000) 204 CLR 82, 116–17.

11 *LPDT* v *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 at [7], [32] – [36]; *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 at [45].

12 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

13 Aronson et al, above n 3 [10.90]. See further, **Chapter 6** at **6.6.1**.

3.3. The hearing rule

To apply the hearing rule to a tribunal proceeding requires consideration of three questions.

1. Is the nature of the power one to which the hearing rule applies at common law? (The implication question).
2. Is the common law rule excluded or modified by statute? (The exclusion question).
3. If the rules apply, what sort of procedures do they require in the particular case? (The content question).

3.3.1. Implication: when does the rule apply?

The general scope of the hearing rule, as it affects tribunals, is as follows. Before making a decision that may adversely affect a person's rights or interests directly and individually, a tribunal must give the person a reasonable opportunity to be heard. The term 'interests' is not confined to legal rights. It may be sufficient that the person has an interest in having the tribunal's powers exercised in their favour.[14]

It follows that a tribunal may in certain circumstances owe a duty of procedural fairness not only to the parties to the proceedings, but also to any other person whose rights or interests may be adversely affected by the tribunal's decision. For example, if the tribunal is proposing to make a finding that may damage the reputation of a party or other person, ordinarily it should consider notifying the person and give the person an opportunity to respond.

3.3.2. Exclusion: when is the rule excluded or modified by statute?

Parliament may exclude or modify the rules of procedural fairness in relation to the exercise of a statutory power, and can do so by express words or by necessary implication.[15] An example of express partial exclusion is a statute that provides that a party is not entitled to be legally represented at a disciplinary hearing (assuming that the common law rules would provide otherwise in the circumstances).

Parliament may exclude or modify the common law requirements of natural justice if it sufficiently expresses a clear and unequivocal intention to do so. For example, the *Migration Act 1958* (Cth) s 422B(1) (repealed) was held to have expressed such a legislative intent.[16] It provided a code of procedure in Div 4 of Part 7, which dealt with the conduct of a review by the former Administrative Appeals Tribunal. The code was expressed to be 'an exhaustive

---

14 *S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 [66]. This has been compared to the kind of 'special interest' that qualifies a person to show standing to apply for judicial review: N Sharp, 'Procedural Fairness: The Age Of Legitimate Expectations is Over' (2016) 90 *ALJ* 797, 804–5.

15 This appears to be the position in New Zealand as well, but this has been questioned: *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121 (Cooke J); Joseph, above n 8, [23.3.2].

16 *SZFDE v Minister for Immigration and Citizenshi*p (2007) 232 CLR 189 at [48]; *Minister for Immigration and Citizenship v SZMOK* [2009] FCAFC 83 ('*SZMOK*') at [8] – [18]. The provisions were repealed and replaced.

statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. No other requirements of fairness were to be implied.[17]

The common law requirements may be excluded or modified by implication where they are inconsistent with the particular procedures required by the Act, or with the operation of the overall legislative scheme. For example, where a statute provides that an official holds office 'at pleasure' (that is, without notice or cause), it impliedly excludes any right to receive natural justice or prior notice before dismissal.[18] Where a decision must be made urgently or with elements of secrecy, the procedures normally required by procedural fairness may be reduced.[19]

For a statute to have the effect of excluding or modifying the rules of procedural fairness, that intention must be clearly manifested. As was noted by the High Court in *Commissioner of Police v Tanos*, an intention to exclude procedural fairness 'is not to be assumed, nor is it to be spelled out from indirect reference, uncertain inferences or equivocal considerations'.[20] The following provisions commonly found in tribunal legislation do *not* exclude procedural fairness (although they may be relevant in determining what procedures are required in the circumstances)—

- a provision that directs the tribunal 'to proceed with as little formality and technicality and with as much expedition as the requirements of the relevant legislation and proper consideration of matters permit'
- a provision stating that the tribunal may determine its own procedure, and may inform itself as it thinks fit, without being bound by the rules of evidence.

3.3.2.1. Is it enough to follow the statutory procedures?

It is uncommon to find a tribunal statute that expressly excludes the common law rules of procedural fairness.[21] It is more common that the rules are excluded partially and by implication. Generally, a statute will prescribe procedures for the tribunal to follow. If the procedures are comprehensive, they may be taken to operate as a *procedural code* that impliedly excludes the common law requirements.[22] In other cases, there may be room for the common law requirements to fill gaps and to operate alongside the statutory procedures.

---

17 *SZMOK* ibid at [17].

18 *Marine Hull & Liability Insurance Pty Ltd v Hurford* (1985) 10 FCR 234, 240–2; *Re Hatfield and Comcare* [2010] AATA 848; *Leghaei v Director-General of Security* (2007) 241 ALR 141; *Jaffarie v Director General of Security* (2014) 226 FCR 505.

19 *Coutts v Commonwealth* (1985) 157 CLR 91; *Stewart v Ronalds* (2009) 76 NSWLR 99. But see *Commissioner of Police for NSW v Jarratt* (2003) 59 NSWLR 87.

20 (1958) 98 CLR 383 at 396; see also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

21 For a list of Commonwealth Acts which, as at 2016, expressly exclude decisions from review for breach of natural justice, including by tribunals, see Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC 129, 2016) ch 14.

22 As, for example, the procedural code in *Migration Act 1958* discussed in this Chapter at **3.3.2**.

The trend of recent authority is against reading statutory procedures as exhaustive or as impliedly excluding the common law requirements.[23] In *Annetts v McCann* the High Court of Australia said that the common law rules will apply unless the Act shows an intention to exclude them.[24] The court will not easily be persuaded to find such an intention. The fact that some of the statutory procedures conform to the common law requirements will not be taken to show that parliament intended to exclude the other requirements.[25] Aronson et al observe: 'The exhaustive code argument faces an increasingly uphill battle and is regularly rejected by the courts'.[26]

This means that it may not be enough in all cases for tribunals to follow the procedures set out in their governing legislation and in their Client Service Charter (if they have one). The common law may require higher procedural standards, depending upon the nature of the issues, the seriousness of the consequences of an adverse decision and other relevant circumstances. Tribunals should therefore consider whether in all the circumstances, procedural fairness demands *more* than compliance with the statutory procedures. For example, the common law may require the tribunal to give the parties an opportunity to make submissions on material obtained by the tribunal through its own inquiries (such as online searches) or through the expertise of members, even though the statutory procedures are silent about it.[27]

3.3.3. Content: what procedures does the rule require?

Apart from the scope of any statutory exclusion of the hearing rule, the main issue for tribunals is the *content* of the rule—what specific procedures will satisfy the requirement to give a fair hearing in the circumstances? Content issues arise throughout the hearing process, and relate to matters such as:

- giving reasonable notice of a hearing and of what is in issue
- giving parties adequate time to prepare for a hearing (see **Chapter 5** at **5.5.7** dealing with requests for adjournment)
- deciding what form of hearing to give—oral or written submissions
- disclosing material obtained from another party or source (see this Chapter at **3.5.2** and **Chapter 5** at **5.2.2** and **5.7.5**)
- giving parties an adequate opportunity to answer the case that is put against them (see this Chapter at **3.5.2**)

---

23 See especially *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. See generally, R French, 'Procedural Fairness: Indispensable to Justice?' Sir Anthony Mason Lecture, University of Melbourne, 7 October 2010 <hcourt.gov.au >.

24 (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).

25 Ibid 598–600.

26 Aronson et al, above n 3, 465.

27 See *Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW* (2010) 56 MVR 108; *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29.

- ensuring that decisions are based on relevant and logically probative information (*probative* information is that which tends logically to prove that which it asserts) (see **Chapter 5** at **5.7.1**)
- in certain cases, deciding whether to allow a party to be represented (see **Chapter 5** at **5.5.3**)[28]
- deciding whether to permit cross-examination of witnesses (see **Chapter 5** at **5.6.3**).

Several key components of the hearing rule can be identified from the case law.[29]

- A person whose interests may be affected by a decision of the tribunal should be provided with notice of the date and place of the proceeding, what will happen during the proceeding, what can happen as a result of the proceeding and the source of the tribunal's power.
- A person must be informed of the nature of the case sought to be raised against them with sufficient particularity to enable the person to know the case to be met, and (where no problem of confidentiality arises) all information obtained from third parties that is 'credible, relevant and significant to the decision to be made'.[30]
- A person must be allowed a reasonable time to obtain and present supporting material and to prepare their case.
- A person must be given an adequate opportunity to put evidence and reasoned arguments before the tribunal in an attempt to seek a favourable outcome. They must also be given an adequate opportunity to counter the case that is being raised against them. This does not mean that an oral hearing is required in every case.[31] In some circumstances, the opportunity to make submissions in writing or by telephone may satisfy the common law requirements.
- If a hearing is conducted by one tribunal member then, ordinarily, procedural fairness may require that the parties be notified and given an opportunity to make submissions if a second, different tribunal member is to decide their case.[32]

---

28 *Cains v Jenkins* (1979) 28 ALR 219; *WABZ v Minister for Immigration and Multicultural Affairs* (2004) 134 FCR 271.

29 *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; *Park v Minister for Fair Trading* [2000] NSWCA 96 at [58]; *Seiffert v Prisoners Review Board* [2011] WASCA 148.

30 *Kioa v West* 159 CLR 550 at 629; [1985] HCA 81 [38] (Brennan J); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 [15] – [17]; *AB (a pseudonym) v Independent Broad-based Anti-Corruption Commission* (2024) 278 CLR 300; [2024] HCA 10 [25]. As to the tribunal's duty in a case where the information is of a confidential or sensitive nature, see **Chapter 5** at **5.2.3**.

31 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 [33].

32 Ibid [33]– [48].

- A person must be given an opportunity to respond to any adverse conclusion which the tribunal is contemplating, if it was not an obvious evaluation of the material before the tribunal.[33]
- A tribunal should not make an adverse finding about a person's credit without ensuring that the person is aware that their credit is in issue. At the same time, 'a decision-maker is not obliged to expose their mental processes or provisional views to comment before making the decision in question'.[34]
- A party may require the services of a competent interpreter in order for the party to have a 'real and fair opportunity' to understand what is said to them, to put their case, and to participate in the hearing or other process conducted by the tribunal.[35] (See **Chapter 5** at **5.5.2.1**)
- The tribunal must consider representations made to it by a party, unless they are not relevant or not clearly articulated.[36] This means that the tribunal must 'read, identify, understand and evaluate the representations' and must 'bring their mind to bear' on the facts, arguments and opinions put forward therein.[37] Once it has considered the representations, the tribunal can determine what weight to give them.[38] (See **Chapter 6** at **6.3.4.4**).

Caution should be exercised in treating as precedents judicial decisions applying the hearing rule in a different context. The rule cannot be reduced to a code for categories of decisions. Its content is variable and requires particularised assessment. The specific requirements of the rule depend on the legislative provisions, the nature of the decision to be made, the subject matter of the case and other relevant circumstances.

Some examples of the application of the hearing rule are discussed in this Chapter at **3.3.3** and in **Chapter 5**.

---

33 *Kioa v West* 159 CLR 550 at 629; [1985] HCA 81 [7] (Brennan J); [8] (Deane J); *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511, 522 [46]

34 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-2; [1994] FCA 1074.

35 *SZRMQ v Minister for Immigration and Border Protection* (2019) FCR 212: [2013] FCAFC 142, [9] – [10], [24], [46] – [48, [65] – [75; *DVO14 v Minister for Immigration and Border Protection* (2021) 273 CLR 177; [2021] HCA 12 [8]. See also J Longo, 'Affording Procedural Fairness: Culture and Interpreters in Tribunal Hearings' (22 April 2016, COAT Victoria Chapter Conference) <coat.asn.au/>.

36 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 [25]. The Court preferred this formulation of the duty to the previously favoured formulation which requires the giving of 'proper, genuine and realistic consideration' to the representations: ibid [26].

37 Ibid [24]-[27].

38 Ibid [24].

3.4. The bias rule

A central requirement of administrative justice is that the decision-maker should be impartial, and able to judge the case on its merits. Freedom from bias is also necessary to maintain public confidence in the tribunal and acceptance of its decisions.

The Administrative Review Council's *A Guide to Standards of Conduct for Tribunal Members* recognises freedom from bias as an ethical as well as a legal obligation:[39]

> A tribunal member should act in an impartial manner in the performance of their tribunal decision-making responsibilities, so that their actions do not give rise to an apprehension of bias, or actual bias.

3.4.1. Bias—actual and apprehended

Bias means a predisposition to approach the issues in the case otherwise than with an impartial and unprejudiced mind.[40] The presence of bias may be inferred from a member's behaviour, statements, personal interests and past or present associations, or from the way the decision-making process is structured. Examples of behaviour that may be suggestive of bias in the context of a hearing are outlined in **Chapter 5** at **5.4.3**.

Bias exists if the decision-maker is actually biased ('actual bias') or if a fair-minded lay observer might reasonably apprehend that the decision-maker is biased. In New Zealand, the term 'apparent bias' is preferred to 'apprehended bias'. Actual bias can be inferred from statements or conduct, and need not be deliberate, conscious or malicious.[41] An allegation of actual bias will only be upheld by a court where the accusations are 'distinctly made and clearly proved'.[42] A finding of actual bias requires proof that the decision-maker brought a closed mind to the issues to be decided or had prejudged them.[43]

The test for apprehended bias in Australia is:

> whether a fair-minded and well-informed lay observer might reasonably apprehend that the [tribunal] might not bring an impartial and unprejudiced mind to the determination of the matter on its merits.[44]

---

39 at 12. See discussion of the ARC Guide in **Chapter 8** at **8.4.2.4**.

40 *Re JRL Ex parte CJL* (1986) 161 CLR 342 at 352.

41 *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 135–6 (North J).

42 *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17 [69] (Gleeson CJ and Gummow J), see also [127] (Kirby J).

43 Ibid; *R v Stevedoring Industry Board; Ex parte Northern Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 116. A finding of actual bias against a tribunal member is rare. One example is *Jetpoint Nominees Pty Ltd v Lee* [2021] WASAT 10.

44 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344–5 [6]–[8]; *Charisteas v Charisteas* [2021] HCA 29 [11],

The test for apparent bias in New Zealand is similar:

> [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 required to decide.[45]

The double use of 'might' in the quoted passages is deliberate; it indicates that that the test is one of objective possibility, not probability.[46] The appearance of bias is assessed objectively from the perspective of

> a fair-minded lay observer, who is to be attributed with appropriate knowledge of relevant matters so as to be in a position to make a reasonably informed assessment of the likelihood of apprehended bias.[47]

To evaluate an allegation of apprehended bias requires an analytic approach using three steps:

1. identify precisely the interest or fact which might lead the decision-maker to decide the matter other than on its merits
2. articulate a logical connection between the interest or fact and the anticipated deviation from deciding the matter on its merits
3. with respect to that connection, assess the reasonableness of an apprehension of bias, from the perspective of the hypothetical fair-minded lay observer.[48]

The vast majority of challenges to courts and tribunals under the bias rule allege apparent bias rather than actual bias, since the former is easier to prove and less pejorative. Either actual or apprehended bias disqualifies a member from constituting the tribunal unless the parties waive their right to object.

3.4.2. Disqualifying circumstances

In *Webb v R*, Deane J identified four main categories of cases where a decision-maker is disqualified by reason of the appearance of bias:[49]

1. disqualifying interest, where the decision-maker has a pecuniary or other personal interest in the decision outcome. This is also referred to as having a conflict of interest
2. disqualifying conduct, where the decision-maker's conduct in the course of the proceedings or outside the hearing gives rise to an apprehension of having prejudged the issue to be decided
3. disqualifying association, where the appearance of bias arises from the decision-maker's association or relationship with a person interested in the proceedings

---

45 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 [3].

46 *Akiba on Behalf of the Torres Strait Regional Sea Claim v State of Queensland* [2018] FCA 772 at [47].

47 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 3 at [36].

48 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 [8]; *Charisteas v Charisteas* [2021] HCA 29 [11]. An example of the application of this approach to a factual scenario is given in this Chapter at **3.4.4.2**.

49 (1994) 181 CLR 41 at 74–5.

4. disqualification by extraneous information, where the decision-maker has knowledge of some damaging information obtained outside the proceedings.

Each of these categories is discussed below. There may, of course, be other types of cases in which an apprehension of bias may arise. Note that the three-step analytic approach to evaluating bias allegations (at **3.4.1**) is used in Australia for bias arising from all the categories of apprehended bias identified by Deane J.

3.4.3. Operation of the bias rule

The bias rule works like the hearing rule of procedural fairness in that:

- it is a common law presumption that can only be displaced by clear indication of legislative intention that it should not apply, or that its operation should be modified
- the application of the rule in particular situations is highly flexible, to allow for the variety of circumstances in which it is applied.

The participation of a member who is affected by disqualifying bias deprives the tribunal of jurisdiction and amounts to a jurisdictional error.[50] A reviewing court or a tribunal appeal panel reviewing for error of law will not inquire into the actual effect that the member's participation may have had on the tribunal's decision.[51]

There are three recognised exceptions to the rule that a tribunal member (or other decision-maker) is disqualified for actual or apprehended bias: statutory exceptions, waiver and necessity.

3.4.3.1. Statutory exceptions

A statute may expressly or by necessary implication authorise a decision-maker to determine a matter despite circumstances that might otherwise give rise to apprehended bias. For example, a marketing board which had made a loan to a producer was not disqualified from determining the producer's zone of operation, since the Act conferred both functions on the board.[52]

3.4.3.2. Waiver

There is no disqualification where disclosure of the interest is made, and the parties waive the right to object to the decision-maker proceeding to hear and determine the case (see this Chapter at **3.4.9.3**).

3.4.3.3. Necessity

The bias rule is subject to a principle of necessity, which recognises that in some cases a tribunal or member must be allowed to proceed despite an appearance of bias, if the tribunal

---

50 *QYFM v Minister for Immigration* [2023] HCA 15 [27]–[29], [57], [58], [92], [188].

51 Ibid; *Goldsmith v Legal Services and Complaints Committee* [2023] WASCA 136 [10], [24].

52 *Jeffs v NZ Dairy Production Marketing Board* [1967] 1 AC 551.

would otherwise be unable to perform its statutory function.[53] If the tribunal could not find enough members to constitute a panel, a member who would otherwise be disqualified for bias may take part in the decision.[54] This might occur, for example, where all the members available have received and read an email message from party A that makes prejudicial statements about party B, and party B does not waive their right to object.[55]

3.4.4. Conflict of interest

3.4.4.1. Automatic disqualification or presumptive bias rule

In New Zealand today, and in Australia until 2000, cases of direct pecuniary (financial) interest in the subject matter of the proceedings have been treated differently from other causes of bias. They have been subject to a separate rule which in New Zealand is called *presumptive bias,* and in Australia is called *automatic disqualification*. Its effect is that a decision-maker (judge, tribunal member or administrator) who has a direct pecuniary interest in the matter to be decided is disqualified, provided that the interest is not too trivial or remote.[56]

The existence of a direct pecuniary interest can raise an irrebuttable presumption of bias—hence the term *presumptive bias*. Disqualification is automatic in the sense that it is not necessary to enquire whether the decision-maker was in fact influenced by the interest, or whether a fair-minded observer would reasonably suspect bias. The rule was intended to provide clear guidance to decision-makers about when they should withdraw from a proceeding. In practice the rule became more anomalous and unworkable as a result of social and economic change. For example, it has become much more common for decision-makers to have small shareholdings in a number of large companies, through diversified share portfolios or pooled investment and superannuation funds.[57]

In *Ebner v Official Trustee in Bankruptcy*,[58] the High Court of Australia overruled a long line of authorities, holding that there was no longer any rule that a decision-maker is automatically disqualified by reason of a pecuniary interest in the outcome of the proceedings. No free-standing rule of automatic disqualification for pecuniary interest or any other cause now applies in Australia. Pecuniary interest is now dealt with under the same approach as other causes of bias.

---

53 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88 (Mason CJ and Brennan J).

54 In *Bates v Valuers Registration Board* [2015] NZHC 1312, the doctrine of necessity operated to prevent disqualification of a member of a board, as the board would have been without a quorum and unable to determine the matter.

55 *Willing v Hollobone (No 2)* (1975) 11 SASR 118 (all magistrates received parking privileges from the city which were alleged to be a disqualifying circumstance).

56 *Dimes v Proprietors of Grand Junction Canal Pty* (1852) 10 ER 301; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (NZCA).

57 *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376.

58 (2000) 205 CLR 337.

3.4.4.2. Analysing a case of potential conflict of interest or association

A tribunal member may have a conflict of interest by reason of a pecuniary or proprietary interest in the outcome of the litigation, or an association with a party, witness, representative or other person concerned in the proceedings. The majority judgment in *Ebner* provided a three-step method that can be used to analyse whether a tribunal member is disqualified by reason of a conflict of interest or association:[59]

1. Identify with precision the interest in question. For example, the tribunal member owns shares in a company that is a party to the proceedings.
2. Spell out a logical connection between the interest and the anticipated breach of the member's duty to decide the case on its merits. For example, the connection might be that if the applicant company wins the case, the value of the member's shareholding in the company will rise, and this result might predispose the member to decide the case in favour of the applicant.
3. Apply the test for apprehended bias. Having regard to the interest and the connection, would a fair-minded observer reasonably apprehend that the member might not decide the case impartially? This requires an assessment of whether there is a realistic possibility that the outcome of the case would affect the value of the member's shareholding.[60]

As an example of this analysis, in *Clenae Pty Ltd v Australian and New Zealand Banking Group Pty Ltd,* a trial judge inherited a parcel of 2400 shares in the ANZ Bank after reserving judgment in a case in which the ANZ Bank was a party.[61] It was conceded (correctly, in the view of the majority of the High Court) that the outcome of the litigation would not have affected the value of the judge's shares in a bank that was a party, so the interest did not disqualify him.[62]

Notwithstanding the abandonment of the automatic disqualification rule in Australia, a majority of the High Court of Australia in *Ebner* said that pecuniary and proprietary interests continue to be of particular significance, because they are more concrete and identifiable, and are perceived to have a more insidious effect on impartiality.[63] A *direct* pecuniary or proprietary interest in the outcome of the case will normally be disqualifying unless the interest is insubstantial.[64]

It is important to note that the above rule of disqualification for bias applies in judicial review. Tribunal members may be required by legislation or a member code of conduct to adopt

---

[59] Ibid 345, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ). Their Honours indicated that the test applies to associations as well as interests.

[60] Ibid.

[61] (2000) 205 CLR 337.

[62] Ibid 347. (The *Clenae* appeal was heard concurrently with *Ebner* and dealt with in the same judgment.)

[63] Ibid 351.

[64] Ibid 358. Compare this to *Smits v Roach* (2006) 227 CLR 423, where the judge's brother had the direct financial interest.

additional or more exacting standards when deciding whether to take part in a tribunal proceeding (See this chapter at **3.4.4.4**, **3.4.9.1** and **Chapter 8** at **8.3)**

3.4.4.3. Scope of the presumptive bias rule in New Zealand

In New Zealand, the presumptive bias rule continues to apply in cases of direct pecuniary interest and certain situations of *indirect* pecuniary interest, such as where the decision-maker stands to obtain a potential benefit or liability from the proceedings.[65] An example of *indirect* pecuniary interest is where the member's spouse or child has a financial interest in the outcome of the proceedings.

English authority raises the possibility that the presumptive bias rule may also extend to a case where the decision-maker has a direct non-pecuniary interest in the outcome. In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet (No 2)*,[66] the House of Lords held that a judge was disqualified from hearing a case on the basis that he was a member of an organisation that was involved in the work of a party to the case. This decision has blurred the boundaries of the rule, and the scope of the extension that it has introduced is unclear.[67]

3.4.4.4 Conflicts of interest - statutory provisions

In recent years the need to avoid conflicts of interest in tribunal proceedings has attracted legislative intervention. It has become more common for tribunal statutes to include provisions that—

- prohibit a member from taking part in any tribunal proceeding or function if the member has an interest that may conflict with the proper performance of the member's function in relation to the matter, except with the consent of each party and the head following disclosure of the interest;[68]
- place members under a general duty to disclose to the head any interest that conflicts or could conflict with the proper performance of the member's duties;[69]
- prohibit members from undertaking paid outside work that may conflict with the proper performance of their duties unless the work has been approved by the head;[70]
- prohibit members from representing a party to a proceeding in the tribunal or appearing as an expert witness without the consent of the head;[71]

---

65 *Calvert & Co v Dunedin City Council* [1993] 2 NZLR 460.

66 [2000] 1 AC 119.

67 Joseph, above n 8, [23.5.2(2)].

68 See eg QCAT Act s 169; VCAT Act s 19; ART Act s 218; ACAT Act s 50 (material interests): NTCAT Act s 77.

69 Eg ART Act s 217.

70 VCAT Act s 18; TASCAT Act s 52(2).

71 Eg VCAT s 25A, 25B (for a two-year period); ART Act s 217 (for at least 12 months).

- empower heads to take action where a member fails to comply with one or more statutory obligations or a code of conduct, including by initiating the procedure to remove the member from office.[72]

Apart from legislation, duties to avoid conflicts of interest and to disclose potentially disqualifying interests can be imposed under members by a member code of conduct, which may be incorporated into the instrument of appointment.[73] Members should also consider the Conduct guides discussed at **Chapter 8** at **8.4.1**.

3.4.5. Bias by prejudgment

Prejudgment (or predetermination) means that a decision-maker has an opinion on a matter that needs to be decided afresh in the case, and that the member will apply the opinion to the matter to be decided without giving the matter fresh consideration in the light of the facts and arguments.[74] An allegation of bias by prejudgment must be 'distinctly made and clearly proved'.[75] Tribunal members may, by their words or conduct in tribunal processes or their activities outside the tribunal, engender a reasonable apprehension that they have prejudged an issue to be adjudicated, and are not open to persuasion.

New Zealand authorities distinguish between apparent bias and predetermination as distinct grounds for judicial review.[76] The test for predetermination is

> [whether] 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.[77]

The following guidelines may assist members in avoiding giving rise to a reasonable apprehension of bias by prejudgment by their words or conduct.[78]

3.4.5.1. Expression of provisional views

It is helpful to the parties if, in the course of the hearing, the tribunal discloses a provisional view on an issue or directs the attention of the parties to weaknesses in their case.[79] This promotes the purpose of the hearing rule by alerting the parties to what the tribunal is thinking and giving them an opportunity to persuade the tribunal to take another view. Care should, however, be taken when expressing a provisional view, or exposing weaknesses in a party's case, that the tribunal does not give the impression of having made up its mind before the

---

72 ART Act s 201(1), (2), s 221.

73 Eg NCAT *Member Code of Conduct* cl 11-15 <ncat.nsw.gov.au>.

74 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 564; [2001] HCA 17 [185].

75 Ibid at [69] (Gleeson CJ and Gummow J).

76 *Rongotai Investments Ltd and Rongatai Estates Ltd v Land Valuation Tribunal* [2022] NZHC 1669 [35]; *Save Chamberlain Park Inc v Auckland Council* [2018] NZHC 1462 [180].

77 *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982 [143].

78 For further guidance on how tribunals can avoid causing an apprehension of bias, see Wentworth, above n 59.

79 *Vakauta v Kelly* (1989) 167 CLR 568 at 571–2 (Brennan, Deane and Gaudron JJ).

hearing has finished. To avoid the appearance of prejudgment, the former Workers Compensation Commission (NSW) suggested that an appropriate mode of expression is as follows: 'My provisional view, subject to what any of the parties may say, is that …'[80]

3.4.5.2. Preconceived views about witnesses

Tribunal members who see the same expert witnesses appearing before them in different proceedings may form views about the witnesses' expertise and impartiality. For example, a member may have the opinion that a medical expert who is regularly called by an insurance company in workers' compensation cases invariably underestimates the worker's impairment. The member may have rejected the witness's evidence in previous cases.

Provided that the member does not make comments indicating prejudgment, the member is not disqualified from hearing a matter in which the witness is called.[81] This may be contrasted with a situation where a member has in a previous case made findings against the credit or truthfulness of a non-expert witness who is called to give evidence in the current proceedings, and the credit of the witness is a live issue. In this situation there is a reasonable apprehension of bias,[82] so the tribunal member should not sit.[83]

3.4.5.3. Conduct in the hearing

A reasonable apprehension of bias may arise from hostility, sarcasm or aggression shown by a tribunal member towards a party, or the representative or witness for a party, during the hearing.[84] Examples of behaviour suggestive of bias are outlined in **Chapter 5** at **5.4.3**.

A tribunal may need to test the evidence by questioning witnesses and directing their attention to any inconsistencies in the evidence. Where a party is self-represented, care should be taken to ensure that this is not done in a manner that intimidates or overbears the party or 'unfairly undermines the proper presentation of a party's case'.[85] Continual interruptions, expressions of disbelief or aggressive questioning by the tribunal might give rise to a reasonable apprehension

---

80 Workers Compensation Commission (NSW), *Arbitrators Manual* (2002) 45.

81 *Vakauta v Kelly* (1989) 167 CLR 568 at 571–2 (Brennan, Deane and Gaudron JJ); *Johnson v Johnson* (2000) 201 CLR 488.

82 *Vakauta v Kelly*, ibid; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 300.

83 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* 3rd ed (2017, rev'd 2023) [3.3.4(i)] <aija.org.au> ('Guide to Judicial Conduct').

84 See *Johnson v Johnson* (2000) 201 CLR 488; *Vakauta v Kelly* (1989) 167 CLR 568; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288.

85 *Gambaro v Mobycam Mobile Pty Ltd* (2019) 271 FCR 530; [[2019] FCAFC 144 [151]; *Rongotai Investments Ltd and Rongatai Estates Ltd v Land Valuation Tribunal* [2022] NZHC 1669 [163], [179].

that the tribunal has taken sides or has prejudged the issue.[86] This type of conduct may also breach the hearing rule, if it has the effect of denying a party a fair hearing.

Flippant remarks in poor taste made by a member about the subject matter of the proceedings may also give rise to apprehended bias. For example, it was alleged that a member hearing a civil claim for defective construction of a fence had publicly referred to it as 'the case of the shonky fence'. Byrne J found that the allegation was unfounded, but if it had occurred it would meet the test for bias.[87]

3.4.6. Bias by association

Tribunal members commonly have personal or professional relationships with persons who are interested or involved in the proceedings as witness, party or representative. The relationship may be unknown to the parties. This raises the question whether the member should disclose it to them.

Not all prior associations will give rise to a reasonable apprehension of bias. Much depends upon the nature, duration and closeness of the relationship. What must be assessed is the capacity of the relationship to influence the outcome.[88] Some useful guidance may be obtained from the Australasian Institute of Judicial Administration's *Guide to Judicial Conduct* (3rd edition).[89] Although written for judicial officers, its analysis of bias issues is helpful for tribunal members.

- Relationships based on kinship, direct friendship and friendship with family members require close consideration. The Guide to Judicial Conduct classifies familial relationships as first, second and third degree according to the closeness of the kinship.[90] Other personal relationships can also be assessed by analogy with the degrees of kinship. Where the relationship to a party or the spouse or domestic partner of a party is in the first degree (parent, child, sibling, spouse or domestic partner), the Guide to Judicial Conduct says that a judge should not sit.
- Relatives in the second degree are grandparents, grandchildren, in-laws of the first degree, aunts, uncles, nephews and nieces. Where a judge has a relationship in the first or second degree with counsel or solicitor representing a party, or the spouse or domestic partner of

86 *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at 435; Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001, rev'd 2009) 25–26 <coat.asn.au>; Justice John Griffiths, 'Maintaining Impartiality in the Tribunal Environment' (paper presented to the NCAT conference 21 Oct 2019) <coat.asn.au>; Anne Britton, 'Conducting a Fair and Effective Hearing' (paper delivered to the 2018 conference of the AAT, Twin Waters Qld, 29 May 2018) <ncat.nsw.gov.au>

87 *Keirl v Kelson* (2004) 21 VAR 422, [12] (Byrne J). Further examples are *B v DPP* [2014] NSWCA 232 and *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80.

88 *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215 at 226.

89 *Guide to Judicial Conduct*, above n 83.

90 Ibid 12–14 (and see **Chapter 8** at **8.4.3**).

such counsel or solicitor, the judge should not sit unless the matter is uncontested or of a minor procedural nature, or the principle of necessity applies.

A particular issue for tribunals can arise where a legal representative appears in proceedings in front of a member with whom they have previously sat on the tribunal. In the UK, the House of Lords has found that this practice may give rise to apprehended bias.[91] The *Guide to Judicial Conduct* provides a number of specific guidelines for particular categories of familial, personal, professional and business relationships with parties, witnesses or representatives or their spouses or domestic partners.[92] The guidelines take account of settled rules of common law and practice. They are considered further in **Chapter 8** at **8.4.3**. The following guidelines are worth noting here.[93]

- Personal friendship with a party is a compelling reason for disqualification, but mere acquaintance is not. The judge must consider whether to recuse themselves or to disclose the relationship to the parties and invite submissions.
- Past professional association with a party as client does not require disqualification unless the association relates to the subject matter of the proceedings.[94] Applying this in a tribunal example, a member of a planning tribunal may have previously advised a developer who is one of the parties in proceedings before the tribunal. If the matter on which the advice was given is unrelated to the matter presently before the tribunal, the member can sit.
- A judge who has a current or recent business association with a party usually should not sit, but a current or recent business association with a witness will not necessarily be grounds for disqualification. All the circumstances should be considered, and in the latter case the relationship should ordinarily be disclosed.
- Friendship or past professional association with counsel or a solicitor for the parties is not generally a sufficient reason for disqualification.[95]
- The fact that a witness is personally known to the judge is not a ground for disqualification unless the credibility of the witness is likely to be in issue, but the relationship should nevertheless be disclosed to the parties.

---

91 *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187, [21]–[23].

92 *Guide to Judicial Conduct*, above n 83, 11–12.

93 Ibid.

94 *S & M Motor Repairs v Caltex Oil* (1988) 12 NSWLR 358; *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 109; *Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council* [2008] NSWLEC 318, [42] (Pain J); *Precision Fabrication Pty Ltd v Roadcon Pty Ltd* (1991) 104 FLR 260, 264.

95 *Morton v The Transport Appeal Boards* [2007] NSWSC 888; *Taylor v Lawrence* [2003] QB 528. In *Charisteas v Charisteas*, above n 104, there were additional circumstances that supported disqualification: the judge had an ongoing association with counsel and communications took place without the knowledge of the other party while the matter was before the judge and while judgment was reserved. See *Reynolds v Rayney* [2023] WASCA 144 [38]-[42].

- The fact that the tribunal member or decision-maker communicates with third parties during the hearing about matters arising in the case could, depending on the facts, also give rise to an apprehension of bias. An unsuccessful claim of bias was made against Commissioner Ipp, who communicated with the NSW Government about legal matters generally relating to a current ICAC inquiry before him.[96]

The Administrative Review Council's *A Guide to Standards of Conduct for Tribunal Members* focuses on perceptions of bias that may arise from a tribunal member's private and professional life and associations. The Guide is considered further in **Chapter 8** at **8.4.2**. It advises as follows:

- Members should have regard to the potential impact of activities, interests and associations in their private life on the impartial and efficient performance of their tribunal responsibilities.[97]
- Members who have other professional and business activities should ensure that people from whom they accept work in their private practice do not appear in matters before them.[98]
- Members should avoid involvement in partisan political activity that might adversely affect perceptions of their impartiality.[99]
- Members may participate as members, donors and supporters in community and professional organisations, and may contribute to public debates, but should consider the potential for those associations and activities (and those of their family members) to give rise to apprehensions of bias in matters coming before the tribunal.[100]

The advice in the conduct guides cited above should be considered in the light of the High Court of Australia's remarks about the 'fair-minded lay observer' standard in *Charisteas v Charisteas*.[101] While the hypothetical observer may be taken to have knowledge of what is ordinary professional practice for the judiciary with respect to personal associations and communications, the observer represents a standard aligned with the public perception.[102] It is not to be equated with the 'professional self-appreciation' of the judiciary and legal profession.[103] The fair-minded observer is taken to be aware of 'human frailty' and understands

96 *Duncan v Ipp* (2013) 304 ALR 359.
97 Administrative Review Council, above n 86, 42.
98 Ibid 43.
99 Ibid 44.
100 Ibid 43–8.
101 [2021] HCA 29.
102 Ibid [21].
103 Ibid.

that 'information [as well as attitudes] consciously and conscientiously discarded might still have a subconscious effect on even the most professional of decision-makers'.[104]

3.4.7. Bias by extraneous communication

Once the hearing has commenced and until a final decision is delivered, there should be no communication between a tribunal member allocated to hear a case and a party, representative or adviser to a party or a witness for a party in the absence of the other parties, except with the prior knowledge and consent of each other party.[105] It makes no difference what is discussed in the communications. The conduct must be assessed from the viewpoint of a fair-minded lay observer, who might reasonably apprehend that the tribunal's impartiality might have been compromised by something said in the absence of the other parties.[106]

Particular care must be taken when attending a 'view' of a site (for example, for a planning appeal) that the member does not travel with one of the parties, their witness or representatives. Any communication between a member and a witness or party in the absence of other parties may give rise to a reasonable apprehension of bias, even if the content is unrelated to the case.[107] For example, a reviewing court said that if a member of a civil tribunal were found to have held a five-minute conversation with the applicants and their spouses in the waiting room in the absence of the respondents before the hearing commenced, the court would set aside the decision of the member and remit the matter to be reheard by a differently constituted panel of the tribunal with a 'stern rebuke' to the member.[108] Even travelling in a lift with a party, witness or legal representative for one party only should be avoided. Private discussions between a member and a witness should be avoided altogether.[109] A disqualifying communication may occur involuntarily so far as the member is concerned, as, for example, where the member receives a phone call at home from one of the parties or a party's representative.[110] The irregularity of the communication gives rise to a reasonable apprehension that matters relating to the case were discussed.[111]

3.4.8. Bias by previous involvement in proceedings

It sometimes happens that a party applies for the recusal of a member on the ground that the party has been unsuccessful in earlier proceedings before the member. Justice John Griffiths offered the following guidance to tribunal members—

---

104 *Charisteas v Charisteas* [2021] HCA 29 [47] (Kiefel CJ and Gageler J), quoting *Ebner v Official Trustee in Bankrutpcy* (2000) 205 CLR 337 at 345 [8].

105 *Charisteas v Charisteas* ibid [14] – [18]. See also, *Guide to Judicial Conduct*, above n 83 [4.6].

106 Ibid [15].

107 *City of St Kilda v Evindon Pty Ltd* [1990] VR 771; Administrative Review Council, above n 86, 38.

108 *Keirl v Kelson* (2004) 21 VAR 422, [14] (Byrne J).

109 *Re JRL; Ex parte CJL* (1986) 161 CLR 342.

110 *City of St Kilda v Evindon Pty Ltd* [1990] VR 771.

111 Ibid, 777.

> Much will depend upon the basis for the earlier determination. If it relies upon adverse credibility findings against the [person], it would be must unwise for you to hear a subsequent matter. Absent such a finding, however, there is generally no sound basis for recusing yourself merely because you have rejected the earlier case on its merits.[112]

An apprehension of bias may arise because of a member's previous involvement in the same proceedings or similar proceedings involving the same parties. Examples of where an apprehension of bias may arise in court and tribunal contexts include:

- a decision in which the judge had previously made findings of fraud against one of the parties in proceedings involving similar facts, arising from the destruction of documents of which discovery was sought in the litigation;[113]
- a decision where the decision-making panel is constituted by a member who was previously involved, albeit in a limited way, in the investigation of the underlying allegations before the panel,[114] or has in some way 'been the adversary of a party in the same or related proceeding';[115]
- a decision where the judge was a member of the Law Society committee which had originally instituted proceedings against the appellant;[116]
- a decision where the judge made a series of ex parte interlocutory decisions, including granting freezing orders, in the same proceedings;[117]
- an appeal which was decided on the papers by a panel including the same senior member who had made the original decision;
- a decision whether the member or judge has participated in pre-hearing dispute resolution processes in the matter without seeking the consent of the parties to the member holding a final hearing of the matter.[118]

---

[112] Hon. Justice John Griffiths, 'Apprehended Bias and Administrative Tribunals' (paper presented to COAT Annual National Conference 11 June 2021) [50] <coat.asn.au>.

[113] *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 330–3 (Heydon, Kiefel and Bell JJ).

[114] *Isbester v Knox City Council* (2015) 255 CLR 135 but see *City of Subiaco v Simpson MLA* [2014] WASC 493.

[115] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 ('*QYFM*') [44] - [55], [80] – [95].

[116] *R v Lee; Ex parte Shaw* (1882) 9 QBD 394. But see also *Hall v New South Wales Trotting Club Ltd* [1977] 1 NSWLR 378, 389.

[117] See *Michael Wilson & Partners Limited v Nicholls* (2011) 86 ALJR 14, although the application was unsuccessful because: 'in none of the [interlocutory] applications was the trial judge required to make, and in none of the applications did he made, any determination of any issue that was to be decided at trial'. For a general discussion of how bias may arise in these circumstances, see: A Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 *Sydney Law Review* 761.

[118] It was held that 'apprehension of bias in a tribunal member may be increased if the member omitted to disclose their prior involvement in a matter and did not ask whether there was objection to them continuing to sit.': *Maher v Adult Guardian* [2011] QCA 225 at [24]. See also *Sengupta v Holmes* [2002] EWCA Civ 1104.

3.4.9. Management of bias issues

3.4.9.1. Disclosure

The Guide to Judicial Conduct states: 'Parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest'.[119] There is no common law duty on a tribunal member to disclose facts and circumstances that would not legally disqualify the member from hearing the matter.[120] There is only a duty not to hear a matter from which the member is disqualified unless the right to object has been waived. However, there are reasons why a member might disclose a matter even if the member does not consider it disqualifying.

A majority of the High Court said in *Ebner* that it is good practice and prudent to disclose interests and associations 'if there is a serious possibility that they are potentially disqualifying'.[121] Tribunals commonly advise their members to take a more scrupulous approach to disclosure than may be required by the bias rule. Reflecting this approach, the ARC's *A Guide to Standards of Conduct for Tribunal Members* appears to favour a low threshold for disclosure by tribunal members, in order to maintain public confidence in the tribunal's impartiality.[122] It proposes the following standard—

> A tribunal member should be pro-active and comprehensive in disclosing to all interested parties interests that could conflict (or appear to conflict) with the review of a decision.[123]

Some tribunal codes of conduct introduce a lower threshold for disclosure than required by the common law. See **Chapter 5** at **5.5.5**.

The purpose of disclosure is to allow the parties to determine whether grounds for disqualification exist, and whether to waive their right to object to the member constituting the tribunal. In *Charisteas v Charisteas*, the High Court referred to a requirement for waiver to be based on 'informed consent'.[124] The disclosure should not leave out relevant details which might cause a fair-minded observer to reasonably apprehend bias. In *Goldsmith v Legal Services and Complaints Committee*, a member of a tribunal panel disclosed at a directions hearing that he and the complainant had both served on the board of a barristers' chambers, but failed to disclose facts relating to the 'nature, duration, intensity and proximity' of the relationship which were essential to a finding that a reasonable apprehension of bias arose.[125]

---

119 Above n 83, 12, cited with approval in *QYFM*, above n 115, 287] (Jagot J.

120 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 360 (Gleeson. CJ, McHugh, Gummow and Hayne JJ).

121 Ibid 360.

122 Administrative Review Council, above n 86 , 38–41.

123 Ibid 38.

124 2021] HCA 29 [15], [23].

125 [2023] WASCA 136.

Given the inadequate disclosure, the appellant's failure at the directions hearing to object to the panel as constituted did not amount to waiver of his right to object.[126]

3.4.9.2. The member's decision on a course of action

It is the member's decision whether to recuse themselves from hearing the matter. The decision should be made at the earliest opportunity. Members are permitted and encouraged to consult with the tribunal head and colleagues to seek guidance on whether to stand down or to disclose the matter to the parties.[127] Members may also find it helpful to consult the conduct guides discussed in **chapter 8** at **8.4.1** and general references listed in **chapter 10** at **10.2.4** of this Guide.

If the member is uncertain whether the circumstances warrant the member's recusal from the proceeding, disclosure should be made to the parties at the first opportunity. Disclosure may also be appropriate in a case where the member thinks there is no reason for disqualification but apprehends that failure to disclose may lead to a subsequent complaint.[128] It is wise to err on the side of caution. The member should decide what information to disclose, and once the information is disclosed the member should discourage further questioning by the parties or their representatives.[129]

A tribunal's code of conduct or procedures may require notification to the tribunal head or other office bearers before disclosure to the parties. If the hearing has not yet commenced or the matter is to be determined 'on the papers' without a hearing, it may be possible to avoid the need for disclosure by substituting another member who is unaffected by the potentially disqualifying circumstances.

3.4.9.3. Objection and waiver following disclosure

If a member makes a disclosure of potentially disqualifying circumstances, the tribunal should then ask each party if they wish to make an application or an objection. The ARC's *A Guide to Standards of Conduct for Tribunal Members* advises:

> Although as a matter of law waiver may be implied from a party's failure to object following disclosure, it is suggested that it is a tribunal member's responsibility expressly to raise the question of consent with the potentially prejudiced party.[130]

Consent of the parties is not the determinative factor. Even if the parties waive objection, the member may decide not to sit if they consider that disqualification is the proper course.[131]

---

126 Ibid [10], [67], [80], [82].

127 *Guide to Standards of Conduct for Tribunal Members,* above n 86, 15.

128 Ibid 13.

129 A judge's disclosure does not expose the judge to cross-examination: *QYFM*, above n 115, [321] (Jagot J, citing *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 466-67).

130 Ibid 39.

131 Ibid 15.

If a party objects, the member will need to consider the submissions of the parties and decide whether recusal is the proper course. The following points should be noted:

- A member is not automatically obliged to recuse where objection is taken following disclosure.
- The fact that one or more of the parties has an actual suspicion that the member is biased does not satisfy the test for apprehended bias. The test is an objective one, requiring consideration of what a fair-minded observer would reasonably apprehend.
- The member should consider all the circumstances, including the stage of proceedings at which objection is taken, and any costs and delays that might result from a decision to recuse themselves.

Courts have cautioned judges and tribunal members not to acquiesce too readily to applications for them to stand down, since this can cause hardship to parties, particularly if the matter is part heard. To stand down when there are no legal grounds for disqualification may in some circumstances amount to an abdication of the member's duty.[132]

If the member decides not to recuse, the reasons for the decision should be recorded. So too should the disclosure of relevant circumstances.[133] If the member decides to recuse, the ARC's *A Guide to Standards of Conduct for Tribunal Members* recommends that the member should explain to all the parties why this is being done.[134] Tribunal legislation or practice directions may specify the procedures for reconstituting the tribunal after a hearing has commenced.

3.4.9.4. Objection and waiver *not* following disclosure

A party may raise an objection to a member constituting the tribunal at the commencement of the hearing or at any time before the tribunal has discharged its function. Subject to any particular statutory requirements, the member should seek submissions from any other party to the proceeding, and then make a decision about recusal. If necessary, the member may suspend the hearing briefly to consider the question.

If a party raises an objection to the member constituting the tribunal after the hearing has commenced, otherwise than in response to a disclosure by the member, the tribunal should inquire when the party first learned of the facts on which the objection is based. If there has been a delay in taking the objection, the tribunal should ask the party to explain why the matter was not raised sooner.

Objections on bias grounds are sometimes taken for tactical reasons, such as to have the matter heard before another member whom the objector believes is more likely to decide the case favourably to the objector. Parties who know of potentially disqualifying circumstances are not

---

132 See, for example, *Re Polites; Ex parte Hoyts Corporation Pty Ltd (No 2)* (1991) 173 CLR 78; *Western Australia v Watson* [1990] WAR 248, 264.

133 *Guide to Standards of Conduct for Tribunal Members,* above n 86, 13.

134 Ibid 41.

entitled to bide their time and raise the objection only once they perceive the case is going against them. To prevent such an abuse of process, the courts insist that objections be taken at the earliest opportunity once the objector knows of the potentially disqualifying facts and knows of the right to object.[135] If this is not done, the ground of objection may be taken to have been waived, and may not be later relied upon to challenge the tribunal's decision.[98]

3.4.9.5 Bias objection – multi-member panel

The procedure for dealing with a recusal application relating to one member of a multi-member court was considered by the High Court of Australia in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[136] Three judges held that the judge whose recusal is requested should consider the application first and independently of the others. If the judge in question decides to recuse themselves and the objection is maintained, the panel as a whole must then determine the application.[137] Jagot J agreed that the application should be determined by the judge in question, but said that the judge's decision could be 'gainsaid' only on appeal to a higher court.[138] Kiefel CJ and Gageler J said that the recusal application was an objection to the court as constituted, and should therefore be heard and determined by the whole panel.[139]

In *Masi-Haini v Minister for Home Affairs* the Full Court of the Federal Court found the following course to have majority support from the High Court in *QYFM*:

> [T]he preferable course is for the judge in question first to be given the opportunity to determine for him or herself whether they will recuse themselves. Thereafter if the judge decides not to recuse themselves after having provided notice to the other judges of the material facts or circumstances and an application based on apprehended bias is maintained, or the other judges are concerned there are matters that may give rise to a potential for apprehended bias, the Full Court will need to determine the issue.[140]

The higher courts of New Zealand have issued recusal guidelines for their judges.[141] The guidelines require the judge in question to deal with the application after conferring with all members of the panel.

The above principles apply to recusal applications in a court setting. For a tribunal, the provisions of the relevant tribunal Act should be considered, including any duty to notify the head of tribunal (see **this Chapter** at **3.4.4.4**).

---

135 *Vakauta v Kelly* (1989) 167 CLR 568 at 571–3 (Brennan, Deane and Gaudron JJ), 587–8 (Toohey J).

136 [2023] HCA 15.

137 [2023] HCA 15 [66], [94] (Gordon J), [133] (Edelman J), [191] (Steward J) ('*QYFM*').

138 Ibid [[306], [311] – [315], [333].

139 Ibid [27] – [29], [35],

140 [2023] FCAFC 126 [95], citing *QYFM* at [94]-[100] (Gordon J), [108], [131]-[135] (Edelman J) and [193] (Steward J).

141 Courts of New Zealand, *Court of Appeal Recusal Guidelines* (2021); *Supreme Court Recusal Guidelines* (2020) <courtsofnz.govt.nz>.

The VCAT Act s 108(1) provides that at any time before the conclusion of a hearing before VCAT a party may apply to the tribunal for the reconstitution of the tribunal, or the President or another member of the hearing panel may seek the reconstitution of the tribunal. A presidential member will then decide whether to exercise the power to reconstitute the tribunal.[142] VCAT's Practice Note states that an application for reconstitution of the tribunal under s 108 can be made on the basis of an allegation of bias, but only after a member has first refused to recuse themselves.[143]

3.5. Procedural fairness in administrative review and civil proceedings

3.5.1. Procedural fairness and obtaining information

In the absence of a clear contrary intention in legislation, both the hearing and the bias rules of procedural fairness apply in the making of primary administrative decisions, in the review of administrative decisions, and in the adjudication of civil disputes. The rules have an inbuilt flexibility that allows them to be applied in ways that take account of the differences in the composition and function of tribunals.

Tribunals commonly inform themselves in a different way to the courts. They are generally empowered to inform themselves on the matter before them in any way they think fit (see **Chapter 5** at **5.2** and **5.2.1**). In formal adversarial proceedings before the courts, judges are required to act only on evidence presented by the parties, except for matters of 'judicial notice'.[144] Tribunals are often empowered to make inquiries and inform themselves.[145] A tribunal may form certain views or acquire information in deciding previous cases. For example, the Administrative Review Tribunal's Protection Division may have 'country information' about the human rights situation in a country which it uses to evaluate evidence given by applicants from the country.

Members of tribunals are often experts in the subject matter of the disputes that come before the tribunal and are expected to use their professional knowledge and skill in reaching their decisions.

These systematic differences between courts and tribunals raise a question of how the rules of procedural fairness are applied to tribunal proceedings.[146]

---

142 VCAT Act s 108(2).

143 VCAT Practice Note PNVCAT8 *Applications for reconstitution of the tribunal under section 108* (8 Dec 2022), [12]; *Chopra v Victorian Institute of Teaching (Human Rights)* [2024] VCAT 136.

144 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 562 (Hayne J).

145 As to whether tribunals are ever under a duty to make their own inquiries, see **Chapter 5** at **5.2.2**.

146 See N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration Inc, Melbourne, 2005).

3.5.2. Tribunal relying on its own knowledge

The use by the tribunal of its own knowledge may raise issues of prejudgment under the bias rule, and disclosure obligations under the hearing rule. The following points are worth noting.

- An expert tribunal is entitled to draw upon its general expertise and experience when evaluating the evidence and reaching its conclusions, and generally does not have to disclose its knowledge.[147] An apprehension of bias will more readily arise where the tribunal relies on particular rather than general information.
- Where the tribunal proposes to rely upon particular factual information known to it or discovered through its own investigations and the information is prejudicial to the interests of a party, the tribunal should disclose the information to the parties and give them an opportunity to respond to it.[148] For example, if a medical member knows that a diagnostic test relied upon by an expert medical witness for a party is unreliable, the member should put the point to the witness (if opportunity presents) or otherwise to the party. If the tribunal relies on information that is from an identifiable source such as a medical journal, the source as well as the information should be disclosed. That is particularly the case if the source material may contain errors or be open to misinterpretation.[149]
- Where the tribunal is relying on its own theory to explain events, it must disclose that theory to the parties. For example, in *Keller v Drainage Tribunal*,[150] a civil tribunal decided a claim on the basis that there was a perched water table which had caused the damage in issue. The existence of a perched water table had not been referred to by the parties, and the member had given them no indication that it had this theory in mind.
- In some circumstances, a tribunal may rely on its own observations of the actions or demeanour of a party in reaching its decision. If the tribunal proposes to use the observation in a way that is prejudicial to the party, it should ask itself whether the party could reasonably be expected to anticipate how the tribunal might view the behaviour. If the answer is negative, the tribunal must notify the party and allow them to respond. For example, suppose that a party gives evidence that the party is incapable of sitting for more than an hour at a time due to back pain, but the tribunal observes the person in the hearing room sitting quite freely for hours at a time. If the tribunal proposes to rely on its observations of the behaviour to reject the party's evidence on that matter, it must first tell the person or their legal representative what it has observed and what conclusion it intends

---

147 *Minister for Health v Thomson* (1985) 8 FCR 213 at 217 (Fox J), 224 (Beaumont J). However, this will not be the case where the knowledge goes beyond professional expertise and amounts to personal knowledge or observation: *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

148 *R v Milk Board; Ex parte Tomkins* [1944] VLR 187.

149 *Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW* (2010) 56 MVR 108. For a more detailed discussion of the obligations of specialist tribunals, such as disciplinary tribunals comprising members of a regulated profession, see Wentworth, above n 59.

150 [1980] VR 449.

to draw, and give the person an opportunity to answer the point.[151] This is an application of the general principle of procedural fairness that a party must be given an adequate opportunity to present their case.

- If a tribunal is proposing to rely upon evidence that contradicts the testimony of a party or witness, it must ensure that the substance of that contrary evidence is put to the person so that they have an opportunity to explain the contradiction. In court proceedings, this is known as the rule in *Browne v Dunn*.[152] Even a tribunal that is not bound by the rules of evidence may nevertheless be required to apply the rule to ensure procedural fairness.[153]

[151] *Kassem v Crossley* [2000] NSWCA 276 (Unreported, NSW Court of Appeal, Mason P, Heydon JA and Clarke AJA, 13 June 2000).

[152] (1893) 6 R 67 (HL). See discussion in **Chapter 5** at **5.7.1.1.**

[153] *Marelic v Comcare* (1993) 47 FCR 437 at 443 (Beazley J); *A School v Human Rights and Equal Opportunity Commission (No 2)* (1998) 55 ALD 93 at 111–12 (Mansfield J).

Chapter 4: Pre-Hearing and ADR

4.1. Key points

Preliminary procedures:

- Many tribunals employ case management processes from application to completion. The processes include pre-hearing or preliminary procedures, directions hearings, referral to ADR processes, and closer supervision of case preparation by the parties.
- Case management processes serve varied purposes, eg, encouraging early settlement; ensuring the preparation required for efficient final hearings; obtaining the appropriate evidence; encouraging self-represented persons to seek legal advice and assistance, and determining preliminary procedural matters such as whether to extend the time for making an application, or grant an expedited process.
- In some tribunals, case management and referral to ADR processes are supported by statutory powers, rules, practice directions and procedures.

Standing:

- Tribunals can only determine disputes upon an application from a person with standing, that is, the right to appear before the tribunal.
- Standing is conferred by legislation, which usually limits the class of persons who have standing to apply. There is a significant body of case law on standing.

Directions hearings and conferences:

- Directions hearings are hearings held some time before the full hearing, in person, by video-conference, or by correspondence.
- They promote case management and resolve issues such as:
  - whether to grant an extension of time for an application
  - whether another person or body should be served or notified or joined as a party to the proceedings
  - whether to order that additional reasons or further and better particulars of claim be supplied, or documents provided
  - whether to refer the parties to an alternative dispute resolution (ADR) process
  - whether to order a stay of the operation of the decision under review
  - whether to summarily dismiss the proceedings on one of several grounds.
- Many tribunals also use conferences as a pre-hearing process because they are flexible, and their relative informality encourages participation by self-represented parties.

Alternative dispute resolution:

- Alternative Dispute Resolution (ADR) comprises a range of processes other than formal adjudication, such as arbitration, negotiation, conciliation, mediation, neutral evaluation of factual and/or legal issues, and blended processes.
- ADR is now institutionalised in the practice of many tribunals, sometimes as a pre-requisite to a hearing on the complaint. Tribunal legislation commonly provides for referral of parties to ADR and for formalisation of settlement agreements reached in ADR processes,
- ADR services may be delivered by external providers or the tribunal's members and officers.

4.2. Case management

The past two to three decades have seen major changes in the operation of both courts and tribunals with the introduction of case management. Traditionally, courts took a reactive role in the pre-hearing stages of the conduct of cases, waiting for the parties to initiate the next step. Tribunals tended to be more proactive because they were required by their legislation to provide a mechanism that is 'fair, just, informal, economical and quick'; they operated in a more inquisitorial and less adversarial manner; and they had a high proportion of self-represented parties. Indeed, a key reason for legislatures to entrust types of matter to tribunals was to improve access to justice by obtaining such efficiencies.

By the turn of the century, public concerns over backlogs, costs and delays led to both courts and tribunals introducing case management systems, procedures and technologies. The purpose was to give the court or tribunal the power and the responsibility to oversee the timely and efficient disposal of cases by managing all stages from initiation to completion, and holding parties and their representatives accountable for timely completion of pre-trial procedural steps such as exchange of documents, obtaining expert reports, summoning witnesses, and providing summaries of facts and arguments.

Case management began with courts as a judicial initiative and flowed on to tribunals through the leadership of tribunal heads. It is now well accepted as part of the everyday operations of courts and tribunals in Australia and New Zealand.[1] Many tribunals, particularly the larger ones, actively manage the progress of cases from initiation through to completion. They set targets, benchmarks and other metrics for reporting statistical data on the time taken to dispose of cases, and the stage at which proceedings are settled or concluded.

As tribunals are generally under a statutory duty to dispose of applications with informality, efficiency and speed and are empowered determine their own procedures and to inform themselves as they see fit, they are well placed to undertake case management. In a submission to the Productivity Commission in 2013, COAT observed—

> [Most tribunals'] case management techniques [involve] early discussion with the parties themselves at directions hearings, compulsory conferences and the like. Tribunal members also often adopt an inquisitorial approach to dispute determination. This early intervention through directions hearings and the like informs the tribunal about the real issues in a matter, and enables members to frame directions designed to ensure the quickest and least expensive method of resolution.[2]

A key part of case management is to ensure that genuine steps are taken to resolve a dispute before the matter is listed for hearing and final decision. Tribunals now offer a range of dispute

---

1 Council of Australasian Tribunals Inc, Submission to the Productivity Commission Public Inquiry into Access to Justice Arrangements No 98 (13 November 2013) <coat.asn.au> ; *Law Commission New Zealand, Tribunals in New Zealand* (January 2008, Law Commission, Wellington) [9.18] <lawcom.govt.nz> .

2 COAT Submission, ibid 8–9.

resolution services (ADR), and a high proportion of cases are resolved via these processes. Even where the dispute is not finally resolved, the ADR process can identify and narrow the issues which require adjudication by the tribunal.

Case management tends to focus on pre-hearing procedures. Not all tribunals use them. In some tribunals, applications proceed directly to a hearing unless they are determined 'on the papers' (that is, determined upon the evidence on the tribunal's file without an oral hearing).

The larger divisional tribunals, and tribunals in which parties are commonly represented, are more likely to use pre-hearing procedures. The type and format of the procedures varies widely, and different processes may be used in different lists or divisions of the larger tribunals, or for different types of jurisdictions by subject matter.[3]

Pre-trial processes are normally regulated by legislative provisions in the tribunal's governing Act, rules made by the tribunal's Rules Committee under powers conferred by the Act,[4] practice notes or procedural or practice directions issued under the rules or under the tribunal head's statutory functions and powers,[5] and orders and directions made by the tribunal for the conduct of proceedings in individual cases.[6]

4.2.1. Case management process

Most Australian and New Zealand tribunals employ structured case management processes.

By way of example, NCAT has a structured case management process designed to deal with applications in a flexible and timely manner. It publishes on its webpage its legislation (Act, regulations and rules), procedural directions and guidelines on specific issues, and guidelines relating more specifically to the tribunal's various Divisions.7 Applicants are encouraged to commence and manage their cases online. A video is provided on the web page to assist them to register for and use online services. Each registered user has their own dashboard from which they can initiate a proceeding, pay fees, lodge evidence and submissions and view filing history and hearing details.

Case management processes vary among tribunals and among types of proceedings but there are broadly common stages, as outlined by Justice Janine Pritchard, former President of the SAT):[8]

---

3 For discussion of how this 'differential case management' operates in NCAT's Lists, see Justice R Wright, 'NCAT Case Management and Practice and Procedure' (paper presented to Land and Environment Court conference, Sydney, 29 May 2015 <ncat.nsw.gov.au>.

4 Eg TASCAT Act ss 91, 92.

5 Eg NCAT Act s 25, 26; TASCAT Act s 26.

6 Eg SAT Act s 34.

7 <ncat.nsw.gov.au>.

8 Hon. Justice Janine Pritchard, 'Australian civil and administrative tribunals: challenges and opportunities' (2020) 100 *AIAL Forum* 148, 157-58.

> [T]he typical approach following the filing of an application in the SAT is to hold an initial directions hearing, at which the issue for resolution will be identified and the most expeditious means to resolve it will be explored. Orders will usually be made to require a brief responsive document to be filed, and the parties will then be required to attend a mediation or compulsory conference. If the proceeding does not resolve at the mediation then a second directions hearing will be held, at which point orders will, if appropriate, be made for the filing of statements of issues, facts and contentions, or statements of agreed facts, for the filing of witness statements, and for the listing of the final hearing.

4.2.2. Applications

4.2.2.1. Standing – who can apply

Tribunals are not vested with general power to determine disputes or other matters. They can only do so upon an application from a person who is entitled to apply. That is, they respond to applications made to them; they do not initiate matters for decision. The right to apply to the tribunal must be given by legislation, usually different from the tribunal's governing Act.

Most persons applying to a tribunal to review an administrative decision are directly and individually affected by the decision. For example, a person whose occupational licence is cancelled by an administrator, or whose application for a planning permit is refused. In other contexts, a person may wish to challenge an administrative decision that does not relate to the person individually. To control the initiation of proceedings by 'busybodies', some legislation limits the class of persons who have *standing* to apply to the tribunal for review of a decision. The restriction on standing may be contained in the tribunal's governing legislation or in other enabling statutes which give jurisdiction to the tribunal.

For example, under ART Act s 17, 'a person whose interests are affected by a reviewable decision may apply to the Tribunal for review of the decision'.[9] The phrase 'a person whose interests are affected' is commonly used in tribunal legislation to import a standing test. Broadly speaking, the phrase is taken to mean interests which

> a person has other than as a member of the general public and other than as a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed.[10]

The nature of the interest required in a particular case will be considered in the light of the scope and purpose of the relevant legislation.[11] It is also necessary to consider the nature of the

---

9 See generally *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 1)* (1980) 3 ALD 74, 79, 81; *Re Gay Solidarity and Minister for Immigration and Ethnic Affairs* (1983) 5 ALD 289.

10 *Re Control Investments Pt Ltd and Australian Broadcasting Tribunal (No 1)* (1980) 3 ALD 74, 79, 81 (Davies J)

11 *Alphapharm Pty Ltd v Smithkline Beecham (Aust) Pty Ltd* (1994) 121 ALR 373, 393 (Gummow J),

decision and how it affects the applicant's interests.[12] 'Interests' do not have to be pecuniary or property interests or even discrete legal rights.[13] They may extend to the protection of reputation.[14]

Once an application has been made to the tribunal, the legislation may allow other persons to apply to the tribunal to be joined as parties. A person applying for *joinder* (that is, to be added as a party to a proceeding already commenced between other parties) is commonly subject to the same test of standing as the original applicant unless the legislation provides otherwise. Tribunal legislation usually gives the tribunal discretion to refuse to join a person as a party to the proceeding even if the person satisfies the standing test. In a joinder application there may be other relevant considerations, such as the costs and delays that might result from widening the dispute.

A challenge to the standing of an applicant may be raised in a directions hearing. As the issues involved are complex and sometimes bound up with the merits of the case, the tribunal may reserve the question of standing to be determined at the same time as the final decision in the proceeding, or it may list the issue for separate determination at an interlocutory hearing.

4.2.2.2. Procedure and time for application

The requirements as to the form, manner and time for making applications may be specified in the tribunal's legislation or in rules made by the tribunal.

Where the legislation specifies a time limit for making an application, the expiry of the time period for making a given application should be reckoned in accordance with the 'reckoning of time' provisions in the Interpretation Act for the relevant jurisdiction.[15] For example, if a Commonwealth Act says that an application for review of a decision must be made within 28 days from the day on which the decision is made, the 28-day period starts on the day *after* the day on which the decision is made.[16] If the 28th day falls on an excluded day (a Saturday, Sunday or public holiday), the 28-day period expires on the next day that is not an excluded day.[17] Like other provisions in the Interpretation Acts, the reckoning of time provisions are subject to contrary intention in the Act being interpreted.

The tribunal may have a discretionary power to extend the time period for the making of an application. The tribunal may also be able to extend the time even if the application for extension is made after the time period has expired.[18]

---

12 See *Re McHattan and Collector of Customs (NSW)* (1977) 1 ALD 67; *Kannan and Minister for Immigration and Ethnic Affairs* (1978) 1 ALD 489; *Re Queensland Investment Corporation and Minister for Transport and Regional Services* (2004) 84 ALD 717; *Re Son and Australian Trade Commission* (2005) 86 ALD 469.

13 *McHatten v Collector of Customs (New South Wales)* (1977) 18 ALR 154 (Brennan J).

14 *Annetts v McCann* (1990) 170 CLR 596.

15 On these Acts generally, see **Chapter 2** at **2.4.2**.

16 *Acts Interpretation Act 1901* (Cth) s 36(1).

17 *Interpretation Act 1984* (WA) s 61(1),

18 Eg NCAT Act s 41.

If the statute gives no specific criteria for deciding whether to grant an extension of time, the tribunal should consider what would best serve the interests of justice. In doing so, the tribunal will consider the following factors—

- the length and cause of the delay in making the application
- the merits and wider significance of the applicant's case
- any prejudice to other parties.[19]

4.2.2.3. Stay orders

The making of an application to the tribunal to review a decision or to restrain an action does not of itself affect the legal operation of the decision or prevent action being taken to implement it.[20] The tribunal may have statutory power to *stay* (suspend) the operation of a decision or to prevent action being taken on it until the proceeding has been finally determined.[21] Some legislation states that the stay order may be granted to 'secure the effectiveness of the application or appeal'.[22]

Tribunal legislation is sometimes silent as to the factors that should be considered in a stay application or it may provide a non-exhaustive list of factors. The considerations which courts and tribunals have applied in deciding whether to make a stay order usually include whether the applicant has an arguable case,[23] and a balancing of any hardship or prejudice to the applicant and to other parties if the decision is stayed or not stayed.[24]

In *Scott and Australian Securities and Investments Commission*,[25] Downes J set out the following framework of matters that he would consider in a stay application under s 41(2) of the former *Administrative Appeals Tribunal Act 1975* (Cth)—

- the prospects of the applicant succeeding in the application
- the consequence for the applicant of the refusal of a stay
- the public interest[26]

19 See, for example, *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348 (Wilcox J); *Michelotti v Roads Corporation* (2009) 26 VR 609; *Hua-Aus Pty Ltd v Federal Commissioner of Taxation* (2009) 75 ATR 886; *SZQGO v Minister for Immigration and Citizenship* (2012) 125 ALD 449.

20 Eg TASCAT Act s 77(1); NCAT Act s 43(1)(2).

21 Eg NCAT Act s 43(2), (3).

22 Eg NCAT Act s 43(3); QCAT Act s 58(1). Cf the TASCAT Act s 77(2), which provides for the Tribunal to grant a stay order if satisfied it is 'just and reasonable in the circumstances'.

23 If the applicant's prospects of success are assessed as weak, that counts against the applicant in a stay application.

24 See, for example, *Re Repatriation Commission and Delkou* (1985) 8 ALD 454 (AAT); *Re Secretary, Department of Employment and Workplace Relations and Croysdale* (2006) 45 AAR 378; *Re Nguyen and ASIC* (2011) 55 AAR 85; *Day v Humphrey* [2017] QCA 104 per Morrison JA [5]– [6].

25 2009] AATA 798 [4].

26 Downes J considered that the public was generally entitled to the benefit of a regulatory decision made by regulator such as ASIC under a regulatory regime established for the protection of the public: *Scott and Australian Securities and Investments Commission* [2009] AATA 798 [10].

- the consequences for the respondent depending upon whether a stay is granted or not
- whether the application for review would be rendered nugatory if a stay were not granted
- the time likely to elapse before a final order is made.

The framework proposed by Downes J is not an exhaustive list of the factors that should or may be considered in each case, but it was used by the former Administrative Appeals Tribunal as a starting point for consideration of stay applications. Tribunal members may apply it or another framework that is used in their tribunal or jurisdiction.[27]

The general approach of tribunals to evaluating a stay application is as follows:[28]

- identify the factors that are relevant in the context of the decision and the application
- separately consider each factor in the context of the case, assessing whether it weighs for or against the grant of a stay or does not influence the outcome either way
- arrive at an overall balancing of the factors to reach a conclusion.[29]

4.2.2.4 Summary dismissal

A tribunal Act may give the tribunal power to dismiss an application or proceeding on various grounds, such as the applicant's failure to comply with the tribunal's directions,[30] or a failure to attend a compulsory conference or ADR process after being given reasonable notice.[31]

Tribunal Acts commonly give the tribunal power to dismiss a proceeding on grounds related to the lack of merit in the proceeding or the applicant's failure to prosecute the case. For example, the NCAT Act s 55(1) provides that the tribunal may dismiss at any stage a proceeding before it on any of the following grounds—

> a) …
> b) if the Tribunal considers that the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance,
> c) if the applicant … has failed to appear in the proceedings,
> d) if the Tribunal considers that there has been a want of prosecution of the proceedings.

A decision to dismiss a proceeding under a provision such as s 55(1) requires a two-step process. The first step is to determine whether a ground for dismissal exists, (such as that the

---

27 Eg in *Fleger v Joubert* [2024] QCATA 13 [14], QCAT Appeals applied Queensland Court of Appeal authority on the criteria for granting a stay under QCAT Act s 58(1): *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347 per Jerrard JA at [8]; *Day v Humphrey* [2017] QCA 104 per Morrison JA at [5]–[6]. The criteria are similar to those applied in other jurisdictions.

28 For an example of the application of this approach, see *X.Trade.Au Pty Ltd and ASIC* [2024] AATA 1372.

29 For an example of a tribunal reasoning through the factors to a conclusion, see *Brisbane Marine Pilots Pty Ltd v General Manager of Maritime Safety Queensland* [2021] QCAT 436 [118] - [173], [176], [177].

30 Eg TASCAT Act sch 2 l cl 9(8).

31 Eg TASCAT Act sch 2 cl 9(5)(a).

proceedings are frivolous or vexatious). The second step is to consider whether to exercise the tribunal's discretion to dismiss.[32] At the second step, a broader range of considerations may be relevant in the circumstances of the case.[33]

4.2.3. Directions hearings

Tribunal legislation may empower the President or head of the tribunal to give general directions on matters of practice and procedure. In addition, the tribunal is often empowered by the Act to give directions to the parties to a proceeding as to the procedure to be followed in preparation for final hearing.

While directions can be made at any time, some tribunals hold interlocutory hearings for this purpose, often called directions hearings.[34] Directions hearings are held to deal with certain issues that need to be determined or steps that need to be taken prior to the final hearing. They may take place in person at the tribunal, or by telephone or by audio or conference or videoconference. If the parties are represented, the tribunal usually requires the representatives to participate.

The purposes for which directions hearings are held, the procedures followed and the types of orders that may be made may be set out in practice directions or practice notes issued by the head of the tribunal. Directions hearings may be scheduled as a matter of course, at the request of a party, or at the initiative of the tribunal when circumstances require. They are primarily a case management procedure, intended to promote case progression and to resolve interim or preliminary issues such as—

- whether the tribunal has jurisdiction to determine the application. The tribunal should raise any issue as to its jurisdiction, even if the parties take no objection to the tribunal hearing the matter;[35]
- whether to grant an extension of time for making an application;
- whether to grant an adjournment;
- whether to order that the proceedings be summarily dismissed;
- whether to grant a stay order to stay the implementation of a decision under review;
- whether another person or body should be served or notified or joined as a party to the proceedings;
- whether to grant leave for a person to be legally represented (where leave is required);[36]

---

32 *Davis v NSW Minister for Health* [2023] NSWCATAP 211 [86].

33 Ibid [88]–[[89].

34 An interlocutory hearing is one held during the progress of an application or complaint through the tribunal process, as opposed to the final hearing to determine the outcome of the application or complaint.

35 *McGarry v Coates* [2013] QCATA 32 [6]; *Welch v Erica's Aesthetics Pty Ltd* [2017] ACAT 68 [6]; *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 [35].

36 Eg QCAT Act s 43.

- whether to order that additional reasons for decision or further and better particulars of claim be supplied or that further evidence, statements of issues, facts and contentions or other documents be provided;
- whether the proceedings should be referred to mediation;
- whether any question of law, or mixed fact and law, should be decided at a preliminary hearing;
- whether anything further is required to be done prior to listing the matter for hearing.

The expected outcome is that the tribunal gives a direction, for example, that the parties exchange expert reports by a specified date. For greater efficiency, some tribunals have prepared standard directions or orders that are regularly made in certain types of matters.[37] Members may use them if they find them suitable in an individual proceeding but are not bound to use them.[38]

A directions hearing may also be held where a party has failed to comply with legislative requirements or a direction of the tribunal or has been responsible for undue delay. In a case of default without lawful excuse, the tribunal usually has power to dismiss or strike out an application, to enter judgment by default against a respondent, or to take the failure into account in awarding costs. Where these sanctions are not available, a further direction may be given.

4.2.4. Conferences

Many tribunals have power to direct the parties to attend a pre-hearing conference conducted by a tribunal member or, in some cases, a registrar. The tribunal may hold one conference, or a series of conferences, or call them as needed. They are usually held in private and may be conducted by audio or videoconference conferencing.

Tribunals use conferences as a pre-hearing process because they are flexible, can serve multiple purposes, and their relative informality encourages participation by self-represented parties. Legislation commonly gives the tribunal substantial control over the way that conferences are conducted. Conferences can be used to explore possibilities for settlement, to assess the suitability of matters for referral to ADR processes such as mediation, to identify and resolve preliminary issues and to manage the progression of cases.

Tribunals use conferences for different purposes, depending on their powers and the caseload. Some tribunals use them as settlement conferences, where the presiding member uses ADR methods such as conciliation or mediation. This is more likely to occur where the tribunal lacks the power to refer parties to ADR processes without their consent.

---

37 Eg SAT, *Standard and Regularly Used Orders* <sat.justice.wa.gov.au>. Standard directions and orders may facilitate giving *ex tempore* oral decisions with reasons.

38 On the use of standard text in statements of reasons and orders, see **Chapter 6** at **6.3.5.3**.

Where conferences are used to explore possibilities for settlement, there is a need to protect the confidentiality of communications between the parties in any subsequent hearing. Some tribunal statutes include a provision restricting the admission, in any subsequent hearing by the tribunal, of anything said or done at a conference, unless all parties consent.[39] The legislation may also provide that a member who took part in the conference (or other pre-hearing ADR process) must not subsequently take any further part in the proceeding unless the parties consent.[40] Alternatively, the statute or a guideline may provide that the member must not take part in the subsequent hearing if a party objects.[41]

4.3. Alternative dispute resolution processes

There is some debate as to the meaning of ADR. On one view, it means ‘assisted’ or ‘additional’ dispute resolution and includes all processes used to resolve disputes, including adjudication. For others, ADR means ‘alternative’ dispute resolution and includes processes other than formal adjudication under statutory powers, such as arbitration, negotiation, conciliation, mediation, neutral evaluation and blended processes. ADR used to be seen as an additional or alternative service provided by courts and tribunals operating as primarily adjudicative bodies. It has now become integral to their reconceptualised function as providers of dispute resolution services.

ADR in its various forms is now institutionalised in the pe-hearing practice of many tribunals.[42] Tribunal legislation commonly provides for referral of parties to ADR and for settlement agreements reached in ADR processes to be formalised in orders.[43] ADR services may be delivered by external providers to whom the tribunal refers parties, or it may be part of the range of dispute resolution services offered by the tribunal through its members and staff.

4.3.1. Definitions of ADR processes

Tribunal legislation commonly empowers the tribunal to refer parties to particular ADR processes, often conducted under the title of ‘conferences’, for example, mediation conferences or conciliation conferences. Statutory definitions of processes are not used consistently. Given the problems with terminology, it may be more useful to adopt a functional approach and describe processes according to whether they are ‘facilitative’, ‘advisory’ or ‘determinative’. As described by the former ADR advisory body, National Alternative Dispute Resolution

---

39 Eg VCAT Act s 85.

40 Eg VCAT Act s 93A (mediator); SAT Act s 54(10) (mediator) considered in *Nugawela v Medical Board of Australia (WA Branch) [No 2]* [2024] WASC 15

41 Eg ART Act s 89; For an example of a guideline to this effect, see NCAT Consumer and Commercial Division Guideline *Conciliation and hearing by the same Member* (Aug 2017) [10] <ncat.nsw.gov.au>.

42 Eg NCAT Act s 37. See also, Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (Canberra, 2014) Vol 1, 351 <pc.gov.au>; New Zealand Law Commission, *Tribunals in New Zealand* (January 2008, Law Commission, Wellington) at [9.29] <lawcom.govt.nz> .

43 Eg SAT Act s 54(8).

Advisory Council (NADRAC),[44] the key difference between these processes is the role played by the ADR practitioner.

- *Facilitative*. In a facilitative process, the practitioner 'assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute'. Examples are mediation and conciliation.
- *Advisory*. In an advisory process, the practitioner 'considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved'. The former AAT used two forms of advisory ADR in certain classes of applications. In *neutral evaluation*, a neutral subject expert assists the parties to resolve the dispute by evaluating the factual and legal issues and providing a non-binding opinion on the likely outcomes. *Case appraisal* is similar, but the subject expert assesses only the factual issues in dispute.
- *Determinative*. In a determinative process, the practitioner 'evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination'.[45] An example is arbitration.

Legislation may provide for different dispute resolution processes to be used in sequence. For example, equal opportunity or discrimination complaints may be treated first with an advisory process, then a facilitative one, and finally a determinative stage for those that remain unresolved.

Based on the NADRAC *Dispute Resolution Terms*, and in order to provide greater clarity on terminology in the provision of ADR services, the following process definitions were incorporated into the Australian Standard:[46]

- *Arbitration*. A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.
- *Mediation*. A process in which the parties to the dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution.
- *Conciliation*. A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the disputed issues, develop options,

---

44 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003), <webarchive.nla.gov.au/>.

45 National Alternative Dispute Resolution Advisory Council, *Your Guide to Dispute Resolution* (July 2012) <https://webarchive.nla.gov.au/>.

46 Standards Australia, *Dispute Management Systems,* AS4608–2004, (2nd ed, 2004) Appendix B. This was withdrawn on 13 January 2017 and had not been replaced at the time of writing.

consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the most desirable outcome, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement. Note: there are wide variations in meaning for *conciliation*, and the term may be used to refer to a range of processes used to resolve complaints and disputes.

4.3.2. Tribunal practice

The processes as conducted by various tribunals do not necessarily correspond to the definitions at **4.3.1** above. The labels applied to ADR processes in legislation are not used with consistent meaning and may not match the definitions used in reputable sources.

Even where the same process term is used in different Acts, it may be applied differently in practice. Some years ago the Australian Law Reform Commission noted that in some tribunals conciliation is a facilitative process practically indistinguishable from mediation while in others conciliation is an evaluative process in which the conciliator expresses a view on the likely outcome.[47] A conciliator might have the determinative role of certifying that the parties have or have not negotiated in good faith; or parties to a conciliation conference might be left to engage in settlement discussion with no active involvement of the conciliator.[48]

The diversity of ADR processes enables tribunals to respond flexibly to varied needs and circumstances. However, the lack of consistent terminology, contested definitions and the development of technology can lead to misunderstandings about the nature of the process.

4.4. Standards for ADR practice and accreditation

Increasingly, tribunal members and registrars conduct ADR processes, sourcing training from various providers.[49] Some tribunals have established their own training programs and codes of practice, and some statutory schemes have their own accreditation criteria.

There is currently no comprehensive legislative framework for the operation of ADR in Australia. There are, however, well-recognised industry standards that are applied in the field of mediation.

4.4.1 AMDRAS Standards

Within the rubric of ADR, there are areas of specialised accreditation, for example, in relation to mediation. The National Mediator Accreditation Scheme (NMAS) commenced on 1 January

47 Australian Law Reform Commission (ALRC), BP2 *Alternative or Assisted Dispute Resolution* (ALRC, Sydney, 1996) ch 3 pt 2 <austlii.edu.au>.

48 Ibid.

49 An example of such provider is Resolution Institute: <www.resolution.institute> at February 2020.

2008. It introduced a voluntary industry system whereby mediator organisations (known as Recognised Mediator Accreditation Bodies) may accredit mediators in accordance with national standards.

From 1 July 2024, the NMAS was replaced by the Australian Mediator and Dispute Resolution Accreditation Standards (AMDRAS), and the Mediator Standards Board was replaced by the AMDRAS Board. On 1 June 2024, the Mediator Standards Board issued the AMDRAS standards. The standards provide a minimum level of accreditation and practice standards for mediators at three levels: Accredited, Advanced and Leading Mediator. Transition arrangements for mediators registered under the NMAS are set out in Transition Rules.[50]

4.4.2 Codes of Ethics

The National Alternative Dispute Resolution Advisory Council (NADRAC) operated from 1995 to 2013 as an independent non-statutory body which provided expert policy advice to the Commonwealth Attorney-General on ADR. In 2001, NADRAC recommended that ADR service providers adopt and comply with a code of practice setting out essential standards for practice, to be developed by ADR service providers or associations through a consultative process.[51] It specified the topics to be covered by codes of practice relating to the provision of ADR. [52]

The AMDRAS contain the "AMDRAS Code of Ethics" in Appendix 3. A practitioner accredited under AMDRAS is required to comply with the Code.[53]

A variety of mediation organisations have published ethics guidelines for their members, including the Resolution Institute, the New Zealand Law Society, and the Law Council of Australia.[54] They cover matters such as impartiality, conflicts of interest, competence, confidentiality, termination of mediation, recording settlement, publicity and advertising and fees. A person seeking accreditation as a mediator under the AMDRAS standards must maintain membership of a Recognised Accreditation Provider or an equivalent organisation approved by the AMDRAS Board that has 'an appropriate ethical code or standard'.[55]

---

50 NMAS to AMDRAS Transition Rules < https://amdras.au/resources/>.

51 NADRAC, Report to the Commonwealth Attorney-General, *A Framework for ADR Standards* (April 2001) 71-2 <adrac.org.au>.

52 Ibid, ch 5.2.

53 Australian Mediator and Dispute Resolution Accreditation Standards, (1 July 2024) ('AMDRAS Standards') cl 63.

54 Resolution Institute, *Code of Ethics* (2015) < resolution.institute>; New Zealand Law Society, *Guidelines for Mediators* (Nov. 2011) <lawsociety.org.nz>; Law Council of Australia, *Ethical Guidelines for Mediators* (16 May 2019), <lawcouncil.au>.

55 AMDRAS Standards, above n 53, cl 41.

4.4.3. Knowledge, skills and ethics for mediators

The AMDRAS standards define the professional knowledge, skills, ethics and responsibilities and professional development required for Registered Practitioners (mediators).[56]

- Knowledge includes: understanding conflict and human behaviour in conflict; understanding the factors that play a role in conflict and dispute resolution; knowing the principles, models and strategies for resolving conflict and when to use them; and understanding their ethical, professional and legal obligations.
- Skills include: being able to conduct an initial assessment; facilitating a fair process; managing the dispute resolution process; supporting parties to participate; and managing risks to fairness, safety and abuse of process.
- Ethics and responsibilities include: providing accessible and inclusive services; providing information to the participants about the confidentiality of the process; supporting agency, self-determination and cooperative decision-making; facilitating even-handed, safe and ethical procedures; providing guidance and advice only when competent and authorised; and providing a feedback and complaint mechanism.
- Professional development includes engaging in reflective practice; continuing professional learning; and contributing to the field.[57]

4.5 Referral to ADR

Various methods are used to refer disputes to ADR processes. Referrals may be made by a tribunal member, by a registrar, based on assessment of the suitability of the dispute for ADR processes, or may be done as a matter of course in certain classes of cases.

Increasingly, legislative schemes use a degree of compulsion to encourage parties to use ADR processes to resolve their disputes. A statute may require parties to attempt settlement through some ADR process before they can apply to a court or tribunal. Some tribunal legislation empowers the tribunal to refer parties to ADR processes (most often mediation or conciliation) without their consent. The parties may then be under a duty or expectation to participate 'in good faith'.[58]

The settlement rates for cases referred by court to ADR is generally high,[59] although research findings are inconclusive on whether compulsory referral increases the likelihood that disputes

[56] Ibid [61].

[57] Ibid.

[58] See, for example, ART Act s 87(1), (2). Government parties may also be under a self-imposed duty to 'participate fully and effectively' in ADR. See eg, Victoria, Department of Justice and Community Safety, *Victorian Model Litigant Guidelines* (8 July 2022) 1, 2(h) <justice.vic.gov.au>.

[59] Eg ART Act (2024) s 87(1)(a), (2); Productivity Commission, *Access to Justice Arrangements* Inquiry Report No 72 (Canberra, 2014) vol I at 288 < pc.gov.au>.

will settle before hearing.[60] Those who are referred compulsorily to mediation generally do not object afterwards. Some research suggests that few disputants will use mediation if it is entirely voluntary.[61]

The costs and barriers to participating in ADR are reducing as tribunals make increased use of online dispute resolution ('ODR'). The innovations range from e-Mediation, which uses audio or videoconference conferencing to create a virtual mediation meeting,[62] through to development of artificial intelligence tools with customised content to guide parties towards settlement outcomes.[63]

4.5.1. Referral criteria

Not all disputes are suitable for referral to ADR processes. In deciding whether to make a referral, the primary consideration is the prospect of successful resolution of the dispute.[64] Individual tribunals may have their own guidelines for assessing which disputes to refer. Various attempts have been made to formulate generally applicable criteria for identifying which disputes are suitable for referral to ADR, or for matching disputes to forms of ADR process—usually mediation.[65]

In a research project undertaken for the Australasian Institute of Judicial Administration and NADRAC in 2003, Professor Kathy Mack examined the commonly proposed referral criteria in the light of findings from a number of empirical research projects in Australia and overseas.[66] She categorised the referral criteria in three groups and reached the following conclusions—

- Some criteria are preconditions for an ADR process to take place, rather than predictors of its effectiveness. These include factors that affect the capacity of parties to take part in ADR processes, such as fear of violence, cultural differences and intractable power imbalances, cost and the existence of a restraining order. These matters should be taken into account in deciding whether to make a referral.
- The following variables were not reliably established as barriers to participation in ADR, nor as indicators for its effectiveness: the type of case (for example, family, civil), the amount in dispute, the involvement of multiple parties, social characteristics of the parties

---

60 K Mack, *Court Referral to ADR: Criteria and Research* (AIJA Inc and NADRAC, 2003) [1.4.2] <webarchive.nla.gov.au>.

61 Ibid.

62 P Johnstone, 'e-Mediation—Trial & Outcomes' (presentation to COAT conference 'Tribunal Accessibility: Meeting Community Expectations', Adelaide, October 2017) <coat.asn.au> (discussing the use of this method by QCAT); A Wallace, 'Using Video-conferencing to Improve Access to Justice: Suggestions from the Gateways to Justice Project' <www.coat.asn.au>.

63 On the VCAT ODR pilot, see L Thomas, S Kaur and S Goodrich, 'Making ODR Human: Using Human-Centred Design for ODR Product Development' (2018) 1–2 *International Journal of Online Dispute Resolution*, <www.lawcouncil.asn.au>.

64 *Barrett v Queensland Newspapers Pty Ltd* (1999) 20 Qld Lawyer Reps 104 (Samios J).

65 See, for example, C Berman-Robinson and H Shurven, 'ADR Process Design: Considerations for ADR Practitioners and Party Advisers' (2016) 27 *Australasian Dispute Resolution Journal* 140.

66 Mack, above n 60.

(for example, gender, race), whether the dispute is primarily about facts, and whether the dispute raises multiple issues. Mack concludes that these factors should be treated cautiously as referral criteria.

The third group of factors may be significant indicators of the effectiveness of ADR in promoting settlement. Predictors for success of ADR processes include the presence of a genuine concern for children, and the participation of a party or representative with authority to settle or to be bound by any outcome. Factors making ADR less likely to succeed include the intensity of conflict and parties with major, non-negotiable value differences. Legal representation of the parties may be a positive or negative indicator for success, depending on the attributes of the lawyer. Perhaps the most significant variable affecting the likelihood of success was the skill of the ADR practitioner.[67] Mack concluded that there is no one set of generally applicable referral criteria. Each tribunal should develop its own criteria, taking into account 'its own program goals, jurisdiction and case mix, potential ADR users, local legal profession and culture, internal resources, and external service providers'.[68]

4.5.2 Guides for parties

Some tribunals publish or provide their own guides for parties participating in ADR processes. In July 2012, NADRAC published *Your Guide to Dispute Resolution* which contains a consolidated summary of what ADR is, provides practical tips for engaging in ADR processes, and sets out the National Principles for Resolving Disputes.[69] The Law Council of Australia has also published a guide for parties in mediation.[70]

4.5.3. Self-represented parties and ADR

One of the issues in ADR practice is whether to include or exclude self-represented parties. Some court-based ADR programs have their own rules about this. There has been a concern that a power imbalance will result where one party is represented and another party is not. To address this concern, training programs for ADR practitioners now commonly include techniques for reducing the effect of an imbalance of power. Guidance for ensuring effective participation by parties is also provided in some standards developed for ADR practitioners.[71] With proper management of the issue, self-represented parties can benefit from participation in ADR processes.

---

67 Ibid, [1.5.1]– [1.5.4].

68 Ibid, [1.7], citing Hilary Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (AIJA Inc, Carlton, 2001).

69 <ag,gov.au>.

70 Law Council of Australia, *Guidelines for Parties in Mediations* (LCA, 2018) <lawcouncil.au>.

71 AMDRAS Accreditation Standards app 4 (Professional Practice Domains), Table 1.

4.5.4. Confidentiality and admissibility of evidence

ADR processes are unlikely to succeed unless the parties can make disclosures without prejudicing their case at a subsequent hearing if the matter fails to settle. To address this concern, tribunal legislation usually includes a confidentiality provision, making the disclosures inadmissible in subsequent proceedings unless all parties agree.

The confidentiality provisions in the various tribunal statutes are not in standard terms, and their scope is variable. For each statute, it is important to check what is made inadmissible, and in what proceedings. For example, a survey of confidentiality provisions in New South Wales Acts found that a statute may declare statements or admissions made at mediation to be inadmissible, but not mention documents.[72] A statute may provide that the material is inadmissible in proceedings before the tribunal, or in any proceedings under the Act, or in 'any other legal proceeding'.[73] Apart from restricting admissibility, the legislation rarely deals with other disclosures of confidential communications.

To the extent that the statutory confidentiality provision does not cover certain material, the common law principles will apply.[74] Oral or written admissions made by a party in a genuine attempt to settle a dispute by negotiation, whether expressed to be 'without prejudice' or not, are generally privileged, meaning that they are not admissible in subsequent proceedings without the consent of the parties.[75] There is some uncertainty as to the extent to which the privilege applies to communications made in ADR processes.[76] The obligations of ADR practitioners with respect to confidentiality and disclosure may be regulated by legislation and guidelines. Tribunal statutes show no consistent approach. For example, a given statute may:

- make it an offence for the practitioner to disclose to any other person any statements made to them in the course of the ADR process unless the person who made the statement consents
- require the ADR practitioner to take an oath of confidentiality as a precondition to receiving immunity from suit
- require the practitioner to report on whether a process has taken place, whether the dispute has been settled, whether a party has negotiated in good faith or what issues remain in dispute.

72 T Altobelli, 'New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination' (1997) 8 *Australian Dispute Resolution Journal* 203.

73 Ibid.

74 In South Australia, admissibility of communications made with a view to compromising a civil dispute is regulated by s 67C of the *Evidence Act 1929* (SA). See also s 131 of the uniform evidence legislation (for example, *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic).

75 *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285; *Rodgers v Rodgers* (1964) 114 CLR 608 at 614 (McTiernan, Taylor and Owen JJ); see generally, T Sourdin, *Alternative Dispute Resolution* (6th ed, Lawbook Co, Sydney, 2020) [7.430].

76 Sourdin, ibid.

Where confidentiality is not protected by legislation, it may be provided for in an agreement entered into between the parties and the ADR practitioner before the process commences. Agreements are not normally used for ADR services provided under statutory schemes. There are also ethical obligations with respect of confidentiality.[77]

Where a mediation conference is held, there should be no communication about the case between the mediator and a member who is to hear the matter, to avoid giving any reason for an apprehension of bias.[78]

4.5.6. Liability of ADR practitioners

Where a statute provides for tribunal members or staff to conduct ADR processes, it may also include a provision making the members immune from any action, demand or liability arising from their conduct of the process.[79] The immunity is similar to that given to judicial officers in the performance of their judicial functions. Such provisions do not provide immunity for conduct outside the process, such as an unauthorised disclosure of confidential information. There is little consistency in the drafting of immunity provisions in tribunal statutes, and some have no provision at all.[80] Mediators and conciliators external to the tribunal may have statutory immunity under other legislation,[81] and otherwise may need to limit their liability through the use of written agreements with the parties.

An ADR practitioner who lacks statutory immunity could in principle be sued for negligence, breach of contract or breach of fiduciary duty arising from their conduct of the process, although no cases have been reported in which such a claim succeeded.[82] It is unlikely that any party would suffer loss resulting from the conduct of a facilitative process like mediation, which is intended to enable the parties to reach their own settlement.[83] However, in *Tapoohi v Lewenberg (No 2)* the judge left open the possibility that there may be evidence of breaches of duty and tortious conduct by a mediator who allegedly rushed the parties into executing a settlement agreement drafted by the mediator that failed to reserve a party's right to seek taxation advice before being bound.[84]

---

77 See Law Council of Australia, *Ethical Guidelines for Mediators* (LCA, Sydney, rev'd Apr 2018) at 5–6 <lawcouncil.asn.au>.

78 *Ruffles v Chilman* (1997) 17 WAR 1; Law Council ibid at 3–4.

79 Eg ART Act (2024) s 293(1)(d); ACAT Act s 116.

80 ALRC, above n 47.

81 For example, *Alternative Dispute Resolution Act 2001* (Tas) s 12 exonerates mediators and evaluators.

82 A Lynch, 'Can I Sue My Mediator? —Finding the Key to Mediator Liability' (1995) 6 *ADRJ* 113, 117. See further, D Spencer and S Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (3rd ed. Thomson Reuters, Sydney, 2014) [14.110]; M Moffitt, 'Ten Ways to Get Sued: A Guide for Mediators' (2003) 8 *Harvard Negotiation Law Review* 81.

83 Spencer and Hardy, ibid [14.110]– [14.140].

84 [2003] VSC 410 at [87]– [88] (Habersberger J); Spencer and Hardy, ibid at [14.135].

Chapter 5: Hearings

5.1. Key points

Tribunal proceedings and a duty to inquire

- Tribunal proceedings are often described as 'inquisitorial' because tribunal Acts give members greater control over the conduct of proceedings compared to courts operating in the adversarial system.
- Tribunals are under no general duty to exercise their power to conduct their own inquiries and generally do not do so. The circumstances in which the tribunal's failure to inquire will amount to a legal error are limited. Tribunals should use case management processes to encourage the parties to procure the information and evidence required.
- If a tribunal obtains information or evidence which is relevant and significant through its own inquiries, it should generally be disclosed to the parties.

Conduct of the hearing:

- Tribunal members should conduct themselves at hearings with respectfulness, diligence, humanity, fairness and rigour.
- It is important that persons appearing before the tribunal as parties, witnesses or observers feel that they are treated with dignity, courtesy and respect and that information placed before the tribunal is treated with gravity.
- When dealing with disruptive or uncooperative persons in a hearing, tribunal members need to apply skills, techniques and self-control to keep the hearing on track and to avoid breaching natural justice or giving rise to apprehended bias.
- Conducting hearings by telephone or video conferencing technology offers advantages and challenges, requiring members to master new skills.

Evidence:

- Tribunal Acts usually state that the tribunal is not bound by the rules of evidence. This enables the tribunal to proceed without undue technicalities and formality.
- While limits on the admission of evidence in the Evidence Acts and the common law rules of evidence generally do not apply in tribunals, the rationale for the rules can be useful in assessing whether material is relevant, credible and of probative value, and what weight should be accorded to it.
- The privilege against self-incrimination applies in tribunal proceedings.
- It is generally, although not universally, accepted that legal professional privilege applies to tribunal proceedings. The privilege protects from disclosure confidential communications between a lawyer and a client for the dominant purpose of obtaining legal advice or for use in current or contemplated litigation.

5.2. Tribunal proceedings

5.2.1 Inquisitorial powers of tribunals

The High Court in *Minister for Immigration and Citizenship v SZGUR* observed that 'the term "inquisitorial" has been applied to tribunal proceedings to distinguish them from adversarial proceedings and to characterise the Tribunal's statutory functions.[1]

Tribunals are given by statute inquisitorial powers which enable the tribunal to take the initiative in gathering information and evidence, identifying issues and controlling the hearing process. These include provisions which state that the tribunal—

- subject to the rules, may determine its own procedure in each proceeding;2
- is not bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks fit,3 and
- in a proceeding, must act with as little formality and technicality as a proper consideration of the matter permits.[4]

An aspect of the informal character of tribunals is that, from time to time, it is appropriate for tribunal members to obtain information additional to what is formally provided to them by parties. However, when this takes place, parties must be advised of the information obtained,[5] and given a proper opportunity to respond to it.[6] This is an example of the obligation for tribunals to extend procedural fairness to parties, explored in **Chapter 3**.

To the extent that a tribunal undertakes investigations, it must do so in such a way as to avoid the reality or appearance of bias.[7] Thus, where a tribunal does not receive the information during pre-hearing processes which it needs to make a just and informed decision, it may:

- raise the problem at a directions hearing and suggest that extra information be put before it
- take steps itself to procure extra information but alert any party potentially adversely affected to the information so that it can locate other relevant information and make submissions in relation to the new material.

Depending upon the powers given to it by its enabling legislation, a tribunal may be able to:

---

1 (2011) 241 CLR 594 [23].

2 Eg ACAT Act s 23; ART Act s 49(1); NCAT Act s 38(1).

3 Eg ACAT Act s 26; ART Act s 52; NCAT Act s 38(2); QCAT Act s 28(c).

4 Eg ART Act s 50(1); NCAT Act s 38(4); TASCAT Act s 79(a), (c); QCAT Act s 28(d).

5 See *Kappos v State Transit Authority* (1995) 11 NSWCCR 386.

6 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; *Re Macquarie University; Ex parte Ong* [1980] VR 449. However, if the information obtained is not material or is uncontroversial, case law suggests that non-disclosure will not necessarily amount to a denial of procedural fairness: *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29.

7 See *R v Optical Board of Registration; Ex parte Qurban* [1933] SASR 1.

- summon a person to attend to give evidence or produce documents, at the request of a party or on the tribunal's own motion
- request or require an administering agency to exercise any powers it has to require a person to give information or give documents
- question witnesses
- authorise a person to take evidence on behalf of the tribunal
- arrange a medical examination or commission a report, or require an administering agency to do so
- require an administering agency to investigate a matter and report to the tribunal
- enter and inspect premises or authorise a person to do so or
- refer a question of fact to an expert, expert panel or special referee empowered to advise or give an opinion, or, possibly, even to decide a question.

5.2.2. Scope of duty to inquire

It sometimes happens that a self-represented party relies upon a factual claim or a document while failing to produce evidence on which the tribunal can base a finding of fact. The party may not understand that a tribunal decides on the basis of evidence before it, and that 'if there is no evidence of a fact then no finding can be made'.[8]

Tribunals should use pre-hearing case management processes to encourage the parties to obtain the information and evidence required. See **Chapter 4** at **4.2.3.**

In the exercise of its functions, a tribunal is usually empowered by its tribunal Act to inform itself as it sees fit. In this sense it has an inquisitorial function which it exercises at its discretion. The existence of the power does not of itself place the tribunal under a duty to make its own inquiries to obtain information beyond that which the parties provide.[9] Nor is it a requirement of procedural fairness that the tribunal should undertake such inquiries.[10]

The circumstances in which a failure to inquire will be a legal error are limited. In *Minister for Immigration and Citizenship v SZIAI* ('*SZIAI*') the High Court of Australia rejected a general duty to inquire, but left open the possibility that 'a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained' could be a 'jurisdictional error' if the inquiry could have made a difference to the outcome.[11] In *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs*, the High Court explained that this passage in *SZIAI* must be understood as referring to the high threshold in judicial review for making the case that a

---

8 Graeme Neate AM, 'Dealing with Self-represented Parties' (2019) 96 *AIAL Forum* 37, 45.

9 *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429; [2009] HCA 39 [1].

10 Ibid [24]; *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273 at 290, 305.

11 *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429; [2009] HCA 39, [25], [26]; *DXF22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 74 [43].

failure to inquire amounts to jurisdictional error or a legally unreasonable exercise of a power.[12] The Court's comments in *Ismael* support the view expressed by a leading text that cases decided before or after *SZIAI* in which a tribunal was held to be under a duty to inquire into a 'critical' and 'easily ascertainable' fact should be viewed with 'extreme caution'.[13]

If the tribunal makes its own inquiries, it will need to disclose the material obtained to allow the parties to respond to it. See **Chapter 3** at **3.5.1**.

5.2.3. Duty to disclose adverse information

On occasions, a tribunal will be made aware of highly prejudicial information and determine not to give any or any significant weight to it even though it may be 'credible, relevant and significant'.[14] In such circumstances, because of the risk of the information having exercised some unconscious influence over the tribunal's decision-making processes,[15] the person concerned should generally be provided with some information about it so as to be able to respond to its contents.[16]

For example, in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[17] the Department of Immigration and Multicultural and Indigenous Affairs sent a letter that had been provided in confidence to it to the Refugee Review Tribunal. The letter set out adverse comments about an applicant for a protection visa. The Tribunal did not tell the applicant that it had received the letter. It subsequently decided not to grant protection visas to the applicant and his partner. On appeal, the High Court held that procedural fairness required that the Tribunal should have drawn the applicant's attention to the information so that the applicant could respond to the adverse information.[18]

The relevant person need not be provided with a full copy of the information, if this would, for instance, tend to disclose the identity of an informer, and thereby be contrary to the public interest, or if the information is otherwise confidential. However, procedural fairness requires that the person should at least be made aware of the general substance of the case which they need to answer.[19]

---

12 [2024] HCA 2 [25].

13 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action* (6th ed, Thomson Reuters, Sydney, 2017) [5.230].

14 See *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

15 On the risk of unconscious bias due to information, see *Charisteas v Charisteas* [2021] HCA 29 [47] (Kiefel CJ and Gageler J); *Ebner v Official Trustee in Bankrutpcy* (2000) 205 CLR 337 at 345 [8].

16 *Kioa v West* (1985) 159 CLR 550, 629.

17 (2005) 225 CLR 88.

18 Ibid [21]. There are exceptional cases in which the confidentiality and sensitivity of underlying source material have justified its non-disclosure to an affected party. See, eg, *Tucker v Minister for Immigration and Citizenship* [2011] FCAFC 16 and *Jaffarie v Director General of Security* (2014) 226 FCR 505.

19 Ibid [29]. Compare the approaches adopted in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247; *Tucker v Minister for Immigration and Citizenship* [2011] FCAFC 16; *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30; and *Coutts v Close* [2014] FCA 19.

5.3. Preparation and organisation

Tribunals receive in different ways the evidence that will inform their decision-making. Some tribunals are proactive in eliciting information and evidence relevant to the matter to be decided. Others rely more upon evidence presented by those who appear before them.

A tribunal's decision-making is assisted if as much relevant evidence as possible is available before the hearing. This enables the parties to test the evidence more effectively and to prepare submissions about its relevance and weight. It also helps tribunal members prepare for hearings and to focus on the issues in dispute.

It is helpful, wherever possible, for tribunal members in advance of the hearing to—

- read the file
- identify the matters apparently in dispute between the parties
- check that service of relevant documents has been properly effected
- examine the relevant statutory provisions —checking that they are addressing the correct version that they will need to apply (see **chapter 6** at **6.2.3.1** and **6.2.3.2**).

In addition, certain steps can be taken prior to a hearing to optimise the way in which it runs. These include—

- booking interpreters
- ensuring appropriate access and facilities for people with disabilities[20]
- confirming the availability of telephone and videoconferencing equipment
- considering the need for additional security
- confirming the lodgement of any material which was required to be lodged.

Pre-trial case management procedures such as directions hearings and conferences can be of great assistance in preparing matters for hearing and enabling the hearing to proceed smoothly and efficiently. See **chapter 4** at **4.2.3.**

5.4. Tribunal member's conduct at the hearing

It is important for tribunal members to command the respect and confidence of those who appear before them and of the general public. The hallmarks of member conduct should include respectfulness, diligence, humanity, fairness and rigour. COAT's *Tribunal Competency Framework* identifies conduct of hearings as one of the key member competencies. Relevant qualities for this competency are 'firmness without arrogance, courtesy, patience, tolerance,

---

[20] Eg a person with impaired hearing may require facilities such as hearing loops, captioning services. A person with low vision may need facilities such as screen readers and magnifier programs like ZoomText.

sensitivity, compassion and self-discipline'.[21] The document gives examples of specific behaviours which demonstrates this competency.

5.4.1. Punctuality

It is important for tribunal members to be seen to treat parties appearing before them with respect and to model appropriate behaviour at the hearing. This includes commencing the hearing, as far as possible, at the appointed time, and, if that cannot be done, explaining why and apologising for the delay.

It is helpful for tribunal members to arrive at the hearing venue a suitable period before the appointed sitting time. This facilitates preparation that is not unduly rushed and enables commencement of the sitting in a timely way.

When breaks are taken, it is worth making sure that everyone is aware of their expected duration. This allows parties and witnesses to maintain punctuality. Likewise, it is important to adhere to the pre-announced duration of breaks, unless there is a good reason to vary them.

5.4.2. Members' attire

Members should wear standard business attire for tribunal hearings whether conducted in person or by video-conferencing technology.

5.4.3. Members' demeanour

It is important that persons appearing before the Tribunal as parties, witnesses or observers feel that they are treated with dignity, courtesy and respect and that information placed before the tribunal is treated with gravity. This facilitates a perception that parties have received procedural fairness and reduces the potential for feelings of dissatisfaction and disenfranchisement.

Accordingly, members should avoid giving indications of impatience, such as repeatedly looking at their watch, fidgeting, sending text messages on their telephone, and remarking that evidence is taking too long or that the hearing should be completed more quickly. Such conduct could also suggest that witnesses are not being listened to attentively and that parties are not receiving a fair hearing because tribunal members have prejudged the case.[22]

Likewise, intemperate behaviour that is suggestive of bias for or against a witness, party or representative or is similarly discourteous should be avoided. Examples of such behaviour are—

---

21 Council of Australasian Tribunals Inc, *Tribunal Competency Framework* 10 <coat.asn.au>.

22 See eg, *Sharma v Minister for Immigration and Border Protection* [2017] FCAFC 227. For a general overview of the do's and don'ts of the behaviour of a member at hearing, see Anne Britton, 'Conducting a Fair and Effective Hearing' (paper delivered to the 2018 conference of the AAT, Twin Waters Qld, 29 May 2018) <ncat.nsw.gov.au>.

- rolling of the eyes
- shaking of the head
- looking out the window
- glaring
- gesturing
- slamming of books
- overly aggressive questioning
- ostentatious discarding of papers
- sarcastic questions or comments.[23]

It is important too that persons known to tribunal members (for instance, by reason of their having appeared before the tribunal before) not be 'welcomed' to the hearing or otherwise treated in a way that suggests that their evidence will be dealt with in an unequal or uncritical fashion. This may suggest to a party that there is a 'club' to which they do not belong.[24]

It is inevitable that a member's attentiveness will wane at times. It is essential to monitor one's attention levels and to take suitable measures to maintain concentration. If necessary, a short break should be taken if the member's attention is drifting and there is a risk of creating an impression that the witness or representative is no longer receiving due attention.

Because an integral part of assessing evidence includes taking into account how it is delivered, it can be helpful for a reasonable measure of eye contact to be maintained with witnesses. A balance needs to exist between taking notes and inspecting documents, on the one hand, and paying attention to a witness, on the other hand. If the tribunal needs to read a significant document, it is appropriate for the tribunal to ask the parties to wait or to stand the matter down briefly.

Use of humour by tribunal members during a hearing should either be avoided or undertaken with discernment.[25] While a light-hearted comment or a joke can reduce tension, lighten an atmosphere and put participants at ease, there is also the risk that it can be misinterpreted. It can induce an impression that a party or witness or the case generally is not being taken seriously. Tribunal members should be cautious in employment of jokes, banter with representatives, double meanings and light-hearted comments, being conscious of the impression that their demeanour and behaviour may create.

---

23 See, eg, *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10, 5. See also chapter 3 at **3.4.5.3**.

24 The Hon. Justice John Griffiths, 'Apprehended Bias and Administrative Tribunals' (paper presented to COAT Annual National Conference 11 June 2021) [51] <coat.asn.au>.

25 Ibid.

5.5. Procedures and processes at hearings

5.5.1. Security procedures

On occasions there may be reason to conclude in advance or in the course of a hearing that a party may be violent or unacceptably abusive, threatening or disruptive. This can raise an occupational health and safety issue, and represent a risk to witnesses and parties as well as to the orderly conduct of hearings.

Where it can be done, adequate security arrangements should be put in place prior to the commencement of a hearing. These may include moving the proceeding to a more secure venue or ensuring that an alarm will enable a suitable emergency response. The presence of security staff can often temper poor behaviour at or in the vicinity of hearings.

While assaults or seriously abusive behaviour are very rare at tribunal hearings, a responsibility of tribunal members is to take the steps necessary to minimise the risk to participants in tribunal hearings, as well as to observers and staff.[26] If suitable security arrangements cannot be instituted, it may be necessary to consider whether the hearing should be adjourned to another time or place to ensure safety. Sometimes, a short break is sufficient to reduce tensions and enable safe resumption of the hearing.

A member or tribunal officer should lodge an incident report when any violent behaviour or assault has taken place at a tribunal hearing. This can facilitate the assessment of criminal or employee compensation claims, and the preferring of criminal charges, if that is appropriate. It can also assist reflection on how security arrangements can be improved for future hearings.

5.5.2. Communication

5.5.2.1. Culturally responsive practice

The COAT *Tribunal Competency Framework* identifies one of the core competencies of a tribunal member as 'communication (including cultural competency and working with interpreters)'. The qualities associated with the competency include:[27]

- being 'aware of and respect[ing] diversity in all its forms'
- having 'a clear understanding of cultural context and the inherent disadvantage experienced by Koori [Indigenous] and Culturally and Linguistically Diverse (CALD) communities'.

---

26 For useful guidance on risk identification and de-escalation strategies, see N O'Connor, 'Dealing with Distressed and Volatile People' (presentation to 2018 COAT NSW Chapter Conference 'Efficient, Formal and Fair: Tribunals Delivering under Pressure', Sydney, 7 September 2018) <coat.asn.au>.

27 COAT, above n 21 at 5. For a more expansive discussion of what 'cultural competency' means and how to build it, see John Billings, 'Procedural Fairness—Cases Involving People from a Culturally and Linguistically Diverse Background' (paper presented at COAT conference 'Tribunals Boards and Panels—Issues of Procedural Fairness', Melbourne, April 2016) <www.coat.asn.au>.

- 'Participating in the Tribunal's cultural competency program as part of their … professional development'.

Billings notes that developing one's cultural competence has been said to require personal and professional commitment, self-knowledge and self-awareness, modesty and respect, understanding of the concept of culture, and knowledge of cultures and practices.[28]

The courts and tribunals sector, through membership and engagement with the Judicial Council on Diversity and Inclusion (JCDI), has developed a range of resources to support courts, tribunals and other parties in developing cultural competence and working with interpreters.[29] The JCDI has developed reports, guidelines, factsheets and videos to promote access to justice for diverse communities and individuals including Aboriginal and Torres Strait Islander, migrant and refugee women. Its website provides links to a range of resources developed by other agencies, including a cultural diversity e-learning resource developed by the Judicial Commission of New South Wales.

The JCDI has also developed *Recommended National Standards for Working with Interpreters in Courts and Tribunals* ('Recommended Standards') with the accompanying *Supplementary Materials* to establish minimal and optimal practices for Australian courts and tribunals.[30] The Recommended Standards are accompanied by annotations ('Annotated Standards') which provide further detailed further guidance on each standard,[31] and *Model Rules* and a *Model Practice Note* for adoption by each court and tribunals to implement the Standards. Together, these documents provide a comprehensive guide as to practices and procedures to be adopted by Australian courts and tribunals, judicial officers (defined to include tribunal members), interpreters and legal practitioners.[32]

The Recommended Standards cover matters such as selecting and engaging an interpreter (including evaluating qualifications, experience and professional affiliations of interpreters, and availability of qualified interpreters for each community language),[33] and providing support for interpreters. The Recommended Standards for Judicial Officers include assessing the need for an interpreter (Standard 16 and Annexure 4) [34] and conducting proceedings with an interpreter

---

28 Billings, ibid at [53], citing T Brettel Dawson *Addressing Social and Cultural Diversity in Judicial Process—Putting Ourselves in Context* (paper presented at AIJA 25th Annual Conference Cultures and the Law, 2007).

29 The Hon. Chief Justice Wayne Martin AC, 'Access to Justice in Multicultural Australia' (paper presented at COAT Sydney, 8–9 June 2017) <www.coat.asn.au>. The JCDI is a broad-based independent body to promote the responsiveness of the justice system to community needs arising from cultural and linguistic diversity.

30 Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* 2nd ed (JCDI, 2022) <JCDI.org.au> ('*Recommended National Standards*').

31 Ibid 27.

32 See also the related Factsheets and videos at <https://JCDI.org.au/resources/>.

33 JCDI, *Recommended National Standards*, above n 30, 8–11; Standard 11 and Model Rule 1.8. Note also, at 108–16, Annexure 1 dealing with geographic distribution of community languages in Australia, and Annexure 2, which overviews the profession of interpreting including qualifications and accreditations.

34 Ibid 8–11. The Standard refers to Annexure 4 (at 117), which provides a test for determining need for an interpreter. See also *Perera v MIMA* [1999] FCA 507; Billings, above n 27, [17]–[25].

(Standard 17).[35] The Recommended Standards for Interpreters define the duties of court interpreters and require them to comply with the Court Interpreters Code of Conduct.[36] The Code deals with duty to the court, duty to comply with directions, duty of accuracy, duty of impartiality, duty of competence and confidentiality.

Standard 3 affirms the principle that 'courts must accommodate the language needs of parties and witnesses with limited or no English proficiency in accordance with the requirements of procedural fairness'. This duty arises whether a party is self-represented or not. A party may be denied procedural fairness if the lack of interpreter, or the inadequacy of the interpreting service, deprives the party of a 'real and fair opportunity' to understand what is said to them, to say what they wish to say, and to participate in the hearing.[37] Failure to arrange for an interpreter could also breach statutory fairness duties under various tribunal statutes, enabling Act and human rights Acts, as well as international human rights conventions.[38]

As a rule of thumb, serious consideration should be given to procuring an interpreter (including an interpreter using Auslan or another signed language for a hearing-impaired person) where a party or a witness asks for one, or if there is a suspicion that a person giving information to the tribunal is impaired in any significant way in communicating to the tribunal or their legal representative or in understanding what is said to them. Annexure 4 to the Recommended Standards gives a four-part test that court staff and tribunal members can apply to assess whether a witness or a party needs an interpreter.

If a party is resolute in refusing an interpreter, and there is evidence before the tribunal of the party's capacity to communicate in English, the tribunal is not required to insist.[39]

Tribunal members and parties should ask questions in the usual way when an interpreter is interpreting questions and answers, maximising the extent to which communication is taking place directly with the witness. It is recommended that:[40]

- questions be addressed directly to the party concerned and not through the interpreter (that is, ask 'What did you do next?' to the party rather than say to the interpreter 'Please ask Mr X what he did next')
- the member asking the question look directly at the party concerned and not the interpreter

---

35 Ibid at 12–13. See also, Annexure 5, at 121 'what judicial officers can do to assist the interpreter'. Also note, p 16, Standard 26 dealing with translation of documents and, at 123, Annexure 6 'interpreting in matters where a witness or defendant appears via audio-visual link'.

36 Ibid 14; *Model Rules* Div 6 and sch 1.

37 *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142 at [9]. See JCDI, ibid 94 'Legal Appendix' which provides a comprehensive summary of the current Australian and New Zealand law on engagement of interpreters to ensure procedural fairness.

38 See JCDI, above n 30, 94.

39 *BLD15 v Minister for Immigration and Border Protection* [2018] FCA 3467.

40 For further advice on ensuring fairness when communicating through an interpreter, see Billings, above n 27, at 11–16; ACT Courts and Tribunals, *Interpreter Protocols* (ACT Courts and ACT CAT, Canberra, February 2020) at 8–11 <courts.act.gov.au>.

- sentences be kept short with sufficient breaks to allow the interpreter to interpret the content as accurately as possible
- tribunal members ensure that interpreters understand that *everything* that is said must be translated *exactly* as said
- tribunal members ensure that interpreters understand that if they need clarification of what has been said, they should indicate this first to the tribunal.

5.5.2.2. Communicating with a person with a cognitive impairment

There are different definitions of ‘cognitive impairment’. The New South Wales Law Reform Commission adopts the following definition:[41]

- Cognitive impairment is an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, or disorder, developmental delay, impairment or deterioration of the brain or mind.
- Such cognitive impairment may arise from, but is not limited to, the following:
    i. Intellectual disability
    ii. Borderline intellectual functioning
    iii. Dementias
    iv. Acquired brain injury
    v. Drug or alcohol related brain damage
    vi. Autism spectrum disorders.

The severity of the impairment can vary, and it may be ongoing or of short duration. Tribunals can promote effective communication with persons with a cognitive impairment, by:

- encouraging the person to be accompanied by a competent and impartial support person to provide emotional and other support during the hearing
- speaking in plain English, using simple sentence structure, common, everyday language
- explaining what needs to be done, and by whom
- managing the environment to minimise noise and other distractions.

A tribunal may be under a statutory obligation to take steps to ensure that the proceedings are conducted in a way which is responsive to the needs of a person with impaired capacity.[42]

In 2019 the Australian Guardianship and Administration Council (AGAC) issued its Final Report: *Maximising the Participation of the Person in Guardianship Proceedings: Guidelines*

---

41 NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (Report 35, NSWLRC, Sydney, June 2012) 136, [5.123] <lawreform.justice.nsw.gov.au>. The meaning of the terms in the definition are discussed in Report 35 ch 5.

42 eg, QCAT Act s 29(c)(ii)). See also the objects in NCAT Act s 3(c), TASCAT Act s 10(b).

for Australian Tribunals.[43] The Final Report includes advisory or best practice guidelines for the procedures, panel composition and training of members and staff of guardianship tribunals.[44] They are to be read in conjunction with a report prepared by AGAC in the course of developing the Guidelines, entitled *Maximising the Participation of the Person in Guardianship Proceedings—Draft Guidelines for Australian Tribunals*.[45] This is a report on extensive consultations with persons with disabilities who had been the subject of proceeding in the Guardianship Division. One of the report's recommendations was that the Council add a guideline on 'the components of good communication with persons with cognitive disability in a hearing context' which would, for example, include the following points:[46]

- prior to a hearing the applicant or a person who knows the person well could prepare a communication tip sheet for the tribunal
- allow time at the beginning of the hearing to develop respectful rapport with the person
- ask questions of or invite the subject person to share their views before seeking the views of others
- allow the subject person ample time to express their views
- check in regularly with the subject person to confirm if they understand what is going on at different intervals during the hearing
- check if the subject person understands by inviting them to explain in their own words what has been said
- use plain English and avoid unfamiliar terminology, unnecessary legalese and acronyms
- where appropriate use visual tools to augment oral communication and to assist the person to participate in the hearing processes[47]
- ask the subject person if they wish to speak privately
- regularly during the hearing ask the subject person if they need to have a break
- be transparent in communication; for example, by explaining the rationale behind protocols and processes or a particular line of questioning

The guideline was proposed specifically for guardianship proceedings in which the tribunal acts administratively in its original jurisdiction, the proceedings do not involve a dispute between parties, and the tribunal must act in the best interests of the subject person.[48] In contested

---

43 Australian Guardianship and Administration Council, *Maximising the participation of the person in guardianship proceedings: Guidelines for Australian Tribunals* Final Report, June 2019, <agac.org.au>, 21 January 2025).

44 Ibid 4–6.

47 Ibid.

47 Ibid.

47 Ibid.

48 See *GS v MS* [2019] WASC 255 at [77]– [92]; *PJB v Melbourne Health* (2011) 39 VR 373; [2011] VSC 327 at [125], [129].

proceedings, including civil disputes, the tribunal must avoid giving rise to an apprehension of bias, for example, by speaking to one party in the absence of the other. Therefore, while the AGAC guideline may be useful in other tribunals and jurisdictions beyond guardianship, it needs to be applied with advertence to the context.

5.5.2.3 Capacity and competence

Where a party has a cognitive disability, a question may arise as to whether the person is competent to commence or carry on proceedings, and if not, whether a litigation guardian or other form of representative should be appointed.

Legislation in various jurisdictions creates a legal presumption that, unless found to be lacking capacity or competency, a person of full age attains full capacity to exercise their right to be recognised as a legal person before the law and is presumed to have decision making capacity unless there is evidence to the contrary.[49]

There is no general competence requirement for a person to commence or carry on proceedings before an administrative tribunal. Procedural fairness does not ordinarily require the tribunal to ascertain that a party before it is competent, but only that the party 'can understand the nature of the proceedings and … give evidence'.[50]

In some cases, the tribunal may consider that, due to a cognitive or other disability, a party is not legally competent to bring or defend proceedings. Principles for assessing whether a party is legally competent (in the context of civil proceedings in a superior court) are summarised by Kyrou J in *Slaveksi v Victoria*.[51] The level of cognitive capacity required to be legally competent as a self-represented litigant is greater than for a party who is legally represented.[52]

Some tribunals have a practice direction or guideline dealing with appointment of a litigation guardian (or *guardian ad litem*) to conduct proceedings on a behalf of a party who lacks legal competence.[53] A litigation guardian 'stands in the shoes' of the person under a disability and must represent the interests of that person, including engaging and instructing a legal representative.[54]

---

49 Eg in Victoria, see *Age of Majority Act 1977* s 3; *Guardianship and Administration Act 2019* s 5(2); *Mental Health and Wellbeing Act 2022* s 85(2); Judicial College of Victoria, *Disability Access Bench Book* [4.3.1] <judicialcollege.vic.edu.au>.

50 *Minister for Immigration and Multi-cultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 [19], [45]; *Karan v Minister for Home Affairs* [2019] FCA 478 [23]; M Groves, 'Do Administrative Tribunals Have to be Satisfied of the Competence of Parties before Them? (2013) 20 *Psychiatry, Psychology and the Law*, 133, 134.

51 [2009] VSC 596; 25 VR 160, [32]; extracted in Neate, above n 8, 60–2. See also Nguyen v South Australia [2024] SASCA 105 [12].

52 *Slaveski*, ibid [31]; approved in *Attorney-General for Queensland v SLS* [2021] QSC 111 [40] (Williams J).

53 For example, NCAT Guardianship Division Guideline 2; *Representatives for people who cannot represent themselves (GALs)*, December 2021 <ncat.nsw.gov.au.>.

54 *Slaveksi v Victoria* [2009] VSC 596; 25 VR 160 [36].

5.5.3. Legal representation

Some tribunal statutes expressly grant a right to legal representation for all or certain types of proceedings. Sometimes they exclude it. Generally, if statutory provisions exclude legal representation, that is the end of the matter. However, the validity of delegated legislation to that effect has been said to be potentially open to an argument that it is not authorised by the empowering Act.[55]

In *Appellant WABZ v Minister for Immigrations and Multicultural Affairs*, a provision stating that a person is not entitled to be represented was held to relate only to matters of entitlement, and did not exclude the rules of procedural fairness if representation was required in the circumstances of the case.[56]

The case is strongest for allowing legal representation where statutory provisions are silent, and when proceedings are conducted orally and in person.[57] The law on the subject is not settled,[58] but Australian law has tended to support the proposition that there is no absolute right to legal representation.[59] By contrast, the New Zealand Court of Appeal has held that the right to counsel is an entitlement under the common law principles of natural justice.[60] However, this right can be removed or relaxed by specific statutory provision.

Many tribunal statutes provide that parties may only be legally represented with the leave of the tribunal. The statute may also set out criteria for the tribunal to consider in deciding whether to allow a party legal representation.[61] Usually the statutory criteria are not exhaustive, and the tribunal may take into account other relevant circumstances.

In the absence of a statutory provision stating that there is no entitlement to legal representation, it may be advantageous for parties to be represented so that they receive legal advice and assistance in making their arguments. It often results in shorter hearings and more effective communication. However, legal representation can increase the level of formality and the adversarial nature of the proceedings.[62] For this reason the Productivity Commission recommended that, 'in tribunals, where matters are relatively simple in legal and factual terms and equality between parties is likely to be the norm, the use of legal representation should be

---

55 *Freedman v Petty and Greyhound Racing Board* [1981] VR 1001.

56 (2004) 134 FCR 274.

57 See JRS Forbes, *Justice in Tribunals* (5th ed, Federation Press, Sydney, 2019) 136.

58 For the right, see *Edgar and Walker v Meade* (1916) 23 CLR 29; *R v Visiting Justice at Pentridge Prison; Ex parte Walker* [1975] VR 883; *Appellant WABZ v Minister for Immigration and Multicultural Affairs* (2004) 134 FCR 271; for the absence of the right, see *Maclean v The Workers Union* [1929] 1 Ch 602.

59 See, for example, *Smith v Aldrich* (1993) QCA 253 (Unreported, Queensland Court of Appeal, Pincus, Davies and McPherson JJA, 9 July 1993); *MacNab v Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54; *Cains v Jenkins* (1979) 28 ALR 219; *Finch v Goldstein* (1981) 4 ALD 419; *Doepgen v Mugarinya Community Association Incorporated* [2014] WASCA 67.

60 *Drew v Attorney-General* [2002] 1 NZLR 58.

61 For example, *QCAT Act 2009* (Qld) s 43.

62 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006) 49–52.

limited'.[63] Where legal representation is currently allowed only with the leave of the tribunal, the Commission suggested that 'leave should be granted only in exceptional cases where one party would otherwise be significantly disadvantaged'.[64]

The Law Council of Australia proposed a less rigorous approach, proposing that the following considerations are relevant to whether a fair hearing requires that a party is allowed legal representation:[65]

- the existence of a power imbalance between the parties, such as where another party is represented by a professional representative or a repeat player
- the party's lack of legal capability
- a particular vulnerability of the party (such as the status of being a potential victim of abuse), and
- the significance of the consequences of the decision for affected individuals.

Tribunals dealing with vulnerable persons, such as in guardianship and administration and mental health orders, commonly allow a party to be represented in most cases.[66]

A 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,[67] may sit with the party at the hearing and assist them by taking notes, organising papers and quietly advising the party, 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.[68] In considering such an application, a court may take into account whether the unrepresented party is capable of making oral submissions on their own behalf, and whether the individual acting as McKenzie friend is a suitable person to address the court.[69] Subject to the requirements of procedural fairness, the tribunal may impose formal conditions on the grant of permission to act as a McKenzie friend.[70]

63 Productivity Commission, *Access to Justice Arrangements* Inquiry Report No 72 (Canberra, 2014) Vol 1 at 51, recommendation 10.1 <pc.gov.au/>. The Productivity Commission is a policy and advisory body.

64 Ibid.

65 Law Council of Australia, *The Justice Project Final Report: Overarching Themes* (LCA 2018) at 7, rec 4.2 <www.lawcouncil.asn.au/justice-project/final-report>. The Law Council is a peak body for the Australian legal profession and professional bodies.

66 Council of Australasian Tribunals, Submission to the Productivity Commission Public Inquiry into Access to Justice Arrangements (13 November 2013) 10 <coat.asn.au>.

67 So-called from the name of the UK case in which this form of assistance was recognised: *McKenzie v McKenzie* [1970] 3 All ER 1034, 37G–H, 38B–C, 41B–D. The principle has been widely adopted in the common law world. On the role and its limitations, see *Batey-Elton & Elton* [2010] FAMCAFC 79 [21], [22].

68 *Myers v Victorian Civil and Administrative Tribunal* [2024] VSCA 206 [28], [47], [49], [54] ('*Myers v VCAT*'). While in *McKenzie v McKenzie* the English Court of Appeal held that a litigant in person had a right to such assistance, Australian authority views it as subject to the grant of leave.

69 In *Myers v VCAT* ibid [30]-[35] the Victorian Court of Appeal held that the trial judge did not err in taking into account the observations of judges about the person's behaviour in other proceedings.

70 *Gindy v Capital Lawyers Pty Ltd* [2022] ACTCA 66 [158].

5.5.4. Preliminary matters

It is common, and helpful, for the chairperson of the tribunal to commence proceedings by identifying who is present, including legal representatives, if any; outlining the process and explaining what is expected of those at the hearing; and identifying the documents before the Tribunal.

In some kinds of hearings, it is also helpful to identify who else is present in the tribunal room so that their potential contribution or perspective can be recognised and factored into the proceedings. If the hearing is conducted via video-conferencing technology, the member should check each party in the online meeting room. Some VCT programs enable a person with the access code to add an AI robot which displays as a party to the meeting, for purposes such as to transcribe what is said.

Generally, it is appropriate that persons be referred to by their title and surnames. This reflects the seriousness of proceedings, can reduce power imbalances, and accords due respect to all participants. However, it is important to retain flexibility. On some occasions, and in some circumstances, it can be appropriate to use first names—for instance, where it is the expressed wish of witnesses, and with young persons. There is the need to balance formality and informality and to avoid the appearance of being patronising or showing favour.

Inquiries should be made before the hearing to check on the parties' preferred mode of address, personal pronouns and pronunciation of names.[71] If this information is not already available, a member should ask the party or witness when first addressing them.

Provision of information about sitting times and resolving what materials are already in the possession of the tribunal, as well as the parties, is an important early step. If proceedings are being recorded for the purpose of a transcript, this should also be noted by the chairperson of the tribunal. If there are preclusions upon publicity (such as in relation to the identity of a notifier), these should be stipulated so that there are no misunderstandings.

It is often worthwhile for the tribunal chairperson to provide a brief summary of the dispute to be resolved by the tribunal and to inform the parties about relevant rights and entitlements. This can remove misapprehensions which some persons may harbour about the tribunal's role or independence. It also aids discussion about the parameters of the hearing and clarifies those matters which remain contentious, as opposed to those which are the subject of agreement.

Where proceedings are confidential, this ought to be identified. If there is an application for proceedings to be closed (assuming they are generally open) or for a suppression order to be made (for example, in the interests of justice or the administration of justice or to protect commercial confidences), this should be facilitated at a very early stage.

---

[71] See Judicial Council on Diversity and Inclusion, *Pronunciation of Names and Gender Pronouns Practice Note* <jcdi.org.au/resources>. Some courts and tribunals have their own practice note on the subject.

An explanation of the order in which evidence will be received is also generally helpful. This will usually involve informing the parties the stages involved in the process of parties or others giving evidence. Whether cross-examination or re-examination will occur depends on the nature of the tribunal and the issue before it.[72] For example, where the tribunal follows procedures analogous to a court, three basic stages will be followed by the tribunal—

- the applicant or complainant will give evidence first
- the respondent (if there is one) is then given the opportunity to cross-examine
- the applicant or complainant has the right to re-examine.[73]

This process applies *to each* of the applicant's or complainant's witnesses and, at the end of this aspect of the case, is repeated for the respondent and their witnesses.

Sometimes, the retention of flexibility in the order of proceedings can be constructive, such as where there are serial, discrete issues that need to be determined, or where there is a particularly anxious party or witness from whom it may be advantageous to hear out of order. An example of this can occur in hearings before mental health review tribunals and guardianship tribunals. By contrast, in matters such as planning disputes, the responsible authority, defending its decision, often goes first, followed by the objector and the applicant for the planning permit.

It is often constructive for the chairperson of a tribunal to indicate that questions will be asked from time to time by members of the tribunal to clarify matters as they arise and also between cross-examination and re-examination.

Where there is the potential for a matter to be settled, it can be advantageous for the possibility to be raised by the chairperson of the tribunal at the outset. It can be useful to offer to stand the matter down or even adjourn it to enable the parties to speak further with a view to reaching a settlement. Such urging may be particularly appropriate where a party appears not to have had legal advice and requires it or where costs are likely to exceed the amount of money in dispute.

Where there is a realistic prospect that an applicant may be in a worse position as a result of a hearing (for instance, where a debt may be increased, or compensation awarded by a lower tribunal overturned), it is proper for these issues to be explicitly raised at the outset with the applicant. The tribunal chairperson should make it clear that this does not mean that a concluded view on the issue has been formed by the tribunal. Suitable time for the applicant to reconsider their position should be made available. The same considerations can arise in respect of respondents where they have adopted an adversarial posture which appears not to be justified by the evidence adduced or likely to be adduced.

---

72 *Hurt v Rossall* (1982) 43 ALR 252.

73 See, for example, *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd* (1990) 3 PRNZ 653 at 654. But the tribunal is not required to advise an applicant how to conduct their case: *Heyward v Minister for Immigration and Citizenship* (2009) 113 ALD 65.

Where there is an indication on a file that an applicant stands in jeopardy of criminal prosecution associated with matters before the tribunal, the applicant should be warned accordingly. For example, this may occur in the context of social security matters. It is helpful for the applicant to be asked if they have received a formal communication relating to the possibility of prosecution action. The applicant should be advised that the information that they give to the tribunal may be incorporated in the written decision of the tribunal. This will be seen by the relevant government department or agency and may be used in a criminal prosecution.

It is generally advantageous to extend the opportunity for preliminary or housekeeping matters to be raised at the outset so that issues such as jurisdictional problems, the availability of witnesses or legal representation or problems arising from time constraints or other logistical difficulties are made known early. If a party is unclear as to what is taking place or any aspect of the 'ground rules', this provides them with the opportunity to say so, enabling remedial action to be taken promptly.

It can also be useful to provide an indication of the likely duration of the hearing, when a decision will be handed down and whether there are appeal rights from the decision.

5.5.5. Disqualification for bias

Chapter 3 explored the requirement for tribunal members to be impartial and disinterested. Where a question is raised as to the independence or impartiality of a tribunal member, the governing principle is, subject to qualifications relating to waiver, that a tribunal member should recuse themselves from sitting if a fair-minded observer might reasonably apprehend that the tribunal member might not bring an impartial mind to the resolution of the question the tribunal member is required to decide.[74] This 'apprehended bias test' reflects the importance of maintaining public confidence in the administration of justice and its capacity to ensure that cases are decided impartially. As Barwick CJ, Gibbs, Stephen and Mason JJ explained in the case of *R v Watson; Ex parte Armstrong*,[75] such an apprehension on the part of a fair-minded observer might arise from prior contact a tribunal member has had with a party or a witness, from behaviour previously engaged in by a tribunal member or from the way in which they conduct themselves in the course of a hearing.

However, not every contact, previous behaviour or conduct during a hearing will reach the point of being such as to satisfy the contention that a tribunal member should recuse themselves for bias.[76] For instance, it has been held that the apprehended bias test does not involve imputing to the hypothetical observer a propensity to draw the most sinister

[74] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 [6]. See the test for 'apparent bias' (as it is called in New Zealand): *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72 [3]. See **Chapter 3** at **3.4.1**.

[75] (1976) 136 CLR 248 at 263.

[76] See **Chapter 3** at **3.4.6** on potentially disqualifying associations; Justice John Griffiths, 'Maintaining Impartiality in the Tribunal Environment' (paper presented to the NCAT conference 21 Oct 2019).

implications from every ruling or adopt the least favourable interpretation of every comment made.[77]

Where a tribunal member has had some interaction with a person appearing before the tribunal or where there is any reason for a disinterested bystander to have concern about the capacity of a tribunal member to bring an unprejudiced mind to bear on the matters to be determined, it is appropriate that such issues be disclosed by the tribunal member at the earliest opportunity in the hearing. On occasions, this will only become apparent when a tribunal member physically recognises a person. On other occasions, it will become apparent when the tribunal member prepares for the hearing. It may even occur after a tribunal member has reflected upon evidence given in the course of a hearing. It is a fundamental entitlement that a party who might be troubled by the prior knowledge or interaction of the tribunal member should be afforded an opportunity to make submissions upon whether the tribunal member should refrain from sitting on the hearing.

The member codes of conduct adopted by tribunals usually encourage members to be proactive in disclosing potentially disqualifying circumstances, and at a relatively low threshold. That is, members should disclose anything which they think might have a bearing on their impartiality.[78] The disclosure should occur at the earliest opportunity.

5.5.6. Non-appearance of parties

On occasions, an applicant or a respondent (if there is one), does not attend a hearing in a timely way or at all. Non-appearance of a party does not of itself postpone or terminate a hearing. Natural justice requires an opportunity to be heard, but it is waived by a failure to attend a hearing.[79] However, it is important that the tribunal assure itself that the non-attending party has duly received proper notice of the date, location and status of the hearing. It may be appropriate for the matter to be stood down for a short period of time to enable some latitude to be extended to the person who has not attended. Generally, it is not the responsibility of the tribunal to undertake inquiries about the absence of the party or the reasons for it. However, this is not an invariable rule. On occasions, it is proper for inquiries to be made about whether it had been anticipated that the party was going to attend and whether anything is known about why the person is not present.

Tribunals' policies about the granting of adjournments because of non-attendance of parties vary considerably. Some regularly extend an opportunity to a party, especially an applicant or a party under review, to attend on a subsequent occasion. Others proceed with a hearing, after the

---

77 See *R v Doogan; Ex parte Lucas-Smith* [2005] ACTSC 74 (Unreported, ACT Supreme Court, Higgins CJ, Crispin and Bennett JJ, 5 August 2005) at [78].

78 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001, rev'd 2009) 17, 25–26 <coat.asn.au>.

79 See *Ostreicher v Secretary of State for Environment* [1978] 1 WLR 810.

matter has been stood down for a short while, taking into account the information available on the file and what is presented by any party that is present.

5.5.7. Adjournments

Adjournment refers to the delay of a hearing for resumption on a later day. When matters are delayed until later in the same day, they are generally referred to as being *stood down*.

Tribunals have different policies, procedures and practice directions in relation to the granting of adjournments. For many tribunals, adjournments are only granted as a last resort. For example, an NCAT Guideline provides that the overriding principle is that when a date and time has been set for a hearing it will go ahead on that date and at that time, unless the Tribunal allows an adjournment.[80] A tribunal is entitled to have regard to case management considerations, including the consequences in delay and expense, when determining an adjournment application.[81] That is because speed and efficiency are essential to a just resolution of proceedings. Accordingly, the NCAT Appeal Panel has observed that an application for an adjournment should be seen as the exceptional rather than the ordinary course.[82]

However, when matters cannot be fairly and adequately resolved on the day for which their hearing has been set down, they may need to be adjourned. Similarly, if a party to a hearing is ill or otherwise for good reason unable to continue to participate in a hearing, an adjournment may be appropriate. On occasion, where there is a question mark over assertions about matters such as ill health, it can be necessary for a tribunal to require a party to provide documentary or other evidence about what is precluding them from participation in the hearing. This evidence might include, depending on the context—

- a medical certificate
- a letter from an employer
- confirmation of a family emergency or other emergency.

If proceedings are part-heard (in other words, if they have commenced but have needed to be stopped part the way through), they should generally be adjourned to a tribunal hearing with the same personnel. However, if a tribunal member hearing a matter dies, becomes incapacitated or is unable to continue hearing the matter, consideration needs to be given to adjourning the hearing to allow it to be conducted afresh by a differently constituted tribunal. Sometimes, parties can agree to the contrary. However, this depends upon the exact terms of the legislation establishing the tribunal's hearing processes.

Fairness to parties is the yardstick for determining whether an adjournment should be granted. For instance, if a party has been served with documentation too late to prepare adequately for

---

80 *NCAT Guideline 3—Adjournments* (3 July 2024) cl 3 <ncat.gov.nsw.au>.

81 *O'Neil v T and I Engines Pty Ltd* [2015] NSWCATAP 77 [20]–[23]; *Mares v Kirsten* [2018] NSWCATAP 306 [22]]–[23]

82 *O'Neil v T and I Engines Pty Ltd*, ibid [22]; *Mares v Kirsten* ibid [22]-[23]

the hearing, it is generally appropriate either to stand the matter down or to adjourn it to a later date. Consideration should be given to the length of the adjournment in the circumstances of the case. For example, it was held in one case that standing a hearing down for only 30 minutes to enable a party to review and respond to complex evidence of more than 350 pages was procedurally unfair.[83]

If a party wishes to lodge a late counterclaim, it may be appropriate to dispense with service requirements, on the basis that its late lodgement will not cause prejudice to the other parties. Alternatively, the matter may need to be adjourned to enable the other side to respond in the usual way.

When a party is taken by surprise (or 'ambushed') in relation to important matters raised by the other side at the hearing, it may be appropriate to adjourn the hearing to enable them to present answers or contextualise evidence that they would have presented had they been aware of the need for it. When a party raises complex legal or factual matters which place the other side in no position to anticipate or prepare for adequately, it may be appropriate to adjourn the hearing to allow them to read, reflect and respond to the new issues or submissions.

An adjournment may be appropriate where a matter cannot be finalised within the time allotted to it in the listing process. The hearing should not be unduly rushed, nor take place in circumstances which are oppressive, in an attempt to conclude the hearing in the allotted time. It is important that a party at potential risk of an adverse decision be given an adequate opportunity to be properly heard and to make submissions.[84]

It can also be appropriate for an adjournment to be granted where, through no fault of a party, an important witness cannot be present. Often the actual presence of a witness is preferable to relying only on their written statement or report, but this depends upon the facts of the particular case. The yardstick is whether the tribunal's decision-making will be disadvantaged by the absence of the physical presence of the witness or whether a party's interests will be materially worsened.

A hearing may also need to be adjourned for a variety of reasons. These include where—

- a party with limited English requires an interpreter whose presence cannot promptly be secured
- a party asks for an adjournment to enable relevant material to be placed before the tribunal when they were not in a position to procure the material prior to the hearing date, or when the tribunal concludes that it would be substantially assisted by access to such material

---

83 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 13. Unreasonable refusal to grant an adjournment may also or alternatively be reviewable on the ground of unreasonableness: *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618.

84 *R v Thames Magistrates' Court; Ex parte Polemis* [1974] 1 WLR 1371; *Love v AFL Canberra Limited and the Members of the Disputes Tribunal of AFL Canberra Limited* [2009] ACTSC 135.

- another person should be joined in the proceedings
- a party is unable to attend, for a legitimate reason
- it is decided that a witness should be summonsed to attend and/or produce documents
- the basis of the hearing significantly changes in running—for example, if serious new allegations are added in the course of a disciplinary hearing
- it is decided that further expert or other evidence is required.

Failure to grant an application for an adjournment, if unreasonable or procedurally unfair, could be an appealable error.[85] Any refusal to grant an adjournment must be justifiable on an intelligible and reasoned basis.[86]

5.5.8. Self-represented parties

The *Tribunal Excellence Framework* states that the provision of a fair hearing includes:[87]

> [T]he duty to provide assistance to self-represented parties (sometimes called litigants in person). Members and staff should identify the difficulties experienced by any party, whether due to lack of representation, unfamiliarity with the law, language, culture, disability or any other matter, and find ways to assist parties through the tribunal process.

5.5.8.1 Difficulties faced by self-represented parties

Neate identifies a number of difficulties that commonly arise for self-represented parties, including:[88]

- the personal and emotional demands of conducting their case, and the lack of practical assistance with the work of preparing the case
- lacking the objectivity and emotional distance from their case required to critically assess how best to advance their interests
- understanding the role of the tribunal and legal representatives of other parties
- understanding the tribunal's procedures and what the procedures require of them
- distinguishing what is relevant from what is irrelevant to their case
- understanding that the tribunal requires evidence to make findings of fact
- identifying evidence and other material that will assist their case, and knowing how and in what form to present it

---

85 (2013) 249 CLR 332 ([18], [48] ('*Li*').

86 Ibid. In *Steelbond Aust Pty Ltd v Wein* [2024] NSWCATAP 20 [55], the NCAT Appeal Panel found that NCAT was not required by procedural fairness nor by the legal unreasonableness principle in *Li* to adjourn or delay the commencement of a hearing for which a party's legal representative arrived late.

87 Council of Australasian Tribunals Inc, *Tribunal Excellence Framework 2017* 16 <coat.asn.au >.

88 Neate, above n 8, 41–54.

- knowing how to ask questions and cross examine witnesses, and how this differs from making submissions
- knowing when, how and why to object to evidence
- knowing how to use the law and to make legal arguments.

5.5.8.2 Scope of assistance

It is not the tribunal's role to advise the party how to present their case, but the tribunal may provide guidance to enable a self-represented party to participate effectively in the proceedings and ensure a fair hearing. The extent of the guidance will depend on the individual's capabilities, the nature of the proceedings, and the nature and complexity of the issues.[89]

The scope of the guidance that may be offered is not confined to matters of procedure—

> 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. It is elementary that a judge ought to ensure that the self-represented litigant understands his or her rights so that he or she is not unfairly disadvantaged by being in ignorance of those rights. Notwithstanding this, the judge should refrain from advising a litigant as to how or when he or she should exercise those rights.[90]

Neate suggests the following action may be taken by the tribunal to reduce the difficulties experienced by a self-represented party:[91]

- encourage them (particularly at pre-hearing stage) to seek legal advice and representation or at least legal assistance with preparation of the case, and make them aware of relevant legal aid services.
- give clear directions at pre-trial proceedings about the forms of the evidence which they will need to provide, and discuss with them the practical steps they should take to procure and present the evidence encourage the party to make a note of what they need to do in the preparation of their case (for example, preparing a timeline and collating evidence in relation to each key event) and allow sufficient time for them to do it.
- adopt a calm, patient and reassuring manner, establish an orderly environment and conduct proceedings at an appropriate pace.
- give clear guidance about the purpose of the hearing or pre-trial proceeding; the issues to be decided; how the proceeding will be conducted; the party's right to call, question and

89 Ibid 57–8 (citing *Roberts v Harkness* [2018] VSCA 215 at [49]; *Doughty-Cowell v Kyriazis* [2018] VSCA 216 at [4], [8]).

90 *Trkulja v Markovic* [2015] VSCA 298 [39] (Kyrou and Kaye JJA and Ginnane AJA) (citations omitted). See also *Myers v VCAT* [2024] VSCA 206 [60].

91 Neate, above n 8, 41–58. For additional guidance, see Judicial Commission of NSW, *Equality before the Law Bench Book* (<judcom.nsw.gov.au>.

cross-examine witnesses and to object to evidence, the role of the tribunal, and the role of law and evidence in the tribunal's decision-making

- give clear directions, explaining the reasons for them and the consequences of not complying with them.
- deal fairly and, if necessary, firmly with any misbehaviour, breach of procedure, disrespect or contempt.
- encourage parties to focus on what they must show to prove their case, and discourage them from submitting irrelevant material.
- explain the difference between giving evidence and making submissions, and at what point in the proceedings the party will have the opportunity to present them.
- where appropriate, explain the role of a legal representative acting for another party in the hearing.
- assist the party to put questions to witnesses in an appropriate form and, if appropriate, ask questions directly of the witness on occasion.
- if appropriate, pose questions and raise relevant issues which have not been canvassed by parties.
- identify an attempt by another party to adduce objectionable material and either object to it or provide the self-represented party with an opportunity to object to it.
- if appropriate, caution a self-represented party about their conduct or a line of questioning, taking care to avoid engendering any apprehension of bias.
- demonstrate even-handedness by including other parties in the procedural guidance provided.

While it is unrealistic to expect that all non-legally qualified parties will be equipped to conduct themselves with an informed understanding of the nature and limits of the tribunal's role, tribunal processes and enabling legislation, it remains appropriate to impose limits upon questioning and conduct in order to facilitate the conduct of orderly, efficient and dignified hearings.

There are opportunities for the tribunal's public communications to inform, prepare, guide and support self-represented parties through the provision of practice directions, fact sheets, forms and guidelines. A tribunal's website is usually a valuable source of guidance for self-represented litigants. More on good communication practices relevant to tribunals are set out in **Chapter 7** at **7.3.2**.

5.5.9. Managing the hearing

One of the challenges for tribunal members is to manage hearings so that they run efficiently and fairly, as well as in such a way as to achieve the statutory obligations of the tribunal. A number of factors can interfere, such as the conduct of legal representatives, the conduct of parties and witnesses, and an imbalance caused by one party being legally represented and another not being represented.

It is the responsibility of tribunal members to ensure that legal representatives assist the tribunal and do not obstruct or hinder the orderly assembly of relevant information by the tribunal. On occasion, representatives are more accustomed to the adversarial culture of, for instance, the criminal courts and need to be assisted to adjust to the inquisitorial environment of tribunals. Such assistance can involve representatives being advised of the tribunal's procedures, and being constrained from unhelpful styles of cross-examination and other conduct that is not compatible with the orderly running of the hearing.

Potentially problematic forms of cross-examination include—

- harassing, intimidating or bullying witnesses
- using distressing or embarrassing questioning
- deploying demeaning or patronising questioning
- resorting to the usage of unhelpfully complex or multi-part questions
- questioning directed toward collaterally indirect issues of a party or witness's credit and veracity.

It is in the interest of the tribunal that witnesses are enabled to communicate effectively with the tribunal. This can require tribunal members tempering what might otherwise be aggressive forms of questioning which may or may not be acceptable in other legal forums.

Some legal representatives attempt also to intimidate tribunal members and to behave in a disrespectful way. This can include—

- making inappropriate comments
- making improper objections
- insisting on the application of the rules of evidence
- lodging serial demands that tribunal members recuse themselves for bias.

In such situations, it is appropriate for tribunal members to maintain a dignified and firm control over proceedings, making clear and explicit rulings which derive directly from the terms of the tribunal's enabling legislation and which are guided by considerations of procedural fairness (see **Chapter 3**).[92]

The legislation establishing some administrative tribunals includes an obligation on the parties and their representatives to assist or cooperate with the tribunal.[93] Several jurisdictions have

92 For a useful guide to the 'dos and don'ts' of managing a hearing, see Britton, above n 22.

93 Eg ART Act s 56, ACAT Act s 7A.

adopted Model Litigant guidelines or principles for the fair conduct of litigation by government parties.[94]

Another issue that arises from time to time is an imbalance caused by the legal representation of one party and the lack of legal representation for another party. To a lesser degree, it can also arise when there is a significant difference in the quality of legal representation. For tribunal members, either scenario results in a need to provide assistance and explanations in order to facilitate the capacity of parties to participate effectively in the proceedings. In a practical sense, it means that tribunal members may need to be more detailed in their explanations of tribunal procedures than they otherwise would be and to extend a measure of latitude to persons not legally trained who wish to ask questions and make submissions. It can also necessitate tribunal members being more involved in asking questions that self-represented persons are not able to formulate and in assisting parties than they otherwise would be where legal representation was effective.

5.5.10. Managing disruptions during a hearing

Some parties, witnesses and even legal representatives pose particular challenges for the orderly and efficient conduct of hearings. Sometimes it is the bitterness and antagonism of self-interest that generate the difficulties. On other occasions, specific tactics of intimidation and disruption are deliberately or otherwise adopted, and risk impairing procedural fairness within the hearing process. It is the responsibility of tribunal members to manage such scenarios within the context of their duty to accord fairness to all parties and, as far as possible, to minimise any harmful consequences.

It is important for tribunal members to control persistent interruptions, and the expression of abuse or insults directed at the tribunal or witnesses. Generally, this can be done in a way that is neither heavy-handed nor dependent upon threats.

Early and full explanation of what is acceptable conduct, and the drawing of clear lines in a calm but firm voice as to what is not permissible suffices in most circumstances. However, where that proves not to be sufficient, there are other strategies that can be employed.

On occasion, it is anxiety and tension that results in persons (for instance, those with mental illnesses, personality disorders or intellectual disabilities) speaking in a disrespectful way or conducting themselves disruptively or abusively. If those causes of stress can be addressed, this

---

94 Eg Victoria, Department of Justice and Community Safety, *Victorian Model Litigant Guidelines* (8 July 2022) <justice.vic.gov.au>.

can go a long way toward reducing the problematic behaviours and enhancing the person's contribution to proceedings. The following strategies may be found useful:[95]

- reassuring an anxious and apprehensive applicant that they will have a full opportunity (a little later) to say what they wish to communicate and to ask questions of witnesses
- providing a pen and paper, where the person is literate, to facilitate making notes of issues that they wish to address
- explaining quietly that the behaviour that the person is engaging in is not helpful to the tribunal or to the person's interests, whether that be in terms of 'winning' the case or in being accepted as a reliable, credible witness
- calmly and in a lowered voice explaining that certain kinds of behaviour in which the person is engaging are not acceptable or fair to others who are present
- standing the hearing down for five or ten minutes to allow the person to reflect on whether they want to continue with the hearing, whether there is a specific submission that they wish to make, or whether they would prefer the matter to be adjourned
- asking a person to speak more slowly so that the tribunal member can take full notes of everything that they are saying.

Ultimately, the yardstick for managing inappropriate conduct is to consider what needs to be done to ensure that the hearing proceeds in an orderly fashion, with fairness to parties and in such a way as to command public confidence. It may be necessary to set fair and reasonable time limits on final submissions, examination and cross-examination, or to limit the length of written submissions and specify consequences for non-observance.[96]

If it becomes necessary to exclude persons from hearings, some tribunals are enabled by statute to take such a step where the person's conduct is disruptive or amounts to contempt.[97] In the case of hearings via telephone or videoconferencing, it may be necessary to temporarily mute the microphone of a party who persists in abusing or interrupting others after being asked to desist and warned.[98]

If other methods of controlling a person's behaviour are ineffective, a tribunal may be empowered by the tribunal Act to deal with insulting, disruptive, obstructive or non-compliant

95 For additional strategies see Britton, above n 22; H Dillon, 'Working Effectively and Ethically in an Environment of High Emotion' (presentation to COAT conference, Sydney, 7 September 2018); Griffiths, 'Apprehended Bias and Administrative Tribunals', above n 24, [41]– [51]; Grant Lester, 'The Unreasonable, Querulent and Vexatious as Self Represented Litigants' (Presentation to Enables of Justice Conference, Sydney , 8–9) <www.coat.asn.au>. See also Victoria, Ombudsman, *Good Practice Guide: Managing complex complainant behaviour* (2 February 2022) <ombudsman.vic.gov.au>.

96 *Gindy v Capital Lawyers Pty Ltd* [2022] ACTCA 66 [159]; *Di Liristi v NSW Public Trustee* [2021] NSWSC 1347[141].

97 See, for example, *Residential Tenancies Act 1986* (NZ), s 112(2); NTCAT Act ss 87, 88; *Disputes Tribunal Act 1988* (NZ) s 90(2).

98 *Cathcart v Wang* [2021] VSC 685 [75] – [78].

behaviour as a contempt of the tribunal.[99] The behaviour may constitute an offence under the tribunal Act.[100]

5.6. Evidence at hearings

Evidence placed (or adduced) before tribunals may be either oral or documentary. Where there is more than one party to a hearing, it can be appropriate for evidence to be placed before the tribunal by way of examination-in-chief, cross-examination and re-examination. However, many tribunals function less formally and in an environment which is not conducive to such formal procedures. The following paragraphs briefly describe examination-in-chief, cross-examination and re-examination.

5.6.1. Administration of oath and affirmation

A tribunal's governing Act may provide that the tribunal is empowered to require oral or written evidence to be verified by an oath or affirmation.

Statutory provisions such as the Oaths Acts prescribe the form of an oath. A common example is: 'I swear by almighty God that the evidence that I shall give before this tribunal will be the truth, the whole truth and nothing but the truth'.

As some witnesses prefer to make a non-religious promise to tell the truth, legislation usually provides an alternative to the oath in the form of an affirmation. A common form of an affirmation is: 'I [solemnly and] sincerely declare and affirm that the evidence I shall give before this tribunal will be the truth, the whole truth and nothing but the truth'.[101]

There is no difference in legal effect or probative quality between evidence given on affirmation and evidence given on oath.[102] It is important that witnesses be made to feel comfortable about taking an affirmation as against an oath. They should be offered their options in a non-judgmental way.

Practices in tribunals vary in relation to whether evidence is taken on oath, by affirmation or simply by way of less formal provision of information. There are two advantages of taking evidence by oath or affirmation—

- it emphasises to the witness the importance of telling the truth and being accurate in what they say to the tribunal
- it enables a prosecution for perjury if the evidence given is wilfully false.

---

99 See contempt powers in tribunal Acts, eg, VCAT Act s 137; NTCAT Act s 87, SAT s 100; QCAT Act ss 218, 219.

100 SAT Act s 99; ART Act s 100; *Disputes Tribunal Act 1988* (NZ) s 56; QCAT Act ss 213-217.

101 *Oaths and Affirmations Act 2018* (Vic) s 8 and sch 1 (note simpler form of wording prescribed for a child or person with cognitive impairment: 'I promise to tell the truth': s 8(3).

102 See eg, *Oaths and Affirmations Act 2018* (Vic) s 8(2),

The disadvantage of taking evidence by oath or affirmation is that it is a formal and potentially intimidating procedure.

The governing Acts for some tribunals provide that it is a contempt of the tribunal for a person not to take an oath or affirmation when required by the tribunal to do so.[103]

5.6.2. Examination-in-chief

Certain tribunals are required to apply the rules of evidence in specified types of proceedings.[104] Otherwise tribunals are generally not bound by the rules of evidence.[105] Where there are multiple parties and where parties are legally represented it is common, though not a strict requirement, for the basic rule of evidence that questions put to a witness during examination-in-chief should not be leading in the sense that they:

- directly or indirectly suggest a particular answer, i.e. they plant an idea or suggestion, or
- assume the existence of a fact the existence of which is in dispute in the proceeding and as to which the witness had not given evidence before the questions are asked.[106]

It can be useful for tribunals to adhere to this rule as it enables information from witnesses to be assessed for its reliability.

5.6.3. Cross-examination

There is no general right for parties to cross-examine witnesses for another party before a tribunal.[107]

In some tribunal proceedings, parties have a right to cross-examine. For instance in *Barrier Reef Broadcasting Pty Ltd v Minister for Post and Telecommunications*[108] Brennan J found that legislation that provided that counsel might 'examine' witnesses implied a right to cross-examine.

Even where parties are not expressly given a right to cross-examine, in some circumstances a failure to allow a party to cross-examine a witness may amount to a breach of procedural fairness.[109] The key question is whether the party has been given a fair opportunity to put his or her case or has otherwise suffered any real detriment.[110]

---

103 NTCAT Act ss 86, 87(1)(b)(ii); QCAT Act s 214(2)(a).

104 For example, NCAT is bound by the rules of evidence in exercising its enforcement and civil penalty powers, and in certain proceedings for professional misconduct.

105 See, for example, ACAT Act (ACT) s 8; ART Act *s* 52; NCAT Act s 38(2).

106 See *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), Dictionary, Pt 1.

107 *Medical Board of Australia v Adams* [2023] WASCA 41 [79] [81] - [88; *Kingham v Cole* (2002) 118 FCR 289 at 295; see also *O'Rourke v Miller* (1985) 156 CLR 342 at 352.

108 (1978) 19 ALR 425 at 455.

109 See for example *Commissioner of Police (NSW) v Ireland* [2024] NSWCATAP 1 esp at [32]-[35]

110 Ibid [35].

Forbes has argued that there are several good reasons for the law restricting cross-examination in respect of tribunals because their rules of evidence are less formal than that of a court:

- a right to cross-examine would be ineffectual when there is no power to compel witnesses to attend and answer questions
- many tribunals can conduct 'hearings' wholly in writing, meaning that opportunities for cross-examination do not arise
- tribunals may rely on their own knowledge and cannot themselves be cross-examined
- tribunals are entitled to act on hearsay which defies effective cross-examination.[111]

Allowing parties to cross-examine (and setting limits as necessary) can assist the tribunal more effectively to evaluate the evidence before it because it has been tested. It also relieves tribunal members of the need to ask extensive questions themselves.

As the purpose of cross-examination is to test the reliability of evidence given by a witness, leading questions are permitted. A common form of cross-examination challenges the reliability of evidence, such as by suggesting that the witness is not dispassionate, accurate or honest. Frequently, cross-examination simply tests whether other possibilities exist than the account provided by a witness in examination-in-chief. It may scrutinise the quality of memory or cite a witness's previous account of an event to suggest that it was inconsistent. This may imply that the witness is unreliable or that their later account is affected by the passage of time or even prompted by a malign motive. The fact that a witness has omitted key details may be utilised in submissions later to suggest that their account is fabricated or embellished—in one way or another either not truthful or not reliable.

An important role of the tribunal is to ensure that witnesses are not gratuitously attacked, harassed or demeaned during cross-examination. The line between robust testing of assertions by a witness and badgering or harmful interrogation can be a fine one. The presiding tribunal member has the role of balancing the need to obtain a perspective that enables evaluation of a witness's evidence and preventing the tribunal process from causing any harm to witnesses.

Exaggerated or repeated expression of astonishment or scepticism by the member upon hearing a witness' evidence can contribute to an impression that the member has preconceived views, and may contribute to an apprehension of bias. (See **Chapter 3** at **3.4.5.3**).

5.6.4. Questioning by the tribunal

Tribunal members may question a witness after examination-in-chief to give the witness an opportunity to clarify their evidence. The suggestion should be resisted that in questioning a witness the tribunal is engaged in 'cross-examination'. Cross-examination is conducted by another party or their legal representative.

---

[111] See JRS Forbes, above n 57, 223.

Due to the inquisitorial nature of tribunal proceedings, the tribunal may need to test the evidence and give a witness the opportunity to demonstrate that it was truthful.[112] Procedural fairness may require the tribunal to put to a party matters which appear to contradict their testimony or reflect adversely on their credit.[113] The tribunal's questioning should be conducted in a manner that does not overbear or intimidate a party without legal representation, as this might raise an apprehension of bias in the mind of a fair-minded lay observer.[114]

Questions should be asked in an open-ended format to avoid cross-examining the witness and to give the witnesses a full opportunity to answer. It is preferable to ask only one short question at a time, use single words, and give the person sufficient time to think before responding. Open questions commencing with 'who', 'what', 'when' and 'why', are best employed.

Closed questions which suggest answers are best avoided or confined to checking the member's understanding of what the witness has said.[115] The latter can give the impression that tribunal members are coming from a fixed position and have predetermined the question. In addition, closed questions tend not to elicit answers from witnesses that will assist the tribunal as much as open-ended questions, which enable witnesses to say what they actually wish to communicate.

5.6.5 Re-examination

Re-examination enables clarification by the person who has previously examined a witness in-chief of issues that may have become confusing or ambiguous in the course of cross-examination. It is important for tribunals to prevent re-examination being used as an opportunity to open up new issues not raised during examination-in-chief. Should that occur, a further opportunity for cross-examination should be given.

5.6.6. Telephone evidence

Where tribunal hearings are often conducted via telephone, dropouts and technical disruptions can occur. The tribunal must ensure that technological glitches do not result in a denial to a participant of a reasonable opportunity to hear and be heard.

In *Cathcart v Wang*, the presiding member believed that a party (the tenant) had deliberately hung up to withdraw from participating in the hearing.[116] He decided not to ring her again and proceeded in her absence to make an order for possession against her. In setting aside the possession order, Croucher J accepted the tenant's evidence that she had acted reasonably

---

112 *Rowan v Beck* [2021] QCATA 20 [162], [163], [166].

113 *Re: Refugee Review Tribunal: Ex parte H* (2001) 179 ALR 425; [2001] HCA 28 [[29], 30]

114 Ibid [31], [32].

115 For examples of open and closed questions and effective questioning strategies, see A Dixon, 'Effective Questioning for Eliciting Information from Witnesses in Tribunal Hearings' (conference presentation to COAT conference 'Mind over Matters', Sydney, August 2015) <www.coat.asn.au/>.

116 [2021] VSC 685.

promptly in ringing the tribunal back. Her evidence was supported by telephone records and screenshots of her phone. His Honour considered the breach of procedural fairness to be a grave one: 'It is as if the tenant had no hearing at all'.[117] If the tenant had deliberately withdrawn from the hearing, there would have been no breach of natural justice. Croucher J said that if a party deliberately hangs up during a telephone hearing, or disconnects from a hearing via videoconferencing, or 'walk[s] out of the hearing room in a huff', there is no denial of procedural fairness in continuing in the party's absence.[118] The same principle applies if a party simply fails to attend without reasonable excuse of justification.[119]

There is a particular need to ensure fairness where any aspect of proceedings is conducted in the physical and visual absence of any of the parties. For instance, it is important to ensure that parties have access to all documentary material that is the subject of evidence before the tribunal.

In *O'Reilly v Firework Professionals Ltd*, Abbott DCJ suggested:[120]

> It might be preferable if the Registrar was to direct that there be an exchange of documentary material prior to a Disputes Tribunal hearing which is to involve the participation of a party by way of a telephone conference. Such a procedure would also avoid any impression of unfairness that could be given by a requirement that documents be filed seven days prior to such a hearing only by the party who intends to participate in the hearing by a telephone conference.

When documentary evidence is not sent beforehand to or from a person who is not physically present at the hearing and it becomes relevant in the course of a hearing, it should be remitted by email or other electronic means and, if necessary, the hearing should be stood down (that is, temporarily suspended) for that purpose. If adequate telephone facilities are not available, once again it is appropriate for the hearing to be stood down or adjourned to enable suitable arrangements to be made. This may include adjourning the hearing and extending the opportunity to the absent party to attend in person.

5.6.7. Giving evidence via VCT

The use of video-conferencing technology (VCT) by means of programs such as Zoom greatly accelerated during the COVID-19 epidemic. The following observations about the benefits and challenges of using VCT-enabled communication were offered by Justice Janine Pritchard, former President of the SAT:[121]

---

117 Ibid 685 [136], [137].

118 Ibid; *Collier v Attorney-General for NSW* [2021] NSWCA 16 [19] – [20]; *Daniels v Sack* [2023] NSWCATAP 269 [45]; *Zonnevylle v Secretary, Department of Education* [2023] NSWCATAP [92] – [94].

119 *Collier v Attorney-General for NSW* ibid.

120 (Unreported, District Court, Christchurch, 13 March 2001).

121 The Hon. Justice Janine Pritchard, 'Australian civil and administrative tribunals: challenges and opportunities' (2020) 100 *AIAL Forum* 148, 161-63.

- The ability to conduct proceedings by VCT in remote and regional areas offers significant cost savings for the parties and the tribunal and improves access to the tribunal.
- Because the use of VCT can enable the tribunal to see a witness clearly, it is as effective as an oral hearing for the purpose of assessing demeanour.
- It is more difficult for interpreters to interpret, and for persons from culturally and linguistically diverse backgrounds, elderly people and persons with disabilities to participate effectively.
- The SAT found 'a marked improvement in the effectiveness of mediation and hearings conducted in this way'.
- VCT is not ideal for multi-party hearings and mediations due to the limited number of persons who can be clearly seen on screen at one time.
- More time must be allowed for hearings and mediations due to loss of connection and poor-quality connection for some participants.
- Members and mediators need training in how to manage the hearings, maintain decorum, and prevent participants talking over each other.
- Since people tend to behave more informally in communications via VCT, it may help the member to maintain control if the hearing is conducted from a tribunal hearing room and with enhanced formality.'[122]
- Where participants need to see and refer to documents, pre-planning is required.

If a tribunal forms the view that the videoconferencing technology is malfunctioning, it should stand the matter down for the problem to be addressed or adjourn the hearing for it to be conducted when the technology is functioning satisfactorily or for the hearing to take place in person. See comments relating to telephone evidence in this chapter at **5.6.6**.

5.6.8. Documentary evidence

Much of the information received by tribunals is in the form of written documents. It is for the tribunal is to evaluate the relevance and reliability of this evidence. The tribunal should ensure that documentation received is what it purports to be and should learn of the circumstances in which it was generated. An example of potential unreliability is a downloaded email which purports to be from a certain person but may have been generated by others with access to the person's computer.

When documents are provided to the tribunal, or 'tendered', they are generally marked as 'exhibits' and retained until the conclusion of the hearing. This occurs after they have been identified by a witness. Where there are two parties, it is common for the documents tendered by one party to be marked with a letter of the alphabet and for those tendered by the other to be

---

122 Ibid 162; citing B McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40, 44.

marked with a number. A technique often used is to tender a document 'absolutely' where a witness can identify it and to simply 'mark it for identification' where a witness is shown a document but is not in a position to identify it.

It is common for tribunals to specify in practice directions or at a directions hearing the time in which documents are to be filed and provided to other parties in advance of the hearing.

5.6.9. Closing submissions

Tribunals vary as to whether they receive submissions from those who appear before them. Where hearings are brief, and where persons are not legally represented, it is common to dispense with closing submissions.

The advantage of closing submissions is that they have the potential to summarise the most important parts of the evidence that has been given and enable a party to explain how they consider the tribunal should view the information before it. They give a final opportunity for a party to explain how they consider the tribunal should finally determine a matter. The disadvantage of extending the opportunity for submissions is that they may not assist the tribunal's fact-finding responsibility by reason of being disorganised, argumentative, or 'speechifying'. It is up to tribunals in particular cases to determine whether they will be assisted by closing submissions.

A further issue when tribunals decide to receive submissions is to determine whether they should be oral or in writing. Again, practices of tribunals vary. However, where a hearing has been lengthy (for example, extending for several days or weeks) or complex, it can be of assistance to the tribunal to receive written submissions that bring together the extensive material in a way which will aid its decision-making.

It is open to a tribunal to place a time limit on an oral submission, and to give a warning at intervals of ten and five minute before the expiry of the allocated time. As Justice John Griffiths remarks 'The fair hearing rule requires the person to be given a reasonable opportunity to present their case, not an open-ended one'.[123]

5.7. Evidentiary issues

5.7.1. Dispensation from the rules of evidence

One of the characteristics of tribunals is that they are generally not bound to apply the rules of evidence.[124] The rules of evidence are incorporated in the New Zealand, Commonwealth, state

---

[123] Griffiths, 'Apprehended Bias and Administrative Tribunals', above n 24, [49].

[124] This is normally stated in tribunal Acts, sometimes with limited statutory exceptions where tribunals must apply rules of evidence in specific types of matter, eg, NCAT Act s 38(2), (3) creates an exception for the exercise of the tribunal's enforcement and civil penalty powers.

and territory Evidence Acts and in common law.[125] The Evidence Acts for Victoria, New South Wales, Tasmania, the Commonwealth, the Northern Territory and the Australian Capital Territory are based on a national uniform scheme and, while not totally uniform, are in mostly similar terms. Evidence law in Queensland, Western Australia and South Australia is based on the common law rules.

The governing Acts for most tribunals empower the tribunal to carry out its functions without being bound by legal forms and technicalities. The common law assumes that the rules of evidence do not apply to tribunals,[126] and some tribunal statutes include a statement to that effect. The Evidence Acts in each jurisdiction are expressed to apply to courts and other bodies which are required to apply the laws of evidence.[127]

The law requires tribunals to make findings of fact on the basis of material that is 'logically probative'.[128] The Evidence Acts define the term 'probative value' to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. For material to be 'logically probative', it must be relevant and reliable.

Some rules of evidence are exclusionary, in that they bar certain types of evidence from being admitted before a court. Tribunals' dispensation from the rules of evidence means that tribunals can accept into evidence types of evidentiary material that would not be admissible in court. Once having received such material, the tribunal must then decide what weight to give to it. For example, a tribunal may hear second or third hand hearsay evidence (a witness heard the information from somebody who said they heard it from somebody else). The tribunal might decide to place little or no weight upon the information as related by the witness because of the unreliability of information sourced via this indirect medium of proof.

So even though the tribunal is not bound by the rules that restrict the admissibility of the evidence in a court, the tribunal may have regard to them in assessing weight.[129] This is because the rules of evidence are based on 'principles of common sense, reliability and fairness,'[130] and 'principles of logic applying to fact-finding'.[131]

To say that the rules of evidence do not apply in tribunals simply means that they do not necessarily apply. Tribunals are not precluded from adopting them in particular circumstances,

---

125 A useful online commentary on the Victorian Act is found in Judicial College of Victoria, *Uniform Evidence Manual* (JCV, Melbourne, 2014-) <judicialcollege.vic.edu.au>.

126 See, eg, *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546.

127 Eg *Evidence Act 1995* (NSW) s 4(1) and notes to s 4. See generally, D Giles, 'Dispensing with the Rules of Evidence' (1991) 7 *Australian Bar Review* 233

128 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 31; (1979) 2 ALD 33.

129 I Harvey, 'Applying Rules of Evidence in Administrative Proceedings' (2019) 150 *Precedent* 18 at 22.

130 *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555; [2014] FCAFC 93 at [94].

131 The Hon Justice Duncan Kerr AO, 'Keeping the AAT from becoming a Court' (AIAL Seminar, 27 Aug 2013, Sydney).

as they see fit.[132] When assessing information to which an exclusionary rule of evidence refers, the tribunal may consider the rule, or just its rationale, for purposes of determining what weight to give the information.[133] The basic principle for fact-finding by tribunals was summarised as follows in *Sullivan v Civil Aviation Safety Authority*:[134]

> The procedural flexibility accorded to an administrative tribunal does not absolve it from the obligation to make findings of fact based upon material which is logically probative in which the rules of evidence provide a guide.

Tribunals may also be bound by the legislation to apply the rules of evidence in some situations, such as when determining certain kinds of disciplinary proceedings,[135] or when dealing with allegations of contempt.[136]

5.7.1.1. The exclusionary rules of evidence

The law of evidence uses certain terms and categories, which tribunals find useful in assessing whether to admit an item of evidence and, if so, the weight to be accorded to it—

- *irrelevant*: evidence that does not bear directly on the issues before the tribunal, but is perhaps prejudicial
- *hearsay evidence*: an account by a person about what someone else, not present before the tribunal, said or did[137]
- *opinion evidence*: inferences drawn on the basis of data that may not be clear or when the expertise of the person offering the opinion may be questionable
- *similar fact or propensity evidence*: evidence that invites reasoning that because something happened on a previous occasion, it is more likely that it happened on a later occasion
- *character evidence*: evidence that because a person has behaved in an improper way on a previous occasion, it is likely that they have done so again.

The rules of evidence provide useful guidance as to what courts have regarded as information worthy of reliance.[138] For example, third-hand hearsay may well have such minimal probative

---

132 *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555; [2014] FCAFC 93 at [121]; VCAT Act s 98(1)(b) makes this clear, stating that VCAT is not bound by the rules of evidence except to the extent that it adopts them; Harvey, above n 129, 24.

133 Kerr, above n 131; *Kevin v Minister for the Capital Territory* (1979) 37 FLR 1 at 2; The Hon. Justice Rachel Pepper and Amelia Van Ewijk, 'Making Sure that Curiosity Does Not Kill the Cat: The Use of Expert Evidence in Merits Review for where the Rules of Evidence Do Not Apply' (2019) 97 *AIAL Forum* 37 at 53–4.

134 (2014) 226 FCR 555; [2014] FCAFC 93, 97 (Flick and Perry JJ).

135 See, for example, *Legal Profession Act 2006* (ACT), s 460; NCAT Act, Sch 5, cl 20

136 See, for example, NCAT Act, ss 33, 38(3).

137 See Harvey, above n 129, 22.

138 See the principles set out in *Ileris v Comcare* (1999) 56 ALD 301. For instance, in *Lipovac v Hamilton Holdings Pty Ltd* (Unreported, ACT Supreme Court, Higgins J, 13 September 1996) at [102], Higgins J noted that 'the rules relating to expert evidence at common law are largely based on good sense and fairness'. See too *Pearce v Button* (1986) 8 FCR 408 at 422; *Bannon v The Queen* (1995) 70 ALJR 25.

value that it should not be permitted.[139] Opinion evidence from persons not possessed of expertise (including from expert witnesses outside their area of expertise) may not be regarded as helpful. Information the relevance of which is highly tangential or lacking logical probative qualities may not be regarded as advancing the fact-finding process.[140]

Where a party had the opportunity to call a witness, to give evidence personally, to tender documents or other evidence, or to put them to an expert witness, but the party did not use this opportunity, this may lead to an inference that the uncalled evidence would not have assisted their case.[141] The principle is known as 'the rule in *Jones v Dunkel*'.[142] While a tribunal may choose to adopt the rule, it should first caution a party of the possible consequences of failing to call a particular witness.[143] The tribunal might also consider calling the witness itself.[144]

An evidentiary rule that has been controversial in the tribunal context is the common law rule in *Browne v Dunn*.[145] It states that if a party intends to contradict testimony given by a witness, it should give the witness an opportunity to comment by putting the substance of the contradictory version to the witness in cross-examination. A failure to do so may be taken as implied acceptance of the witness' version. The rule has been held to apply in some tribunals (particularly disciplinary tribunals) and not in others.[146] In *Sullivan v Civil Aviation Safety Authority* the court said that in some circumstances it would be procedurally unfair to allow a party to put a factual claim to the tribunal while denying a witness for an opposing party the opportunity to counter it.[147] Whether this is so depends on the circumstances of the case. To apply the rule may not promote fairness in non-adversarial proceedings,[148] and where the party is self-represented.

Tribunals are not strictly bound by rules relating to propensity or similar fact evidence and can allow and act on material that would fall short of what would be admissible in the courts.[149] However, tribunals should be cautious in doing so. Because a person has engaged in a certain form of conduct on particular occasions does not necessarily mean that they have done so again. There is a particular risk in propensity or disposition reasoning because it can result in

---

139 See *Gardiner v Land Agents Board* (1976) 12 SASR 458 at 474–5.

140 See *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33.

141 The inference deriving from *Jones v Dunkel* (1959) 101 CLR 298 has been held to be legitimate for tribunals: see *Stasos v Tax Agents' Board of NSW* (1990) 90 ATC 4950, at 24. See generally, DC Pearce, *Administrative Appeals Tribunal* (4th ed, LexisNexis, Sydney, 2015) [9.14].

142 (1959) 101 CLR 298 (High Court of Australia).

143 *Wei v Yu* [2015] VSC 726.

144 DC Pearce, above n 141.

145 (1893) 6 R 67, 70-71 (Lord Herschell MR). See generally, Pearce, ibid [8.18]–[8.19].

146 Pepper et al, above n 133, 38, and authorities cited there at fn 11–14.

147 [2014] FCAFC 93 [48]– [49].

148 *Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60 at [57]; *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 at [149]; The Hon. Justice Keith Mason AC, 'Flexibility, Informality and Despatch: Striking the Balance in Tribunal Decision-Making' (paper presented to COAT conference, 8 June 2017), 6 <coat.asn.au>.

149 See, for example, *Davis v Carew-Pole* [1956] 1 WLR 833.

unfair prejudice. The yardstick used by the common law courts has been that there should be a striking similarity between other prior matters and that which is the subject of the hearing before the prior matters should be taken into account. [150] The criminal courts have gone even further, excluding similar fact evidence unless there is no rational view of the evidence consistent with the innocence of the accused.[151]

A useful guideline in assessing the probative force of similar fact evidence is by reference to—

- the cogency of the evidence showing a person's 'bad disposition'
- the extent to which such evidence supports the inference sought to be drawn from it
- the degree of relevance of that inference to some fact in issue in the proceedings.

The obligation of a tribunal is to make 'every effort … to administer "substantial justice"'.[152] The major challenge for tribunal members, unconstrained by the formal rules of evidence and procedure, is to determine when information will assist sound fact-finding, as against when it will not serve a useful purpose in crystallising issues in dispute, evaluating other evidence and assessing the matters that are required to be the subject of findings of fact. Tribunals should not act on material of little probative value but significant prejudicial effect.[153]

5.7.1.2 The non-exclusionary rules

Some rules of evidence are not directed to excluding evidence but are designed to facilitate proof of matters. The tribunal may decide in the exercise of its discretion to adopt an approach modelled on a rule of evidence if it is appropriate to the circumstances of proceeding. For example, s 191 of the *Evidence Act 1995* (NSW) provides that an admission of fact as stated in an agreement in writing signed by the parties or their legal practitioners and placed in evidence creates an 'agreed fact' which is beyond dispute and does not need to be proved by evidence. NCAT is not bound by s 191 and may determine its own procedure, subject to the 'guiding principle' to facilitate the just, quick and cheap resolution of the real issues'.[154] In *Jain v Dr N Kalokerinos*, NCAT decided it could treat an admission in such a document in the same way as an 'agreed fact' unless, for example, it would be unfair, or it is not credible.[155]

5.7.2. Expert evidence

Evidence by experts, namely persons possessed of specialised knowledge by reason of their skill, training or experience, constitutes an important source of information for tribunals. Some tribunals have rules, practice notes, directions or guidelines relating to the use of expert evidence, to ensure that the evidence is complete, free of adversarial bias, and of assistance to

---

150 See, for example, *Makin v Attorney-General (NSW)* [1894] AC 57.

151 *Pfennig v The Queen* (1995) 182 CLR 461 at 482–3.

152 *R v War Pensions Entitlements Tribunal; Ex parte Bolt* (1933) 50 CLR 228, 256.

153 See *Moore v Guardianship and Administration Board* [1990] VR 902.

154 NCAT Act ss 38(1), (2), 36(1).

155 [2023] NSWCATAP 141 [115], [118].

the tribunal. For example, the tribunal may require a written report in a specified form to be provided to the tribunal and other parties in advance of the hearing, require expert witnesses to adhere to a code of conduct and acknowledge a primary duty to the tribunal, and may require the parties' experts to confer and prepare a joint report indicating areas of agreement and disagreement.[156] Some tribunals give directions for concurrent evidence: the experts sit together as an expert panel, are questioned by the tribunal and have an opportunity to respond to each other's evidence and to propose questions.

At the hearing, it is important for tribunals to ascertain, through questions posed by legal representatives or their own members, that experts possess the requisite specialised knowledge to assist the tribunal on the questions before it. While a witness may be an expert in the sense of possessing tertiary qualifications or significant experience, it does not follow that the witness has knowledge on the relevant area which will assist the tribunal.

Expert evidence usually includes evidence of fact and evidence of opinion, and the tribunal evaluates both components.[157] It is helpful to identify with precision—

- the experts' qualifications, training and practical experience in their designated area of specialist knowledge
- the data upon which experts base their opinions
- what observations have been made by experts
- what tests have been undertaken by experts
- the reasoning process engaged in by experts
- whether other interpretations of test results or data could reasonably be drawn
- whether the theory on which the experts' conclusions are based is generally accepted within their academic or professional community.[158]

If experts have made assumptions these should be clarified, as should what expert witnesses regard as the reasons for the differences amongst the views expressed by different experts to the tribunal.

Tribunals are generally assisted by being able to identify the processes employed by experts to reason from the basis of data to inference, and whether different forms of reasoning from the available data could legitimately be employed. Where expert evidence is unclear or where expert evidence or further expert evidence would assist the tribunal in its fact-finding, this can be identified by the tribunal, whereupon suitable arrangements can be made for such expert material to be located.

---

156 Eg *NCAT Procedural Direction 3 Expert Evidence* (11 September 2024) <ncat.nsw.gov.au>; ART, Expert Evidence Practice Direction 2024 (9 December 2024) <art.gov.au>.

157 See generally I Freckelton, *Expert Evidence* (7th ed, Law Book Co, Sydney, 2023). See too *Daniel v Western Australia* (2000) 178 ALR 542; *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483.

158 Pepper et al, above n 133, 54.

The tribunal is not limited to making findings only on the basis of evidence presented to the tribunal. Subject to the disclosure requirements of natural justice, it may have regard to published research, and to findings of other courts and tribunals.[159]

5.7.3. Privilege against self-incrimination

The privilege against self-incrimination applies to evidence given before tribunals and documents required to be provided to tribunals.[160] It is a "basic and substantive common law right."[161]

The privilege applies to oral and documentary disclosures, not to requirements to provide a fingerprint, a breath sample, a tissue sample or to show one's face for identification.[162] It relates to natural persons, not corporations.[163] However, the privilege varies from jurisdiction to jurisdiction. In general terms, there is an entitlement on the part of witnesses in tribunals either to decline to answer questions or to provide documents, unless given protection by way of a certificate limiting the use that can be made of the answers where the answers or the provision of documentation may expose them to a criminal conviction. In general, the privilege only applies to the answers to specific questions and cannot be claimed globally. It is for the person claiming the privilege to assert it and justify its basis. However, a tribunal may deny a self-represented party procedural fairness if its questioning strays into matters about which the self-represented party could invoke the privilege against self-incrimination without warning the person.[164]

It is conventionally said that the claimant must establish a bona fide apprehension of the consequence on reasonable grounds.[165] The witness's mere contention that they are at risk of prosecution is not sufficient, even though it may be made on oath and apparently be bona fide. The tribunal needs to identify from the circumstances of the matter before it, and the nature of the evidence that the witness is called upon to give, that there is a reasonable ground to apprehend danger for the witness in answering the question.[166] The risk must be real and appreciable, not a danger of an imaginary or insubstantial character, having reference to an extraordinary or barely possible contingency so improbable that no reasonable person would

---

159 Mason, above n 148.

160 See *Rogerson v Law Society* (NT) (1991) 1 NTLR 100; *Griffin v Pantzer* [2004] FCAFC 113; 137 FCR 209 [44].

161 *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29 136-7 [104].

162 *King v McLellan* [1974] VR 773; *Sorby v Commonwealth* (1983) 152 CLR 281 at 292–3; *R v Deenik* [1992] Crim LR 578.

163 See *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395.

164 *Kohli v Minister for Immigration and Border Protection [*2018] FCA 540 [33]-[34]

165 *Ex parte Reynolds; In re Reynolds* (1882) 20 Ch D 294; *Brebner v Perry* [1961] SASR 177; *Jackson v Gamble* [1983] 1 VR 552 at 556; *BTR Engineering (Australia) v Patterson* (1990) 20 NSWLR 724 at 730; *National Association of Operative Plasterers v Smithies* [1906] AC 434 at 438; *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 441.

166 See, for example, *R v Boyes* (1861) 1 B & S 311; 121 ER 730.

allow it to influence their conduct.[167] The privilege traditionally applies also to the risk of a civil penalty[168] or disciplinary proceedings.[169]

5.7.4. Legal professional privilege

Although there is conflicting authority, it is now generally accepted that legal professional privilege applies to evidence given before tribunals and documents required to be provided to tribunals.[170] A person may decline to answer questions or to supply documentation to a tribunal if the subject matter relates to communications with a legal adviser which were made for the dominant purpose of obtaining or giving legal advice or for the dominant purpose of current or reasonably anticipated legal proceedings.[171] The privilege relates to three kinds of communication:

- communications between a client or the client's agents and the client's professional legal advisers, if made for the dominant purpose of the client obtaining legal advice or for contemplated legal proceedings
- communications between a client's professional legal advisers and third parties, if made for the dominant purpose of contemplated legal proceedings
- communications between a client or a client's agent and third parties, if made for the dominant purpose of obtaining advice upon pending or contemplated legal proceedings.

The High Court of Australia has explained the purpose of the privilege as follows:[172]

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.

It is common for documents to be generated for multiple purposes, so it is often necessary for the party claiming the privilege to establish that the purpose of the creation of the document or the communication was of a kind that is covered by the parameters of the privilege.

---

167 See *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380; *Rio Tinto Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 574, 579, 581, 612, 627 and 628.

168 See, for example, *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 332.

169 See, for example, *Police Service Board v Martin* (1985) 156 CLR 397.

170 See *Farnaby v Military Rehabilitation and Compensation Commission* (2007) 97 ALD 788; *Comcare v Foster* [2006] FCA 6 at [38]– [39]; ALRC Discussion Paper 73, 'Client Legal Privilege and Federal Investigatory Bodies', Chapter 3, 72. See *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd* (2006) 233 ALR 369 for the opposing view.

171 See *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67.

172 *Grant v Downs* (1976) 135 CLR 674 at 685.

5.7.5. Receipt of additional material after the hearing

Generally, the provision of information to a tribunal hearing concludes prior to the making of submissions. On occasions, though, parties to a tribunal hearing submit additional material after the conclusion of a hearing. This is not necessarily problematic. However, it can create difficulties. Where there are two or more parties to a hearing, the tribunal needs to be careful and vigilant to ensure that the additional material, if it is credible, relevant and significant, is provided to all parties so that they can respond to it.[173] It may be necessary to reconvene the hearing for the material to be tested and/or for further submissions to be made in relation to it. However, often the obligations of procedural fairness can be satisfied by the tribunal ensuring that all parties have the additional material and that an opportunity is provided for further written submissions to be made in respect of it.

173 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72, (2005) 225 CLR 88 [15] – [17].

Chapter 6: Decision-making and reasons

6.1. Key points

Decision-making processes:

- Where appropriate, threshold legal questions (such as jurisdiction and standing) should be determined as preliminary questions.
- Decisions by multi-member tribunals should be unanimous and, if not, by majority.
- Subject to the terms of the statute and the preservation of accrued rights, merits review is contemporaneous review, based on the facts and law before the tribunal.
- The tribunal should state the reasons for making findings of fact on material issues.
- In general, there is no formal onus of proof in tribunal hearings. The tribunal is usually required to be 'satisfied' of its decision. Generally, this is reached on the balance of probabilities. Where serious allegations are made or serious consequences for a person may flow from making the order sought, the *Briginshaw* principle generally applies.

Reasons:

- Tribunal legislation usually requires tribunals to give reasons for their decisions, whether orally or in writing. The legislation usually gives requirements as to the content of the reasons.
- Reasons should include:
  - findings on material questions of fact,
  - identification of the sources of evidence and information upon which the findings of fact are based
  - reference to the law, rule, policy or principle applicable to significant issues before the tribunal and how it was applied to reach the decision
  - a logical statement of the reasoning process engaged in by the tribunal, showing the connection between facts, legal principles and the decision arrived at
  - the decision and order of the tribunal.
- In general, it is not necessary to refer specifically in reasons for a decision to information if the disclosure would reveal confidential, dangerous or privileged information.

Costs and other orders:

- Some tribunals have a power to order costs. Depending upon the tribunal, the practice may be for costs to coincide with the successful party. Alternatively, the award of costs may depend upon considerations set out in the legislation governing the tribunal.

- A tribunal should only make orders within the express terms allowed for orders within its enabling legislation. Creative orders outside the terms of such legislative provisions are fraught with risk.

6.2. Decision-making process

Tribunals are obliged to make their decisions in ways which are comparable with those of courts, namely, on the basis of information properly presented and available for testing and upon which submissions can be made by a person potentially adversely affected.

Tribunals generally are empowered to act without being constrained by formalities of evidence and procedure and to provide a mechanism 'that is fair, just, economical, informal and quick'.[1] However, this does not authorise reasoning processes that are substandard, intellectually deficient or unreasonable. Nor does it allow a tribunal to take into account irrelevant considerations, ignore relevant considerations or fail to reveal its fundamental reasoning.

6.2.1. Preliminary questions

On occasions, threshold legal arguments are placed before tribunals which require them to consider matters such as—

- whether there is a reviewable decision
- whether a person has standing to make an application for review of an administrative decision
- the interpretation of enabling legislation
- issues relating to the application of the rules of natural justice.

Some questions may need to be dealt with as preliminary matters because they logically precede the issues of fact which may or may not need to be determined, depending upon the threshold decision of the tribunal. According to the tribunal's procedure, they may be dealt with at a directions hearing or other pre-trial process.

Preliminary matters often involve questions of law. Tribunals cannot authoritatively determine questions of law in the same way as a court. However, they are entitled, and often have a duty, to determine questions of law for the purpose of guiding themselves to make a lawful decision within the parameters of their powers.[2]

Members in Australian State tribunals should be on the lookout for issues that raise diversity jurisdiction or other federal 'matters'. See **Chapter 1** at **1.3.3.1** and **1.3.3.2.**

6.2.2. Decisions by majority

The decisions of multi-member tribunals are usually unanimous. However, there is no legal requirement to this effect.[3] Where there is division of view, there are a number of ways in which differences can be resolved. On some bodies, for instance, there is a statutory provision

---

1 *Administrative Appeals Tribunal Act 1975* (Cth) (repealed) s 2A. Many tribunal Acts have objects which are a variation on this prototype.

2 *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 [21]–[26], [27], [63].

3 *Owen-James v Delegate of the Director-General of the Department of Health* (1992) 27 NSWLR 457.

that a casting vote of the presiding member breaks a deadlock. On others, a simple majority will determine the outcome. The member who is in the minority, in many tribunals, can provide the reasons for their dissent in writing. Sometimes it can be confusing for persons appearing before tribunals if tribunals are unable to come to decisions that exhibit a common approach. Multi-member panels should expend significant efforts to attempt to reach a joint position or, at least, to isolate the issues upon which they disagree.

In such instances, there will be a majority decision and a dissenting decision. The status of each should be clear. A majority decision should indicate that that is its status. A dissenting decision should:

- refer to the majority decision of the tribunal
- explain where the points of disagreement lie
- state the decision which the dissenter would have reached
- articulate clearly the reasons for the different approach.

It can be helpful for a dissenting decision to commence with words such as, 'I have read the decision of the majority and I agree with it, save that …'.

There are two circumstances in which there can be a division of approach, namely, in regard to the:

- outcome of the case
- reasoning which leads to the outcome.

Tribunal members should record their dissent when they are of the view that the outcome should have been different from that which other members of the tribunal in the case have determined. However, when the difference consists 'only' of the reasoning process by which the ultimate decision is arrived at, the need for the recording of a separate decision may not be so compelling.

A tribunal member who dissents should ensure that they do not sign the majority decision.

6.2.3. Scope of merits review

6.2.3.1 General principles

The general principles relating to administrative review of decisions on the merits were introduced in **Chapter 1** at **1.4.1.4.** The principles largely derive from judicial consideration of the *Administrative Appeals Tribunal Act 1975* (Cth) pt IV (repealed) ('AAT Act'). While the provisions of the governing Acts conferring merits review powers on Australian tribunals largely mirror the provisions of the repealed AAT Act, they are not identical. The variability of tribunal legislation should be borne in mind when considering the following principles. The precise nature of the review depends on the provisions of the tribunal's governing Act, read together with the enabling Act under which the decision in question was made.[4]

An administrative tribunal on the AAT model that undertakes review of administrative decisions is usually empowered to re-exercise the powers and functions of the original decision maker and to arrive at the correct or preferable decision on the evidence and other material before it.[5] It follows that the tribunal can generally have regard to material that was not available or not put in evidence at the time of the original decision.[6] Depending on the nature of the decision to be made, the tribunal may take into account evidence relating to events or developments subsequent to the original decision, provided that the evidence is relevant and the statutory question to be decided by the tribunal remains substantially the same as the question before the original decision maker.[7]

As the tribunal and the primary decision-maker 'exist within an administrative continuum', they have the same powers and are subject to the same constraints.[8] The primary decision determines the scope of the review. Unless the relevant Act provides otherwise, the tribunal must address the same questions as the primary decision maker could or should have addressed.[9] The tribunal cannot exercise a power which the primary decision-maker could not have exercised.[10]

While it is tasked with deciding the same question, the tribunal 'is not concerned with identifying whether there was error in any aspect of the way the original decision was made'.[11] The tribunal does not have to find some legal flaw or factual error in the primary decision to justify departing from it. It is enough that the tribunal concludes that another decision is preferable.

---

4 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 3 ('*Shi*') [25], [132], further explained in *Schroeder and Australian Securities and Investments Commission* [2020] AATA 2453 [23].

5 *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16 [14] ('*Frugtniet HCA*'); *Shi* ibid 60], [99]–[100], [118], [102]–[104]; *Hossain v Minister for Immigration and Border Protection* [2018] HCA 35. It would be rare to find an Act that provides for merits review but restricts the evidence to that which was before the original decision maker.

6 *Shi*, ibid [39]-[46]. The principle derives from s 43(6) of the AAT Act (repealed): *Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943 ('*Costello*').

7 *Frugtniet HCA*, above n 5 [15], [51].

8 Ibid [51], [53].

9 Ibid.

10 Ibid.

11 *Sage v Commissioner of Taxation* [2023] FCA 1247 [12]. The tribunal's decision to review a 'decision' does not depend on the validity of that decision: *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21.

There is no presumption that the decision under review is correct.[12] The tribunal may have regard to the findings and reasons of the original decision maker, and may agree with them, but the decision itself carries no weight in the review.[13]

Since merits review requires a re-exercise of the powers of the original decision maker, the tribunal ordinarily applies the law that was applicable at the time of the original decision.[14] Where the applicable legislation has been amended, the tribunal must consider the nature of the decision and the terms of the amending Act determine whether it is required to apply the law in force at the date of its review, or the law as it stood at the time the original decision was made.[15] The transitional provisions to the amending Act may provide an answer.[16]

There are classes of decision in which the tribunal applies the law in force at the date of its decision unless the amending Act gives a contrary indication. In *Costello and Secretary, Department of Transport* the AAT drew a distinction between

- a decision under review that involves consideration of accrued rights or liabilities, and
- a decision under review that 'involves an investigation whether the applicant has a present entitlement to the grant of a right or privilege'.[17]

In the second class of decisions, the tribunal applies the law in force at the date of its review.[18] The decision under review in *Costello* related to an application for a commercial pilot's licence. It was held to be of the second class.

6.2.3.2 Accrued rights following repeal or amendment

Where an Act is repealed, rights and liabilities accrued under the Act may be preserved by operation of provisions in the relevant Interpretation Act.[19]

The leading Australian case, *Esber v Commonwealth*, provides an example of an accrued right preserved by an interpretation provision.[20] Mr Esber applied to exercise a statutory right to redeem his weekly compensation payments for a lump sum ('right of redemption') given by a

---

[12] *Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407, 411-12 ('*Collins*'); *Forrest & Forrest Pty Ltd v Minister for Aboriginal Affairs* [2024] WASCA 96 [49]–[50], [58], [67]]–[69], [202] ('*Forrest*'). In the latter case the tribunal erred in having regard to the Minister's decision when making its assessment of the general interests of the community.

[13] *Collins*, ibid. *Re Control Investment Pty Ltd v Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88, 92-93; *Forrest*, ibid [39], [41], [67].

[14] Ibid [14]; *Shi*, above n 4 [134]; *Board of Professional Engineers of Queensland v Gardner* [2021] FCA 564 [5]; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 46.

[15] *Frugtniet HCA*, above n 5 [14]; *Shi*, above n 4 [134]; *Costello*, above n 6 , 943.

[16] *Frugtniet* ibid [56]. The transitional provisions were found to empower the tribunal to exercise powers in the amending Act in *Schroeder*, above n 4 [37]–[46].

[17] (1979) 2 ALD 934, 943-44.

[18] Ibid.

[19] An example of the provisions preserving accrued rights and liabilities after repeal or amendment of an Act is *Interpretation Act 2019* (NZ) s 32(1).

[20] (1992) 174 CLR 30.

1971 Commonwealth Act. His application was refused because he failed to produce the evidence required to establish his right to redemption. While his appeal to the AAT was pending, the 1971 Act was repealed and replaced by a new Act which did not include a right of redemption. He argued that, for purposes of the appeal, he had an accrued right to redeem that was preserved by the *Acts Interpretation Act 1901* (Cth) s 8 (now s 7(2)).

The High Court held that he had an accrued right to have his appeal determined under the repealed provisions of the 1971 Act. This was a conditional right because Mr Esber would first have to establish by evidence to the AAT that he had a right to redemption, but that conditional right was preserved by s 8.[21]

Subsequent cases have noted that *Esber v Commonwealth* concerned the repeal of provisions that changed an entitlement, not merely the process for securing an entitlement, and was therefore of a substantive rather than a merely procedural character.[22] Moreover, the entitlement was non-discretionary in the sense that Mr Esber had 'a conditional right to an exercise of power in a particular way if certain facts were established'.[23]

6.2.4. Formal requirements of a decision

Generally, a decision comes into effect when it is published. However, there is an exception when an appellate tribunal varies or sets aside a decision under review and substitutes a decision that may have effect from the date on which the first instance decision had effect. Another exception occurs when it is the will of the tribunal that the decision take effect from a date in the future—for instance, when a health practitioner has been able to effect closure of a therapeutic relationship. The date of effect of the tribunal's decision ought to be clearly stipulated.

A decision needs to contain a number of formal elements—foundation or preliminary issues, substantive findings on issues of evidence etc. and the decision and orders of the tribunal. It should record clearly each of these three elements and their component parts:

Foundation or preliminary issues

- when and where the hearing took place
- the names of the persons who sat on the hearing

---

21 Ibid [21]; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act* (1988) 14 NSWLR 685, 694.

22 *Jagroop v Minister for Immigration and Border Protection* [2016] FCAFC 48 [70], [72]; *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] FCAFC 119 [74], [78]. In Australia, the common law presumption that legislation does not operate retrospectively unless 'the intention appears with reasonable certainty' is rebutted where the legislative amendments are procedural and not substantive in nature: *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *Rodway v The Queen* (1990) 169 CLR 515, 518.

23 *Jagroop*, ibid [72]; *Khalil* ibid [75].

- where there is a decision under review, what that decision was, who made it and when it was made
- the key statutory provisions applicable to the decision
- the identity of the applicant and the respondent (if there is one) before the tribunal
- the identity of the main persons who provided information to the tribunal
- whether, and if so, by whom, the applicant and the respondent (if there is one) were represented.

Relevant evidence, findings and reasoning

- important information taken into account by the tribunal
- the findings of fact made by the tribunal
- the reasoning of the tribunal.

Decision and orders

- the actual decision of the tribunal
- any orders made by the tribunal.

The basic details relating to the matter such as the names of the parties, the tribunal member(s) deciding the matter, the date(s) of the hearing and the actual decision or orders are set out on a cover sheet or at the end of the reasons. To assist with this process, many tribunals have developed pro formas or templates for their decisions, which act as a checklist for the information that needs to be recorded and facilitates the preparation of reasons for the decision. The use of templates, however, should never interfere with the independent reasoning and fact-finding process of members.

6.2.5. Burden and standard of proof

6.2.5.1 Burden (or onus) of proof

In general, the burden (or the onus) of proving an assertion on the balance of probabilities lies with the party making a claim. In administrative proceedings, unless the legislation provides otherwise, it is usually not appropriate to view the matter on the basis of who bears the burden of proof and whether they have discharged the burden. The question may simply be whether on the evidence before it the tribunal is satisfied that a matter is established. However, there are instances in which a party who bears no formal onus of proof faces a 'practical reality' that they are unlikely to succeed unless they place relevant and probative evidence before the tribunal.[24]

Much depends on what consequence the legislation specifies in the event that the tribunal is unable to reach a state of satisfaction that a matter is established. For example, under s 107(1) of the *Worker Screening Act 2020* (Vic), VCAT must refuse to order a working with children

[24] *McDonald v Director-General of Social Security* [1984] FCA 59; I FCR 354, 357–59.

('WWC') clearance unless satisfied that to do so 'would not pose an unjustifiable risk to the safety of children, having regard to [specified matters]'. Kyrou J observed that while the Act imposes no legal onus of proof on an applicant for a WWC clearance, it is difficult to see how VCAT could be so satisfied 'unless the applicant adduces probative evidence going to that issue'.[25]

6.2.5.2 Standard of proof

The tribunal bears the responsibility of being reasonably satisfied on each component issue. The standard of proof, or the level of evidence, required for such satisfaction is generally considered to be 'on the balance of probabilities'—whether it is established that something is more probable than not, more likely than not.[26]

There is an important qualification in this regard. Although our law knows only two standards of proof (beyond reasonable doubt and on the balance of probabilities), where serious allegations are made the gravity of the assertion requires a higher level of satisfaction than 'mere balance of probabilities'. As Latham CJ put it in *Briginshaw v Briginshaw*:[27]

> In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue.

In the same case, Dixon J explained the same point as follows —

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[28]

This '*Briginshaw* principle' is not a separate standard of proof but refers to a continuum within the civil standard. It is commonly summarised by saying that the more serious or severe the consequences of finding of fact, the more demanding is the evidence the tribunal requires to be reasonably satisfied as to the existence of the fact. The principle is commonly applied in

---

25 *Maleckas (LKQ) v Secretary Department of Justice* [2011] VSC 225 [56]; applied in *WPU v Secretary to the Dept of Government Services* [2024] VCAT 953 [28].

26 See the principles set out succinctly in *Repatriation Commission v Smith* (1987) 15 FCR 327; *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

27 (1938) 60 CLR 336 at 343–4; *Barten v Williams* (1978) 20 ACTR 10; *Re Sutherland* [1994] 2 NZLR 242 (HC) at 251 (Barker ACJ).

28 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2. See also provisions in the Evidence Acts eg, *Evidence Act 1995* (Cth) s 140(2).

disciplinary tribunals, such as where professional misconduct is alleged. Although not bound to apply the *Briginshaw* test, tribunals are free to apply it or its rationale as they see fit.[29]

Where an allegation of criminal activity (such as fraud) is made, it is ordinarily not appropriate for a tribunal to make a finding that a person has committed a crime, unless such a finding is a necessary component of the tribunal's reasoning. Ordinarily, such language should be avoided where possible, lest it appear that a tribunal is purporting to decide on collateral matters such as criminal guilt. It is quite permissible on occasion to make factual findings that amount to a finding of the elements of a criminal offence, as long as the findings are not phrased as though the tribunal were a criminal court making a finding of guilt.[30] A tribunal should be cautious in making such a finding until it is very confident (taking into account the *Briginshaw* principle) that the facts underpinning the finding are established.[31]

The *Briginshaw* principle has also been applied by tribunals in the protective jurisdictions of guardianship and mental health when dealing with an application to appoint a guardian for a person or to make a mental health treatment order for a patient.[32] The tribunal must be satisfied that each of the statutory criteria for the making of the order are met, having taken account of the nature of the order requested and the consequences for the subject person.[33]

6.2.6. Using tribunal knowledge

Tribunal members should make decisions based upon the information placed before them. In general, while tribunal members can draw upon their general knowledge as members of the community, or the specialist expertise they bring to the tribunal, fact-finding specific to the particular case before the tribunal should come from information made available during the hearing. If it was clearly foreseeable that non-legal materials would be used in decision-making from the way in which the hearing was conducted, such matters can be relied upon. However, it is unfair and a breach of the rules of natural justice if information (other than legal authorities) is relied on by a decision-maker which was not foreseen by or known to the parties.

Personal knowledge or expertise may be used in assessing the information presented to a tribunal or to assist in the questioning of witnesses. However, such knowledge or expertise

---

29 *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 at [60], [121]; *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41. See further, The Hon, Justice Rachel Pepper and Amelia Van Ewijk, 'Making Sure that Curiosity Does Not Kill the Cat: The Use of Expert Evidence in Merits Review for Where the Rules of Evidence Do Not Apply (2019) 97 *AIAL Forum* 37 at 38–9; The Hon. Justice Duncan Kerr AO, 'A Freedom to be Fair' (paper presented to the AGS Symposium 'Excellence in Government Decision-making', Canberra, 21 June 2013).

30 For examples of such findings, see *Medical Board of Australia v Zhao [*2024] VCAT 774; *Gailunas v Victorian Institute of Teaching* [2023] VCAT 720.

31 See the approach of the High Court in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 and the discussion in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

32 *J v Guardianship Board and Anor* [2019] TASSC 15 [64]; *BET (Application for Treatment Order)* [2023] TASCAT 79 [34].

33 BET, ibid.

should not form a basis for decision-making unless the facts are so commonly known that they are within the awareness of the general community or they are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.[34] The New South Wales Court of Appeal has said that the role of a medical member in professional disciplinary proceedings is “confined to a consideration of the evidence and submissions before the Tribunal for the purpose of determining whether the complaints had been made out and, if so, the appropriate disciplinary action which ought be taken to protect the public.”[35] The medical member should therefore not purport to make a diagnosis of the practitioner.

Tribunals should only rely on matters canvassed during the hearing or, if tribunal members propose to use other materials, they should signify that intention in such a way that the materials are made available to parties before the tribunal and they are enabled at least to make submissions in relation to the materials. It is legitimate for tribunal members to rely upon other decisions, published policies, scholarly writings or specific information, provided that they were made available during the hearing or identified in the course of the hearing. Tribunal members can cite a legal commentary or case authority in answer to a legal issue even though that source was not mentioned in the hearing. However, if the discovery of such a commentary or decision was not canvassed at all at the hearing, there are occasions when the hearing should be reconvened to enable a party or parties to make submissions in relation to its applicability to the decision to be made by the tribunal.

6.2.7. Structuring the decision-making process

It is good practice to structure the decision-making process so as to separate its constituent parts. Questions that can be useful for this exercise are—

- what is the decision under review or the nature of the application?
- what is its procedural history?
- what decision or order is the applicant seeking?
- what is the statutory test that must be applied?

It is generally helpful to identify the matters on which findings of fact need to be made. Whether or not a fact is a *material* one will depend upon an analysis of the relevant law. These are the facts on which the existence and exercise of the relevant powers depend. They are to be identified by analysis of the appropriate legislative provisions.

A finding on a material fact may involve an element of judgment or discretion (for example, that the circumstances causing severe financial hardship were ‘reasonably foreseeable’ to the

34 In the courts, this concept is known as ‘judicial notice’; in tribunals ‘official notice’.

35 *Ghosh v Health Care Complaints Commission (NSW)* [2022] NSWCA 229 [55]

applicant). The information that is relevant needs to be identified and applied to make a finding on the material facts. This analysis should be part of the case preparation before the hearing.

Raymond has emphasised the need for decision-making to avoid 'rambling through facts and allegations without distinguishing the credible from the implausible'.[36] He refers to bad decision-making as:

- switching constantly from one party's version to the other's
- simply reproducing the evidence given instead of analysing it
- meandering from one argument to another in a 'stream of consciousness' style rather than in an orderly sequence.

Raymond argues that the following seven steps are helpful for organising a decision, even if the case is complex:[37]

1. 'Identify and partition the issues
2. Prepare a LOPP [losing party's position]/FLOPP [flaw in losing party's position] analysis for each issue
3. Arrange the analysis of issues like rooms in a shotgun house [a house in which each room follows from another in a straight line leading from the front verandah to the back verandah]
4. Prepare an outline with case-specific headings
5. Write a beginning
6. Write an ending
7. Review the draft decision with a checklist…'

6.2.8. Making findings of fact

The tribunal should identify the questions of fact on which it is required to make a finding. The significance of such facts may be indicated by legislation that prescribes that certain facts must exist or that certain findings must be made. Or it may be apparent from the subject matter, scope and purpose of the legislation that certain facts are material to the decision.

A finding of fact must be rationally based upon identifiable evidence, or an inference from primary facts. Findings of fact are an exercise in judgment in which a decision-maker sifts and weighs various sources of evidence and makes conclusions or draws inferences.[38]

6.2.9. Assessing credibility

Assessment of the truthfulness and reliability of witnesses' accounts is a fundamental role of tribunal decision-making. Tribunal members should be aware of the consequences for

---

[36] James C Raymond, 'The Architecture of Argument' (2004) 7 *The Judicial Review* 39, 42–3.

[37] Ibid 42 and see 42–56 where the steps are explained in detail.

[38] See *Ansett Transport Industries (Operations) Pty Ltd v Taylor* (1987) 18 FCR 498.

witnesses of adverse findings about their credibility. If such findings are made on limited evidence and there have been few chances for the decision-maker to assess witnesses' behaviour properly, there is the potential for considerable unfairness. If the issue before a tribunal can be determined reliably without making 'findings which will be extremely hurtful to one or other of the contending sides, and which depend on estimates of credibility that have to be formed on a very limited view of the persons whose credit is in question', it can be preferable not to make them.[39]

Close observation of the demeanour of a witness tested by probing questions (such as competent cross-examination) is an aid to reliable decision-making. If a witness is unable to advance a coherent narrative and varies their story in an effort to avoid inconvenient questions, this may prompt doubt as to the witness's truthfulness.[40]

However, undue reliance should not be placed on observations of a witness's demeanour. Samuels JA has commented:

> The cases seem to treat as axiomatic the proposition that a trial judge can reliably assess the credibility of a witness simply on the basis of their demeanour in the witness box. But it should not be taken for granted. Indeed, recent scientific studies cast doubt on the correctness of this view … Nevertheless, I think it too late in the day to deny the truth of the axiom that forms the basis of a considerable body of jurisprudence. It may be a fiction, but it has the sanction of long-established authority.[41]

This passage was referred to by the High Court in *Fox v Percy* where Gleeson CJ, Gummow and Kirby JJ went on to say:

> Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.[42]

Where there are incontrovertible facts at odds with the evidence of an apparently convincing witness, logic dictates that the incontrovertible facts prevail over the appearance or demeanour of the witness. There can be a range of reasons unconnected with truthfulness as to why people may appear to be evasive, unconfident or even deceptive. There is no straightforward key to detecting lying or unreliability.[43] Non-verbal cues can be particularly prejudicial, and it is important for tribunal members to be cautious in applying their own prejudices to the process

39 *R v Amad* [1962] VR 545, 550.

40 See, for example, *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479.

41 *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326, 348.

42 (2003) 214 CLR 118, 128–9.

43 See A Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (John Wiley, Chichester, New York, 2000); and R Kemp and H Paterson, 'Assessing Witness Credibility' (paper presented to COAT conference 'The Modern Member's Guide to Decision-Making, Sydney, 12 Sept 2014) <www.coat.asn.au/>.

of evaluation of evidence. Allowance should also be made for cultural differences,[44] and for difficulties where evidence is given through an interpreter or via video-conferencing technology.[45] It is helpful to attempt to—

- analyse evidence on its merits, setting aside the identity of the person who has given it
- factor into the evaluation what is known about the witness's cultural, economic, educational and social background, characteristics and potential motives for unreliability
- come to a decision based on only the evidence that is placed before the tribunal
- ignore extraneous information
- be cautious about assumptions of accuracy and unreliability on the part of witnesses
- be wary of concluding that a witness has lied by virtue of factors such as body language and demeanour
- identify one's own emotional responses, and attempt to place them to one side
- remain conscious of the standard of proof.

In addition, it is significant for an assessment of veracity and credibility that witnesses sometimes tell the truth about some matters and not others. Findings on credibility should not be 'blanket, reflex or exaggerated', but must demonstrate that the tribunal has performed its function of assessing each factual claim a witness makes.[46]

When there is more than one account about a material issue, the task for tribunal members is not simply to decide which account they prefer but to determine whether they are satisfied that one of the accounts is correct. If they are not, then it is proper not to accept the account of either witness.

6.2.10. Evaluating expert information

Most tribunals receive expert evidence. It may be in the form of evidence of fact or evidence of opinion. This was explored in **Chapter 5**. Insofar as it is evidence of fact, it should be treated in the same way as other forms of information about what people have done, seen, heard or otherwise perceived. Insofar as it is evidence of speculation, purporting to be expert opinion, it should be accorded little if any weight.[47] Insofar as it is evidence of opinion, it falls into a special category of information. It need not be accepted by the tribunal. Provided it assists the tribunal, it can be accepted in whole or in part. If it seems flawed to the tribunal, or if its bases

---

[44] John Billings, 'Procedural Fairness—Cases Involving People from a Culturally and Linguistically Diverse Background' (paper presented at conference 'Tribunals Boards and Panels—Issues of Procedural Fairness', Melbourne, April 2016) [36]–[42] <www.coat.asn.au/>.

[45] See **Chapter 5** at **5.6.7**.

[46] *AZU15 v Minister for Immigration and Border Protection* (2016) 240 FCR 143; [2016] FCAFC 74 [11].

[47] See *HG v The Queen* (1999) 197 CLR 414. See generally, Pepper et al, above n 29, 53–4.

are unacceptable or the reasoning unconvincing, it can be rejected.[48] This is so even if there is no other evidence on the subject. It can be helpful for tribunal members to—

- reflect upon the level of relevant expertise of the expert (for example, clinical expertise or in relation to a particular industry)
- identify the factual bases of expert opinions
- consider whether the bases are sufficient and, if sampling is involved, whether it is fair and representative
- assess the appropriateness of any tests employed by the expert
- consider whether other tests might have been employed
- evaluate whether the tests undertaken necessarily give rise to the inferences drawn from them
- determine whether other inferences might have been drawn
- assess whether the expert appeared neutral, non-partisan and focused on assisting the tribunal, rather than advancing the cause of a party before the tribunal.

6.2.11. Weighing evidence

Justice Peter Young has advanced the following practical suggestions in relation to weighing evidence:[49]

1. The usual is more likely to be what occurred than the unusual.
2. A witness whose evidence suffers from no internal inconsistency is more likely to be correct than a person whose evidence cannot be so ranked.
3. A witness whose evidence is consistent with the other witnesses is likely to be correct.
4. The witness whose evidence is consistent with the documents is more likely to be correct.
5. Do not think that there exists an innate ability to spot a fraud or a liar. Try not to judge a case wholly on observations of demeanour.
6. All observation evidence needs to be examined in the light of the opportunity to observe, so that distance, position, light and amount of time available to observe are important.
7. Many witnesses will lie when the matter is vital or when they think they can escape detection.
8. Do not be misled by advocates' tricks.
9. Sometimes one unassailable piece of evidence will reveal where the true facts fall.

---

48 See, for example, *Middleton v The Queen* (2000) 114 A Crim R 258, 270–2.

49 See Hon. Justice P Young, 'Fact Finding' (1998) 72 *Australian Law Journal* 21, 21–2; Hon. Justice J Douglas, 'How Should Tribunals Evaluate the Evidence?' (Paper presented to the 7th Annual AIJA Tribunals Conference, Brisbane, 11 June 2004); Kerr, above n 29.

10. Take into account cultural or other characteristics that operate on the witness. Watch the forces that are likely to influence the witness in formulating the evidence.
11. Just because a witness says that something is not so and is shown to be a liar, this does not establish that that something is so.

6.2.12. Exercising discretionary powers

6.2.12.1 Discretionary considerations

Sometimes, the administrative power exercised by a tribunal is discretionary. (See discussion of discretions, and some legal constraints upon them, discussed in **Chapter 1** at **1.2.3.2**.) It is necessary to identify the considerations that are relevant to the exercise of the discretion. Considerations specified in the enabling provisions are 'mandatory' relevant considerations that the tribunal must take into account in its decision-making.[50] Other relevant considerations may be implied by a process of statutory interpretation which requires consideration of the 'scope, subject matter and purpose' of the Act.[51] Subject to the legal unreasonableness ground of judicial review, it is for the tribunal to decide what weight to give each relevant consideration in reaching its decision.[52]

6.2.12.2 Human rights

A mandatory relevant consideration may be specified by another law. In Queensland, Victoria and the ACT, human rights legislation prescribes that a 'public authority' (defined to include a tribunal exercising administrative power) must give proper consideration to any human right that is relevant to the decision to be made unless, under law, the tribunal could not reasonably make a different decision.[53] Generally speaking, a tribunal exercises

---

[50] *Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd* (1986) 162 CLR 24 at 39 (Mason J); Aronson et al, above n 13, [5.20], [5.30]. The 'enabling provisions' means the legislation under which the original decision was made.

[51] Ibid. See further, **Chapter 6** at **6.2.13.1**. For an example of how a tribunal member deduces relevant considerations for the exercise of a discretionary power through a process of statutory interpretations, see *Re Vidler and Secretary to Department of Social Security* (1994) 36 ALD 720.

[52] *Peko-Wallsend*, ibid 40-41; *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 [24].

[53] *Human Rights Act 2019* (Qld) ss 5–11, 13, pt 2, divs 2, 3, s 58(1), (2), (3); *Human Rights Act 2004* (ACT) ss 40(2)(b), 40B, Dictionary (definition of 'court'); *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ss 3(1), 4(1)(b),(j), 7, pt 2, ss 38, 39. See Judicial College of Victoria, *Charter of Human Rights Bench Book* at [2.4], [3.2] <judicialcollege.vic.edu.au> ; J Boughey and A Fletcher, 'Administrative Decision-Making under Victoria's Charter' (2018) 25 *Aust J Admin L* 10; *PJB v Melbourne Health; Patrick's case* (2011) 39 VR 373; [2011] VSC 327 [117]–[122].

administrative power in its review jurisdiction, and in some matters within its original jurisdiction.[54]

Failure to meet the obligations of a public authority to consider human rights would be reviewable or appealable for 'failure to take into account a relevant consideration'.[55] In order to discharge the obligation the tribunal must:[56]

- identify any relevant human right of a person (or persons) and how the right will be affected by the decision
- seriously consider the possible impacts of the decision on the person's human right and the implications for the person
- identify any countervailing interests or obligations
- balance the competing interests to determine whether any limit on the person's human right can be justified under the justification or proportionality provision.

While the *New Zealand Bill of Rights Act 1990* (NZ) lacks a provision similar to the Australian state provisions discussed above,[57] the New Zealand Supreme Court has held that the Act operates as 'a substantive constraint' on a statutory decision maker.[58] This means that when making a discretionary decision that may limit a protected human right, the decision maker 'must turn their mind to and engage with the question of whether it was reasonable to limit the affected rights by their decision'.[59] They must consider whether they are satisfied that the decision is a demonstrably justified restriction of the right under s 5 of the Act.[60]

6.2.12.3 Policies and guidelines

Usually, any relevant considerations specified in or implied from legislation are not exhaustive and allow scope for other considerations, provided the latter are consistent with the scope and purpose of the legislation.

---

54 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [332], [840] (Bell J). Examples of administrative power in VCAT's and QCAT's original jurisdiction include the appointment of a guardian or administrator: *PJB v Melbourne Health; Patrick's case* (2011) 39 VR 373; [2011] VSC 327; *NJ* [2022] QCAT 283, and the granting of an exemption under the *Anti-Discrimination Act 1991* (Qld): *Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164, [29]; *Lifestyle Communities Ltd (No 3)* (2009) [2009] VCAT 1869 at [44], [46]; reviewing Working with Children clearance: *PIM v Director-General, Department of Justice and Attorney-General* [2020] QCAT 188; E Nekvapil, *Pizer's Annotated VCAT Act* (6th ed, Lawbook Co, 2017) at [VCAT 8.50].

55 *Charter of Human Rights Bench Book* above n 53 [3.8] at p 8. Failure to consider a mandatory relevant consideration is a legal error: *Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd* (1986) 162 CLR 24.

56 *Bare v IBAC* (2015) 48 VR 129; [2015] VSCA 197; *Charter of Human Rights Bench Book* ibid [3.2].

57 See this chapter at n 53 and accompanying text.

58 *A v Minister of Internal Affairs* [2024] NZSC 63 [138]; *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138 [82].

59 Ibid.

60 *Dickson v Real Estate Agents Authority* [2025] NZHC 50 [162], [168].

Administering agencies commonly issue administrative guidelines to assist their delegates in exercising their discretions. The guidelines (falling into the general class of 'policy' documents) may set out procedures, criteria and examples, with advice on how to assess facts and circumstances. For the guidelines to be lawful, the suggested criteria must be consistent with the enabling Act, should not be exhaustive, and should leave room for consideration of special circumstances.[61] The guidelines may properly guide, but not control, the exercise of the discretion. A lawful guideline or other policy for the exercise of a discretion must allow the decision-maker to take account of relevant considerations, must not require them to take account of irrelevant considerations, and must not serve a purpose outside that for which the statutory power was given.[62]

A tribunal reviewing the decision of a government agency may have regard to lawful guidelines or policies used by the agency.[63] If the guidelines indicate a particular decision outcome, the tribunal is not bound to decide accordingly (unless the Act provides otherwise).[64] The tribunal may reach the decision indicated by the guideline if satisfied that it is the correct and preferable decision in the circumstances, and should make this reasoning clear in giving its reasons for decision.[65]

In *Drake v Minister for Immigration and Ethnic Affairs (No 2)* ('*Drake No 2*'), Brennan J was considering a guiding policy adopted by a Minister for the purpose of determining whether or not to exercise his discretionary power to deport an immigrant or alien on the basis of a criminal conviction. Brennan J identified considerations which 'warrant the Tribunal's adoption of a practice of applying lawful Ministerial policy, unless there are cogent reasons to the contrary', such as 'working an injustice in a particular case'.[66]

In later cases Brennan J's recommended practice in *Drake No 2* has been extended beyond ministerial policies to encompass policies issued by an administering agency to guide its delegates in exercising their statutory discretions.[67] Such policies are to be distinguished from policies that instruct administrators to adopt a particular interpretation of the legislative provisions which they are to apply. A government policy cannot constrain the tribunal from forming its own interpretation of the legislation and engaging in its own reasoning process.[68]

---

61 *Green v Daniels* (1977) 13 ALR 1: *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640–1; *Minister for Home Affairs v G* [2019] FCAFC 79.

62 *Minister for Home Affairs v G* [2019] FCAFC 79; *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [24].

63 *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65; *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR 1.

64 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

65 Ibid 641–2.

66 Ibid 643-45.

67 *Tarrant v Australian Securities and Investments Commission* [2013] AATA 926 [19] - [21]; *GJDB v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 3245 [20].

68 *GJDB v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 3245 [19] – [20]; *Karamanian v Australian Securities and Investments Commission* [2024] AATA 2006 [282], [285].

6.3. Giving reasons

6.3.1. Oral reasons

It is common for the decision and reasons to be provided *ex tempore* (in oral form delivered at the end of a hearing or after a short delay). They are more likely to be given in interlocutory or straightforward matters. The advantage of 'ex temp' reasons is that they are immediate, they flow straight from the information provided and they enable prompt closure of issues. Delivering ex temp reasons where practicable has been proposed as a strategy for members to minimise their backlog of reserved decisions.[69]

Aside from any legislative requirements, the decision to give ex temp reasons depends upon the kind of hearing, whether the giving of oral reasons will be recorded, whether a standard order or direction is to be given, the preference of the tribunal member and the capacity of the member to encapsulate effectively what they wish to communicate in oral form.

The Hon. Justice Robert Beech-Jones recommends using a template to record and organise information before and during the hearing.[70] The template can serve to guide the delivery of ex temp reasons so that what is said maintains a logical, coherent flow and important aspects are not omitted.[71]

Some tribunal Acts provide that if written reasons are not provided at the hearing, a party may within a specified time request that they be provided. Where oral reasons are followed by a written statement of reasons, the written statement can be in longer form but should not depart in substance from the oral reasons.[72] Errors of grammar and syntax may be corrected, and references added. 'Slips' or 'infelicity of expression' may be corrected.[73]

6.3.2. Reserved decisions

If a tribunal does not give a decision on the final day of a hearing, it reserves its decision. This means it will be delivered at a later time in writing or orally. If the decision is to be handed down in writing, a copy should not be given to anyone before it is given to the party or parties.

---

69 The Hon. Justice Robert Beech-Jones, 'Judgment Writing: Get Smart' (Speech delivered to the Judicial College of Victoria program—The Art of Judgment Writing, Judicial College Victoria), 20 February 2025), 3 <hcourt.gov.au/publications/speeches/>.

70 Ibid 5-7.

71 There are many articles, speeches and conference papers providing helpful guidance on preparing oral reasons, see Hon. Justice John Chaney, 'Oral Decisions Masterclass' (presentation to COAT WA Chapter, 3 April 2014) <www.coat.asn.au/> at 22 January 2025; L Walker, 'Ex Tempore Decisions—or Saving Your Sanity' (presentation to the COAT National Conference 'Toward the Horizon: Tribunals of the Future', Canberra, 7 June 2018) <coat.asn.au/> ; National Judicial College of Australia,' Oral Decisions: Delivering Clear Reasons' (2011) <njca.com.au>.

72 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329, [30]–[31].

73 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* 3rd ed (2017, rev'd 2023) <aija.org.au> ('*Guide to Judicial Conduct*') [4.5]. Many tribunal Acts contain 'slip' provisions, eg, NCAT Act s 63.

This does not preclude a tribunal member discussing the decision with a colleague on the tribunal, but no-one outside the tribunal should see or hear about the decision before it is formally delivered.

Where there is more than one party before the tribunal, every effort should be made for each to receive the decision at about the same time. If a decision is likely to attract media interest, the parties should receive the decision at the same time or before the media are given access to the decision.

During the period that a decision is reserved, the members of the hearing panel should scrupulously avoid any private conversation or communication with the parties or their legal representatives, whether the proceeding is discussed or not, as this might give rise to apprehended bias. See **Chapter 3** at **3.4.7**.

Waiting for decisions can be stressful for persons with an interest in their outcome. Delays in handing down reserved decisions are a common cause of complaints about tribunal members. Some tribunals are obliged by statute to deliver their decisions with reasons within a specified timeframe.[74] Others such as QCAT publish on their website a Reserved Decisions Policy which includes information about what is considered a reasonable timeline for delivering a reserved decision, and how to enquire about the progress of a reserved decision.[75] The publication of a policy is useful in managing expectations and ensuring that enquiries are directed through preferred channels.

Decisions are most easily written when matters are fresh in members' minds and before the passage of time confuses impressions and perceptions about evidence.[76] Commitment to formalising decisions within a short timeframe works against writing blocks and bank-up of decision-making responsibilities.

Strategies for writing decisions promptly include—

- use of standard paragraphs (usually setting out the legislation, policies and questions to be decided) and standard orders[77]
- starting the preparation of the statement of reasons before or during the hearing by inserting information such as names of parties, the legislation and so on
- using a standard cover sheet which includes dates, names of members and so on, and which can be prepared by tribunal staff

---

74 Eg SAT Act s 76 sets a time limit of 90 days for handing down a reserved decision and reasons, unless the time is extended by the President. Some Acts give a party the right to request written reasons within a specified time after the decision and sets a time limit for the provision of the reasons, eg, VCAT Act s 117(2) – (4).

75 QCAT, *QCAT Reserved Decisions Policy 2023* (12 June 2023) <qcat.qld.gov.au> states that the tribunal endeavours to deliver decisions (with reasons) within three months.

76 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367.

77 This has been held to be legitimate: see *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100. However, the member must engage in their own independent fact-finding and reasoning process. See this Chapter at **6.3.4.3.**

- keeping records of proposed findings of fact and assessments of witnesses to assist when recollections fade with the passage of time when writing up of reasons is undertaken.

6.3.3 The purposes of reasons

Parties to a tribunal proceeding expect that they will receive reasons for the tribunal's decision. The Hon. Chief Justice Bowskill summarised the purposes of reasons as follows:[78]

a) to explain the outcome – in particular, to explain to the losing party why they have lost, and avoid them feeling a "justifiable sense of grievance" because they do not understand why they lost;

b) to facilitate or not frustrate a right of appeal;

c) as an element of the principle of natural justice;

d) because it is consistent with the idea of democratic institutional responsibility – that those entrusted to make decisions affecting their fellow citizens should be required to explain their decisions;

e) as an expression of the open court principle;

f) because it promotes good, consistent decision-making, and decisions which are acceptable to and accessible by the community we serve.

Most tribunals are under a legislative obligation to give reasons. Some tribunal statutes limit this obligation to final decisions.[79] The obligation may be to provide reasons orally or in writing, and a party may have the right to request written reasons within a period after the decision takes effect.[80] The QCAT Act s 123 permits a requirement to give reasons for decision to be satisfied by giving the person a written transcript or audio recording of reasons given orally.

In the absence of legislation, there is no common law right to reasons unless there are 'special circumstances'.[81] It is probable that a tribunal can decline to give reasons if the tribunal Act does not require it and:

- no interests are affected by its decision
- the decision is not reviewable or appealable
- written reasons have already been given
- the request is not in writing

---

78 The Hon. Chief Justice Helen Bowskill, 'Without Fear, Favour or Affection' (paper presented at COAT Annual Conference, Brisbane, 6-7 June 2024, 4 <austlii.edu.au>. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palm*e (2003) 216 CLR 212 at [105]; Soulemezis v *Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279.

79 Eg VCAT Act s 117(1); QCAT Act s 121(4), (122).

80 Eg VCAT Act s 117(2) – (4).

81 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; *Sherlock v Lloyd* (2010) 27 VR 434, 438; *Hancock v Executive Director of Public Health* [2008] WASC 224; *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480.

- the request is out of time.[82]

Justice John Griffiths has suggested that 'absent a statutory obligation to the contrary, it may well be that there is no legal obligation on some tribunals to provide written reasons for a ruling on an interlocutory matter'.[83]

6.3.4. Content of reasons

In his analysis of best practice in drafting tribunal decisions, former Justice Garry Downes AM advised that reasons should be clear, comprehensible, concise, cogent and complete. Reasons should—

- identify the issues and set out the essence of the case at the start
- state the facts rather than engage in narrative
- contain nothing irrelevant to the decision
- follow a logical reasoning process.[84]

Key elements that should be addressed in reasons include—

- identification of the sources of evidence and information upon which the findings are based;
- findings on material questions of fact, such as credibility or differing accounts of incidents;
- clear explanation of why evidence led by one party to establish a material fact was rejected, or that contradictory evidence led by another party was preferred;[85]
- reference to or summary of the law, rule, policy or principle applicable to significant issues before the tribunal, showing how it was taken into account;
- explanation of how the relevant considerations were evaluated in exercising a discretion;[86]
- a logical statement of the reasoning process engaged in by the tribunal, showing the connection between facts, legal principles and the decision reached by the tribunal; and
- the decision of the tribunal.

---

82 See Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons*, (2000, rev'd 2002) 78 <ag.gov.au>.

83 The Hon. Justice John Griffiths 'Decision Writing: Beyond Adequacy' (COAT Conference Independence, Integrity and Impartiality in a Changing World, Sydney, 9 June 2023 [15]. See also *Wainohu v NSW* (2011) 243 CLR 184 [54] (French CJ): 'The duty [to give reasons] does not apply to every interlocutory decision, however minor'.

84 Justice Garry Downes AM, 'Best Practice in Drafting: How to Draft Reasons for Decision as Efficiently and Effectively as Possible—Techniques for Structure, Organisation and Coverage of Essential Issues'.

85 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; *Hermes Nominees v Shepherd* [2024] NCATATAP 36

86 See above, this Chapter at **6.2.13.**

6.3.4.1. Material facts and evidence

A statement of reasons is not expected to refer to every issue of fact that arose in the proceeding. If the tribunal reasons omit a finding on a question of fact, it will be taken to mean that the tribunal did not consider the question to be material.[87]

In this context, a 'material fact' is one that is essential or necessary to the path of reasoning that led to the tribunal's decision, in the sense that the decision could have been different if the fact did not exist.[88]

The High Court of Australia in *Minister for Immigration and Multicultural Affairs v Yusuf* considered what is meant by a legislative requirement that the decision-maker set out findings on 'material facts' in reasons for decision.[89] The Court held that the findings have to be those that the decision-maker did actually make in reaching their decision, whether or not the findings were ones that the decision-maker was required by legislation to make.

A tribunal is not obliged to explain in any detail why it rejected or made no finding about evidence led by the parties or factual claims made in representations if the disputed fact was not material to its decision.[90] However, if the decision-maker has failed to make a finding required by the legislation, the decision may be set aside on review or appeal for error of law.

A finding of fact may be established directly on the evidence or may be based on an inference from other facts. In the latter case, the statement of reasons should set out the facts from which the inference is drawn and explain why it is proper to draw the inference.[91] If no evidence is cited for the finding, an appellate court or tribunal may infer that the finding was based on 'mere' speculation.[92]

The reasons should identify the evidence which was considered relevant and credible in making each finding of fact and explain why certain evidence was preferred to other contradictory evidence.[93] In general, it is not necessary to refer specifically to information if such disclosure would—

- reveal a trade secret;

---

87 *Minister for Immigration and Multicultural Affairs; Ex parte Yusuf Minister for Immigration and Multicultural Affairs v Yusuf*; 206 CLR 323 [5], [34], [35].

88 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 [11] – [14], [34] – [36] ('*Plaintiff M1/2022*').

89 *Minister for Immigration and Multicultural Affairs; Ex parte Yusuf* [2001] HCA 30; 206 CLR 323.

90 *Plaintiff M1/2021* , above n 88 [24]; *Re the Minister for Immigration and Multicultural Affairs*; *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at [63]; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263 at [29]; *Summers v Repatriation Commission* [2014] FCA 608 at [56]–[57].

91 Hon. Justice Melissa Perry, 'Statements of Reasons: Issues of Legality in Best Practice' (Speech to AAT, 10 June 2020) [3] <fedcourt.gov.au>.

92 See *Minister for Immigration v Pochi* (1980) 4 ALD 139 at 159–60.

93 Ibid.

- breach a statutory[94] or common law[95] duty to keep information confidential;[96]
- endanger national security; or
- infringe legal professional privilege.

It can also be unhelpful to detail communications made, for instance, between a doctor and their patient, if this would harm the relationship or cause distress or embarrassment to the patient.

Given the increasing accessibility of tribunal decisions on the Internet, it can be important to exclude discussion of highly sensitive and embarrassing personal details, such as health information, if it is not fundamental to the reasoning within the decision. Some tribunals go further in protecting anonymity in anonymising the names of all or some of the parties and even the names and locations of expert witnesses, or of children referred to, are suppressed.

6.3.4.2. Findings on credibility

Where a finding as to credibility is made, there are many ways in which it can be phrased. It is problematic, however, for a decision simply to state that a tribunal did not find a witness credible, that it rejects the evidence of a particular witness, or that it prefers one witness to another.[97] Reasons for such conclusions should be set out. They need not be lengthy but they should go beyond stating 'I prefer the evidence of Dr Y to that of Mr X'. They should identify what it is that has led to a witness's account not being accepted or one witness being found more believable than another.

Examples of such reasoning might lie with a witness having been inconsistent in their account, exhibiting problematic gaps in memory, or lacking practical knowledge of an industry or experience in a form of evaluation. Alternatively, a witness's account may be more contemporaneous with an event or corroborated by documentary material.

6.3.4.3. Reference to legal materials

While it is important for tribunal decisions not to be unduly legalistic, there are many occasions on which it is appropriate for case law, statutory provisions and legal commentary to be the subject of reference. It is important that cases, legal articles and books, as well as statutes, are cited accurately and in standard legal style so that a person wishing to follow up the reference

---

94 Eg health information protected by the *Health Records Act 2001*, s 27.

95 Eg the name of a notifier: *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 246.

96 Eg *Crimes Act 1914* (Cth) in relation to information held by Commonwealth Officers.

97 Where a finding that a witness is not to be believed is material to the tribunal's decision and the tribunal fails to give reasons for the finding, a court reviewing the tribunal's decision may infer that it *had* no good reason: *R v Stevedoring Industry Board; Ex parte Northern Stevedoring Co Pty Ltd* (1953) 88 CLR 100.

can locate the relevant document. It is useful to refer to medium-neutral citations of cases so that persons without ready access to legal libraries can read the decision cited if they wish.[98]

In addition, if a case is cited to support a proposition, the relevant page or passage (pinpoint reference) within the case should be referred to, not just the case generally. This does not mean that substantial passages from the case need to be quoted in full or even in part, simply that the reader should be enabled to find the passage and understand its significance to the point being made by the tribunal.

6.3.4.4. Representations and submissions

In *Plaintiff M1/2021 v Minister for Home Affairs* the High Court of Australia made the following statements about the obligations of a statutory decision maker to consider representations by a party or affected person—

- [The] decision-maker must read, identify, understand and evaluate the representations.
- [T]he decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them.
- [T]he decision-maker might [then] sift them, attributing whatever weight or persuasive quality is thought appropriate.[99]

The Court made the following points about the limits to the decision-maker's obligation—

- The weight to be afforded to the representations is a matter for the decision-maker … within the bounds of rationality and reasonableness.
- The decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims" made.
- The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.[100]

If reasons are inadequate in this regard—for instance, if they fail to address an issue that they are required by the legislation to address—it can be appropriate on application for the reasons to be rewritten to address the deficiency. The rewriting cannot introduce fundamentally new analysis but can replace omissions or gaps in the reasoning of a tribunal and omissions in compliance with statutory requirements.[101]

---

98 Medium neutral citations bear the year and court judgment number, but do not use a citation to a law reporting service. The Australian Legal Information Institute provides a website that can be searched for cases that use media neutral citations: <www.austlii.edu.au/>.

99 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 [24], [25] (*'Plaintiff M1/2021'*) The Court preferred this formulation of the duty to the older formulation of Gummow J in *Khan v Minister for Immigration, Local Government and Ethnic Affairs* (1987) 14 ALD 291, 292, which required the decision-maker to give 'proper, genuine and realistic consideration' to the representations. The Court in *Plaintiff M1/2021* considered that the older formulation could be misconstrued as an invitation to merits review: [26].

100 *Plaintiff M1/2021*, ibid [24]–[25].

101 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329, [30]–[31].

6.3.4.5. Structuring the reasons

The following may be useful pointers for the delivery of reasons.[102] A number of the suggestions apply also to the delivery of oral reasons.

- identify the issues or questions which must be resolved to reach a decision. When making or reviewing an administrative decision, identify the question on which the exercise of the relevant statutory power depends, using the statutory terms. For example, '[W]as the applicant *engaged in an occupation ... for remuneration'* over [the specified period?].'[103]
- briefly set out statutory and case law requirements. Do not paraphrase them as it is almost impossible to do so without changing the meaning.
- summarise accurately important information from the hearing that is relevant to deliberations and findings of fact.
- discuss material issues, even if not addressed by a party or parties.
- summarise important submissions advanced in the hearing.
- where evidence conflicts about material issues, make clear findings as to which, if any, evidence is preferred, and why.
- summarise any concessions or admissions made by the parties.
- resist the temptation to moralise or to be gratuitously critical, especially of persons who did not appear before the tribunal.
- be circumspect about making generalised recommendations for reform or change of practice.
- avoid collateral comments or irrelevancies, instead focusing upon the matter squarely before the tribunal.
- ensure that the orders are clear and complete, consistent with the reasons, and capable of being enforced.
- avoid legal terminology as far as possible but use the statutory language when applying a statutory test.
- where there is more than one application before the tribunal, make orders that dispose of each application.
- avoid metaphors, similes or other flowery forms of expression.
- avoid unnecessarily personally judgmental language.

---

[102] Some of these suggestions are derivative of proposals advanced by Deirdre Fitzgerald, 'Tribunal Decision Writing' (Seminar Paper, Administrative Decisions Tribunal, Sydney, 2000). Other sources of useful advice on the form of reasons include: Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons* (2000, rev'd 2002) and *Commentary on the Practical Guidelines* <ag.gov.au>; Kerr, above n 29; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6.

[103] *Alsheri v Minister for Immigration, Citizenship, Migrant Services and Multi-cultural Affairs* [2025] FedCFamC2G 242 [25]-[26] [italicised words added to identify terms used in the statute].

- avoid words and turns of phrase that are paternalistic, condescending, discriminatory or unhelpfully emotive.
- be conscious of the various audiences of reasons and the potentially harmful consequences of some forms of language.
- use simple, straightforward language, rather than terminology and jargon.
- employ the active voice, rather than the passive voice.
- avoid double negatives, for example, 'the tenant did not refrain from making undue noise'.
- use parties' actual names, unless there is a good reason not to do so (eg use of pseudonym for anonymity, such as in refugee protection or guardianship matters).
- if anonymity is given to a party or a witness, ensure that the anonymising descriptor is effective—thus, for instance, use of the initials of the person is best avoided.
- employ headings, reasonable margins and an accessible font. Paragraph numbers can also be useful.
- proofread the decision carefully before it is provided to the parties.

6.3.5. Adequacy of reasons

6.3.5.1 What are adequate reasons?

Where tribunals are under a duty to give reasons for a decision, the source of the duty is in legislation. The legislation that creates the duty usually sets out the requirements for the content of the reasons.[104]

The adequacy of reasons is measured by their content and form, not their legal validity or length.[105] What amounts to adequate reasons depends on the circumstances of the case.[106]

In general, more is expected in reasons by tribunals, particularly those constituted by members with legal qualifications, than is expected of primary decision-makers.[107] Reasons, whether oral or in writing, should contain sufficient information for a losing party to understand (although not necessarily accept) the outcome.[108] Further, reasons should be extensive enough for a dissatisfied party to exercise their appeal or review rights and for the higher body to be able to understand the factual and legal bases of the tribunal's decision, as well as its reasoning

---

[104] Eg SAT Act s 77(2).

[105] *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 482.

[106] Ibid

[107] *Dodson v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 451,465; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291 (Kirby J).

[108] See *Comcare v Lees* (1997) 151 ALR 647.

processes.[109] The exposure of tribunals' reasoning is also important in engendering confidence in the community that decision-makers have gone about their task appropriately and fairly.[110] In *Comcare v Parker*[111] Finn J commented that the adequacy of reasons 'will depend upon the circumstances of the case. But the reasons will be inadequate if (a) the appeal court is unable to ascertain the reasoning upon which the decision is based or (b) justice is not seen to have been done'.[112]

Reasons should be—

- comprehensible for parties appearing before a tribunal and, on occasions, for the public[113]
- written for their audience, having regard to the objective of tribunals to be simple, affordable, timely and fair[114]
- concisely written without lengthy reproductions of the evidence
- written in a logical sequence, not a stream of consciousness[115]
- capable of a logical explanation.[116]

An issue for tribunals where there are multiple members is the degree of involvement that each member should have in the reasons. The fundamental principle is that the reasons must be those of each member (subject to any dissent). It follows that it is inappropriate and an abrogation of their responsibilities for tribunal members unquestioningly to adopt the draft of other members.

6.3.5.2 Inadequacy of reasons as a ground of appeal or review

Where a court or tribunal is under a duty to provide reasons for decision, inadequacy of reasons can be a ground for judicial review of the decision, but only if the inadequacy relates to 'material' aspects of the case', being 'issues on which the parties were divided, the resolution of

---

109 See The Hon. Chief Justice Helen Bowskill, 'Reasons, Restraint and Reasonable Apprehensions' (paper presented to Magistrates Court Conference Queensland, 31 May 2018 <austlii.edu.au>; The Hon. Justice Alan Goldberg AO, 'When are Reasons for Decision Considered Inadequate?' (2000) 24 *AIAL Forum* 1; The Hon Justice Wayne Martin AC, 'The Decision-maker's Obligation to Provide a Statement of Reasons, Fact and Evidence: the Law' (1999) 51 *Admin Review* 19; Tom Thawley, 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *Aust J Admin L* 189; *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507 (Woodward J).

110 Administrative Review Council, *Commentary on the Practical Guidelines for Preparing Statements of Reasons* (2002).

111 [1996] FCA 1670 (unreported, Federal Court of Australia, 2 August 1996).

112 Adopting the views of Gray J in *Sun Alliance Insurance v Massoud* [1989] VR 8 at 18; *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263.

113 See *Commonwealth v Pharmacy Guild of Australia* (1989) 19 ALD 510; *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183.

114 See Sue Tongue, 'Writing Reasons for Decisions' in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (AIAL Inc, Canberra, 1998).

115 See Raymond, above n 36, 42–3.

116 See Administrative Review Council, above n 30, 13.

which affected the outcome'[117] For purposes of an appeal on question of law, the provision of inadequate reasons raises a question of law.[118] Subject to the tribunal Act, inadequacy of reasons can also give rise to one or more grounds for judicial review. However, providing inadequate reasons is generally not regarded as a jurisdictional error of itself.[119]

The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given close enough attention, or that it has allowed extraneous matters to cloud its consideration. An appeal court reviewing the tribunal's reasons will require 'the minimum acceptable standard', not the 'optimal level of detail'.[120] A statement of reasons need not necessarily be lengthy.[121] It needs to be logical.

Appellate courts have made it clear that they have realistic views of what is to be expected of tribunal decisions. The courts have held that they should not submit tribunal decisions to meticulous analysis,[122] construe them finely and minutely 'with an eye keenly attuned to the perception of error'[123] or go through the words of the decision-maker with 'a fine appellate tooth comb, against the prospect that a verbal slip will be found warranting the interference of a court of law'.[124]

6.3.5.3 Reproduction of copied material

Some tribunals have developed templates for statements of reasons in certain types of decisions, particularly in areas of high-volume decision making which raise the same or similar issues. The templates are forms structured with generic headings, prompts and standard common text to be adopted (if appropriate), completed or overwritten. They are provided as an efficiency aid to guide members in structuring and writing reasons. Members are not obliged to use a template

---

117 *Amaca Pty Ltd v Werfel* (2020) 138 SASR 295; [23], cited with approval in *Atanaskovic Hartnell Corporate Services Pty Ltd v Kelly* [2024] FCAFC 137 [138][138]. *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166.[118] *Hermes Nominees Pty Ltd v Shepherd* [2024] NSWCATAP 36 [16] – [17]; *EXW v Mulroney* [2022] VSC 524 [55], [56]; *Ming v Director of Public Prosecutions* [2022] NSWCA 209 [25]. There are different rationales for characterising extensive and unattributed copying from submissions as a jurisdictional error; *MZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133 [30], [47] – [53]; *Porter v The Queen* [2024] ACTA 9, [28] – [51].

118 *Hermes Nominees Pty Ltd v Shepherd* [2024] NSWCATAP 36 [16] – [17]; *EXW v Mulroney* [2022] VSC 524 [55], [56]; *Ming v Director of Public Prosecutions* [2022] NSWCA 209 [25]. There are different rationales for characterising extensive and unattributed copying from submissions as a jurisdictional error; *MZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133 [30], [47] – [53]; *Porter v The Queen* [2024] ACTA 9, [28] – [51].

119 *Ming v Director of Public Prosecutions (NSW)* [2022] NSWCA 209 [6], [31]; *Transcon Holding Pty Ltd v Aged Care Quality and Safety Commissioner* [2023] FCAFC 60 [101].

120 *Resources Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [48].

121 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500.

122 *Strbak v Newton* [1989] NSWCA 202 (unreported, New South Wales Court of Appeal, Gleeson CJ, Samuels and Priestley JJA, 18 July 1989) (Samuels JA).

123 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272–3; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

124 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 266 (Kirby J).

but may do so if they find one to be suitable and helpful. If a template is used, it must be tailored to the facts and circumstances of the individual case.

A statement of reasons is not inadequate just because it incorporates ‘common form material routinely used by the tribunal in high volume decision-making with respect to similar claims’, provided that the specific issues of the case are considered and discussed individually.[125] For example, a tribunal may properly use standard wording to explain the legal test to be applied and to structure its reasons, but should formulate its own explanations of matters such as how it assessed a witness’ credibility, determined the merits of a party’s case, resolved a factual or legal controversy, or weighed discretionary considerations in reaching its decision.

Different considerations apply when a tribunal incorporates into a statement of reasons a slab of text substantially copied from a party’s submissions without attributing the source. The extent and nature of the copying may raise questions as to whether the tribunal has independently and impartially engaged with the evidence, the facts and the law to reach its own conclusions.[126]

These questions have been considered by appellate courts where a party has argued that a judge or tribunal member has committed a legal error in delivering reasons which substantially incorporate another party’s submissions. In *Porter v The Queen*, the ACT Court of Appeal held it to be ‘well established’ that where a judge is under a duty to give reasons, the following principles apply:[127]

- A judge does not necessarily make a legal error by incorporating a party’s submissions into the reasons ‘so long as the reasons sufficiently reveal that the [judge] gave independent consideration to the relevant issues’.
- ‘[R]easons will be inadequate where, when objectively assessed as a whole, they do not demonstrate that the judge “gave independent and impartial consideration to the evidence and the issues”’.

Where material from the party’s submissions has been reproduced in the reasons and that fact is raised in a ground of appeal or review, an appellate court or appeal tribunal will examine the reasons as a whole to determine whether the tribunal ‘gave independent and impartial consideration to the evidence and the issues’. The court or appeal tribunal will consider matters such as the nature of the proceeding, the quantity and content of the copied material, whether it relates to matters that require the tribunal’s active and independent assessment, whether the copied material was attributed, and whether the tribunal has engaged with the submissions of both parties and explained why the copied submission was preferred.[128]

---

125 Ibid [84]; *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFCA 90 [82], [88], [90].

126 *Atanaskovic Hartnell Corporate Services Pty Ltd v Kelly* [2024] FCAFC 137 [33], [55], [56], [58], [159], [164] (‘*Atanaskovic*’); *Porter v The Queen* [2024] ACTA 9; 21 ACTLR 12 [32]-[33] (‘*Porter*’).

127 *Porter*, ibid [51], [79], quoting Brereton JA in *Li v Attorney General for New South Wales* [2019] NSWCA 95 [122]. The principles as formulated in *Porter* were approved by all justices in *Atanaskovic*, ibid [32]-[33], [55]-[58], [155]-[158].

128 *Porter*, ibid [60] – [82]; *Atanskovic*, ibid; *Ultimate Vision Inventions Pty Ltd v Innovation and Science Aust* [2023] FCAFC 23 [17]]19].

While copying does not always amount to a legal error,[129] the Full Court of the Federal Court has cautioned that—

> Irrespective of the legal consequences of such copying, it should not happen. It is damaging to public confidence in the Tribunal.[130]

6.3.5.4 Use of generative AI

Courts and tribunals are assessing the benefits and risks of the use of Generative Artificial Intelligence (Gen AI) to produce information in documents including statements of reasons.[131] To prevent the misapplication of AI, Chief Justice Andrew Bell has issued a practice note which limits the use of Gen AI in New South Wales courts.[132] The practice note directs that '[j]udges in New South Wales should not use Gen AI in the formulation of reasons for judgment or the assessment or analysis of evidence preparatory to the reasons for judgment' nor 'for editing or proofing draft judgments, and no part of a draft judgment should be submitted to a Gen AI program'.[133]

The reasons given by the Chief Justice for his concern include—

- the generation of false information,
- the limitation of the data sets and the possibility that information generated is not current or relevant in the court's jurisdiction
- the possibility that AI-supplied data was obtained in breach of copyright
- the lack of adequate safeguards of the privacy and confidentiality of case material submitted to a public AI chatbot.[134]

The *Administrative Review Tribunal Code of Conduct for Non-Judicial Members* ('ART Member Code') issued by the President of the ART places members under the obligations

- not to use Gen AI for specified purposes including 'to produce any part of the Member's reasons for a decision or to obtain any form of feedback or assistance on any part of the Member's reasons' and

---

[129] In *Porter*, a judge had copied from a submission but the Court of Appeal was satisfied that, read as a whole, the reasons demonstrated that the judge had gave independent and impartial consideration to the issues ibid [89]-[90]. For a contrary conclusion in different circumstances, see *Atanskovic*, ibid.

[130] *Ultimate Vision Inventions,* ibid [6].

[131] See generally, L Bennett Moses, M Zalnieriute, M Legg, F Bell and J Silove, *AI Decision-Making and the Courts:A guide for Judges, Tribunal Members and Court Administrators* (AIJA, 2022) <aija.org.au/publications>.

[132] The Hon. Chief Justice Andrew Bell, Supreme Court Practice Note SC Gen 23, *Generative Practice Note and Judicial Guidelines* (21 November 2024) <supremecourt.nsw.gov.au>. See also, NCAT, Procedural Direction 7 — Use of Generative Artificial Intelligence (Gen AI), 7 March 2025, which is expressly based upon SC Gen 23.

[133] Ibid [4], [5].

[134] Ibid [6].

- not to enter any Tribunal data or records into any Gen AI application.[135]

The Code permits members to use Gen AI as a research tool but must verify the accuracy of the information generated before using it.[136]

It is likely that other tribunals will deal with Gen AI in member codes of conduct and practice notes.

6.4. Costs

The normal rule in tribunals is that each party bears their own costs,[137] but in some jurisdictions, a tribunal may have a discretionary power to order one party to pay the costs of another. The practice may be for costs to 'follow the event' (be awarded in favour of the party who wins the case) or may depend upon considerations set out in the legislation governing the tribunal. Many tribunals discourage applications for orders for costs. Where costs are awarded, they do not simply 'follow the event', but are awarded only where, in the particular circumstances of the case, it is in the interests of justice that such an order be made.[138] The relevant considerations may include that a party has acted unreasonably, such as by delaying proceedings, making untenable claims or refusing a reasonable settlement offer.

The amount awarded in costs may cover matters such as

- the costs and disbursements of witnesses
- the costs of obtaining photographs or other material necessary for the hearing
- travelling to the hearing
- application fees.

Where costs can be awarded, it is appropriate generally to enable submissions to be put as to whether and in what sum costs should be awarded. Factors such as the following can be relevant in determining whether costs should be awarded and in what sum:

- the length of the hearing
- the sums involved
- the importance of the issues to the parties
- the legal and factual complexity of the hearing
- any matters of particular urgency
- unnecessary steps caused by a party's conduct

135 (14 October 2024) <art.gov.au> [9.1], [9.2].

136 Ibid 9.3

137 Eg QCAT Act s 100; SAT Act s 87.

138 Eg QCAT Act s 100(2), (3); *Choi v To (No 3)* [2014] QCAT 30 [4].

- whether the party bringing or resisting the proceedings was obdurate or unduly time-consuming in their conduct of the case
- whether arguments advanced lacked merit
- whether there was any abuse of process, including whether the action was brought or defended for collateral purposes, or was brought frivolously or vexatiously
- the standard of documentation produced for the hearing
- whether the matter should have been settled during a pre-hearing step such as mediation
- whether the party applying for costs was wholly or partly successful
- whether a party increased the length of the hearing by their conduct.[139]

Tribunals commonly include on their website a practice direction, factsheet or other advice to parties and their representatives about costs applications and orders.

6.5. Orders

A tribunal only has the power to make orders to the extent that the statute creating it provides it with such power. Thus, a tribunal should only make orders within the express terms allowed for orders within its enabling legislation. Creative orders outside the terms of such legislative provisions are fraught with risk.

In general, however, it is important that the following guidelines concerning orders by tribunals be taken into account—

- Orders should be in clear language and convey unambiguously what it is that the tribunal is mandating be done.
- If a decision of another decision-maker is being overturned or varied, that decision should be identified with precision.
- To the extent that a previous decision is being varied, this should be specified by explicit and meticulous reference to what was previously decided.
- Where an order is that a person undertake a task, this should be framed in such a way that the person knows what they are obliged to do and the task should be capable of performance.
- Where a timeframe is contemplated for compliance with an order, this should be clear and not unrealistic or unduly onerous.
- Where any aspect of a decision is contingent, a mechanism that is feasible should be set out.

[139] See *Holden v Architectural Finishes Ltd* (1987) 10 PRNZ 685.

6.6. Finality

This section considers two issues relating to the finality of tribunal decisions:

- can a tribunal re-open its own decision and in what circumstances? (**6.6.1**)
- can an issue decided by a tribunal be re-determined by the tribunal in subsequent. proceedings? (**6.6.2**)

As a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.[140] This arises from the doctrine of *functus officio*, which prescribes that once a person or body has discharged a statutory power or duty by exercising it, the person or body has no authority thereafter to embark upon the exercise again.

6.6.1. *Functus officio*

For a variety of reasons, a tribunal may wish to revoke or vary its own decision. This might arise because the tribunal realises that it has made an error, or because an application has been made to the tribunal to set aside a decision it has made and to rehear the matter. As a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.[141] This arises from the doctrine of *functus officio*, which prescribes that once a person or body has discharged a statutory power or duty by exercising it, the person or body has no authority thereafter to embark upon the exercise again. Whether the doctrine applies depends on the relevant legislation.

Where tribunal members are asked to set aside or revoke their own decisions, or are considering doing so of their own motion, it would be wise to consult the tribunal head. To revoke and remake a decision where there is no power to do so would be to commit a jurisdictional error. The tribunal will need to consider the following questions, to determine whether it has the power to re-open its decision.[142]

- Has the decision been made or 'perfected'? Generally, a decision will be perfected once the tribunal has reached a conclusion on the matter and has communicated it publicly or to

140 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 603; see too *Chandler v Alberta Association of Architects* [1989] 2 SCR 848.

141 Ibid.

142 R Orr and R Briese, 'Don't Think Twice? Can Administrative Decision Makers Change Their Minds?' (2002) 35 *AIAL Forum* 11–43.

the parties in a way that indicates that it is final.[143] Until the decision has been perfected, it is merely provisional and the tribunal can reconsider it. For example, in one case it was held that the Tribunal could revise a decision which had been sent to the Registry but not yet communicated to the parties.[144]

- Is the decision invalid because it is affected by a jurisdictional error, such as breach of natural justice? If so, grounds exist for a supervising court to set the decision aside (see **Chapter 1** at **1.6.2** and **1.6.3**). In *Minister for Immigration and Ethnic Affairs v Bhardwaj* (‘*Bhardwaj*), the High Court of Australia held that a decision affected by a jurisdictional error is regarded in law as no decision at all; the tribunal has not validly exercised its power to decide, and is not *functus officio*.[145] Many kinds of error may be jurisdictional error,[146] but only if the error is material to the decision ‘in the sense that there is a realistic possibility that the decision … *could* have been different if the error had not occurred’.[147] The tribunal does not have the final say on whether it has made a jurisdictional error, but if it has done so, it may be entitled to correct its error without waiting for a reviewing court to set the decision aside.[148] However, a finding of jurisdictional error cannot always be predicted with confidence, and it may be prudent for the tribunal to wait for a court to determine whether the decision was void. New Zealand tribunals have stronger cause to await a ruling from a supervisory court. The decision in *Bhardwaj* is based on a conception of invalidity that is inconsistent with the New Zealand authorities.[149]
- What is the relevant statutory power? Is there an express or implied statutory power to revoke, re-open or vary the decision? Even after a decision has been perfected, a tribunal may exercise any statutory power to alter or re-open its decision, such as a power to reinstate a dismissed application, or a ‘slip rule’ that empowers it to correct clerical errors or accidental omissions from its decision or statement of reasons.[150] In exercising these

---

143 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533; *X v Minister for Immigration and Multicultural Affairs* (2002) 67 ALD 355 at 361; *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18. See also *Minister for Immigration and Citizenship v SZRNY* (2013) 214 FCR 374.

144 *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25.

145 [2002] HCA 11; (2002) 209 CLR 597 [51]. Gleeson CJ concurred in the order on a different analysis but did not regard the tribunal’s decision as having no legal operation: [11] - [15].

146 For a non-exhaustive listing of the categories of jurisdictional error, see *LPTD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 [3] – [5].

147 Ibid [6]-[7] (emphasis in original). The Court added that the materiality criterion will be made out *a priori* if apprehended or actual bias or legal unreasonableness is demonstrated.

148 *Bhardwaj* (2002) 209 CLR 612–17 (Gummow and Gaudron JJ), 618 (McHugh J), 638–40 (Hayne J); *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (G405 of 1991)* (1991) 103 ALR 661. However, Downes J has stated that: ‘except in the clearest case, the making of a second decision by a tribunal will only lead to uncertainty of result. This is, at the least, a sound reason for a tribunal to act with extreme caution before reconsidering a matter which has already been decided …’: *Re Michael and Secretary, Department of Employment, Science and Training* (2006) 90 ALD 457, 460–1.

149 *Martin v Ryan* [1990] 2 NZLR 209; see generally, Joseph, above n 1, 771–6.

150 For an example of a slip rule, see AAT Act s 43AA and the cases on its scope discussed in DC Pearce, *Administrative Appeals Tribunal* (4th ed, LexisNexis, Sydney, 2015) at [17.24].

powers, the tribunal will need to observe the requirements of procedural fairness (see **Chapter 3**).

- The principle of finality is subject to provisions in each of the Interpretation Acts which state that a power, duty or function conferred by legislation may be exercised or performed from time to time.[151] The interpretation provision is subject to a contrary indication in the legislation in question.[152] Does the Interpretation Act provision operate to allow the tribunal to re-open its final decision and re-exercise its power? In *K v Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand* [2021] NZHC 307 the High Court of New Zealand found that s 16 of the Interpretation Act 1999 (NZ) was not applicable to the decision of a disciplinary committee due to contrary indications in the *Education and Training Act 2020* (NZ) and rules. The committee was therefore functus officio from the moment it communicated its final decision to the parties.
- Are there other statutory indications either for or against an implied power to vary or revoke? For example, if there is a right to appeal the tribunal's decision to a second-tier merits review tribunal, this may indicate that the tribunal cannot reconsider its own decision.[153] The contrary is indicated if the statute says that the tribunal's decision is 'final'. It may also be relevant to consider the nature of the power, and the consequences a power to re-open tribunal decisions might have for third parties and for the operation of the statutory scheme.

6.6.2. *Res judicata* and issue estoppel

6.6.2.1. *Res judicata* in court proceedings

It may be argued in tribunal proceedings that a party should not be allowed to re-open a decision or an issue determined in an earlier proceeding on the ground that it is *res judicata*, or that the party is 'estopped' from re-litigating the issue. These are concepts developed by the courts to bring finality to legal proceedings, in order to prevent the waste of public resources and the use of the courts to harass other parties.

Res judicata may be pleaded as a defence to a lawsuit. It prevents a party from re-litigating a suit (or 'cause of action') that has been determined by a court in an earlier, completed proceeding between the same parties. This is also called *cause of action estoppel*. (Estoppel means that a party is legally precluded or disqualified from advancing a particular claim or argument). For example, A sues B for negligently causing damage to A's car. A's claim is dismissed by the court. Later, A brings against B another suit which is essentially the same as the earlier one. B can plead *res judicata*.

---

151 Eg *Interpretation Act 1999* (NZ) s 16; Acts Interpretation Act 1954 (Qld) s 23(1).

152 Eg *Interpretation Act 1999* (NZ) s 4; Acts Interpretation Act 1954 (Qld) s 4.

153 *Sloane v Minister for Immigration, Local Government and Multicultural Affairs* (1992) 37 FCR 429. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Watson* (2005) 145 FCR 542; *VQAR v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 900.

Related to *res judicata* is a broader principle of issue estoppel, under which parties are precluded from challenging a finding on an issue of fact or law decided by a court in an earlier proceeding between them. For example, assume that in maintenance proceedings brought by Y against X, a court finds that X is the father of Y's child. When X later applies to the court for a contact order, Y opposes the application and argues that X should not have contact because he is not the father. Y will be estopped from disputing the finding of paternity made in the earlier proceedings between the parties.

Issue estoppel is a narrower concept than *res judicata*. It covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion.[154] It is fundamental to the operation of the estoppel that a dispute between the parties results in what might be described as 'a final judgment', which determines once and for all the dispute between the parties.[155]

Australian authorities usually reserve the term *res judicata* to mean cause of action estoppel, and treat issue estoppel as a separate, although related, principle.[156] Sometimes, though, *res judicata* is used to mean issue estoppel, which can lead to confusion.

There has been much controversy as to whether these principles should extend to tribunal decisions, so as to preclude a party re-opening a decision or a finding by the tribunal in an earlier completed proceeding.

6.6.2.2. Do *res judicata* and issue estoppel apply in tribunal proceedings?

Res judicata has been applied to statutory tribunals which make final decisions exercising judicial power, whether or not they are courts.[157] In *Administration of Papua and New Guinea v Daera Guba*,[158] the High Court of Australia applied *res judicata* to prevent re-litigation of a land title claim that had been adjudicated by the Land Board. Although the Land Board was not a court, it had power to decide finally a dispute between parties as to their existing legal rights to a parcel of land—a function that was essentially judicial in nature. As discussed in **Chapter 1** at **1.3.3**, CATs make final decisions exercising state judicial power in civil jurisdictions such as discrimination, real property and consumer and tenancy disputes.

There has been a conflict of authority as to whether *res judicata* (cause of action estoppel) and issue estoppel apply to a decision of an administrative tribunal, such as the former AAT. A number of commentators have argued there are conceptual difficulties in applying these

---

154 *Blair v Curran* (1939) 62 CLR 464.

155 *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (unreported, Victorian Supreme Court, Gillard J, 20 December 2005) at [86].

156 The distinction is explained in *Blair v Curran* (1939) 62 CLR 464 at 532 (Dixon J).

157 A N Hall, '*Res Judicata* and the Administrative Appeals Tribunal' (1994) 2 *Aust J Admin Law* 22, and n 2; see too T J F McEvoy, '*Res Judicata*, Issue Estoppel and the Commonwealth Administrative Appeals Tribunal: A Square Peg into a Round Hole?' (1996) 4 *Aust J Admin Law* 37, 38.

158 (1973) 130 CLR 353.

principles of litigation to merits review tribunals. In *Bogaards v McMahon*,[159] Pincus J purported to apply the reasoning in *Daera Guba* to the AAT, holding that it was a 'judicial tribunal' for purposes of the application of the doctrine of *res judicata.* The decision was applied by the AAT in later cases.[160] However, other AAT and Federal Court decisions held that *res judicata* did not apply in the AAT.[161] Paterson concluded that AAT decisions can meet the threshold test for the application of *res judicata*, as they were final, on the merits and 'judicial in the relevant way', but a case by case analysis is required.[162]

6.6.2.3. Operation of issue estoppel in tribunal proceedings

A statutory tribunal may be a tribunal to which the doctrines extend,[163] but the question is whether in the exercise of its decision-making process it finally decides a question arising between the parties. The NCAT Appeal Panel has held that issue estoppel can apply in NCAT proceedings, at least if the tribunal is exercising judicial power.[164] The doctrine does not apply when a tribunal in making its decision exercises solely administrative power.[165]

The decision must be one made in respect to an issue between parties, after considering the evidence and argument.[166] An example of a hearing falling outside the scope of such a doctrine was an 'informal hearing' conducted by the Medical Practitioners Board of Victoria to decide whether a medical practitioner had engaged in 'unprofessional conduct not of a serious nature'.[167]

Most of the cases on issue estoppel in tribunal decision-making have arisen in relation to the former AAT. Some authorities have regarded it as settled that a decision of the AAT will give

---

159 (1988) 15 ALD 313.

160 *Re Hospital Benefit Fund (WA) Inc* and *Department of Health, Housing and Community Services* (1992) 28 ALD 25, [15].

161 The authorities against it include *Comcare Australia v Grimes* (1994) 50 FCR 60; *Minister for Immigration and Ethnic Affairs v Daniele* (1981) 5 ALD 135; *Commonwealth v Sciacca* (1988) 17 FCR 476; and *Re Jebb and Repatriation Commission* (2005) 86 ALD 182.

162 Matthew Paterson, '*Res judicata* at the Administrative Appeals Tribunal: Re-opening the case' (2019) 30 *Public Law Rev* 58 at 72, referring to the threshold test in *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353, 453 (Gibbs CJ).

163 Thus, for instance, the General Medical Council has been found to be a civil disciplinary tribunal to be regarded as 'judicial': *Hill v Clifford* [1907] 2 Ch 236. A similar decision has been made in respect of the Medical Board of Victoria: *Basser v Medical Board of Victoria* [1981] VR 953 at 975.

164 *Lane v AGY Global Wealth Pty Ltd (t/as Skylight Energy)* [2024] NSWCATAP 83.

165 *Administration of Papua New Guinea v Daera Guba* (1973) 130 CLR 353 at 353. In *Pastras v Commonwealth* (1966) 9 FLR 152, Lush J considered the procedures and determination of the Commonwealth Commission for Employees Compensation. His Honour stated (at 155):

> The underlying principle of this form of estoppel is that the parties who have had a dispute heard by a competent tribunal should not be able to litigate the same issues in other tribunals. When the decision-making body is an administrative body not affording the opportunity of presenting evidence and argument, it seems to me that there is no room for the operation of this principle.

166 *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (unreported, Victorian Supreme Court, Gillard J, 20 December 2005) at [87].

167 Ibid at [88].

rise to issue estoppel in a subsequent proceeding before the Tribunal,[168] but there is conflicting Federal Court authority.[169] In a High Court case involving a state industrial tribunal, the High Court unanimously accepted a submission by the parties that the doctrine of issue estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties.[170] It is the finality of the decision, not whether the tribunal is 'judicial' in nature, that determines whether a decision can give rise to an issue estoppel.[171] In *Commonwealth v Snell* the Full Court of the Federal Court held that 'the doctrine of issues estoppel is not apposite to the constitutional and statutory context of the [AAT] and ought not to be extended to it.'[172]

6.6.2.4. The tribunal's power to control its proceedings

The former AAT recognised that it did not need to resort to the principles of *res judicata* or issue estoppel to promote finality of its decisions and prevent abuse of process. The Tribunal could decline to revisit its findings, or decline to hear evidence afresh, by fully exercising its statutory powers to determine its own proceedings.[173] Many other tribunals have a similar power.

In *Re Quinn and Australian Postal Corporation*,[174] the AAT suggested that this power enabled it to determine whether to allow re-opening of an issue that had been decided in earlier proceedings between the parties. Where a party seeks to re-open an issue of fact that has already been determined by the Tribunal in an earlier proceeding between the same parties, the Tribunal is required to consider whether to allow the matter to be re-opened and whether to receive evidence afresh.[175] In deciding how to proceed, it will need to consider 'all relevant circumstances', including the requirements of procedural fairness.[176]

In *Re Matusko and Australian Postal Corporation*,[177] the AAT said that it would not generally allow issues already decided by the Tribunal to be re-opened without good reason. It summarised the authorities as follows:

---

168 See, for example, *Bogaards v McMahon* (1988) 15 ALD 313 (Pincus J); *Re Hospital Benefit Fund (WA) Inc and Dept of Health, Housing and Community Services (No 1)* (1992) 28 ALD 25, 29–30 (AAT); *Re Simcock and Repatriation Commission* (1993) 29 ALD 881 (AAT).

169 *Minister for Immigration and Ethnic Affairs v Daniele* (1981) 5 ALD 135 at 139; *Commonwealth v Sciacca* (1988) 17 FCR 476, 480; *Midland Metals Overseas Ltd v Comptroller-General of Customs* (1991) 30 FCR 87, 96–7; *Comcare Australia v Grimes* (1994) 50 FCR 60, 64.

170 *Kuligowski v Metrobus* (2004) 220 CLR 363.

171 Ibid 373–4.

172 [2019] FCAFC 57 at [51].

173 *Re Mulheron and Australian Telecommunications Corporation* (1991) 23 ALD 309; *Re Quinn and Australian Postal Corporation* (1992) 15 AAR 519.

174 (1992) 15 AAR 519.

175 *Blackman v Commissioner of Taxation* (1993) 43 FCR 449; *Re Matusko and Australian Postal Corporation* (1995) 21 AAR 9.

176 *Morales v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 374.

177 (1995) 21 AAR 9.

a) The Tribunal should use its flexible procedures to allow further consideration of issues where there is a reason to do so, for instance—
b) where there is a different decision
c) where there is a clear legislative intent
d) where the reconsideration decision is not final
e) where there has been a change in circumstances or fresh evidence or
f) where justice to the parties requires a departure from the general rule.[178]

The New South Wales Court of Appeal applied the principle in *Matsuko* to allow the NCAT Appeal Panel to re-open its own decision to determine a previously unconsidered challenge to NCAT's jurisdiction.[179]

For tribunals which have statutory power to control their own proceedings, the approach adopted in *Re Matusko* is preferable to relying on issue estoppel, which is of uncertain application to tribunals. In *Commonwealth v Snell* the Full Court approved the approach in *Re Matusko*.[180]

[178] Ibid [33].

[179] *Sunaust Properties Pty Ltd t/as Central Sydney Realty v The Owners - Strata Plan No 64807* [2023] NSWCA 188.

[180] [2019] FCAFC 57 [50].

Chapter 7: Communication

7.1. Key points

Communicating with tribunal users

- Effective communication is a core competency for tribunal members.
- Members are expected to treat all persons attending, appearing or working at the tribunal with courtesy, dignity and respect.
- Guidance, resources and training are available to assist members to
  - articulate questions, instructions, decisions and reasons in clear, precise language
  - communicate effectively with persons from different ethnic and cultural backgrounds and people with disabilities of different kinds
  - make effective use of persons who support, interpret for, assist and represent parties to enable all to participate fully in tribunal proceedings.
- Effective communication is also an aspect of fairness.
- Bench books published by courts offer valuable practical guidance on improving communication with groups of users with special needs including persons affected by inter-generational and other trauma.

Communicating with the media:

- Courts and tribunals frequently deal with matters of high public interest. The media will very often wish to report these and has a strong interest in ready access to the details of court and tribunal proceedings.
- The media plays a key role in educating and enlightening the community about the place of tribunals in our governmental arrangements.
- Where appropriate, tribunals should consider the use of websites and social media to enhance consultation and feedback from stakeholders and the media.
- However, communicating with the public and the media may raise issues including procedural fairness, the tribunal's integrity and privacy of tribunal users.
- Generally, a tribunal member should not communicate directly with the media.
- Tribunals should consider developing a protocol for dealing with the public and the media.

7.2. Introduction

7.2.1. Communication and tribunal values

This Chapter is concerned with aspects of what might loosely be termed *communication* in relation to the operation of tribunals. Communication is essential to the proper conduct of individual cases and to the maintenance of public confidence in the system. A study of court and tribunal process identified five key process-oriented factors as contributing to the perceived fairness of the institutions and public confidence in them:

1. The expectations of, and information provided to, participants.
2. The quality of participation granted to participants (i.e. the extent to which, and the process through which, participants are able to get their story out in a way they view as accurate and fair).
3. The quality of treatment and, in particular, the respect shown to the participant during their time at the tribunal.
4. Issues of convenience and comfort, including timeliness and efficiency.
5. Judgments about tribunal members and staff, including whether they were perceived as helpful and empathetic.[1]

Communication is integral to core tribunal values identified in COAT's *Tribunal Excellence Framework*, including accessibility, fair treatment, efficiency and accountability.[2]

- *Accessibility* refers to the ease of entry or access to the tribunal's services, including a person's ability to obtain complete and accurate information about how the tribunal operates. Accessibility measures include: having a functional and easy to access website, enabling online lodgement of applications and upload of supporting documents, publishing user guides in plain English and in community languages regularly spoken by users; having processes and resources designed to assist self-represented parties and making parties aware of pro bono legal or other advice services.[3]
- *Fair treatment* includes enabling a person to obtain the information they need to put their case to the tribunal and participate effectively in tribunal processes that concern their interests. Measures include provision of free translation and interpreter services, provision of copies of recorded hearings or transcripts to parties at reasonable cost, and promoting cultural competency of tribunal members and staff.[4] Other communications to ensure fair

---

1 R Moorhead, M Sefton and L Scanlan, *Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals* (March 2008, Cardiff Law School, Wales) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425127 >.

2 Council of Australasian Tribunals Inc, *Tribunal Excellence Framework* (2nd ed, 2017) 5. <coat.asn.au > .

3 Ibid 17–18.

4 Ibid 15–16.

treatment include members' disclosure to parties of potentially disqualifying interests and associations, and disclosure of the tribunal's own inquiries into disputed questions of fact.[5]

- *Efficiency* includes reduction of transaction costs by ensuring that time and costs expended in obtaining outcomes from the tribunal are not disproportionate to the complexity of the matter and the importance of what is at stake. It includes establishing performance benchmarks for case disposition, having standard guidelines and standard directions where appropriate, having timeliness guidelines and processes for reducing delays, and providing timely and appropriate access to ADR.[6]
- *Accountability* includes communicating to actual and potential users what standards of service they can expect, providing an effective process to deal with complaints, reporting performance results against benchmarks, regular stakeholder and community engagement. It also includes public hearings and published decisions (except where the legislation or the sensitivity or private nature of the subject matter indicates that the hearings should be closed).[7]

7.2.2. Innovations in communication

The rapid and continuing development of tribunals is a ready indicator of the strong drive towards greater simplicity and accessibility in dispute resolution services. Generally speaking, tribunal proceedings are much simpler than those in courts. Entry fees are usually low or non-existent, and there may be provisions to waive fees in cases of hardship; there are often restrictions on legal representation; decisions are handed down quickly; appropriate ADR processes are available, and orders for costs are not normally made. These features are essentially why tribunals have become so popular with users, compared with courts, and why governments have provided them with a good deal of support in recent years.[8]

Tribunals have considerably extended and diversified their public communication and outreach using online technology in recent years. It is common to find on tribunal websites electronic forms, online payment of fees, practice notes, policies and protocols, factsheets, electronic lodgement of applications and complaints and customer service charters, content in community languages other than English, and enhanced accessibility for people with disabilities. Some tribunals have embraced social media to communicate directly with the public and users. Social media is also used to improve accessibility through strengthening communication with stakeholders, seeking feedback and disseminating information.

---

5 Ibid, and see **Chapter 3** at **3.4.4**, **3.4.9**, **3.5.2**.

6 Ibid 24–5.

7 Ibid 22–3.

8 R Creyke 'Tribunals— "Carving out the Philosophy of Their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19–33.

7.3. Communication as a competency

COAT's *Tribunal Competency Framework* identifies communication as a core competency for tribunal members, and gives example of performance indicators whereby a member:

- asks clear, concise and relevant questions which are understood by those to whom they are addressed
- uses clear, concise and plain language to explain any relevant factual, legal or procedural issue to the parties, and in giving findings, reasons and decisions
- employs active listening skills and appropriate body language
- makes effective use of those who support, interpret, assist and represent parties, to enable all to participate fully in the proceedings, and ensures effective use of all types of communication aids
- communicates effectively with other members of tribunal panels to ensure that there is an opportunity for full discussion and for each member to express an opinion on the matters to be decided .[9]

COAT conferences and seminars, the Judicial College of Victoria and a number of tribunals offer training for members in communicating with the public and tribunal users, and in drafting reasons for decision that are clear and informative.[10]

The Judicial Council on Diversity and Inclusion offers online training modules and other resources to develop 'culturally responsive practice'. This means practices 'that are respectful or, and relevant to, the beliefs, practices, cultural and linguistic needs of diverse populations and communities'.[11] The resources cover topics such as working effectively with an interpreter and understanding barriers to justice for persons from culturally and linguistically diverse backgrounds (in particular, migrants, refugees and Aboriginal and Torrens Strait Islander people).

7.3.1. Communication and fairness

The United Kingdom's Judicial College *Equal Treatment Bench Book* makes an important connection between communication issues and fairness of the overall process.[12]

---

9 Council of Australasian Tribunals, *Tribunal Competency Framework: Promoting Professional Excellence* (2012) 6 <coat.asn.au>.

10 Providers of tribunal training and professional development are listed in the References section at the end of the Guide.

11 <jcdi.org.au/training>.

12 Judicial College (UK), *Equal Treatment Bench Book* (July 2024), 4-6 <judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/>,

It notes the following:

- The judicial process must be seen to be fair and must inspire the confidence of all who enter into it.
- Fairness is demonstrated by effective communication.
- People view the world from individual perspectives that are culturally conditioned.
- People with personal impairments or who are otherwise disadvantaged in society are entitled to a fair hearing.
- A person's outlook is based on their knowledge and understanding. There is a fine line between relying on this and resorting to stereotypes that can lead to injustice.
- Effective communication is the bedrock of the legal process—everyone involved in proceedings must understand and be understood or the process of law will be seriously impeded.

The document goes on to note that these kinds of considerations are most important in the processes of law and justice because if the parties involved in cases (and the relevant tribunal member) do not understand the material put before them, and the questions and answers being provided, the process is flawed and justice may be denied.

7.3.2. Dealing with difference

Good communication, especially through the use of simple concepts and plain language, is a universally desirable quality in a tribunal system. It has particular significance when a tribunal is dealing with cases involving persons from culturally and linguistically diverse (CALD) backgrounds, and people with various kinds of disabilities. The Bench Book for the Judicial College (UK) provides a series of suggestions as to 'dos' and 'don'ts' (modified for the purposes of this Guide) in relation to the conduct of proceedings generally, but with some particular emphases on cases involving one or more parties who may be in a situation of some disadvantage or from a particular background:

7.3.2.1. Do …

- Get names (including correct pronunciation), personal pronouns and modes of address correct by asking parties and witnesses how they wish to be addressed (see **Chapter 5** at **5.5.4).**
- Obtain, well in advance if possible, precise details of any support requirements that a person appearing before you may have due to a disability.[13]
- Allow more time for special arrangements, breaks, and so on, to accommodate special needs during a hearing.

[13] On how to obtain information about a person's disability and special needs in a sensitive manner, see Judicial College of Victoria, *Disability Access Bench Book* [4.2], < judicialcollege.vic.edu.au>.

- Give particular thought to the difficulties facing disabled people who attend tribunals—prior planning will enable their various needs to be accommodated as far as possible.[14]
- Consider the position of the individual—the stress of attending a tribunal hearing should not be made worse unnecessarily through a failure to anticipate foreseeable problems.
- Bear in mind the problems facing self-represented parties.[15]
- Admit a child's evidence, unless the child is incapable of giving intelligible testimony.
- Ensure that appropriate measures are taken to protect vulnerable witnesses; for instance, children, those with mental or physical disabilities or those who are afraid or distressed.
- Be polite, courteous and patient at all times.
- Take the initiative to find out about different local cultures and faith communities.
- Display an understanding of difference and difficulties with a well-timed and sensitive intervention where appropriate.

7.3.2.2. Don't …

- Underestimate the stress and worry faced by those appearing for hearings, particularly when the ordeal is compounded by an additional problem such as a disability or having to appear without professional representation.
- Overlook the use—unconscious or otherwise—of gender-based, racist or homophobic stereotyping as an evidential shortcut.
- Allow advocates to attempt over-rigorous cross-examination of children or other vulnerable witnesses.
- Let the tribunal's processes become unduly formal. The relative flexibility and informality of tribunal proceedings make them less intimidating to those unfamiliar with the legal system.[16]
- Use words that imply an evaluation of the sexes, however subtle—for instance, 'man and wife', girl (unless speaking of a child), 'businessmen'.
- Use terms such as 'mental handicap', 'the disabled'—use instead 'learning disability', 'people with disabilities'.[17]
- Allow anyone to be put in a position where they face hostility or ridicule.
- Make assumptions based on stereotypes or misinformation.
- Use offensive words or terminology.

---

14 For information about the matters to be considered before the hearing, see ibid [4].

15 See **Chapter 5** at [**5.5.8**]

16 See generally R Creyke, 'Tribunals as the Generic Face of Justice: A Challenge for the 21st Century' (June 2012) <https://coat.asn.au>.

17 For guidance on the use of outdated and preferred language in which to refer to persons with various kinds of disability, see JCV, *Disability Access Bench Book,* above n 13 [1.3].

The same document has a detailed treatment of aspects of dealing with cases in which issues of ethnicity, race, culture or religion may arise. It also has specific sections devoted to dealing with children, people with disabilities, issues of gender, sexual orientation and other matters.

7.3.3. Resources

Some courts have bench books providing guidance and resources on various communication-related topics that may be of assistance to tribunals. A bench book is a guide to the procedure to be followed in a court or tribunal. In Australia, court bench books are published online. This has not been the practice of Courts New Zealand, which is currently preparing its bench books for publication.[18]

Note also the guidance and resources discussed in **Chapter 5** at **5.5.2** regarding communication with persons from culturally and linguistically diverse backgrounds, and persons with cognitive impairments.

7.3.3.1 Trauma-informed practice

Courts and tribunals commonly deal with parties and witnesses who are suffering the long-term effects of trauma. For present purposes, trauma can be defined as

> An event, series of events or set of circumstances that are experienced by a person as physically or emotionally harmful or life threatening.[19]

Complex trauma results from repeated, ongoing or extreme trauma arising from experiences such as being exploited, abandoned or abused.[20] Unresolved complex trauma may have persisting negative impacts on a person's functioning, emotional self-regulation and coping mechanisms. It can also affect a person's memory, concentration and ability to give a coherent answer to questions. In some cases it may lead to hypersensitivity, reactivity and challenging behaviours.

Training programs and other resources have sought to raise the awareness of judicial officers and tribunal members about the nature and prevalence of trauma, and to develop a 'trauma-informed' approach to practice.[21] The practice requires a basic understanding of how trauma can impact a person's mind and behaviour, and how participation in court or tribunal proceedings can exacerbate the effects of trauma. The *Equality before the Law Bench Book* (NSW) explains that a trauma-informed judicial officer will—

---

18 N Sands, 'Judges' secret bench book released to lawyers, public for the first time, *Law News*, 27 Nov 2024, <lawnews.nz/courts/judges-secret-bench-book-released-to-lawyers-public-for-the-first-time/>.

19 The Hon. Justice Jennifer Boland and Dr Catherine Boland, 'Tribunals and Trauma-Informed Practice: The Vulnerable Client' (presentation to COAT National Conference, Sydney, 8 June 2023).

20 Judicial Commission of New South Wales, *Equality before the Law Bench Book* [12.2] <judcom.nsw.gov.au/>.

21 Ibid [12].

- ‘recognise that the effects of overwhelming stress may impede a traumatised witness … such that their evidence may appear “discursive, episodic, unreliable and even mendacious”’ and
- help to defuse the stressful courtroom environment [for the person] to minimise the risk of re-traumatising them.[22]

To enable the tribunal to engage in trauma-informed practice, staff or members need to be informed that a person’s participation in a tribunal proceeding may be retraumatising for them. To encourage disclosure, TASCAT has a factsheet for persons who believe that their involvement in a tribunal proceeding may contribute to retraumatising them. The factsheet advises them how to communicate their concerns to the tribunal, what supports can be made are available to them and what they can expect at the hearing. It also lists external services that can provide additional support or information.[23]

7.3.3.2 Indigenous people and disadvantage- Australia

It is important for Aboriginal and Torres Strait Islander people to know that judicial officers and tribunal members are informed about the impacts of intergenerational and other forms of trauma on persons involved in tribunal proceedings.[24]

In *Bugmy v The Queen*, the High Court of Australia approved the consideration of disadvantage within indigenous communities in sentencing, but rejected the argument that ‘courts ought to take judicial notice of the systemic background of Aboriginal offenders’ in sentencing.[25] The court found that this approach would be ‘antithetical to individualised justice’.[26]

The case inspired a project to establish the *Bugmy Bar Book* to collate published research, findings of government inquiries and academic commentary on the experience and impacts of particular aspects of disadvantage, deprivation and discrimination on indigenous individuals and communities. The project is directed by a committee which includes representatives of key stakeholders in the criminal justice system including public defenders, prosecutors, the judiciary, legal academics and practitioners.

The *Bugmy Bar Book* has chapters covering the impacts of experiences such as acquired brain injury, hearing impairment, homelessness, cultural dispossession, child abuse and neglect, childhood sexual abuse, exposure to domestic and family violence, interrupted school attendance, cultural dispossession, being raised in out of home care, and social exclusion. Each chapter is reviewed by experts and by an advisory panel including at least one indigenous member.

---

[22] Ibid [12.4.1].

[23] Factsheet: ‘TASCAT and trauma-informed practice’, <tascat.tas.gov.au>.

[24] JCNSW, *Equality before the Law Bench Book*, above n 21 [12.3.3].

[25] [2013] HCA 38 [41].

[26] Ibid.

While primarily written for use in the criminal justice system, the materials are useful to and used by practitioners in other areas of law and administration where the impacts upon individuals of factors of disadvantage covered in the *Bugmy Bar Book* are relevant.

There may, for example, be scope for the *Bugmy Bar Book* to be used and cited in matters involving exercise of the protective jurisdictions in guardianship and mental health, and in dealing with applications for adjournments (such as for funeral attendance or sorry business).

7.3.3.3 Indigenous people and disadvantage - New Zealand

As in Australia, there are research findings on the long-term impacts of inter-generational and situational trauma on Māori health and well-being. National strategic documents have been developed to identify trauma and provide trauma-informed care in the health sector.[27]

The New Zealand judiciary has adopted the *Te Ao Mārama Best Practice Framework* for application in specified courts that have family, youth and criminal jurisdictions. The framework brings together principles developed by the courts, including alternative courtroom layouts to encourage collaborative participation, the use of solution-focused approaches, enhanced connection with communities and service providers and adjusting modes of participation to encourage users to feel safe.[28]

7.4. Dealing with the media

7.4.1. General aspects

Of increasing importance in the modern era is the relationship between the courts and tribunals sectors and the media. There are two key aspects of the relationship between the courts and tribunals sectors and the media.

The first is that courts and tribunals frequently deal with cases of high public interest. The media will wish to report on these cases and has a strong interest in ready access to the details of court and tribunal proceedings. For their part, courts and tribunals have a general obligation to provide such access and have an interest in ensuring, as far as possible, that reporting of cases is accurate and responsible. These are matters of mutual interest to the media and court and tribunal authorities.

The second aspect is that while the media is mostly interested only in reporting particular cases, courts and tribunals have a more general interest in their relationship with the media. For a democratic society to function effectively, its members should have a reasonable knowledge of and regard for the institutions of government, including the judiciary and tribunals. This is

27 Eg K McClintock, M Haereroa, T Brown, M Baker, *Kia hora te marino - Trauma Informed Care for Māori*, (2018, Te Rau Matatini, Wellington).

28 District Court of New Zealand, *Te Ao Mārama Best Practice Framework* 20 Dec 2023, <districtcourts.govt.nz>.

often put in terms of 'public confidence' in the institutions. The media plays a key role played in shaping public knowledge and perceptions about the operations of the court and tribunal systems, often through the frame of a small number of high-profile cases.

7.4.2. Responding to criticism

A former President of the AAT has observed that the following comments, made in relation to the courts, apply equally to tribunals:[29]

- critics in the media or other public forums sometimes take court decisions out of context
- a court can become collateral damage in wider public discussion about issues related to one of its decisions
- a court does not defend its decisions publicly against media or public criticism but relies on the justifications provided in the written reasons for decision.

The *Guide to Judicial Conduct* states: 'It is well established that a judge does not comment publicly once reasons for judgment have been published, even to clarify ambiguity'.[30] The Guide recommends that a judge whose decisions have attracted unfair, inaccurate or ill-informed comment that might reflect adversely upon the judiciary should bring the matter to the head of jurisdiction. If any form of public response to criticism is found to be warranted, it will come from the head of jurisdiction.

Bromberg-Kravitz suggests that courts use social media to respond to criticism, as the directness of the communication avoids the risk that the message will be altered by the media.[31]

The Australian Judicial Officers Association (formerly the Judicial Conference of Australia) occasionally issues media releases, letters to editors and other communications to correct misinformed criticisms of judicial officers.[32]

In recognition of the mutual importance of the court and tribunal system and the media, some courts and tribunals have appointed media liaison officers. Their services are available to the media in the event that particular problems or issues arise. Media liaison officers enable a court or a tribunal to approach the media to explain or clarify matters that may have arisen, or to liaise about media coverage of a pending case or cases. In addition, they provide an important

---

29 The Hon. Justice David Thomas, 'Contemporary Challenges in Merits Review: The AAT in a Changing Australia' (2019) 96 *AIAL Forum* 1 at 10, citing Chief Justice C Holmes, 'Declaration of Independence', *The Australian* (14 June 2019).

30 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017, revised 2023) [5.7.2] [<aija.org.au>.

31 M Bromberg-Kravitz, 'Challenges of Social Media for Courts and Tribunals' (Issues Paper presented at AIJA and Judicial Conference of Australia 'A Symposium: Challenges of Social Media for Courts and Tribunals' 26–27 May 2016, Melbourne), 18 <aija.org.au >.

32 <www.ajoa.asn.au/news-media/>. On the options for responding to criticism, including by the JCA, see The Hon Justice R Beech-Jones, 'The Dogs Bark but the Caravan Rolls on: Extra Judicial Responses to Criticism' (address to South Australian Magistrates Conference, 8 May 2017) <ajoa.asn.au>.

internal resource to individual judicial officers and tribunal members who may need assistance in dealing with the media on aspects of their work.

7.4.3. Media arrangements and protocols

Courts and tribunals commonly adopt protocols or arrangements in relation to media coverage of cases. They may include guidance regarding media usage of notes, sketches, recording equipment, television cameras and so on.

7.4.4. Judicial Conference of Australia media booklet

In 2003 the Judicial Conference of Australia (JCA) published a useful guide for judges and magistrates on working with the media.[33] This publication should be of considerable interest to members of tribunals as well because the issues are common to both. The booklet has three general aims—

- to help judicial officers understand the media better and how it works
- to assist individual judicial officers in deciding whether, and if so, how, to involve themselves with the media
- to facilitate generally the process of communication between the media and the judiciary as an institution.

The Introduction to the booklet covers such matters as when it may be appropriate to engage with the media and also provides some useful insights into the attitudes and approaches of the modern media in relation to the reporting of court cases and coverage of courts generally. Relevant to both these aspects it is observed that—

> A critical part of working with the media is understanding the motivations, pressures and logistics of being a journalist—for only then can judicial officers make informed decisions about their involvement in media commentary.[34]

In its treatment of a wide range of issues the booklet has a practical orientation. For example, it poses and answers the ten most commonly asked questions about the media. The booklet also has a detailed section on what is termed 'the rules of engagement' in regard to judiciary media relations. In this respect it provides a whole series of practical suggestions on such aspects as:

- whether to 'engage'
- dealing with unwanted enquiries
- preparation for involvement in an interview or story
- the actual participation with the particular media representatives.

---

33 Judicial Conference of Australia, *Working with the Media: A Handbook for Australian Judicial Officers* (JCA, 2004). The handbook is available to members of the Australian Judicial Officers Association, and in some libraries.

34 Ibid, Section 2: 'The Media: The Answers to the Most Commonly Asked Questions', [1].

The booklet is especially helpful on when to engage with the media and what to do with unwanted media enquiries. In relation to the first of these matters, it is pointed out that whether to engage is never an easy decision because every media story is different and the same approach will not work every time. The questions which need to be asked are—

- Is it appropriate for me to engage?
- What can I achieve through engagement?
- Will my involvement introduce balance and accuracy or justify a larger and more inaccurate story?
- Do I have enough expertise to engage in this situation or do I need help—if so from whom?
- What can go wrong if I do not engage or if I do engage?
- Am I the appropriate person?

On the issue of unwanted media approaches, the booklet cites the examples of being followed down the street or media people being camped outside the tribunal. The key issue here is how to get the best possible coverage of the main messages to be conveyed. The booklet suggests that this will involve not inflaming the story but bringing it back to the real facts.

> As tempting as it might be, you can rarely achieve this by running away from the camera, jostling the journalist, or tripping up the cameraman. All these actions do is create an even better lead for the story and one that completely replaces your key messages or your capacity to reintroduce balance.[35]

The advice provided is that the options are to communicate on the spot, issue a written statement or to hold one's line and refuse with dignity to comment. It comes down to judgment. A strategy should be selected and adhered to. It is good to seek professional advice and, having chosen a strategy, not to change it in mid-stream without very careful consideration.

Helpful suggestions are also made about different aspects of being an interviewee.

For individual members of a tribunal, the advice in the Media booklet will be considered subject to the media relations policy and member code of conduct, if any, that the tribunal has adopted.

---

[35] Ibid, Section 4: 'Dealing with Unwanted Enquiries', [2].

Chapter 8: Conduct

8.1. Key points

The importance of good behaviour:

- Tribunals play a crucial role in our system of government and in upholding the rule of law. Therefore tribunal members are subject to high standards of behaviour in their professional and private lives. The standards are informed by, although not identical to, those of judicial officers.
- Members of tribunals who are judicial officers (judges and magistrates) are governed by the conduct standards that apply to the court in which they hold office. This Chapter focuses on norms, standards and procedures that apply to non-judicial members.
- Standards of conduct for non-judicial members come from various sources, including the tribunal's governing Act, other legislation including human rights and anti-discrimination laws, the member code of conduct (if the tribunal has one), and standards guides for tribunal members and the judiciary.

Standard guides for members

- While codes of conduct may be specific and expressed in prescriptive terms, conduct guides offer more general advice as to the values, principles and other considerations that should guide the conduct of judges and members in various circumstances.
- The Administrative Review Council's *A Guide to Standards of Conduct for Tribunal Members* and the Australasian Institute of Judicial Administration's *Guide to Judicial Conduct* are instructive as to standards of behaviour for tribunal members and judges.
- *A Guide to Standards of Conduct for Tribunal Members* identifies seven major administrative law values for tribunal members, namely, respect for the law, fairness, independence, respect for persons, diligence and efficiency, integrity, accountability and transparency.
- The *Guide to Judicial Conduct* identifies three fundamental principles against which conduct of judicial officers should be tested: impartiality, independence and integrity.

Tribunal codes of conduct

- Some tribunals have established codes of conduct for their members. The types of conduct likely to be addressed in a tribunal's code have changed. Matters such as sexual harassment, bullying, victimisation, use of social media and generative AI are now more likely to be included. There is a renewed focus on avoiding conflicts of interest and engagement in activities that might conflict with the member's tribunal functions or public perceptions of their independence and impartiality.

Competency, performance management and training

- Some tribunals, particularly the larger ones, have a structured process for managing the development of member competencies, as defined by a competency framework. COAT has published a guide to assist tribunals to develop their own competency frameworks. Such a framework informs the development of the members' competencies through education, training, mentoring and other forms of professional development.

Removal provisions

- The governing Act for a tribunal generally includes provisions for the removal of a member from office during their term of appointment. The provisions promote the accountability and integrity of tribunals by enabling the removal of members whose misconduct renders them unfit to exercise the functions of a member.
- While removal action may be prompted by allegations first raised in a complaint, the removal process is distinct from the complaint handling process.
- Across the tribunal Acts there is marked diversity in the grounds for removal and the procedure to be followed.
- It is common for the removal provisions to provide that the tribunal head may stand the member down during the investigation.
- Members are entitled to be afforded natural justice in the process.
- Special mention is made of the Judicial Commissions of Victoria and the Northern Territory which are empowered to receive complaints and referrals about the conduct of judicial and non-judicial members of VCAT and NTCAT respectively. Each Commission is empowered to investigate matters which could, if substantiated, be grounds for the removal of the member. The removal process for members of the two tribunals is substantially the same as for judicial officers.

8.2. Introduction

8.2.1. Importance of good behaviour

In common law countries it is traditional that very high standards of 'on-duty' and 'off-duty' behaviour are expected of judicial officers and tribunal members. 'On-duty' and 'off-duty' are terms of convenience in this context for categorising behaviour involved in 'carrying out official duties' and 'private life' respectively.

The basic reason for this is the unique and special position which courts and tribunals occupy in the public life of a modern, civilised, democratic society. Courts and tribunals constitute a key component of government, with a significant role in ensuring adherence to the rule of law and in adjudicating in relation to the rights and interests of individual citizens, corporations, governments and statutory authorities. Courts and tribunals also frequently stand between the individual citizen and the State in the independent resolution of disputes.

In determining disputes and in performing other key functions, tribunals are carrying out a vital civilising role in modern society. Proper observance of the rule of law requires that laws and their related regulations are administered fairly, rationally, predictably, consistently and impartially. Behaviour by judicial officers and tribunal members is problematic if it is incompatible with these kinds of ideals and objectives. As former Chief Justice of New South Wales James Spigelman AC observed, 'the preservation of the rule of law is the basic reason for establishing mechanisms for dealing with judicial misconduct, whether it takes the form of corruption or less serious forms of misbehaviour'.[1]

The same sentiments and reasoning apply to tribunal members.

Chief Justice Spigelman went on to say:

- Fairness requires reasonable consideration of the rights and duties asserted.
- Rationality requires a reasoned relationship between the rights and duties and the outcome.
- Predictability requires a process by which the outcome is related to the original rights and duties.
- Consistency requires similar cases to lead to similar results.
- Impartiality requires the decision-maker to be indifferent to the outcome.

Judicial misconduct, particularly due to improper external influence, distorts all of these objectives.[2]

---

1. The Hon, Justice James Spigelman AC, 'Dealing with Judicial Misconduct' (Paper presented to the 5th Worldwide Common Law Judiciary Conference, Sydney, 2003) 1.
2. Ibid.

These ideals and values are at the very core of the proper administration of justice and what is expected of those who hear and determine disputes and who make decisions about the rights and obligations of parties who appear before them. It is useful for tribunal members to reflect on these fundamental principles from time to time as they go about their everyday work.

8.2.2. On-duty and off-duty activity

The hearing and decision-making role of tribunal members is regarded as such an important part of the good operation of society that high standards of behaviour are expected not only in the tribunal activities of these decision-makers but also in their private lives. While most complaints about the behaviour of tribunal members concern their activities in tribunal processes such as hearings and conferences, issues can arise about a member's conduct beyond the tribunal.

There are forms of conduct which, although occurring in a member's private life, might reasonably be thought to affect the performance of the member's functions or the member's suitability to hold office.[3] The following hypothetical scenarios serve as examples of conduct which might prompt such concerns—

- A member uses their position as a tribunal member to improperly seek or obtain a benefit or personal advantage for the member or for another person.
- A member acts for or advises a person who at the relevant time was actually or potentially a party to proceedings before the tribunal.
- A member knowingly takes advantage of or discloses without lawful excuse confidential information obtained in the performance of the member's functions.
- A member publishes remarks on social media that are degrading or insulting towards a person or a group of persons.[4]

Some tribunal Acts and some tribunal codes of conduct impose obligations on members which relate to specific aspects of a member's conduct in private life.

8.3. Tribunal codes of conduct

Some tribunal Acts provide for the tribunal head to have the function of developing a code of conduct for members.[5] A tribunal Act may expressly provide for the code to be binding on members,[6] or compliance may be required by the member's instrument of appointment or other

---

[3] The Judicial Commission of Victoria is required to dismiss a complaint relating to the private life of a member unless it meets this statutory condition: *Judicial Commission of Victoria Act 2016* (Vic) s 16(1)(b); s 35(2)(c).

[4] These hypothetical scenarios are derived from member obligations in the ART, *Member Code of Conduct for Non-Judicial Members* (14 Oct 2024) <art.gov.au> pt 4 obligation 4.1, 4.5; pt 5, 5.1(a), pt 7, obligation 7.2, 10.6

[5] Eg NCAT Act s 20(1)(d)(1); ART Act s 201(f); QCAT Act s 172(2)(c)(i).

[6] Eg TASCAT Act ss 94, 47(1)(d).

instrument.[7] While most tribunal codes of conduct lack an express statutory enforcement mechanism, the tribunal head may counsel a member for a breach. In the case of a serious breach or repeated breaches, the head may refer the member's conduct to the Attorney-General (or other responsible Minister) or recommend that the member not be reappointed at the end of the member's current term.

A recent tribunal Act that provides for a code with a direct link to enforcement is the *Administrative Review Tribunal Act 2024* (Cth). Section 201 requires the President to determine and publish a code of conduct for non-judicial members. The code must provide for the taking of action by the President in relation to compliance with the code.[8] A serious breach of the code may lead to the termination of a non-judicial member's appointment (see this Chapter at **8.6.2.2**).[9]

8.3.1 Content of a code: the ART *Code of Conduct*

Few tribunals publish their codes of conduct, and not all tribunals have one.[10] An example of a recent code is the *Code of Conduct for Non-Judicial Members* made by the President of the Administrative Review Tribunal ('ART Member Code').[11] Chapter 1 of the ART Code sets out 'Obligations', described as 'the minimum standards of conduct with which [members] must comply'.[12] Each obligation is preceded by an explanatory preamble which refers to relevant legislation, principles, other normative standards and contextual factors. Chapter 2 sets out provisions for education and training to assist members to uphold the code (div A p 19), and action in relation to a member who may not uphold the code (div B pt 20).

The 15 obligations are defined in Chapter 1 under the following headings: compliance with the law and the President's directions, integrity, independence and conflicts of interest, impartiality, confidentiality, plagiarism, improper use of generative AI, social media and public activities, membership of a regulated profession, courtesy and respect, sexual harassment, bullying, discrimination, violence and victimisation. The obligations are expressed in specific and prescriptive language, using terms defined in the code, for example,

> **10.2** A Member must not purport to represent the views of the Tribunal in a Public Activity or on Social Media without the prior written approval of the President.
>
> [Underlined terms are defined in ch 1 pt 2 of the Code].

As the example of the ART Member Code demonstrates, the areas of conduct regulated by tribunal Acts, member codes and conduct guides has expanded in recent years to include topics

---

7 TASCAT Act s 45 provides for member to hold office on terms specified in the instrument of appointment.

8 ART Act s 201(2).

9 ART Act s 201221(1)(f).

10 NCAT has published its *NCAT Member Code of Conduct* on its website <ncat.nsw.gov.au>. See also TASCAT Code at <tascat.tas.gov.au>.

11 ART Member Code of Conduct, above n 4.

12 Ibid [1.7].

such as sexual harassment, bullying, victimisation, discrimination, use of social media and generative AI. There is also a trend (evident also in tribunal legislation) to include more comprehensive restrictions or disclosure obligations with respect to types of off-duty activities that may conflict with a tribunal member's functions.

8.4 Conduct guides

8.4.1 Conduct guides—overview

If the tribunal has no code of conduct for members, or if the tribunal's code does not provide the information sought, members may find assistance in the guides discussed below. Codes deal with behaviour and tend to be written in prescriptive and specific terms, while a guide discusses the principles and standards that can be used to guide members as to the appropriate way to conduct themselves in particular situations.

Written for administrative tribunals, the Administrative Review Council's *A Guide to Standards of Conduct for Tribunal Members* is organised around seven major themes as 'core administrative law values', being respect for the law, fairness, independence, respect for persons, diligence and efficiency, integrity, and accountability and transparency.[13]

Under the auspices of the Council of Chief Justices of Australia and New Zealand, the Australasian Institute of Judicial Administration (AIJA) publishes the *Guide to Judicial Conduct.*[14] Although written for judicial officers, it provides guidance in maintaining impartiality and integrity in on-duty and off-duty conduct and activities.

The ARC Guide and the *Guide to Judicial Conduct* are resources that tribunals can use in developing their own codes of conduct for members.

The Judicial Commission of Victoria is empowered to make guidelines about standards of ethical and professional conduct expected of judicial and non-judicial members of VCAT.[15] The Commission has adopted the *Guide to Judicial Conduct* as the principal source of guidelines for standards of ethical and professional conduct expected of all VCAT members.[16] The Commission has also made the following supplementary guidelines, stating that it will apply them when investigating a complaint or referral relating to a VCAT member: the *Sexual Harassment Guideline*,[17] and the *Judicial Bullying Guideline*.[18] The supplementary guidelines are discussed in this Chapter at **8.4.4**.

---

[13] Administrative Review Council, *A Guide to Standards of Conduct for Tribunal* Members (2001, revised 2009) <coat.asn.au>, v ('the ARC Guide').

[14] AIJA, *Guide to Judicial Conduct* (3rd ed, 2017, rev'd 2023) <aija.org.au>.

[15] *Judicial Commission Act 2016* (Vic) s 134(1)(a); *Constitution Act 1975* (Vic) s 87AAL.

[16] As stated in Judicial Commission of Victoria, *Sexual Harassment Guideline* 22 February 2022 <judicialcommission.vic.gov.au/guideline/> 2.

[17] Ibid, made 14 April 2023, fn 1.

[18] Made 24 May 2023, <judicialcommission.vic.gov.au/guidelines/judicial-bullying-guideline/> 15, B4.

An additional resource which may provide guidance for members of New Zealand tribunals is the Courts of New Zealand, *Guidelines for Judicial Conduct 2009*.[19] The *Guidelines* address four topics: conflict of interest and recusal; a protocol relating to activities of judges; complaints; and concerns about court proceedings. Although written for judges, the guidelines may be instructive for non-judicial members.

Some tribunal members are trained as mediators and undertake mediations in their tribunal work. Useful conduct guides for mediators include the Law Council of Australia's *Ethical Guidelines for Mediators*, and the AMDRAS Standards (replacing the *National Mediator Accreditation System Practice Standards*: see **Chapter 4** at **4.4.1**). Other sources of ethical norms and practice guidelines mentioned elsewhere in this Guide include those for dealing with persons with a cognitive impairment (see **Chapter 5** at **5.5.2.2**) the AGAC Guidelines; and resources produced by the Judicial Council on Diversity and Inclusion (JCDI) for developing cultural competency and communicating via interpreters (**Chapter 5** at **5.5.2.1**).

The standards of conduct for judicial officers and tribunal members to some extent overlap with the grounds for judicial review discussed in previous chapters. For example, overbearing or dismissive conduct towards a party or witness may breach the hearing rule and/or the bias rule of natural justice. It may also contravene the tribunal's code of conduct or other conduct standard and be the subject of a complaint.

The material in the next two subsections of this Chapter should be read with reference to the discussion of bias issues in **Chapter 3,** the discussion in **Chapters 5** and **6** regarding the appropriate treatment of persons who appear before tribunals, and the duties of administrative tribunals in the ACT, Victoria and Queensland not to act in a way that is incompatible with a human right, or to fail to give proper consideration to a relevant human right when making a decision.[20]

More detailed discussion of the main conduct guides mentioned above is found in the following paragraphs.

8.4.2. The ARC Guide

In the ARC's *A Guide to Standards of Conduct for Tribunal Members* ('the ARC Guide'), the seven major themes are broken down into a series of sub-categories or components, each with detailed comments.

8.4.2.1. Respect for the law

- A tribunal member should demonstrate a respect for the law in the performance of their tribunal responsibilities. The ARC suggests that when behaviour has the capacity to

19 <wwwcourtsofnz.govt.nz>.

20 *Human Rights Act 2004* (ACT) ss 40-40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 3(1), 38(1); *Human Rights Act 2019* (Qld) ss 9(1), (58), discussed in **chapter 6** at **6.2.12.2.**

damage the integrity or reputation of the tribunal or raise doubts as to the ability of the member to perform tribunal functions in an appropriate fashion, it is in breach of the principle of 'respect for the law'.

- A tribunal member should also demonstrate a respect for the law in private life. Unless specifically provided for by statute or administratively, the question of what is and what is not acceptable behaviour must be determined on the basis of the facts of each case, judged from the viewpoint of a reasonable person.[21]

8.4.2.2. Fairness

- A tribunal member should ensure that each party to a proceeding is afforded the opportunity to put their case. (See **Chapter 3** at **3.3.3**.)
- A tribunal member should act without bias and in a way that does not give rise to an apprehension of bias in the performance of their tribunal decision-making responsibilities. (See **Chapter 3** at **3.4**.)
- A tribunal member should be proactive and comprehensive in disclosing to all interested parties interests of the member that could conflict (or appear to conflict) with the review of a decision. (See **Chapter 3** at **3.4.9**.)
- A tribunal member should have regard to the potential impact of activities, interests and associations in private life on the impartial and efficient performance of their tribunal responsibilities. Notwithstanding that many tribunal members are appointed to a tribunal precisely because of their knowledge of and interest in a particular group or field of professional activity, a high standard of impartiality is required. (See **Chapter 3** at **3.4.6**)
- A tribunal member should not accept gifts where this could reasonably be perceived to compromise the impartiality of the member or the tribunal.

8.4.2.3. Independence

- A tribunal member should perform their tribunal responsibilities independently and free from external influence.
- While tribunals are part of the executive arm of government, tribunal members should bring the same quality of independent thought and decision-making to their task as do judges.

8.4.2.4. Respect for persons

- A tribunal member should be patient, dignified and courteous to parties, witnesses, representatives, tribunal staff and officials and others with whom the member deals and should require similar behaviour of those subject to their direction and control. (See **Chapter 5** at **5.4**.)

---

[21] See also JP Thomas, *Judicial Ethics in Australia* (3rd ed, Law Book Company Ltd, 2009) 140–1, 198–9.

- A tribunal member should endeavour to understand and be sensitive to the needs of persons involved in proceedings before the tribunal. (See **Chapter 5**.)

8.4.2.5. Diligence and efficiency

- A tribunal member should be diligent and timely in the performance of tribunal responsibilities. (See **Chapter 5** at **5.4.1**.)
- A tribunal member should take reasonable steps to maintain and to enhance the knowledge, skills and personal qualities necessary to the performance of tribunal responsibilities.[22] (See **Chapter 8** at 8.5.3)

8.4.2.6. Integrity

- A tribunal member should act honestly and truthfully in the performance of tribunal responsibilities.
- A tribunal member should not knowingly take advantage of, or benefit from, information not generally available to the public obtained in the course of the performance of tribunal responsibilities.
- A tribunal member should not use their position as a member to improperly obtain, or seek to obtain, benefits, preferential treatment or advantage for the member or for any other person or body.
- A tribunal member should be scrupulous in the use of tribunal resources.
- In private life, a tribunal member should behave in a way that upholds the integrity and good reputation of the tribunal.

8.4.2.7. Accountability and transparency

- A tribunal member is accountable for decisions and actions taken as a tribunal member and should fully participate in all applicable scrutiny regimes (including legislative and administrative scrutiny).
- Accountability is fundamental to good government and is a cornerstone value of a modern, open society.
- A tribunal member should be as open as possible about all decisions and actions (including lack of action) taken in the performance of tribunal responsibilities.

8.4.2.8. Responsibility of tribunal head

- A tribunal head should assist tribunal members to comply with the principles of conduct and to perform their tribunal responsibilities, through the provision of appropriate leadership, training and support.

---

22 ARC Guide, above n 13, 44, 5b

8.4.3 The *Guide to Judicial Conduct*

The *Guide to Judicial Conduct* is of interest and assistance to tribunal members on conduct issues. Its purpose is to give 'practical guidance' to members of the Australian judiciary at all levels, indicating how particular situations might best be handled.[23] It recognises that in the area of conduct and ethics there is often a range of reasonably held opinions on many of the issues which arise for discussion. In other words, it will often not be possible or sensible to 'lay down the law' on what the correct approach to a particular issue might be. There may well be different considerations and approaches.

The *Guide to Judicial Conduct* identifies three fundamental principles as the test for assessing conduct:

- impartiality
- independence
- integrity and personal behaviour.

The key objectives to which these principles are directed are:

- to uphold public confidence in the administration of justice
- to enhance public respect for the institution of the judiciary
- to protect the reputation of individual judicial officers and of the judiciary generally.[24]

Particular chapters are devoted to matters such as impartiality, conduct in court, activities outside court, non-judicial activities, and post-judicial activities. Readers are referred to the guide itself for the detail of the discussion on these objectives but the following provides an overview of some particularly relevant chapters.

Chapter 3 of the *Guide to Judicial Conduct* deals with impartiality under the following subheadings:

- associations and matters requiring consideration
- activities requiring consideration
- conflicts of interest
- shareholding in litigant companies, or companies associated with litigants
- business, professional and other commercial relationships
- judicial involvement with litigant community organisations
- personal relationships
- other grounds for possible disqualification

---

23 AIJA, *Guide to Judicial Conduct*, above n 14 [1.1].

24 Ibid at 3.

- disqualification procedure.

For details on these issues contained within this Guide, see **Chapter 3** at **3.4**.

Chapter 4 of the *Guide to Judicial Conduct* is devoted to issues of conduct in court and has the following items:

- conduct of hearings
- participation in the hearing
- private communications
- oral judgments
- reserved judgments
- critical comments
- the judge as a mediator.

Activities outside the court are covered in Chapter 5. Guidance is provided in relation to matters such as:

- membership of government advisory bodies or committees
- making submissions or giving evidence to a parliamentary inquiry relating to the law or some aspect of the legal system
- making public comments and participating in public debate on various matters
- legal teaching and writing for newspapers or periodicals
- appearing on television or radio
- taking part in conferences
- professional development
- welfare of colleagues.

On dealing with the media, see further in this Guide at **Chapter 7** at **7.4**.

Chapter 6 of the *Guide to Judicial Conduct* covers various aspects of conduct further removed from mainstream judicial activities. It includes matters such as the following:

- judicial officers being involved in commercial activities
- accepting gifts
- being engaged in community organisations and public fundraising
- providing character and other references
- participating in social and recreational activities
- membership of clubs
- visits to bars and clubs

- gambling
- involvement in sporting and other clubs and committees.

Chapter 8 provides a guide to resolving issues involving the family of a judge, such as whether a judge should decline to attend or assist in certain activities related to the business, employment, fundraising or political activities of the judge's spouse or another family member. It observes that, while judges should not retreat from normal family life or society, both they and their family may need to consider public attitudes and perceptions that may lead to their conduct being treated differently from the manner in which other community members are treated. While these aspects may not be as pertinent to tribunal members as to judicial officers, they are still relevant and likely to be of interest.

Chapter 9 deals with issues arising from communication media and modes of social interaction facilitated by new technologies, collectively called 'social media'. The chapter finds no reason in principle to deny judges the use of social media. It identifies risks that need to be managed. It advises that 'a judge needs to be aware of the practical operation of social media, and how it may create risks', such as:

- the judge's use of social media may reveal communications to which the judge is a party that, by reason of their content, or the persons with whom the judge is in communication, could be perceived as compromising the judge's integrity and objectivity
- communications (including photographs and videos) intended for a limited audience may be more widely distributed, even if protected by privacy settings, anonymous posting or deletion
- disclosure of personal information through the social media of the judge or a family member may create a security risk.

The chapter provides useful guidance for judges, including the following tips:

- be mindful of the persons with whom the judge communicates through social media, in case of potential bias by association
- take care who sees what the judge communicates
- use the highest privacy settings, but be aware that they can be altered, and may not prevent others from sharing material posted by the judge
- give careful consideration to the content of any communication by the judge which could embarrass the judge if it became public
- counsel family members not to comment in social media on the judge's views, associates or any cases in which the judge is or has been involved
- be mindful of the possibility that the judge or family members may be recorded by cameras and sound recording at public or private events.

This chapter is highly relevant to tribunal members.

8.4.4 The Judicial Commission of Victoria Guidelines

Under its statutory power to make guidelines about standards of ethical and professional conduct,[25] the Judicial Commission of Victoria has made guidelines which it will apply when investigating a complaint against a 'judicial officer' (defined for this purpose to include a non-judicial member of VCAT). The making of the guidelines was informed by research into standards and definitions that apply in Australian workplace laws and relevant factors to consider in court and tribunal contexts. While the guidelines have legal force only in Victoria, the definitions, examples and commentaries may provide useful guidance for tribunal members in other jurisdictions on topics which are not covered in the other conduct guides.[26]

8.4.4.1 The Sexual Harassment Guideline

The *Sexual Harassment Guideline* states that sexual harassment and related victimisation can amount to serious misbehaviour that could warrant the removal of a judicial officer from office.[27] It defines the kinds of behaviours that constitute sexual harassment and related victimisation. The Guideline specifies the standard of behaviour expected of a judicial officer in their workplace or in other places where they carry out their duties, including while attending conferences, committees, views, circuits, training events and social functions.

An interesting aspect of the Guideline is that it articulates a standard of 'bystander conduct'. A judicial officer is under a duty to act and to report to their head of jurisdiction if the officer witnesses or becomes aware of an instance or an allegation of sexual harassment.[28] Conversely, any person including a third party who is a bystander to an instance of sexual harassment can make a complaint to the Commission about a judicial officer. For example, the principal of a law firm can make a complaint about the conduct of a judicial officer towards an employee of the firm.[29]

8.4.4.2 The Judicial Bullying Guideline

The Commission's *Judicial Bullying Guideline* states that 'judicial bullying is a serious issue and one that, depending on circumstances, may amount to a misuse of judicial office'.[30] The definition of judicial bullying in the Guideline is consistent with the established meaning of bullying in Australian workplace law, but the commentary takes account of the judicial context.[31] Judicial bullying is defined as conduct which is objectively unreasonable, and

---

25 *Judicial Commission of Victoria Act 2016* (Vic) s 134(1)(a).

26 The topics covered in the Judicial Commission of Victoria guidelines outlined below are also addressed, in a less detailed manner, in the ART *Member Code of Conduct* ART Member Code of Conduct, above n 4. See this Chapter at [**8.3.1**].

27 *Sexual Harassment Guideline*, above n 16, C2.

28 Ibid B4.

29 Ibid C1.

30 *Judicial Bullying Guideline*, above n 18 [1.9].

31 Ibid [2.3].

> includes, but is not limited to, conduct that a reasonable person would, having regard to all the circumstances, perceive as belittling, humiliating, insulting, victimising, aggressive or intimidating.[32]

It is not necessary to show that the conduct has been repeated. The definition may be satisfied by a single occasion of bullying conduct.

The Guideline recognises that judicial officers are responsible for managing and controlling the hearing, and that the hearing process can involve 'robust and vigorous legal debate and adversarial exchanges'.[33] It provides examples of acceptable conduct, examples of conduct which amount to judicial bullying, and forms of conduct that may or may not constitute judicial bullying depending upon the assessment of specified factors.[34] The Guideline also deals with victimisation of a person in connection with a complaint about judicial bullying.

As with the Sexual Harassment Guideline, judicial officers are expected to act and report if they witness judicial bullying or victimisation or if it is reported to them.[35]

8.5. Performance standards and development

Some tribunals have established a structured process for ongoing appraisal of the performance of each member.[36] The purposes are to review the member's work allocations and achievements and plan for the member's further professional development. The process may include self-appraisal, peer feedback, and feedback from the tribunal head or another member of appropriate seniority.

8.5.1 Member competency framework

For members to perform at their best, tribunals need to communicate clear expectations of the standards of competence and conduct expected of members. Along with the member code of conduct, it is helpful for a tribunal to adopt a member competency framework defining the abilities, skills, knowledge, behaviours, attitudes, and values which demonstrate professional excellence in the role of tribunal member.

COAT has produced a guide to assist tribunals in developing a competency framework suited to their individual circumstances. The *Tribunal Competency Framework* identifies eight competencies, with associated qualities and performance indicators, and gives examples of how each competency is demonstrated in the member's practice.[37] See above **Chapter 1** at **1.5.2**.

---

32 Ibid [2.4].

33 Ibid [2.10].

34 Ibid [2.10] – [3.1].

35 Ibid [4.1]- [4.7].

36 In some Acts the head is given the function of setting performance standards or undertaking performance management for members, eg, QCAT Act s 172(2)(c)(ii); ART Act ss 202, 208(9); TASCAT Act s 14(2)(d), (f)(g).

37 COAT, *Tribunal Competency Framework* <https://coat.asn.au/>, 3.

The framework is designed to 'provide fair and transparent criteria to facilitate the appraisal of tribunal members' and to 'facilitate a competency-based approach' to monitoring each member's professional development and meeting their training needs.[38]

Along with a code of conduct, a competency framework serves a valuable function in informing members about the 'full range of critical abilities and qualities expected of them'.[39] The competencies extend beyond subject knowledge to include behaviours and values.

8.5.2 Performance standards

In addition to the code of conduct, some tribunals have established performance standards for members. The standards may include descriptors, criteria and benchmarks for the performance of the member's duties in a timely and competent manner.

The ART Act ss 201 and 202 require the President to adopt both a code of conduct and a performance standard for non-judicial members of the ART. While the Act does not distinguish the content of the two documents, the President of the ART has inferred that 'the code should deal with the behaviour of members while the standards should deal with the quality and timeliness of their work'.[40] The President has indicated that the ART standards may include such matters as

> benchmark periods within which non-judicial members are expected to provide written reasons for their decision and the maximum number of overdue decisions such a member may have at any one time.[41]

The competency framework, code of conduct and performance standards operate in a complementary fashion to define professional excellence and to support professional development and merit-based re-appointment processes.

8.5.3 Education and training

To enable tribunal members to develop their competencies, suitable educational programs and resources are needed. Some larger tribunals have their own professional development programs to support their members. VCAT members additionally have access to a range of programs offered by the Judicial College of Victoria. COAT and other providers offer recurring short courses as well as seminars, workshops and conferences which give members the opportunity to learn from experts in company with colleagues from other tribunals. Some of these programs are available online. Details of providers of further education for tribunal members and other learning resources can be found in **Chapter 10** at **10.3** of this Guide.

---

38 Ibid 3.

39 Ibid 2.

40 The Hon Justice Emilios Kyrou AO, 'The Art of Merits Review – Significant Changes to Membership Provisions' (Paper presented to the 2024 COAT Annual Conference, Brisbane, 6 June 2024) 6.

41 Ibid 7-8.

While members' participation in professional development is still largely voluntary,[42] practitioners in other professions are commonly required to devote a specified quantum of hours per year to their professional development. Some tribunal Acts empower the President to direct members or classes of members to participate in particular education or training activities.[43] The President of the ART has said that the performance standards for non-judicial members of the ART will include an enforceable obligation to participate in mandatory professional development.[44]

8.6 Removal of a member from office

Tribunal Acts commonly distinguish two different ways in which a member's term of appointment can end prematurely. The first type is generally termed a 'vacation of office' provision. This type of provision declares that the appointment will terminate upon the occurrence of a specified event. The specified event may be one which deprives the member of a qualification to hold the office,[45] or it may be the member's insolvency.[46] The second type of provision, which may be termed a 'removal from office' or 'termination of appointment' provision,[47] requires a decision to terminate the appointment or to remove the member from office for a stated ground such as misbehaviour or incapacity.

The treatment of the topic below commences with the Judicial Commission Acts of Victoria and the Northern Territory, which are clearly drafted and provide detailed coverage as to the procedures for removal. The provisions mirror those that apply to the removal of judicial officers.

The provisions discussed under this sub-heading relate to non-judicial members.

8.6.1 Removal under the Judicial Commission Acts

8.6.1.1 VCAT members

The Judicial Commission of Victoria is an independent body established by statute to investigate complaints and referrals about the conduct and capacity of judicial officers and non-judicial members of VCAT. It can receive complaints from anybody and referrals from the head of jurisdiction, the Attorney-General or the State's integrity body IBAC.

The *Judicial Commission of Victoria Act 2016* (Vic) s 13(3) requires the Commission to refer to an investigating panel a complaint or referral which in the Commission's opinion 'could, if

---

[42] Subject to the ARC conduct standard 5b quoted in this Chapter at **8.4.2.5**, provisions in tribunal Acts and in instruments of appointment and other instruments.

[43] Eg QCAT Act s 173.

[44] Kyrou, above n 40.

[45] Eg TASCAT Act s 46(a); VCAT Act s 21(1), (3).

[46] Eg VCAT Act s 21(2).

[47] The TASCAT Act s 47 uses the term 'revocation of appointment'.

substantiated, amount to proved misbehaviour or incapacity such as to warrant the removal of an officer concerned from office'.[48] The expression 'proved misbehaviour or incapacity' mirrors the grounds for removing a judicial officer under the *Constitution Act 1975* (Vic) s 87AAB(1). The expression is not defined in the legislation. Some assistance as to the meaning of 'misbehaviour' can be found in this chapter at **8.6.1.3**.

The investigating panel must follow the procedures specified in Part 5 of the *Judicial Commission of Victoria Act*. If it concludes that facts exist that could warrant the removal of the officer on the grounds of misbehaviour or incapacity, the panel may report its findings and conclusion to the Attorney-General.[49] After consulting the President of VCAT, the Attorney-General may recommend to the Governor in Council that the officer be removed from office.[50]

If the Commission considers that a complaint or referral does not meet the statutory condition for referral to an investigating panel, the Commission may decide that the matter warrants its further consideration if—

- the conduct of the member may have breached the standards of conduct generally expected of VCAT members, or
- the matter may affect or have affected the performance of the member's functions.[51]

The Commission must refer the matter to the President of VCAT with a report as to its findings of fact, its assessment of the appropriateness of the conduct, and its recommendations in relation to the member's future conduct.[52]

The Commission publishes a statement when it finalises a complaint against a judicial officer or VCAT member with recommendations for further action, or in cases of public interest where the complaint is dismissed.[53]

8.6.1.2 NTCAT members

Similar provisions apply to complaints about the behaviour or capacity of a judicial or an 'ordinary' (non-judicial) member of NTCAT. Complaints may be made to the Territory's Judicial Commission under s 40 of the *Judicial Commission Act 2020* (NT). The Commission can refer complaints to an investigation panel. After following the procedures under the Act, the investigation panel may report to the Administrator its opinion that the matter could justify the termination of the appointment of an NTCAT member on the ground of incapacity or

48 The investigating panel is constituted under Part IIIAA of the *Constitution Act 1975* (Vic).

49 *Judicial Commission of Victoria Act 2016* (Vic) s 34(5).

50 Ibid ss 120, 121. As at 31 December 2024, no VCAT member had been removed under this procedure.

51 Ibid ss 16(1)(b).

52 Ibid ss 13(4), 19(3).

53 < judicialcollege.vic.edu.au/resources/conduct-and-ethics>. As at 31 December 2024, the Commission had published one statement in which a finding of breach of conduct standards (by reason of delay in delivering a reserved decision) was made concerning a tribunal member.

misbehaviour.[54] The Minister must table the panel's report before the Legislative Assembly.[55] The Administrator may subsequently terminate the member's appointment on the address of the Legislative Assembly.[56]

Like its Victorian counterpart, the Judicial Commission of the Northern Territory can receive and investigate complaints but has no power to discipline a member. It may refer a complaint to the President of NTCAT under s 49(1) if satisfied on reasonable grounds that the complaint is wholly or partly substantiated but is not serious enough to justify establishing an investigation panel. There is a further possibility of referral to the President under s 56(1) where, after investigation, the panel finds the complaint to be wholly or partly substantiated but is of the opinion that the matter does not justify giving consideration to the removal of the member from office. When referring a complaint under s 49(1) or s 56(1), the Commission may include in its report to the President its recommendations as what action should be taken in relation to the complaint.[57]

8.6.1.3 Misbehaviour

There is very limited Australasian jurisprudence relating to the general meaning of 'misbehaviour' as a ground for removal, whether in a tribunal or judicial context. Its meaning was considered by the Commissioners who investigated the case of former Australian High Court Justice, Lionel Murphy, in the 1980s.[58] In considering what might constitute removable behaviour on the part of a judge, the Commissioners referred to whether:

- the conduct, judged by contemporary standards, throws doubt on suitability to continue in office
- the conduct, being morally wrong, demonstrates unfitness to continue
- the behaviour represents such a serious departure from the standards of proper behaviour that it must be found to have destroyed public confidence.

In the federal judicial context, where a vote of both Houses of Parliament is a necessary precondition to removal of a judge, Blackshield has noted that 'misbehaviour' is essentially a political rather than a legal notion.[59]

The meaning of 'misbehaviour' in s 11 of the *Inquiries Act 1991* (ACT) ('Inquiries Act') was considered by the ACT Integrity Commission in its report to Parliament on the findings of its inquiry under s 182 of the *Integrity Commission Act 2018* (ACT) ('IC Act'). The central issue in the Commission's inquiry was whether a person, while acting as the Board of Inquiry

---

[54] *Judicial Commission Act 2020* (NT) ss 57(2).

[55] Ibid s 58.

[56] Ibid s 64; see also NCAT Act s 19.

[57] Ibid ss 49(2), 56(3).

[58] Australian Parliament, Parliamentary Commission of Inquiry, *Special Report* (August 1986).

[59] AR Blackshield, 'The Appointment and Removal of Federal Judges,' in B Opeskin and E Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, Melbourne, 2000) 422.

appointed under the Inquiries Act to inquire into the conduct of the Director of Public Prosecutions, had engaged in 'corrupt conduct'. In support of its finding that the impugned conduct 'could constitute a serious disciplinary offence' under para 9(1)(a)(ii) of the IC Act, a term which includes misbehaviour warranting dismissal or termination,[60] the Commission said:[61]

> 'Misbehaviour' is a term commonly used in legislation as a ground for terminating a statutory appointment —sometimes in the form of "proved misbehaviour". The term necessarily takes meaning from the context in which it is used, a central theme being that it draws attention to a person's fitness or suitability to continue holding a particular statutory office. The nature and functions of the office are therefore centrally relevant … Furthermore, maintenance of public confidence in an office (or officer) is an important consideration in deciding whether particular conduct constitutes misbehaviour worthy of dismissal….

8.6.2 Removal under the tribunal's governing Act

Allegations of a serious nature about a member's capacity or conduct may cause the tribunal head to consider whether to initiate the procedure which could lead to the termination of the member's appointment. Almost all governing Acts for tribunals include provisions relating to the removal of a non-judicial member from office during a current term of appointment. These 'termination provisions' are highly diverse as to their grounds for removal.

8.6.2.1 Grounds for removal

At one end of the spectrum are provisions for the removal of non-judicial members which mirror the provisions for removal of judges. This type of provision empowers the Governor (or Governor-General) to remove the member for misbehaviour or incapacity.[62] The grounds are left undefined because, in the context of judicial independence, they have taken their meaning from common law.

Some New Zealand statutes allow removal of a member on the grounds of disability affecting the performance of duties, bankruptcy, neglect of duty, or misconduct, 'proved to the satisfaction of the Governor-General'.[63] The requirement for proof at the highest level of government ensures a degree of scrutiny and accountability for the removal of a member from office.

At the other end of the spectrum are provisions that appear to allow the Governor, or even the Minister acting alone, to remove a member, without specifying the grounds or process. For

---

60 ACT Integrity Commission, Investigation Report: Operation Juno, *Concerning certain conduct of Mr Walter Sofronoff KC* (March 2025) <www.integrity.act.gov.au> [125], [129], [135]. [142].

61 Ibid [126].

62 *Fair Work Act 2009* (Cth) s 641; (also requires an address by the Houses of Parliament); cf the repealed *Administrative Appeals Tribunal Act 1975* (Cth) s 55.

63 Eg *Immigration Act 2009* (NZ) sch 2 cl 1(3); *Disputes Tribunal Act 1998* (NZ) sch 2 cl 1(3); *Residential Tenancies Act 1986* (NZ) s 68(3).

example, the *Anti-Discrimination Act 1977* (NSW) s 76 provides that the Governor may remove a member of the Anti-Discrimination Board (other than the President) from office 'for any cause which to the Governor seems sufficient'. While such provisions can still be found in tribunal Acts, a recent trend is evident to replace them with provisions stating the grounds for removal.

There is a recent trend in tribunal legislation to provide for the establishment of a member code of conduct, and to provide for a breach, or a serious breach, of the code as a ground for removal.[64]

Even where grounds for removal are stated in legislation, they are sometimes loosely defined or lack objective criteria. For example, a member of the Housing Appeal Panel of South Australia can be removed by the Minister for 'failure or incapacity to carry out official duties satisfactorily'.[65] The Governor of Queensland may terminate the appointment of a member of QCAT or the State's Mental Health Review Tribunal if satisfied that the member performed their duties 'carelessly, incompetently or inefficiently'.[66]

8.6.2.2 Removal grounds: the example of the ART Act

The termination provisions of some recent Acts have been drafted with more precision. The *Administrative Review Tribunal Act 2024* (Cth) ('ART Act') was drafted with the benefit of public consultation and expert advice. Section 221(1) of the Act provides that the Governor-General, on the recommendation of the Attorney-General, may terminate a non-judicial member's appointment on any of ten grounds which include where—

- the member's conduct or behaviour amounts to serious misconduct or constitutes a serious breach of the code of conduct or the performance standard made by the President.
- the member is unable to perform their duties because of physical or mental incapacity.
- the member fails to comply with certain provisions of the Act which are directed to avoiding the member having undisclosed interests or engaging in unapproved outside work that may conflict with the proper performance of the member's duties.
- the member is unavailable for duty for specified periods without being on leave of absence.

Section 221(2) provides that the kinds of conduct which may amount to a serious breach of the code of conduct or the performance standard include—

- repeated breaches
- a breach which is likely to damage public trust and confidence in the tribunal

---

64 Eg TASCAT s 47(1)(d), with ss 45(1), 94; ART Act ss 201, 203(1)(a), 221(1)(f).

65 *South Australian Housing Trust Act 1995* (SA) s 32B(4).

66 QCAT Act s 188(1)(iii); *Mental Health Act 2016* (Qld) s 711(1)(b).

- a breach after the member has been given a written direction from the President relating to the performance of the member's duties under s 200(1).

8.6.3 Process for removal

Many of the tribunal Acts say very little about the process for establishing that grounds exist to remove a non-judicial member. Any process that is put in place must at least meet the requirements of natural justice.

In general terms, the process begins when the tribunal head forms an opinion that there may be grounds for the removal of a member. The Act may empower the head to stand the member down, or to do so with the Minister's approval.[67] The head then appoints an investigator to undertake an investigation into the conduct of the member or other circumstances and provide a report, usually to the Minister. The investigator gives the member an opportunity to respond to the matters alleged and to any adverse finding or recommendation that the investigator is proposing to make. On receiving the report, the Minister decides whether the member should be removed from office and advises the Governor or Governor-General.

It is rare for a non-judicial member's appointment to be terminated under the removal provisions. The members are usually appointed for relatively short terms (3-5 years), the processes for termination can be protracted, and other approaches to managing the matter of concern may be tried before the removal process is commenced. Removal for incapacity is much less likely than for judges who are appointed to a statutorily specified age rather than for a term of years.

Regardless of how rarely they are applied, the removal provisions in each tribunal Act play a crucial role in defining the extent to which members enjoy security of tenure during their term of appointment.

---

[67] The Act may provide that the member remains entitled to their usual remuneration and allowances during suspension.

Chapter 9: Complaints

9.1 Key points

Who handles complaints about members?

- Many tribunals now publish procedures for receiving and handling complaints about their members, their staff and the tribunal's operations.
- In each jurisdiction, the ombudsman has an important role in setting standards for the design and operation of complaint handling processes for public sector agencies. The ombudsman standards are generally consistent across all jurisdictions.
- The ombudsman has a limited role in reviewing the conduct of members in exercising their adjudicative functions but may review the way a tribunal has handled a complaint.
- In Victoria and the Northern Territory, complaints about members of VCAT and NTCAT are received by the Judicial Commission, which has power to refer them to an investigation panel. Less serious matters are referred to the President of the tribunal.
- In other jurisdictions, complaints about non-judicial members are generally received by the tribunal and dealt with by the tribunal under its own complaint handling procedures.

What complaints about members are handled?

- In Australia, anyone may make a complaint about a tribunal member. In New Zealand, the guidelines for tribunals overseen by the Ministry of Justice are more restrictive.
- Tribunals have different definitions of what a 'complaint' is for purposes of engaging the complaint handling process. Specified types of complaint may be excluded.

Complaint handling procedure

- Complaints about members are generally handled at a senior level within the tribunal.
- Complaint handling must be conducted in confidence, and complaint files must be kept separate from case files.
- Many complaints are dealt with on first assessment and may be dismissed or referred to a more appropriate agency or avenue (eg, an appeal). An early resolution may be sought by offering the complainant an explanation, clarification or assistance.
- Members can expect to be given an opportunity to respond to the complaint if it is assessed as requiring a substantive response.
- Special considerations apply where the complaint relates to a pending proceeding or to a matter for which an appeal or review is pending or could be instituted.

- There is no general requirement to stand down the member or change the member's work allocations just because a complaint has been made.

Possible outcomes if the complaint is upheld

- The most usual outcomes of a complaint that has been upheld are that the tribunal provides an acknowledgment of what has occurred, an explanation or reasons or an apology in specific terms (if appropriate). The tribunal may in some situations propose a change to tribunal policies, procedures, communications or training.

Action outside the complaint handling process

- Complaints provide a source of data to be considered along with other observations in the management of a member's performance. Tribunals and members reflect upon complaints to identify opportunities for improvement.
- In rare cases, a complaint may allege conduct by the member which could amount to a serious or repeated breach of conduct standards. If the matter is sufficiently serious to warrant consideration of the member's removal from office, the tribunal head may decide to refer the allegation for formal investigation.

9.2 Who receives complaints about members?

9.2.1 Judicial and non-judicial members

The Ministry of Justice New Zealand, which administers 27 New Zealand tribunals, has published guidelines which provide that complaints about a judge or a judicial member of a tribunal should be made to the Office of the Judicial Conduct Commissioner.[1] Complaints about tribunal heads ('chairs') can be made to the responsible minister, and complaints about other members can be made by writing to the relevant chair.[2]

Most jurisdictions have established an independent Commission, a Council or an office of Commissioner to investigate complaints about the conduct or capacity of judicial officers, or are contemplating doing so.[3] Only in Victoria and the Northern Territory do the powers of the Judicial Commission extend to complaints about non-judicial members of a tribunal.

In Victoria, complaints about the conduct or capacity of judicial and non-judicial members of VCAT are made to the Judicial Commission of Victoria or referred from VCAT to the Commission.[4] Similar provisions apply to complaints about a judicial or non-judicial member of NTCAT, which may be made to the Judicial Commission of the Northern Territory.[5] Complaints which are not dismissed but are not sufficiently serious to meet the statutory threshold for referral to an investigation panel are referred to the tribunal head for consideration.[6]

In other Australian tribunals, the general position is that complaints about judicial members are received and dealt with under the process for judges or magistrates of the court to which the judicial member has been appointed. Complaints about non-judicial members are received and dealt with by the head of the tribunal under the tribunal's own policies and procedures.

9.2.2 The Ombudsman

Each of the ten jurisdictions has legislated to establish an ombudsman as an independent officer of the Parliament with power to investigate administrative actions and omissions by public authorities. An ombudsman may investigate administrative actions or omissions by most public sector bodies ('agencies'), make non-binding recommendations to the agency, and report to the minister or parliament. The ombudsman may investigate upon receiving a complaint or on the

---

1 Ministry of Justice New Zealand, 'Complaining about a member of a tribunal' <justice.govt.nz>.

2 Ibid 2.

3 Attorney-General's Department (Cth), Scoping the Establishment of a Federal Judicial Commission (Discussion Paper, January 2023); see also the *Judicial Commissions Act 2024* (Tas), which will be empowered to receive complaints about judicial officers and presidential members of TASCAT.

4 *Judicial Commission of Victoria Act 2016* (Vic) ss 13(4), 15(1).

5 *Judicial Commission Act 2020* (NT) s 40.

6 Ibid ss 48(1), 49(1); *Judicial Commission of Victoria Act 2016* (Vic) ss 13(4), 15(1). See further, **Chapter 8** at **8.6.1.1**.

ombudsman's own initiative without a complaint. An ombudsman resolves most complaints expeditiously without proceeding to a formal investigation and report.

In some cases, the ombudsman's powers of investigation extend to administration by a tribunal established by the same jurisdiction. As the legislative provisions are complex and variable, each tribunal needs to make its own assessment of which aspects of its operations can be the subject of an investigation by the ombudsman. The answer may vary according to the nature and subject matter of the complaint.

An ombudsman is generally not likely to investigate a complaint about the decision-making processes of a tribunal in adjudicating a case. This can be due to a statutory limitation on the ombudsman's powers in some jurisdictions,[7] or to a policy adopted by the ombudsman.[8]

If the ombudsman has jurisdiction to investigate administrative action by a tribunal, its jurisdiction may extend to a review of the handling of a complaint by the tribunal. Most complaints about tribunals are handled and resolved by the tribunal under policies and procedures determined by the tribunal for itself. If the ombudsman investigates the handling of a complaint by a tribunal, it may review and recommend changes to the tribunal's procedures. It is therefore sensible for a tribunal to design and operate its complaint handling system consistently with the ombudsman's standards. COAT and AIJA have jointly published a guide to assist tribunals to develop, review and operate a complaint handling system in a tribunal setting which meets the ombudsman's standards.[9]

Some ombudsman offices provide training and resources for complaint handlers in public sector bodies.[10] COAT has additional resources to assist complaint handlers in tribunals.[11]

9.3 Making a complaint

9.3.1 Who can make a complaint?

The guidelines for the New Zealand tribunals administered by the Ministry of Justice (NZ) state that a complaint will be dismissed if the complainant is not 'a person affected by the conduct or matter [complained] about'.[12]

---

7 See eg, *Ombudsman Act 1976* (Cth) s 3 and sub-para (a)(ii) of the definition of 'prescribed authority'; *Ombudsman Act 1978* (Tas) s 12(3), sch 2 para 6; *Ombudsman Act 1972* (Vic) s 15(5), (6).

8 Eg Ombudsman Western Australia, 'Guidelines: Information for boards and tribunals' (May 2009) <ombudsman.wa.gov.au> 7.

9 Pamela O'Connor, *A Better Complaint Handling System for Tribunals* (AIJA Inc and COAT, June 2023) <coat.asn.au> ('the AIJA/COAT Guide')

10 Ibid app C.

11 Tribunals may direct inquiries to secretariat@coat.asn.au.

12 Ministry of Justice New Zealand, 'Complaining about a member of a tribunal', above n 1.

The Acts establishing the Judicial Commissions of Victoria and the Northern Territory do not restrict the persons or bodies who can make a complaint about the capacity or conduct of a member of VCAT or NTCAT.[13] The same approach is taken by most Australian tribunals.

Complaints about tribunal members can be made by parties to proceedings or by their representatives, witnesses, professional associations such as the Bar or Law Society, tribunal employees and contractors, and the media.

The Judicial Commissions of Northern Territory and Victoria accept complaints from third parties who witnessed or are aware of a matter of concern.[14]

9.3.2 About what matters can a complaint be made?

Complaints concerning a tribunal member may be made about a wide range of matters including the following—

- delays, such as in delivering a reserved decision[15]
- inappropriate or disrespectful behaviour towards any person in a hearing, other tribunal process or the workplace
- inattentiveness or disorganisation
- a health issue which impairs the capacity of a member to perform their duties.

Once the complaint is received by the tribunal, it will be assessed to see if it is within the scope of the tribunal's complaints policy. If not, it may be dismissed without investigation, and the complainant may be referred to another more appropriate complaint handling agency or organisation.

9.3.2.1 Definition of complaint

The tribunal's complaints policy defines what the tribunal regards as a 'complaint'. The policies do not all use the same definition. For some tribunals, an expression of dissatisfaction is enough. Other tribunals define a complaint as an expression of dissatisfaction for which a response is required or expected. This means that if the complainant does not require or expect a response, the communication is recorded as feedback to be noted rather than as a complaint requiring a substantive response.

In tribunal complaints policies, the matters about which a complaint can be made are often defined by exception. There is typically a general statement that a person may complain about the staff or members or the functioning of the tribunal, followed by a list of matters about which

---

13 *Judicial Commission of Victoria Act 2016* (Vic) s 5, 6; *Judicial Commission Act 2020* (NT) s 40(1),

14 Northern Territory Judicial Commission, *Annual Report 2023-24*, 7; Judicial Commission of Victoria, *Sexual Harassment Guideline*, (24 May 2023) [7.1]

15 See **Chapter 6** at **6.3.2**.

a complaint cannot be made, or will be dismissed, or will not be investigated. The list of excluded matters commonly includes the types of complaints below—

- complaints which are outside the tribunal's area of responsibility or control, such as complaints about a legal representative or the state of the law
- complaints about a former member of the tribunal, as the complaint handling process is unlikely to result in a useful outcome
- complaints which are frivolous, vexatious or not made in good faith.

Tribunals receive complaints about a range of matters, including services of the registry, the tribunal's physical or online facilities and other matters. The tribunal's complaint handling policies and procedures relate to all categories of complaint. For the purposes of this chapter, the focus is on complaints which relate to members.

A significant proportion of the member-related complaints that tribunals receive are about the tribunal's decisions or the procedures followed in reaching them. Tribunal policies commonly exclude these types of complaints, referring would-be complainants to other avenues (such as appeal). Even so, a tribunal may decide to investigate a complaint that alleges inappropriate behaviour by a member, particularly if avenues of appeal or judicial review are exhausted.[16] In each case the complaint handler will inform the complainant that if they seek a change in the tribunal's decision, they should consider whatever legal avenues are available to them to achieve this outcome.

Changing a final decision is not an available outcome of a complaint process.[17] If an appeal or review by a court or another tribunal is pending, contemplated or timely, the handling of the complaint is likely to be deferred.

9.3.2.2 Complaint about a pending proceeding

Tribunal policies commonly do not state expressly whether a complaint may be made in a proceeding that has not been finalised by the tribunal. A few policies include limitations relating to pending proceedings. For example, the *QCAT Complaints Policy and Procedures* state:

> Generally, it will not be appropriate for the President to investigate complaints about the conduct of pending proceedings. In most cases, it will be appropriate for a party who has concerns to raise the complaint before the tribunal when the matter is next listed for hearing.[18]

---

16 This appears to be the policy adopted by the Ministry of Justice New Zealand for all tribunals within its portfolio; 'Complaining about a member of a tribunal', above n 1.

17 As to why this is so, see AIJA/COAT Guide, above n 9 [6.4].

18 QCAT website <qcat.qld.gov.au>.

Where a complaint about a pending proceeding is not dismissed, the head of tribunal may decide to defer the handling of the complaint.[19] The QCAT Complaints Policy and Procedures explains this course as follows:

> If the President considers that dealing with the complaint might have an adverse effect on the disposition of a matter currently before the tribunal, the President may defer dealing with the complaint until the determination of the matter. If so, the Member concerned would not normally be advised of the complaint in order to avoid any possible perception of bias, and the complainant would be informed of this.

A dissatisfied party may be advised to consider asking the member to recuse themselves from the proceeding. An application for recusal can be made on grounds of actual or apprehended bias (apparent bias or prejudgment in New Zealand) (see **Chapter 3** at **3.4.1** and **3.4.9.4**.

9.3.3 Formal requirements

Some tribunals require that a complaint be made in a particular form, such as by completing and lodging a form online or in hard copy. This does not mean that a complaint can be dismissed just because it is not in the required form. If the person indicates they wish to make a complaint, they should be advised as to how to go about it.

Tribunals have a duty to make their complaints process reasonably accessible to all members of the diverse community.[20] Members should be sensitive to barriers that people may face in making a complaint, such as those relating to culture, financial hardship, education, health, age, disability, homelessness and loss of trust in institutions.[21] A person may need assistance from tribunal staff, an interpreter or other agency to formulate and lodge a complaint.

9.3.3.1 Complaint made orally to a member

Where a person expresses a complaint to a member orally in the course of a tribunal process, the member may address the person's concern by offering an explanation on the spot. If the person does not indicate that they are satisfied with the explanation, the member should inform the person that the tribunal has a complaints process which is free, responsive, confidential and objective, and that the person will suffer no detriment if they make a complaint.

If the person indicates that they wish to make a complaint, they should be given information as to their next steps. The member should not attempt to dissuade the person from using the complaint process. It should be made clear to the person that making a complaint will not delay the proceeding.

---

[19] Cf *Judicial Commission of Victoria Act 2016* (Vic) s 18.

[20] Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, (revised 1 Jan 2023) ('Better Practice Guide') <ombudsman.gov.au>.

[21] Ibid 12.

It is not always clear whether a person intends to make a complaint. The Commonwealth Ombudsman advises that the following communications are generally not a complaint—

- an initial request for a service or action
- statements about an overall opinion
- requests for information or explanation.[22]

However, repeated statements or requests may be implied complaints.

In case of doubt, the best approach is to ask the person questions based on the tribunal's definition of a complaint. That may require asking the person if they are seeking a response from the tribunal to the communication.

9.4 Complaint handling in tribunals

Complaint handling is the process in which complaints are received, recorded, investigated, found to be either substantiated or not substantiated, and disposed of by notifying the complainant of the finding and any action taken.

9.4.1 Who handles complaints in tribunals?

The complaint handling process in tribunals comprises a series of steps. In small tribunals, complaints may be handled mainly by one person. Some large tribunals have several complaint handlers to handle complaints about the registry, members and other matters.

The registrar usually receives the complaints, co-ordinates action, monitors the timely completion of steps, and designs and operates the record-keeping and management reporting systems. In larger tribunals, the registrar may be assisted by a complaints manager.

The tribunal head may delegate steps up to and including the determination of complaints to a tribunal member, a registrar or an employee with appropriate training or experience. Complaints about the conduct of tribunal members are generally dealt with by the head or another member of appropriate seniority and experience.

9.4.2 What standards apply?

Tribunals generally frame their policies and procedures for complaint handling having regard to various standards which include—

- the current Australian and New Zealand standards on complaint management in organisations.[23]

---

[22] Ibid 6.

[23] Standards Australia and Standards New Zealand, AS/NZS 10002:2022: *Guidelines for complaint management in organisations* (ISO 10002:2018) (2022) ('AS/NZS 10002:2022').

- requirements for New Zealand tribunals specified in the Ministry of Justice document *Complaining about a member of a Tribunal* and other materials on the Ministry's website.[24]
- guidelines on complaint handling by public sector bodies issued by the Commonwealth, New Zealand, state and territory ombudsman.

Some tribunals have policies and procedures for dealing with complaints about non-judicial members. In 2024, the AIJA and COAT conferred with Australasian tribunals to publish a best practice guide for the development of complaints policies and procedures, *A Better Complaint Handling System for Tribunals* (the AIJA/COAT Guide).[25] The information in this Chapter is based on the Guide.

9.4.3 Principles of complaint handling

An effective complaint handling system delivers benefits for tribunals and those who use them. Users can have their concerns addressed through a fair and transparent complaints process which treats them with respect. Tribunals benefit from the opportunities to demonstrate accountability, build trust, enhance the tribunal's reputation for fairness and integrity, strengthen relationships with users and stakeholders, and identify pathways to improve their practice and performance.[26]

The complaint handling guidelines for public sector agencies issued by the ombudsman in each of the ten jurisdictions are very similar in content. The AIJA/COAT Guide references the Commonwealth Ombudsman's *Better Practice Complaint Handling Guide* (Better Practice Guide).[27] It includes design principles, of which the following (as adapted for tribunals) are of interest:

- The tribunal should foster a respectful, non-defensive culture that is receptive to feedback and complaints.
- There should be a role of complaints manager.
- Complaint handling should be supported by clear process guidelines.
- Initial assessment and classification of complaints should be early and effective.
- There should be compliance with privacy guidelines to protect the confidentiality and personal information of complainants and persons about whom complaints are made ('subject persons').
- Complaint records should be held separately from any related case file.

---

24 Above n 1.

25 The AIJA/COAT Guide, above n 9.

26 Ombudsman New South Wales, *Effective complaint handling guidelines – 3rd edition* (2017) <www.ombo.nsw.gov.au> (i).

27 *Better Practice Guide*, above n 20.

- Access to complaint records should be restricted to authorized persons and disclosed to others only where necessary, including where necessary to give procedural fairness to the subject person.
- Staff and members with complaint handling responsibilities should receive a training program that includes managing unreasonable complainant conduct and handling complaints confidentially and impartially.[28]
- All staff [and members] should be trained in their role in complaint handling, including being able to recognize a complaint and assist people to access the complaint system.

9.5 The complaint handling process

The following information about complaint handling processes in tribunals is necessarily generalised. It is based on information provided by those tribunals that participated in the development of the AIJA/COAT Guide.

9.5.1 Initial Assessment

When a complaint is received, it is assessed to see if it is within the complaints policy. If not, it will be dismissed and the complainant advised. The complainant may be referred to another agency or organisation if appropriate.

At the initial assessment stage the complaint handler may undertake limited inquiries, such as checking the tribunal's case records, transcripts or recordings of hearings and other relevant material. At that stage the complaint may be dismissed, or an explanation offered. An example of the type of complaint that may be resolved in this way is as follows:

- A substantial proportion of complaints were framed as being about conduct issues (perceived as bias, infringing the right to a fair trial, or denying procedural fairness). However, the alleged conduct did not support the characterisation. The complaint was really about the complainant's dissatisfaction with the officer's decision or assessment of the evidence.29

9.5.2 Notifying the subject person

Some complaints received by tribunals identify a specific person by name, or by implication (eg, 'the member who heard my case') as the subject of the complaint.

9.5.2.1 When to notify

Tribunals vary in their practice about when to notify the subject person that a complaint has been received. Some adopt the practice of notifying as soon as the complaint is received. Others notify after initial assessment, when the complaint handler has decided whether to dismiss the

---

28 Ibid 18.

29 Judicial Commission of Victoria, *Annual Report 2023-24*, 18.

complaint without a substantive response (as, for example, where the communication does not meet the definition of a ‘complaint’ under the tribunal’s policy). If the complaint is assessed to be one requiring further consideration, the member may be asked to provide a response to the complaint handler about the matters raised in the complaint. In any case, the member should be given the opportunity to respond to the complaint before any substantive finding is made.[30]

To avoid any possible perception of bias arising in future, the tribunal head may decide *not* to notify the member where the complaint is about a pending or part-heard matter currently before the member.[31] The notification and the complaint handling may be deferred until the proceedings are finalised, and the complainant advised of the reason for the delay.

If the complainant is seeking a change of the member allocated to deal with their matter, the complaint handler may advise the complainant that they can apply to the member to recuse themselves.[32] This advice simply indicates the correct procedure.[33] It should not be interpreted as a judgment by the complaint handler that the complaint is substantiated.

The fact that a complaint has been made against a member who is conducting a proceeding does not, of itself, disqualify the member from continuing to conduct the proceeding.[34]

9.5.2.2 Member support and well-being

A member may be concerned to know that a complaint has been made against them. The member will want to know what the process is, when they will have an opportunity to respond, how long the process will take, and what outcomes may be contemplated. Well-documented complaint handling policies, procedures, responsibilities and training can assist in providing the required information and assurance.

When a member is notified of a complaint, they will be instructed to treat the matter as confidential. This does not preclude the member approaching the tribunal head to inquire about services to support the member’s well-being.

Being the subject of a complaint can be stressful. The Judicial Commission of Victoria provides some advice and resources for judicial well-being that may assist tribunal members.[35]

---

30 Ibid 5, Message from the Chair, observing that this step is necessary to afford natural justice to the member.

31 See further, AIJA/COAT Guide, above n 9 [6.6].

32 Ibid.

33 See **Chapter 3** at **3.4.9**.

34 Cf *Judicial Commission of Victoria Act 2016* (Vic) s 12. See also Courts of New Zealand, *Court of Appeal Recusal Guidelines* (2021); *Supreme Court Recusal Guidelines* (2020) <courtsofnz.govt.nz>.

35 Judicial Commission of Victoria, webpage ‘Well-being and Support’ <judicialcommission.vic.gov.au>.

9.5.3 Potential outcomes of complaints process

If a complaint about a member's conduct is found to be substantiated but is not serious enough to warrant referral for formal investigation (see **8.6.3**), the most usual outcomes are one or more of the following:

- the tribunal provides an explanation or reasons for what happened
- the tribunal provides an apology, if appropriate
- the tribunal decides to change a practice or procedure or to provide additional assistance (eg, to support participation by persons with a disability)
- the tribunal decides on an educational response, such as incorporating what has been learned from the complaint into a training program for members generally.

If the subject person has been notified about a complaint, they can expect to be notified in due course of the outcome or proposed outcome. In some cases, the subject person may ask the complaint handler to communicate to the complainant an explanation or apology on their behalf if appropriate.

9.5.4 Action outside the complaints process

There is no general requirement to stand down a member or to change their work allocations while the complaint handling process is in train.

Where a complaint raises a question about whether the member's conduct or performance meets the tribunal's standards, it may be considered and discussed in the member performance appraisal process.

In circumstances discussed in Chapter 8 at **8.6**, a serious breach of conduct standards could lead to termination of the member's appointment. If the tribunal head decides to refer a complaint alleging a serious breach or breaches for investigation, the process takes on a disciplinary character (see **8.6**). In those circumstances the tribunal's governing Act may empower the head to stand the member down pending the outcome of the process. The investigation into the alleged conduct may continue even if the originating complaint is subsequently withdrawn or resolved.

9.5.4.1 Suspected corrupt conduct

The Commonwealth and each Australian state and territory have an integrity agency which is empowered by statute to investigate suspected corrupt conduct by a public official. For example, the Independent Commission Against Corruption of New South Wales can investigate allegations that a public official has engaged in forms of 'corrupt conduct', as defined in Part 3 of the *Independent Commission Against Corruption Act 1988* (NSW). The integrity commission may also receive public interest disclosures (or 'whistle-blower' complaints) about serous wrongdoing in the public sector. A tribunal member may be the subject of a disclosure.[36]

New Zealand does not have a single national integrity body. Instead, the functions are divided among several organisations.

In some circumstances a notification to an integrity agency is mandatory. The legislative terminology and the definitions of the types of conduct that must be reported to the integrity agency vary across the jurisdictions. In general, if a tribunal head has reasonable grounds to suspect that corrupt conduct by a tribunal member or employee has occurred or is occurring, the head should report the conduct to the integrity agency without delay.[37]

A breach of natural justice by a judge or a person constituting a tribunal would not ordinarily be found to constitute corrupt conduct, much less 'serious corrupt conduct', but a recent report suggests that this could occur in certain circumstances.

In March 2025 the ACT Integrity Commission delivered a report on its findings concerning certain conduct of Mr Walter Sofronoff KC while he was acting as a Board of Inquiry under the *Inquiries Act 1991* (ACT) ('Inquiries Act'). The Board was constituted for the purpose of a specific inquiry into the conduct of a controversial criminal proceeding. The Commission found that several aspects of Mr Sofronoff's conduct fell within elements of the definition of 'corrupt conduct' in s 9 of the *Integrity Commission Act 2018* (ACT) ('IC Act'), based on its findings that—

- he had disclosed confidential material to journalists during the Board's inquiry, contrary to the provisions of the Inquiries Act;
- he had disclosed the Board's report to journalists contrary to the Act's requirement to provide it exclusively to the Chief Minister;
- the disclosures were dishonestly concealed from persons involved in the inquiry which prevented them taking protective legal action; and
- by this conduct he had exercised his official functions in a way that was not impartial, significantly compromised the integrity of the inquiry, constituted a breach of public trust and gave rise to an apprehension of bias that affected some of his findings.[38]

---

[36] Eg, *Integrity Commission Act 2018* (ACT), ss 12, 57, *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) s 4(1), s 6, definition of 'public officer' para (n), s 51.

[37] See further, Ombudsman NSW, 'Handling public interest disclosures (whistleblowing) <www.ombo.nsw.gov.au/guidance-for-agencies>.

[38] ACT Integrity Commission, *Investigation Report: Investigation Report Operation Juno:Concerning certain conduct of Mr Walter Sofronoff KC* (March 2025) <www.integrity.act.gov.au> [5].

Moreover, the Commission found that the conduct constituted 'serious corrupt conduct' within the meaning of s 10 of the IC Act on the basis that it —

> undermined the integrity of the Board's processes and the fairness and probity of its proceedings to such as extent as to have been likely to have threatened public confidence in that aspect of public administration.[39]

9.5.5 Reporting of complaints

Some tribunals publish reports on their complaints, typically in the form of de-identified aggregate data about complaints received and handled by the tribunal. The information reported may include total complaint numbers, the most common types of complaint, any trends in complaints, complaint outcomes by type, and performance against timeliness targets.

Where the ombudsman has inquired into a complaint, or the handling of a complaint by the tribunal, the ombudsman may publish a report including a summary of the complaint and outcome without identifying the complainant or the subject person.

---

[39] Ibid [6]. At the time of publication of this Guide, the Commission's report was the subject of pending proceedings brought by Mr Sofronoff in the Federal Court of Australia.

Chapter 10: Resources, Glossary and Index

10.1 General references: Law

T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (7th ed, Federation Press, Sydney, 2018)

S Bottomley and S Bronitt, *Law in Context* (4th ed, Federation Press, Sydney, 2012)

R Creyke, D Hamer, P O'Mara, B Smith, T Taylor, *Laying Down the Law* (10th ed, LexisNexis, Sydney, 2017)

S Joseph and M Castan, *Federal Constitutional Law: A Contemporary View* (5th ed, Thomson Reuters, Sydney, 2019)

LexisNexis *Concise Australian Legal Dictionary* (5th ed, LexisNexis, Sydney, 2014)

10.2 General references: Administrative Law

10.2.1 Textbooks and casebooks

M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action* (7th ed, Thomson Reuters, Sydney, 2021)

P Cane, L McDonald, K Rundle, *Principles of Administrative Law* (3rd ed, Oxford UP, 2018)

R Creyke, J McMillan and M Smyth, *Control of Government Action: Cases & Commentary* (6th ed, LexisNexis, Sydney, 2021) (7th ed forthcoming in 2024)

LB Crawford , J Boughey, M O'Sullivan, M Castan, *Public Law and Statutory Interpretation: Principles and Practice* (2ned ed, The Federation Press, Sydney, 2021)

J Donnelly, M Morgan, M Head, Y-F Ng, *Douglas and Jones's Administrative Law* (9th ed, Federation Press, Sydney, 2024)

J R S Forbes, *Justice in Tribunals* (6th ed, The Federation Press, Sydney, 2024)

M Head, *Administrative Law: Context and Critique* (5th ed, The Federation Press, Sydney, 2021)

PA Joseph, *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021)

J Levingston, *The Law of Tribunals: Annotated Civil and Administrative Tribunal Act 2018 (NSW)* (The Federation Press, Sydney, 2016)

E Nekvapil, *Pizer's Annotated VCAT Act* (7th ed, Lawbook Co, 2022)

DC Pearce, *Statutory Interpretation in Australia* (10th ed, LexisNexis, Sydney, 2023)

M Sanson, *Statutory Interpretation* (2nd ed, Oxford Uni Press, 2017)

10.2.2 Electronic resources

Periodically updated E-resources published by commercial publishers and available in full text via library subscription services:

The Laws of Australia (Thomson Reuters) (via Westlaw).

Halsbury's Laws of Australia (Sydney, Butterworths, 1991–) (via Lexis Advance)

D Pearce and M Allars, *Australian Administrative Law Service* (Butterworths, Sydney, 1979–) (via Lexis Advance)

GA Flick, *Federal Administrative Law* (Sydney, Law Book Co, 2007–) (via Westlaw)

M Robinson (ed), *NSW Administrative Law* (Law Book Co, Sydney, 2007) (via Westlaw)

10.2.3 Government papers and reports

Administrative Review Council <www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/administrative-review-council-publications.aspx>

— *A Guide to Standards of Conduct for Tribunal Members* (rev'd 2009)

— *Review of the Commonwealth Merits Review Tribunals: Discussion Paper* (1994)

— *Better Decisions: Review of Commonwealth Merits Review Tribunals*: Report No 39 (1995)

— *Internal Review of Agency Decision Making*: Report No 44 (2000)

— *Report on the Council of Australasian Tribunals*: Report No 45 (2002)

Australian Law Reform Commission <www.alrc.gov.au/publications/index.htm>

— *Alternative or Assisted Dispute Resolution: Adversarial Background Paper 2* (1996)

— *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings: Issues Paper* No 24 (1998)

— *Review of the Federal Civil Justice System: Discussion Paper No 62* (1999)

— *Managing Justice: A Review of the Federal Civil Justice System: Report No 89* (2000)

Law Commission New Zealand, Report No. 85*: Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (2004) <www.lawcom.govt.nz/publications/>

New Zealand Law Commission, *Tribunals in New Zealand* (January 2008, Law Commission, Wellington) www.lawcom.govt.nz/publications/>

Productivity Commission, *Access to Justice Arrangements* Inquiry Report No 72 (Canberra, 2014) <www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>

10.2.4 Guides

Administrative Review Council, *A Guide to Standards of Conduct for Tribunal* Members (2001, revised 2009) <coat.asn.au>

Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017, rev'd 2023) <www.aija.org.au>

Council of Australasian Tribunals Inc, *Tribunal Excellence Framework* (2nd ed, 2017) <https://coat.asn.au/publications>

Council of Australasian Tribunals Inc, *Tribunal Competency Framework* <https://coat.asn.au/publications>

Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) <https://JCDI.org.au/publications/>

10.2.5 Journals

A large number of journal articles are relevant to topics covered in this Guide. Some are available in full text for free only with a member or library subscription. Journals which publish articles of interest to tribunals include:

Australian Administrative Law Bulletin (via Lexis Advance)

AIAL Forum, past issues are available online (free to members) from the AIAL website under 'Publications –AIAL Forum'
<www.aial.org.au/resources/publications>

Australasian Dispute Resolution Journal

Australian Journal of Administrative Law

Canberra Bulletin of Public Administration

International Journal of Online Dispute Resolution <www.elevenjournals.com/home> (Note the symposium issue No 1–2 of 2018 on online dispute resolution and public and private justice systems).

Journal of Judicial Administration

Judicial College of Victoria Online Journal (2014–17)
<www.judicialcollege.vic.edu.au/resources/jcv-journal>

Some papers and powerpoint slide presentations given at the annual COAT Tribunals conference and at conferences and seminars of the various COAT Chapters are available on the COAT website at <https://coat.asn.au/resources-library/>

Some papers given at the annual Tribunals Conference conducted by the Australasian Institute of Judicial Administration prior to 2012 and other AIJA symposia are available on the AIJA website at <www.aija.org.au/>

Public Law Review

Tribunal Case Update, quarterly, online <coat.asn.au>

Some back issues of university law journals and some others are available in full text for download at <www.austlii.edu.au> and <www.nzlii.org> under 'Journals'.

10.3 Tribunal education providers

Larger tribunals commonly conduct in-house training and professional development for members, including in the form of member conferences.

This section focuses on sector-wide public providers of educational programs for tribunal members.

The Council of Australasian Tribunals (COAT) provides the following education services and resources for tribunal members:

- *The COAT National Conference*. Speakers include experienced tribunal members, judges, academics, researchers, government officials, politicians and experts in related disciplines. Presentations and papers focus on topics of general interest to tribunal members including development of member skills, issues in tribunal practice, broader contexts and future challenges. Some more specialised topics are covered in parallel sessions run during the conference. Some papers and powerpoint presentations from past events are in the online resources database on the COAT website <coat.asn.au>.
- *COAT Chapter Conferences.* COAT has chapters in New Zealand and in each state and territory, the activities of which are undertaken by members of various tribunals. The Victorian and New South Wales chapters have at times held one day conferences or training days. Chapters occasionally hold twilight seminars, offered at one chapter location on an ad hoc basis, generally to provide an update or to give members the chance to hear a visiting speaker. Some chapters produce a newsletter for members. Some of the material is available in the COAT resources database.
- *Training programs and workshops.* COAT offers two courses on a regular basis multiple times per year
    - an online member induction program for tribunal members with at least six months' experience. The course is offered twice per year, each offering

scheduled over a two month period. It is offered flexibly online, offers personal interaction, and requires at least five to six hours per week study.

- a fully online advanced decision-writing course for members with several years' experience. The course is offered at intervals throughout each year for a set period of 2 months. It can be completed in about 8 hours.
- *The Whitmore Lectures.* These are presentations on topical issues in public law topics by a distinguished speaker, organised by COAT's New South Wales Chapter.

In addition, other workshops and courses are advertised from time to time on COAT's website at <coat.asn.au>.

The programs for past and forthcoming events, and copies of papers and presentations from past events, can be found on COAT's website at < coat.asn.au>. Speeches by judicial officers at COAT events can usually be found on the website of the court to which the judge belongs. Some older speeches and papers may be found at <austlii.edu.au>.

To keep tribunals and their members abreast of recent case developments of interest from courts and tribunals in all jurisdictions, COAT publishes a quarterly Tribunal Case Update e-bulletin <coat.asn.au>. This publication is directed by an editorial committee of senior tribunal members from a range of jurisdictions.

The Judicial College of Victoria presents seminars and conferences for VCAT members and Victorian judicial officers. It provides online public access to its bench books on topics useful in tribunal practice such as its *Uniform Evidence Manual*, *Charter of Human Rights Bench Book* and *Disability Access Bench Book*. It also has resources on dealing sensitively with child witnesses and victims of crime, and resources on judicial well-being. See <www.judicialcollege.vic.edu.au/resources>.

Some conferences held by the Australasian Institute of Judicial Administration are open and of interest to tribunal members. See past and forthcoming events at <www.aija.org.au>.

The Judicial Commission of New South Wales, through its college, provides continuing education and training for judicial officers. Some programs have been open to tribunal members. See <www.judcom.nsw.gov.au/education/>.

The Australian Institute of Administrative Law has membership drawn from the legal profession, universities and government as well as tribunal members. It has chapters, chapter events, and an annual national conference, which offers some educational opportunities for tribunal members. It also publishes a journal, the *AIAL Forum*, which contains published versions of some presentations from COAT and AIAL conferences.

The Judicial Council on Diversity and Inclusion is an initiative of the Australian judiciary to develop guidance and resources to support procedural fairness and equality of treatment for all court users. It has developed the Recommended National Standards for Working with Interpreters in Courts and Tribunals. It has published reports on improving accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women. The Council offers short, online training modules for working with interpreters, and some other videos available for institutional subscription. It publishes guides and reports relevant to court and tribunal practice.

10.4 Glossary

Act of Parliament	a piece of legislation produced by one of Australia's nine parliaments (Commonwealth, six states, two territories)
Adjudication	a process in which the parties submit their proofs and arguments to a neutral third party who decides
Balance of probabilities	more likely than not; the burden of proof in civil cases
Beyond a reasonable doubt	a very high percentage probability; the burden of proof in criminal cases
Bias	a predisposition to approach an issue to be decided other than with an impartial and unprejudiced mind
Burden of proof	the duty of one party to make the case out against the other
Common law	a system and source of law based on cases and precedent.
Cross-examination	examination of another party's witness
Delegated legislation	legislation made by a person or body other than parliament, under authority granted by parliament
Discretionary powers	powers in which the decision maker has some choice in the outcome of the exercise of power
Diversity jurisdiction	The jurisdiction of Australian federal courts to adjudicate disputes between parties resident in different states
Due process	fair and just process; due administration of justice
Equity	a source of law, arising out of 15th century England; the system arose so as to try and offset some of the rigidities of the early common law
Examination in chief	examination of one's own witness

Executive	a branch of government; in Australia at a Commonwealth level it includes the Governor General, the public service, and the Federal cabinet
Ex tempore	Reasons for decision given in oral form at the end of a hearing or after a short delay
Federal system	a system of government based on two or more tiers of government power, for example, States and Commonwealth; as opposed to a unitary system
Instrument	A document having legal effect
Judicial power	power to resolve a controversy between parties by application of law to the facts as found
Jurisdiction	the scope of a court's power to determine a dispute; with statute, the geography and people over whom it applies
Legislation	an Act of Parliament, a statute
Mandatory powers	a power in which the decision maker has no choice as to the outcome of an exercise of the power, as opposed to discretionary powers
Natural justice	*see* 'procedural fairness'.
Obiter dicta	that said by the way; all that part of judgment (written or oral) which is not part of the *ratio decidendi*
Objective test	a test based on a hypothetical or generalised example, for example, the reasonable adult, as opposed to a subjective test
Off-duty	private life issues. *See* 'on-duty'
On-duty	carrying out official duties. *See* 'off-duty'
Onus of proof	*see* 'burden of proof'
Precedent	where a court is bound by a prior decision of another court, or a court superior in the court hierarchy. The *ratio decidendi* is binding (as opposed to mere *obiter dicta*)

Presumptions	assumptions or 'preliminary positions' that can be overturned, depending on the circumstances and the evidence adduced. For example, there are common law presumptions as regards the interpretation of statutes
Probative	evidence that tends logically to prove what it asserts
Procedural fairness	natural justice; the probity and efficacy of decision-making; the right to be given a fair hearing and to present one's case to an impartial adjudicator
Ratio decidendi	the reason for a decision of a court in a particular case brought before it; the central proposition or propositions of law which were essential to the outcome
Recusal	the decision of a judge or member to take no further part in a proceeding
Retrospectivity	in relation to a statute, an operating date which is before the date of creation of the Act
Separation of powers	the doctrine applicable in western democracies that separates courts from parliaments from the executive
Standard of proof	the degree to which a court or tribunal must be satisfied of the existence or non-existence of a matter in issue in a proceeding
Standing	the right of a competent party to apply for a matter to be adjudicated
Subjective test	a test based on a particular person's circumstances and knowledge, as opposed to an objective test
Subordinate legislation	*see* 'delegated legislation'
Summary dismissal	the dismissal of a proceeding without a hearing or determination of the merits or issues
Unitary system	a one level system of government, as opposed to a Federal system

10.5 Index

A
Accountability
    conduct of tribunal members, 8.1, 8.3.2, 8.3.2.7
Accreditation
    alternative dispute resolution, 4.4.1
    AMDRAS accreditation system, *see* Mediation
Accrued rights or liabilities, 6.2.3.1
Acts. *see* Legislation
Actual bias, 3.4.1, *and see*, Bias
Adjournments, 5.5.7
    non-appearance of parties, 5.5.6
    reasons for, 5.5.7
    standing down, distinguished, 5.5.7
Adjudicative tribunals
    adjudication, meaning, 4.2
    judicial review of decisions, 1.6.3.1
Administrative Review Tribunal (ART)
    application to, standing, 4.2.2.1
    case management, 4.2.1
    Code of Conduct Guide for Non-Judicial Members, 6.3.5.4, 8.3, 8.3.1
    performance standards, 8.5.2
    issue estoppel in tribunal decision-making, 6.6.2.2, 6.6.2.3, 6.6.2.4
    review of decision, 4.2.2.1
    termination of a member's appointment during term, 8.6.2.2
Administrative law principles, 1.6.2
Administrative jurisdiction 1.4.1.1.
    Human rights Acts, *see* Discretionary powers
    procedural fairness, and, 3.5
        obtaining information, 3.5.1
        tribunal relying on own knowledge, 3.5.2
    separation of powers and, 1.2.1, 1.3.1, 1.3.3, 1.3.3.1, 1.3.3.2
Administrative Review Council (ARC)
    key competencies for tribunal members, 1.5.1
    Standards Guide for Tribunal Members. see Standards Guide for Tribunal Members, A
Administrative tribunals, 1.4.1.1
Admissibility of evidence
    alternative dispute resolution, 4.4.4
ADR. *see* Alternative dispute resolution
Advisory processes
    alternative dispute resolution, 4.3.1
Affirmation, administration of, 5.6.4
AGAC guideline (guardianship hearings), 5.5.2.2
AIJA. *see* Australasian Institute of Judicial Administration (AIJA)
Alternative dispute resolution (ADR)
    Accreditation, 4.4.1, 4.4.1

admissibility of evidence, 4.2.4, 4.5.4
advisory approach, 4.3.1
arbitration, 4.1, 4.3.1
accreditation, 4.4.1
Resolution Institute, 4.4.1
blended process, 4.3.2
codes of ethics, 4.4.2
communication with tribunal member, 4.4.5
compulsory referral to, 4.4.2
conciliation, 4.1, 4.3.1, 4.3.2
confidentiality, 4.2.4, 4.5.4
anonymising parties' names in a decision, 6.3.4.1
determinative approach, 4.3.1
facilitative approach, 4.3.1
key competency for tribunal adjudication, 4.4.3
mediation, 4.1, 4.3.1, 4.3.2
accreditation, 4.4.1
AMDRAS Accreditation System, 4.4.1
AMDRAS code of ethics, 4.4.2
AMDRAS practice standards, 4.4.1, 4.4.3
settlement conferences, 4.2.4
online dispute resolution (ODR), 4.5
parties
duty to act in good faith, 4.5
guides for, 4.5.2
practitioners
ethics, 4.4.2, 4.4.3
knowledge, 4.4.3
liability, 4.5.6
skills, 4.4.3
pre-hearings, 4.2.4
processes, 4.3, 4.3.1, 4.3.2
referral to, 4.5
referral criteria, 4.5.1
self-represented parties, 4.5.3
separation of powers and, 1.3.2
settlement conferences, 4.2.4, 4.3
Appeals, 1.6.1
external, 1.6.1
finality of decision and, 6.6.1
judicial review, *see* Judicial review
merits review, *see* Merits review
reasons for decisions, and, 6.3.3
from decision of tribunal, 1.6.3
types of, 1.6.1
Applications. *see* Pre-hearings
Apprehended bias, 3.4.1
Arbitration, 4.1, 4.3.1
accreditation, 4.4.1

liability of arbitrators, 4.4.6
Resolution Institute, 4.4.1
ARC. *see* Administrative Review Council (ARC)
Artificial intelligence, generative, 6.3.5.4
Association, bias by, 3.4.2, 3.4.6
Australasian Council of Chief Justices, Australasian, *see Guide to Judicial Conduct*
Australia
Commonwealth and State tribunals, 1.2.1, 1.3
parliamentary structures, 1.2.1
system of government, 2.3.1.1
Australian Constitution. *see* Constitution
Australian Guardianship and Administration Council (AGAC)
guidelines, 5.5.2.2
Australasian Institute of Judicial Administration (AIJA)
Guide to Judicial Conduct, 8.1
referral criteria, research into, 4.4.2.1

B
Balance of probabilities, 6.2.5, 6.2.5.2
Behaviour of tribunal members. *see* Conduct of tribunal members
Bias
conduct of tribunal members, 8.2.1, 8.3.2.2
Guide to Judicial Conduct, 8.3.3
meaning, 3.4.1
personal knowledge and, 6.2.7
procedural fairness and. *see* Bias rule
Bias rule, 3.1, 3.2.1, 3.4
actual, 3.4.1
apparent, 3.4.1
apprehended, 3.4.1, 5.5.5
association, by, 3.4.2, 3.4.6
common law presumption, 3.4.3
communication with tribunal members, 4.4.5
conduct, by member, 3.4.2, 3.4.5
expression of provisional views, 3.4.5.1
hearing, during, 3.4.5.3
preconceived views about witnesses, 3.4.5.2
conflict of interest, 3.4.2, 3.4.4
association, conflict by, 3.4.4.2
automatic disqualification, 3.4.4.1
potential, analysis of, 3.4.4.2
presumptive bias rule, 3.4.4.1, 3.4.4.3
waiver of right to object, 3.4.3.1
disqualifying circumstances, 3.4.2, 5.5.5
recusal, 3.4.9.2
exceptions, 3.4.3
extraneous communication, bias by, 3.4.2, 3.4.7
inquiries, making own, 5.2.1
management of issues

disclosure, 3.4.9.1
member's decision on a course of action, 3.4.9.2
multi-member panel, bias objection where, 3.4.9.5
objection and waiver following disclosure, 3.4.9.3
objection and waiver not following disclosure, 3.4.9.4
recusal, 3.4.9.2
necessity, 3.4.3.3
operation, 3.4.3
necessity, 3.4.3.3
statutory exceptions, 3.4.3.1
waiver, 3.4.3.2, 3.4.9.3, 3.4.9.4
pecuniary interest in proceedings, 3.4.4.1
disqualifying circumstances, 3.4.2, 3.4.4.1
prejudgment, by, 3.4.5
expression of provisional views, 3.4.5.1
member conduct evidencing, 3.4.5.3
preconceived views about witnesses, 3.4.5.2
presumptive bias rule, 3.4.4.1, 3.
New Zealand, in, 3.4.4.1, 3.4.4.3
previous involvement in same proceedings, 3.4.8
recusal for, *see* management of issues
statutory exemptions, 3.4.3, 3.4.3.1
test for, 3.4.1, 5.5.5
waiver of ground for objection, 3.4.3.2, 3.4.9.3, 3.4.9.4
Briginshaw principle, 6.2.5.2
Browne v Dunn, rule in, 3.5.2, 5.7.1.1
Bullying,
Cross-examination, control of, 5.5.9
Judicial Commission of Victoria Guideline, 8.4.4
tribunal codes of conduct, 8.3.1
Bugmy Bar Book, 7.3.2.2
Burden of proof, 6.2.5, 6.2.5.1

C
Capacity, of party, 5.5.2.3
litigation guardian, 5.5.2.2.
Case law
hearing rule and, 3.3.3
non-binding precedent, 2.5.2
personal knowledge and, 6.2.7
precedent, 2.5
non-binding, 2.5.2
rules of, 2.5.1
tribunals, and, 2.1, 2.4.1, 2.5.1
Case management, 4.2
AAT, 4.2.1
applications, 4.2.2
conferences, 4.2.4
directions hearings, 4.1, 4.2.3

AAT, 4.2.1
pre-hearings, 4.1
applications, 4.2.2
conferences, 4.2.4
directions hearings, 4.2.1, 4.2.3
Cause of action estoppel. *see Res judicata*
Character evidence, 5.7.1
Children as witnesses, 7.3.2.1, 7.3.2.2
Civil and administrative tribunals (CATs), 1.4.2
Civil jurisdiction, 1.4.1.2
burden of proof, 6.2.5.1
hearing, 1.1, 1.4.2
judicial power, exercising 2.5.2.2,
meaning, 1.4.1.2
res judicata, and, 6.6.2.2
separation of powers and, 1.2.1, 1.3.1, 1.3.3, 1.3.3.1, 1.3.3.2
standard of proof, 6.2.5.2
tribunal precedent, whether bound by, 2.5.2.2
COAT. *see* Council of Australasian Tribunals (COAT)
Code of conduct, tribunals, 8.3, 8.4.1
ART, *Code of Conduct for Non-Judicial Members*, 8.3.1
generative AI, use of, 6.3.5.4
on-duty and off-duty activity, 8.2.2
Common law, 2.2, 2.5
equity, distinguished, 2.2
judicial review, nature and grounds, 1.6.2
precedent, *see* Precedent
procedural fairness, 3.2.3
source of law, 2.2
values, presumption of non-interference with, 2.4.5, 2.4.5.1, 2.4.5.2
Communication, 7.1
accessibility, 7.2.1, 7.2.2
assistance, sources of, 7.3.3
cognitive impairment, persons with, 5.5.2.2
confidentiality, 4.4.4
cultural and language differences and, 6.2.10, 7.3.2.1, 7.3.2.2
culturally responsive practice, and, 5.5.2.1
extraneous, bias by, 3.4.7
fairness, and, 7.2.1, 7.3.1
interpreters, 5.5.2.1
key competency, 1.5.2, 5.5.2.1, 7.3
media,
arrangements, 7.4.3
Judicial Conference of Australia media booklet, 7.4.4
liaison officers, 7.4.2
protocols, 7.4.3
plain language, 7.2.1, 7.3.2
social media, 7.2.2, 7.3.2.1, 7.4.2, 8.3.3
technology, 7.2.2

tribunal values, and, 7.2.1
Competence, of member
ARC model, 1.5.1
performance standards, and, 8.5.2
Tribunal Competency Framework, 1.5.2, 5.4, 5.5.2.1, 7.3
Tribunal Excellence Framework,1.5.2
tribunal members, 1.5, 5.4, 5.5.2, 7.3
Competence, of party, *see* Capacity
Complaints about tribunal members
complainants, 9.2.1
complaint handling procedures, 9.4, 9.5
complaint made to member, 9.3.3.1
form of complaint, 9.3.3
judicial members, complaint about, 9.2.1
Judicial Commissions, role of, 9.2.1
Ombudsman, role of, 9.3.2
pending proceeding, 9.3.2.2
potential outcomes, 9.5.3, 9.5.4
reporting of complaints, 9.5.5
subject matter of complaints, 9.2.2.1, 9.3.1, 9.3.2
subject person, 9.3.2, 9.5.2
Conciliation, 4.1, 4.3.1
liability of conciliators, 4.5.6
settlement conferences, 4.2.4
tribunal practice, 4.3.2
Conduct of tribunal members, 8.1
accountability, 8.1, 8.3.2, 8.4.2.7
attire, 5.4.2
codes, compliance with, see, Codes
complaint procedures, 9.3.2, 9.5.2
criminal convictions, 8.2.2
demeanour suggestive of bias, 5.4.3, 3.4.5.3
diligence, 8.3.2, 8.4.2.5
efficiency, 8.3.2, 8.3.2.5
fairness, 8.2.1, 8.4.2.2
good behaviour, importance of, 8.2.1
guides, conduct, 8.4
Ethical Guidelines for Mediators, 4.4.1.3, 8.3
Guide to Judicial Conduct, The, 8.4.1, 8.4.3
ARC, *Guide to Standards of Conduct for Tribunal Members, A*, 8.4.1, 8.4.2
AMDRAS Code of Ethics, 4.4.2
impartiality, 8.1, 8.2.1
independence, 8.4.2.3
integrity, 8.1, 8.3.2, 8.4.2.6
misbehaviour, 8.6.1.1, 8.6.1.3
on-duty and off-duty activities, 8.2.1, 8.2.2, 8.3.1
professional development, 8.4.2.8, 8.4.3, 8.5.1, 8.5.2, 8.5.3
punctuality, 5.4.1
questioning by members, 5.6.4

bias, presumptions of, 3.4.5.3
cross-examination, 5.6.3, 5.6.5
self-represented parties, and, 5.5.8
removal of member from office, *see* Removal
respect for persons, 8.4.2.4
respect for the law, 8.4.2.1
responsibility of head of tribunal, 8.4.2.8
standards
key objectives of, 8.1
procedural fairness and, 3.2.5
transparency, 8.1, 8.4.1, 8.4.2.7
Conferences
alternative dispute resolution, 4.2.4
communication with tribunal member, 4.4.5
confidentiality, 4.2.4
pre-hearing, 4.1, 4.2.4
self-represented parties, 4.2.4
settlement, 4.2.4
Confidentiality
admissibility of evidence, and, 4.5.4
alternative dispute resolution, 4.5.4
codes of ethics, 4.4.2
conferences, in, 4.2.4
duty to disclose, and, 5.2.3
interpreters, and, 5.5.2.1
reasons for decisions and, 6.3.4.1, 6.3.5.4
proceedings, in, 5.5.4
Conflict of interest
bias rule, and, 3.4.2, 3.4.4
association, conflict by, 3.4.4.2
automatic disqualification, 3.4.4.1
potential conflict, analysis of, 3.4.4.2
presumptive bias rule, 3.4.4.1, 3.4.4.3
waiver of right to object, 3.4.3.1
Constitution, Australian
interpretation of legislation, and, 2.4.1, 2.4.5.1,
legislation and, 2.3.1.1
separation of powers, 1.2.1, 1.3, 1.3.1
diversity jurisdiction, 1.3.3.1, 1.3.3.2, 6.2.1
implications for State tribunals, 1.3.3, 1.3.3.1, 1.3.3.2, 1.4.1.1
judicial power, 1.3.1, 2.5.2.2,
judicial review, and, 1.6.4
limits on powers of tribunals, 2.4.1
validity of legislation, 1.3.3.2, 2.3.1.1, 2.3.3.2, 6.2.1
Costs,
orders, 6.4
consideration in case management, 4.2.2.1, 4.2.3
Council of Australian Tribunals (COAT), 1.2.1
Training Needs Analysis report, 1.5.2

Tribunal Competency Framework 1.5.2
communication, 5.5.2.1, 7.2.1
competence, 1.5.2, 5.4
tribunal member conduct, 5.4, 8.3
Tribunal Excellence Framework, 1.4.4, 1.5.2
communication, 7.1, 7.2.1
competencies, 1.5.2
fair treatment, 3.2.1, 5.5.8
self-representation and, 5.5.8
Counterclaims, 5.5.7
Courts
hierarchies, 2.5.1
judicial review. *see* Judicial review
precedent, 2.5, *and see* Precedent
res judicata, 6.6.2.1
tribunal forming part of, 1.2.1
tribunals, distinguished, 1.2.1, 1.3, 2.5.1, 3.5.1, 4.2, 5.2, 5.5.8, 6.2.1, 7.2.2
Corrupt conduct, 8.6.1.3, 9.4.5.1
Credibility
findings on, 3.4.6, 3.4.8, , 6.2.9, 6.3.4, 6.3.4.2
witness, 6.2.9, 6.2.11
Criminal prosecution
security breaches, report for, 5.5.1
privilege against self-incrimination, 5.7.3
related findings in civil or administrative proceedings, 6.2.5.2
warning regarding potential, 5.5.4
Cross-examination, 5.6.3, 5.6.4, 5.6.5
problematic forms, 5.5.10
Self-represented parties, and, 5.5.8
Culturally responsive practice, 5.5.2.1

D
De novo hearings, 1.6.1, *and see* Merits Review
De novo merit review tribunals, 1.1, 1.4.1.2, *and see* Merits Review
Decisions, of tribunals
appeal from, 1.6.3
consistency of, 2.5.2.1
invalid, 1.2.2, 1.3.3, 6.6.1, 6.6.1
finality of, 6.6
functus officio and, 6.6.1
judicial review of. *see* Judicial review
reasons for, *see* Reasons
reserved, 6.3.2
revocation, 6.6.1
varying, 6.6.1
Decision-making, 6.1
formal requirements, 6.2.4
key elements, 6.2.4
majority, by, 6.2.2

processes, 6.2
structuring, 6.2.7
discretionary powers, exercise of, 1.2.3.2, 6.2.12
considerations, and, 1.2.3.2, 6.2.12.1
human rights, and, 1.2.3.2, 6.2.12.2
policies and guidelines, and, 6.2.12.3
dissenting, 6.2.2
duty to inquire and, 5.2.1
evidence, and. *see* Evidence
findings of fact, 6.2.8
legal materials, reference to, 6.3.4.3
LOPP/FLOPP analysis, 6.2.7
merits review, 6.2.3.1
orders. *see* Orders
preliminary questions, 6.2.1
procedural fairness, effect of breach, 3.2.4
reasons for, *see* Reasons
written, 6.3.4, 6.3.5
relevant material, 6.2.4
reserved, 6.3.2
separation of powers and, 1.2.1, 1.3
slip rule, 6.6.1
standard of proof, 6.2.5, 6.2.5.2
tribunal knowledge, using, 6.2.6
Delay
complaints about, 9.2.2
delivering decisions, 6.3.1, 6.3.3
Delegated legislation, 2.3.2
cessation of operation, timing, 2.3.2.3
delegation of law-making power, 2.3.2.1
empowering Act, relationship to, 2.3.2.1
repeal or revocation, 2.3.2.3
statutory interpretation, 2.4.4.1, 2.4.5
ultra vires, 2.3.2.2
validity, 2.3.2.2
Diligence
conduct of tribunal members, 8.3.2, 8.4.2.5
Directions hearings, 4.2, 4.2.1, 4.2.3. 5.3, 5.8, 6.2.1
Disabilities
awareness of, 5.3, 5.5.2.2, 5.5.10, 7.3.2
communication, and people with, 5.5.2.2, 5.6.7, 7.2.2
guidelines, 7.3.2.1, 7.3.2.2
Disallowable instruments, 2.3.2.1
Disciplinary tribunals, 1.2.1, 1.4.1, 1.4.3, 3.3.2, 5.7.71
Disclosure
bias, management of, 3.4.9.1
conflict of interest, 3.4.4
duty to disclose, 5.2.2
objection and waiver

following, 3.4.9.3
not following, 3.4.9.4
Discretionary powers, 1.2.3.2, 6.2.12, 6.2.7
exercising, *see* Decision-making
Dismissal, summary, 4.2.2.4
Dispute resolution. *see* Alternative dispute resolution
Dissenting decisions, 6.2.2
Documentary evidence, 5.6.8
electronic, 5.6.6
Domestic tribunals, 1.2.1
sources of power, 1.2.3.1
Duties, 1.2.3.2
parties duty to act in good faith, 4.4.2
tribunal, of *see* Tribunals

E
Education and training, members, 8.5.3, Resources
Efficiency
conduct of tribunal members, 8.1, 8.3.2, 8.3.2.5
key competency for tribunal adjudication, 1.5.2
Equity
common law, distinguished, 2.2
Estoppel
cause of action estoppel. *see Res judicata*
issue estoppel
power to control proceedings, 6.6.2.4
res judicata distinguished, 6.6.2.1
tribunal proceedings, in, 6.6.2.2, 6.6.2.3, 6.6.2.4
Ethics
alternative dispute resolution practitioners, 4.4.1.3
procedural fairness. *see* Procedural fairness
Evidence, 5.6, 5.7
additional material, receipt of, 5.7.5
admissibility in alternative dispute resolution process, 4.4.4
character, 5.7.1
cross-examination. *see* Cross-examination
decision requirements, 6.2.4
contents of reasons, 6.3.4.1
documentary, 5.6.6, 5.6.8
electronic, 5.6.6, 7.2.2
examination-in-chief, 5.6.1
expert, 5.7.2
evaluating, 6.2.11
exclusionary rules, 5.7.7.1
hearsay, 5.7.1
irrelevant, 5.7.1
legal professional privilege, 5.7.4
opinion, 5.7.1
non-exclusionary rules, 5.7.1.2

oral. *see* Oral evidence
privilege against self-incrimination, 5.7.3
re-examination, 5.6.3
rules of, inapplicability of, 5.7.1
similar fact, 5.7.1
sources, identification of, 6.3.4
substantial justice, obligation to provide, 5.7.1.1
telephone, 5.6.6
videoconferencing, 5.6.7
weighing, 6.2.11
Ex tempore reasons. *see* Oral reasons
Examination-in-chief, 5.6.1
Exhibits, 5.6.8
Expert evidence, 5.2, 5.7.2
evaluation of, 6.2.10
Explanatory Memorandum, 2.4.3
Extension of time
application for hearing, 4.2.2.2
Extrinsic materials, 2.4.4

F
Facilitative process, ADR as, 4.3.1, 4.3.2, 4.3.6
Facts
finding of, 6.2.8, 6.2.9
material, 6.2.8, 6.3.4.1
Fairness
bias. *see* Bias; Bias rule
communication, and, 7.3.1
conduct of tribunal members, 8.1, 8.2.1, 8.3.2, 8.3.2.2
fair hearing rule, 3.2.1
key competency for tribunal adjudication, 1.5.2
perceptions of, process-oriented factors, 7.2.1, 7.3.1
procedural fairness. *see* Procedural fairness
Finality, of tribunal decision 6.6
Functus officio, 6.6.1
Slip rule, 6.6.1
Statutory power to re-open the decision, 6.6.1
Finding of fact, 6.2.8, 6.2.9
First nations people, *see* Indigenous
Frivolous proceedings, 5.5.8
Functus officio, 6.6.1
Fundamental rights and liberties, 2.4.5.1
legal presumptions as to, 2.4.5.1, 2.4.5.2

G
Guardianship tribunals, 1.4.1, 1.4.3
Australian Guardianship and Administration Council (AGAC) guidelines, 5.5.2.2
Guide to Judicial Conduct, 8.4, 8.4.1, 8.4.3
bias by association, 3.4.6

bias by prejudgment, 3.4.6
bias by extraneous communication, 3.4.7
conduct, principles, 8.4.1, 8.4.3
responding to criticism, 7.4.2
Guide to Standards of Conduct for Tribunal Members, A,
bias rule, 3.4
bias by association, 3.4.6
objection and waiver following disclosure, 3.4.9.3
principles of conduct, 8.4.1, 8.4.2
procedural fairness under, 3.2.2

H
Hearing rule. *see also* Procedural fairness
application of, 3.3
case law examples, 3.3.3
common law, under, 3.3, 3.3.2, 3.3.2.1
content of, 3.3, 3.3.3
decisions affecting rights, 3.3, 3.3.1
exclusion by statute, 3.3, 3.3.2
implication, by, 3.3, 3.3.1, 3.3.2
modification by statute, 3.3.2
procedures required, 3.3, 3.3.3
statutory procedures, following, 3.3.2.1
Hearings, 5.1, 5.2
adjournment of, 5.5.7
affirmation, administration of, 5.6.4
communication issues, 5.5.2
cognitive impairment, persons with, 5.5.2.2, 5.2.2.3
culturally responsive practice, 5.5.2.1
interpreters, 5.5.2.1
litigation guardian, 5.5.2.2, 5.5.2.3
conduct of, 1.5.2, 5.1
conduct of tribunal members. *see* Conduct of tribunal members
disqualification for bias, 5.5.5
disruptive conduct, 5.5.10
documentary evidence, 5.6.8
duty to inquire, 5.2.2
evidentiary issues, 5.7
additional material after hearing receipt of, 5.7.5
expert evidence, 5.7.2
legal professional privilege, 5.7.3
privilege against self-incrimination, 5.7.3
rules of, inapplicability of, 5.7.1
express partial exclusion, 3.3.2
fair hearing rule. *see* Procedural fairness
inquire, duty to, 5.2.1, 5.2.2
inquisitorial nature of, 5.2.1
interpreters, 5.5.2.1
intimidation and disruption, 5.5.10

management of, 5.5.9,
disruptions, and, 5.5.10
non-appearance of parties, 5.5.6
oath, administration of, 5.6.1
organisation of, 5.3
pre-hearings. *see* Pre-hearings
prejudicial information, duty to disclose, 5.2.3
preparation for, 5.3
procedures, 5.5
closing submissions, 5.6.9
cross-examination, 5.6.3, 5.6.5
evidence at, 5.6
examination-in-chief, 5.6.1
address, preferred forms, 5.5.4
interpreters, 5.5.2.1
legal representation, 3.3.2, 5.5.3
preliminary matters, 5.5.4
questioning by the tribunal, 5.6.4
re-examination, 5.6.5
security, 5.5.1
telephone evidence, 5.6.6
videoconferencing, 5.6.7
bias, presumptions of, 3.4.5.3
self-represented parties, 5.5.8
alternative dispute resolution, 4.5.3
assistance, sources of, 5.5.10, 7.3.3
hearings, managing, 5.5.9
pre-hearing conferences, 4.2.4
tribunals duties regarding, 5.2.1, 5.5.9
stay of proceedings, 4.2.2.3
witnesses, 5.2.2, 5.5.4
Hearsay evidence, 5.7.1.1
Human rights
decisions and, 1.2.3.2, 6.2.12.2
legal presumptions as to, 2.4.5
New Zealand Bill of Rights Act 1990, 1.6.3, 2.4.5.1, 3.2.3, 8.3
procedural fairness, 3.2.3. *and see* Procedural fairness

I
Immunities and protections,
members 1.2.4
ADR practitioners 4.5.6
Impartiality. *see also* Bias
tribunal members, 8.1, 8.3.1
Incidental powers, 1.2.3.1
Independence
tribunal members, 8.1, 8.3.2, 8.4.2.2
Indigenous people
indigenous disadvantage Australia 7.3.3.2

New Zealand 7.3.3.3
Inquisitorial proceedings, 5.1, 5.2
duty to inquire, 5.2.1
Integrity
conduct of tribunal members, 8.3.2, 8.3.2.6
key competency for tribunal adjudication, 1.5.2
Interpretation of statutes. *see* Statutory interpretation
Interpreters, 5.5.2.1
dealing with cultural and language differences, 6.2.10, 7.3.2.1, 7.3.2.2
JCDI National Recommended Standards, 5.5.2.1
procedural fairness, 5.5.2.1
witness credibility and, 6.2.10
Invalid decisions, 1.2.2, 1.6.3, 6.6.1
Irrelevant evidence, 5.7.1
Issue estoppel
power to control proceedings, 6.6.2.4
res judicata distinguished, 6.6.2.1
tribunal proceedings, in, 6.6.2.2, 6.6.2.3, 6.6.2.4

J
Joinder of parties, 4.2.2.1
Jones v Dunkel, the rule in, 5.7.1.1
Judgments. *see* Decisions
Judicial Commission of the Northern Territory
Act, 8.6.1.2
complaints about NTCAT members, 8.6.1.2
removal of member from office, *see* Removal of member from office
Judicial Commission of Victoria
Act, 8.6.1.1
complaints about VCAT members, 8.6.1.1, 9.1.1
conduct guidelines, 8.4.1, 8.4.4, 8.4.4.1, 8.4.4.2
removal of member from office, *see* Removal
Judicial Conference of Australia
media booklet, 7.4.4
Judicial Council on Diversity and Inclusion (JCDI) 5.5.2.1
online training modules, 7.3
Recommended national standards for working with interpreters
Judicial review, 1.6, 1.6.3
limitations, 1.2.1, 1.6.3
merits review, distinguished, 1.2.1, 1.6.2, 1.6.3.2, 1.6.3.3
nature and origins, 1.1, 1.6.2, 1.6.3.2
statutory limitations, 1.6.3
tribunal decisions, of, 1.6.3.1
Jurisdiction
Appeal, 1.4.1.3
nature of, 1.2.2
original, 1.2.2, 1.3.3, 1.4.1.3
powers, distinguished, 1.2.3
protective, 1.4.1, 1.4.3

review, 1.2.2, 1.4.1.3
separation of powers and, 1.3
diversity jurisdiction, 1.3.3.1, 6.2.1
issues arising under Constitution, 1.3.3.2

K
Knowledge
key competency for tribunal adjudication, 1.5.2
tribunal relying on own, 3.5.2

L
Leadership
key competency for tribunal adjudication, 1.5.2
Legal presumptions, 2.4.5
Legal professional privilege, 5.7.4
Legal representation, 5.5.3
controlling inappropriate conduct, 5.5.9
duty to assist tribunal, 5.5.9
imbalance in, 5.5.3, 5.5.10
right to, 5.5.3
self-represented parties *see* Self-represented parties
Legality, principle of, 2.4.5.1
Legislation, 2.2
Act, meaning, 2.3.1
Acts ceasing to be laws, 2.3.1.3
Acts changing laws, 2.3.1.2
amending, 2.3.1.3
accrued rights or liabilities following, 6.2.3.2
commencement date, 2.3.1.2
Commonwealth powers to make, 2.3.1.1
Constitutional issues, 2.3.1.1, 6.2.1
delegated, 2.3.1, 2.3.2
cessation of operation, timing, 2.3.2.3
delegation of law-making power, 2.3.2.1
empowering Act, relationship to, 2.3.2.1
repeal or revocation, 2.3.2.3
validity, 2.3.2.2
inconsistency between State and Commonwealth, 2.3.1.1
interpreting, 2.1
key issues, 2.1
parliamentary power to make, 2.3.1.1
regulations, 2.3.2.1
repeal of, 2.3.1.3, 2.3.2.3
accrued rights or liabilities following, 6.2.3.2
subordinate legislation, 2.3.2.3
retrospective, 2.3.1.2
presumption against implied, 2.4.5.2, 6.2.3.1
Royal Assent, 2.3.1.2
sources of law, 2.1, 2.2

statutory interpretation. *see* Statutory interpretation
subordinate, 2.3.2
cessation of operation, timing, 2.3.2.3
delegation of law-making power, 2.3.2.1
empowering Act, relationship to, 2.3.2.1
repeal or revocation, 2.3.2.3
ultra vires, 2.3.2.2, 6.2.1
validity, 2.3.2.2
sunset clauses, 2.3.1.3
Liability
accrued
timing of decision-making, 6.2.3
ADR practitioners, 4.4.6
members, *see* Immunities and protections
Liberties
legal presumptions as to, 2.4.4
Literal approach
statutory interpretation, 2.4.2
Litigation guardian, 5.5.2.2, 5.5.2.3
Local laws, 2.3.2.1
McKenzie friend, 5.5.3
Majority decisions, 6.2.2
Material facts, 6.2.7, 6.2.8, 6.3.4.1
Media
arrangements for dealing with, 7.4.3
communicating with, 7.4.1, 7.4.2, 7.4.1
Judicial Conference of Australia media booklet, 7.4.4
liaison officers, 7.4.2
protocols for dealing with, 7.4.3
social media, 7.2.2, 7.3.2.1, 7.4.2
conduct, and, 8.2.2, 8.3.1, 8.4.3
Mediation, 4.1, 4.3.1
accreditation, 4.4.1
Ethical Guidelines for Mediators, 4.4.1.3, 8.3
liability of mediators, 4.4.6
AMDRAS 4.4.1, 4.4.1.2, 4.4.1.3
practice standards, 4.4.1, 8.3
settlement conferences, 4.2.4
tribunal practice, 4.3.2
Members. *see* Tribunal members
Mental health tribunals, 1.4.3, 1.4.1.1, 5.5.2.2. 5.5.2.3, 5.5.3,5.5.4
Merits review, 1.4.1.4
hearing de novo, 1.6.1.1
appeal by rehearing distinguished, 1.6.1.2
judicial review, distinguished, 1.2.1, 1.4.1.4, 1.6.2, 1.6.4.1
scope of merits review, 6.2.3.1
timing issues, 6.3.2.1, 6.3.2.2
Merits review tribunals, 1.2.1
administrative tribunals, as, 1.4.1.2

standard of review, 'correct or preferable decision'.1.4.1.4, 6.2.3.1
decision under review, status of, 6.2.3.1
de novo, 1.4.1.4, 1.6.1.1
evidence, 6.2.3.1
burden of proof, 6.2.5.1
rules of, dispensation from, 1.4.2, 5.2.1, 5.7.1
standard of proof, 6.2.5.2
law to be applied, 6.2.3.1, 6.2.3.2
powers, 1.2.3.1, 6.2.3.1
question to be considered, 6.2.3.1
rehearing, review by way of, 1.6.1.2
Misbehaviour of tribunal members, 8.6.1.3
Model litigant, guidelines, 4.5, 5.5.9

N
National Alternative Dispute Resolution Advisory Council (NADRAC)
codes of practice, 4.4.1.1, 4.4.1.3
dispute resolution terms, 4.3.1
industry standards, 4.4.1
practitioner standards, 4.4.1.3
Natural justice. *see* Procedural fairness
Necessity principle, bias, 3.4.3.3
Negotiation, 4.1
Neutral evaluation of fact/legal issues, 4.1
New Zealand
legal representation, 5.5.3
presumptive bias, 3.4.4.1, 3.4.4.3
New Zealand Bill of Rights Act 1990
human rights, 2.4.4.1, 8.3
procedural fairness, 3.2.3, 8.3
Non-appearance at hearings, 5.5.6
Non-binding precedents, 2.5.2
Non-disclosure. *see* Confidentiality

O
Oath, administration of, 5.6.4
Obiter dicta, 2.5.1.2
non-binding precedents, and, 2.5.2
seriously considered dicta, 2.5.1.2
Observations by tribunal members, 3.5.2
Ombudsman, role of, *see* Complaints
Online dispute resolution (ODR), 4.4.2
Onus of proof. *see* Burden of proof
Opinion evidence, 5.7.1.1
Oral evidence
cross-examination, 5.6.2
legal representation, 5.5.3
Oral reasons for decisions, 6.3.1
Orders, 6.5

costs, for, 6.4
formal requirements for decisions, 6.2.4
guidelines for making, 6.5
power to make, 6.5
stay orders, 4.2.2.3
Ordinances, 2.3.2.1

P
Parliament
Australian, 1.2.1
Parties
admissions by, admissibility, 4.4.4
communication with, 7.3.2
obligation to contact, 4.2.2.1
duty to act in good faith, 4.4.2
guides for, 4.4.2.2
interests of, meaning, 4.2.2.1
joinder of, 4.2.2.1
legal representation, 5.5.3
non-appearance, 5.5.6
privilege against self-incrimination, 5.7.3
self-representation, 5.5.9
alternative dispute resolution, 4.4.3
assistance, sources of, 5.5.10, 7.3.3
hearings, managing, 5.5.10
pre-hearing conferences, 4.2.4
tribunals duties regarding, 5.2.1, 5.5.9
Pecuniary interest in proceedings
bias rule, and, 3.4.4.1
disqualifying circumstances, 3.4.2, 3.4.4.1
Performance standards, members, 8.5, 8.5.2
AAT Code, and, 8.5.2
Plain language, 7.2.1, 7.3
cultural and language differences and, 7.3.2.1, 7.3.2.2
sources of assistance, 7.3.3
Powers of tribunals, 1.1, 1.2.3, 1.4.1, 5.2
common law, 1.2.3.1
control of own proceedings, 6.6.2.4
costs, 6.1, 6.4
discretionary powers, 1.2.3.2
exercising, 6.2.13
stay orders, 4.2.2.3
duties and, 1.2.3.2
fines, 1.3.1
incidental or implied, 1.2.3.1
orders, 6.1, 6.5
costs, 6.1, 6.4
stay, 4.2.2.3
revoking decision, 6.6.1

separation of powers and, 1.2.1, 1.3, 1.3.3.1
sources of, 1.2.3.1, 2.2
statutory, 1.2.3.1, 6.6.1
stay orders, 4.2.2.3
varying decision, 6.6.1
Precedent, 2.5
non-binding, 2.5.3
judicial hierarchy, and, 2.5.1.1
obiter dicta, 2.5.1.2
ratio decidendi, 2.5.1.2
rules of, 2.5.1
tribunals decisions as precedent, 2.1, 2.4.1, 2.5.2, 2.5.2.1, 2.5.2.2
Pre-hearings, 4.1
alternative dispute resolution processes, 4.3, 4.3.1
referral to, 4.4.2
tribunal practice, 4.3.2
applications, 4.2.2
joinder of parties, 4.2.2.1
procedure, 4.2.2.2
standing, 4.2.2.1
stay orders, 4.2.2.3
timing, 4.2.2.2
case management, 4.2
AAT, 4.2.1
applications, 4.2.2
conferences, 4.2.4
directions hearings, 4.1, 4.2.1, 4.2.3
issues in alternative dispute resolution, 4.4. *see also* Alternative dispute resolution
preliminary procedures, 4.1, 4.2
applications, 4.2.2
conferences, 4.2.4
directions hearings, 4.1, 4.2.3
standing, 4.1, 4.2.2.1
stay orders, 4.2.2.3
Prejudicial information, 5.2.3
Preliminary matters, 6.2.1, 6.2.4
Preparation for hearings, 5.3, 6.2.8
Presumptions, legal, 2.4.4
principle of legality, 2.4.4.1, 3.2.3
procedural fairness, 3.2.3
rebuttable, 2.4.4.2
Presumptive bias, 3.4.4.1
Primary decision-making
review tribunals, 1.4.1.1
standards or criteria, guiding, 1.4.1.2
timing, 6.2.3
Principle of legality, 2.4.4.1, 3.2.3
Privilege
legal professional, 5.7.4

self-incrimination, 5.7.3
Probative evidence, 3.3.3, 5.7.1
Procedural fairness, 3.1, 3.2.1
administrative review, 3.5
obtaining information, 3.5.1
tribunal relying on own knowledge, 3.5.2
bias rule. *see* Bias rule
breaches, consequences of, 3.1,
materiality, 3.2.4
civil proceedings, 3.5
obtaining information, 3.5.1
tribunal relying on own knowledge, 3.5.2
conduct standards, and, 3.2.5
conflict of interest. *see* Conflict of interest
duty to act fairly, 3.2.1
source, 3.2.3
ethical justifications, 3.2.2
fair hearing rule, 3.1, 3.2.1
hearing rule, 3.3
application of, 3.3
case law examples, 3.3.3
common law, under, 3.3, 3.3.2, 3.3.2.1
content of, 3.3, 3.3.3
decisions affecting rights, 3.3, 3.3.1
exclusion by statute, 3.3, 3.3.2
implication, by, 3.3, 3.3.1, 3.3.2
modification by statute, 3.3.2
procedures required, 3.3, 3.3.3
statutory procedures, following, 3.3.2.1
human rights and, 3.2.3, 8.3
instrumental justifications, 3.2.2
interests, meaning, 3.3.1
key issues, 3.1
New Zealand Bill of Rights Act 1990, under, 3.2.3, 8.3
prejudicial information, duty to disclose, 5.2.2
presumption of, 3.2.3
self-representation and, 5.5.9
source of duty, 3.2.3
Proceedings. *see* Hearings
Proclamations, 2.3.2.1
Professional development, 8.4
Professionalism
key competency for tribunal adjudication, 1.5.2
Proof
burden of, 6.1, 6.2.6
standard of, 6.1, 6.2.6
Proprietary interest in proceedings
bias and conflict of interest, 3.4.4.2
Protective jurisdiction, 1.4.1, 1.4.3

Publicity, 5.5.4
Punctuality, 5.4.1
Purposive approach
    statutory interpretation, 2.4.2

Q
Questioning by tribunal members, 5.6.5
    bias, presumptions of, 3.4.5.3
    cross-examination, 5.6.2, 5.6.5
    self-represented parties, and, 5.5.10
Questions of fact, 6.3.3
    material questions of fact, 6.3.4.1
Questions of law
    preliminary matter, as, 6.2.1
    referral to court, 6.2.1

R
Ratio decidendi, 2.5.1
Reasonable satisfaction
    burden and standard of proof, 6.2.5
Reasons for decisions, 6.3
    adequacy of, 6.3.5, 6.3.5.1, 6.3.5.2
    confidential information, 6.3.4.1, 6.3.5.4
    content of, 6.3.4, 6.3.5.1
    credibility, findings on, 6.3.4.2
    delay in providing, 6.3.2
    duty to give reasons, 6.3.1, 6.3.5.1, 6.3.5.2
    ex tempore reasons, 6.3.1
    findings of fact, 6.3.4.1
        material facts, 6.3.4.1
    formal requirements, 6.3.4
    generative AI, use of, 6.3.5.4
    inadequate, 6.3.2, 6.3.7
        judicial review, and, 6.3.5.2
        reproduction of copied material in reasons, 6.3.5.3
    legal materials, reference to, 6.3.5.2
    multi-member panel, 6.2.2
    oral reasons, 6.3.1
    public comment on, 7.4.2
    purposes of, 6.3.3
    representations, and, 6.3.4.1, 6.3.4.4
    reserved reasons, 6.3.2
    structuring, 6.3.4.5
    submissions, and, 6.3.4.1, 6.3.4.4
    written, 6.3.5
        delivery, points to note, 6.3.5.1
        oral, following, 6.3.1
        strategies for writing, 6.3, 6.3.2
Re-examination, 5.6.5

Registrars, 1.5
Regulations, 2.3.2.1 *see also* Delegated legislation
Rehearings, 1.6.1
  merits review. *see* Merits review tribunals
  power to rehear a matter after decision, 6.6.1
Removal, member from office, 8.6
  Judicial Commission Acts, 8.6.1
  NTCAT members, 8.6.1.2, 8.6.1.3
  Removal under tribunal Acts, 8.6.2
    grounds for removal, 8.6.2.1, 8.6.2.2
    process for removal, 8.6.3
    removal under the ART Act, 8.6.2.2
  VCAT members, 8.6.1.1
Repeal of legislation, 2.3.1.3, 2.3.2.3
Re-opening, tribunal decision, *see* Finality
Res judicata
  court proceedings, in, 6.6.2.1
  issue estoppel. *see* Issue estoppel
  tribunal proceedings, 6.6.2.2, 6.6.2.3
    control of, 6.6.2.4
Reserved decisions, 6.3.6
Respect for law
  conduct of tribunal members, 8.1, 8.3.2, 8.3.2.1
Respect for persons
  conduct of tribunal members, 8.1, 8.3.2, 8.3.2.4
Retrospective legislation, 2.3.1.2
Review tribunals, 1.4.1.1
  de novo merits, 1.4.1.2
  finality of decision and, 6.6
  first-tier review tribunals, 1.4.1.1
  jurisdiction, 1.2.2, 1.4.1.1
  merits review, *see* Merits review tribunals
  second-tier review tribunals, 1.4.1.1
  separation of powers and, 1.2.1, 1.3
Revocation of subordinate legislation, 2.3.2.3
Revoking decision, 6.6.1
Rights, human. *see* Human rights
Royal Assent, 2.3.1.2

S
Second-tier review tribunals, 1.4.1.1
Security at hearings, 5.5.1
Self-incrimination, privilege against, 5.7.3
Self-represented parties, 5.5.8
  alternative dispute resolution, 4.5.3
  assistance, sources of, 5.5.3, 5.5.6, 7.3.3
  cross-examination and, 5.5.10
  hearings, managing, 5.5.8
  tribunals duties regarding, 5.2.1, 5.5.9, 7.3.2.1

Separation of powers, 1.2.1, 1.3
  delegated or subordinate legislation, 2.3.2.1
Settlement conferences, 4.2.4
Sexual harassment,
  code of conduct, and 8.3.1, 8.4.1
  Judicial Commission of Victora guideline, 8.4.48.3.4.1
Similar fact evidence, 5.7.1, 5.7.1.1
Slip rule, 6.6.1
Social media,
  responding to criticism, 7.4.2
  use by members, 8.4.3
    conduct, and, 8.2.2, 8.3.1, 8.4.3,
  use by tribunal, 7.2.2, 7.4.2, 7.4.3
Sources of legal power, 1.2.3.1
Standard of proof, 6.1, 6.2.5.2
  Briginshaw principle, the, 6.2.6
Standards
  AMDRAS Standards, alternative dispute resolution, 4.4.1
  conduct standards, and, 8.4.1
Standing
  pre-hearings, 4.1
  applications, 4.2.2.1, 6.2.1
State Tribunals, 1.2.1, 1.3
  civil and administrative tribunals (CATs), 1.4.2
  Jurisdiction of, 1.3.3
Statutes. *see* Legislation
Statutory interpretation, 2.4
  alternative meanings, 2.4.5
  context, 2.4.3
  extrinsic materials, use of, 2.4.4
  general approaches, 2.4.2
  human rights Acts, and, 2.4.5.1
  inconsistency between statutes, 2.3.1.3
  Interpretation Acts, 1.3.3.2, 2.4.2, 2.4.3, 6.2.1
  legal presumptions, 2.4.5, 2.4.5.1, 2.4.5.2
  literal approach, 2.4.3, 2.4.5
  method for, 2.4.6
  modern approach, 2.4.3
  precedent, and 2.5
    non-binding, 2.5.2
    rules of, 2.5.1, 2.5.1.2
    tribunals, and, 2.5.1, 2.5.2.1
  presumptions, 2.4.4, 2.4.5
    principle of legality, 2.4.5.1, 3.2.3
    procedural fairness, 3.2.3
    other rebuttable presumptions, 2.4.5.2
  purposive approach, 2.4.3
  'reading down' state Act to be within jurisdiction, 1.3.3.2
  reconciling statutes, 2.3.1.3

role of tribunals in interpreting statutes, 2.4.1
subordinate legislation, 2.4.4.1, 2.4.5, 6.2.1
Statutory rules, 2.3.2.1
Stay orders, 4.2.2.3
Submissions
additional material, receipt of, 5.7.5
bias issues, 3.4.9.3
closing, 5.6.9
McKenzie friend, leave to make oral, 5.5.3
reasons for decision and, 6.3.5.4
Subordinate legislation, 2.3.2
cessation of operation, timing, 2.3.2.3
delegation of law-making power, 2.3.2.1
empowering Act, relationship to, 2.3.2.1
invalidity, 2.3.2.2
repeal or revocation, 2.3.2.3
statutory interpretation, 2.4.4.1, 2.4.5
Summary dismissal order, *see* Dismissal
Sunset clauses, 2.3.1.3, 2.3.2.3
Supervisory jurisdiction, 1.6.2
Suppression orders, 5.5.4

T
Technical skills
key competency for tribunal adjudication, 1.5.2
Teleconference, *see* Video-conferencing
Telephone evidence, 5.6.6
Termination of appointment during term, *see* Removal of member
Terminology. *see* Communication
Territory Tribunals, 1.2.1, 1.3
Translators. *see* Interpreters
Transparency
conduct of tribunal members, 8.3.2, 8.4.2.7
Trauma
trauma-informed practice, 7.3.3.1
definitions, 7.3.3.1
resources, 7.3.3
Tribunal Competency Framework: Promoting Professional Excellence, 1.5.2
communication, 5.5.2.1, 7.3
competence, 1.5, 5.4
tribunal member conduct, 5.4, 8.3
Tribunal Excellence Framework, 1.4.4, 1.5.2
communication, 7.1, 7.2.1
competence, 1.5.2
procedural fairness, 3.2.1
self-representation and, 5.5.9
tribunal member conduct, 8.3
Tribunal members
attire, 5.4.2

bias rule. *see* Bias rule
communication with, 4.4.5
competence, 1.5, 5.4
ARC model, 1.5.1
COAT Framework, 1.5.2, 5.4
communication, 5.5.2.1, 7.3
complaints against, *see* Complaints
conduct. *see* Conduct of tribunal members
core skills and abilities: ARC model, 1.5.1
culturally responsive practice, 5.5.2.1
demeanour, 5.4.3
flexibility of, 1.2.1
informed decisions, making, 6.2.7
knowledge and skills
ARC model, 1.5.1
personal knowledge, using, 6.2.7
liability, 4.4.6
preparation for hearing, 5.3
public authority, as, 6.2.13
punctuality, 5.4.1
questioning by. *see* Questioning by tribunal members
removal, *see* Removal of member from office
role of, 1.1
specialist members, 1.2.1
Tribunals
administrative, 1.4.1
administrative agencies, overlap with, 1.2.1
alternative dispute resolution. *see* Alternative dispute resolution
appeals. *see* Appeals
civil claims, hearing, 1.4.2, 2.5.2.2
civil and administrative tribunals (CATs), 1.4.2
consistency in tribunal decisions, 2.5.2.1
Commonwealth tribunals, 1.3.2, 1.4.1.1
and State tribunals, 1.2.1, 1.3, 1.4.1.1
court
distinguished, 1.2.1, 1.3, 2.5.1, 3.5.1, 4.2, 5.2, 5.5.8, 6.2.1, 7.2.2
part of, 1.2.1
decisions of, *see* Decisions
definition, 1.2.1
disciplinary, 1.4.1.1, 1.4.1.3
diversity of, 1.4.3
domestic, 1.2.1, 1.2.3.1
duties, 1.2.3.2
bias rule. *see* Bias rule
hearing rule. *see* Procedural fairness
inquire, duty to, 5.1, 5.2.1
procedural fairness. *see* Procedural fairness
features of, 1.2.1
guardianship, 1.4.1, 1.4.3

AGAC guidelines, 5.5.2.3
hearings. *see* Hearings
issue estoppel, 6.6.2.2, 6.6.2.3, 6.6.2.4
judicial review. *see* Judicial review
jurisdiction, 1.1, 1.2.2
original, 1.2.2, 1.3.3, 1.4.1.1
protective, 1.4.1
review, 1.2.2, 1.4.1.1
separation of powers and, 1.3
mental health review, 1.4.3
merits review. *see* Merits review tribunals
nature, of, 1.2.1
New Zealand 1.2.2, 1.3.3, 1.4.1.1, 1.4.2
powers, 1.2.3, 1.4.1, 5.2
common law, 1.2.3.1
control of own proceedings, 6.6.2.4
costs, 6.4
discretionary, 1.2.3.2, 6.2.12
exercising, 6.2.13
duties, 1.2.3.2
fines, 1.3.1
orders, 6.1, 6.5
revoking decision, 6.6.1
separation of powers and, 1.2.1, 1.3, 1.3.1
sources of, 1.2.3.1, 2.2
statutory, 1.2.3.1, 6.6.1
stay orders, 4.2.2.3
varying decision, 6.6.1
pre-hearings. *see* Pre-hearings
private sector, 1.2.1
source of power, 1.2.1
proceedings. *see* Hearings
State and Commonwealth, 1.2.1, 1.2.2, 1.3, 1.4.2
statutory, 1.2.1
types, 1.4
Truthfulness. *see* Credibility of witnesses

U
Ultra vires
Decision, grounds of invalidity, 1.6.2
subordinate legislation, 2.3.2.2, 6.2.1

V
Validity of legislation
Statutes, 2.3.3.1
subordinate legislation, 2.3.2.2, 6.2.1
Varying decision, 6.6.1
Vexatious proceedings, 4.2.2.4,
Victorian Civil and Administrative Tribunal (VCAT)

- complaints procedure, 9.1.1
- conduct and professional development, 8.4
- removal of members, 8.6.1.2

Videoconferencing, 5.6.7

W

Waivers
- bias and, 3.4.3.2

Witnesses
- affirmation, administration of, 5.6.4
- aggressive questioning of, 5.5.10
- children as, 7.3.2.1, 7.3.2.2
- credibility of, 6.2.10, 6.2.12
  - findings on, 6.3.3.2
- cross-examination, 5.5.4, 5.6.2, 5.6.5
- cultural and language differences, 6.2.10, 7.3.2.1, 7.3.2.2
- demeanour, 6.2.10
- expert evidence, 5.2, 5.7.2
  - evaluation of, 6.2.11
- intimidation of, 5.5.10, 5.5.11, 5.6.2
- oath, administration of, 5.6.4
- preconceived views regarding, 3.4.5.2
- questioning, 5.2, 5.5.4
- reassuring, 5.5.11
- re-examination, 5.6.3
- summoning, 5.2
- videoconferencing, 5.6.7

Written reasons for decisions, 6.3.5
- confidential information, 6.3.5.3
- delivery, useful tips for, 6.3.5.1
- legal materials, reference to, 6.3.5.2
- oral, following, 6.3.4
- submissions, 6.3.5.4