

Tribunal Case Update

In *Plaintiff M19A/2024 v Minister*, the High Court of Australia found jurisdictional error where a decision maker unreasonably gave weight to a party's failure to respond to a 'show-cause' notice, the party being under no legal obligation to respond to the notice.

Even where they are not material to the decision, slips in the writing of reasons derogate from the tribunal's educative function. In *Enkhbat v Minister*, a judge observes that authors are not solely responsible for the accuracy of their reasons. The tribunal has an institutional responsibility to provide support for decision making.

We report two cases in which a party unsuccessfully sought to rely on the slip rule in applying to a court or tribunal for amendments to reasons or orders. In *FZK* the alleged error was the result of a deliberate decision. In *Wu v Registrar-General* the alleged error was no slip but 'a substantive matter of controversy'.

In *Helensburgh Coal*, Edelman J considered how an appellate court or tribunal determines whether the appropriate standard of appellate review to apply in a particular case is the correctness standard, or the 'standard of appellate restraint' enunciated in *House v The King*. The Court held that an error in determining which standard to apply is not a jurisdictional error.

Since *Burns v Corbett* it is clear that a State tribunal can exercise administrative but not judicial power in a proceeding between residents of different States. In *NSW v Wojciechowska*, High Court found that NCAT did not exercise judicial power in making an order for damages which would, on registration with a court, operate as a court judgment for debt. The Court discussed the principles for distinguishing judicial from non-judicial power.

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In *CX (Federal Jurisdiction Issue)*, TASCAT determined that it exercised administrative, not judicial, power in reviewing an enduring power of attorney. The decision accords with interstate authority on the exercise of protective jurisdiction in guardianship matters.

In *WUJ v Victoria University (Human Rights)*, a State Act incorporated Disability Standards made under a Commonwealth Act. VCAT decided that the dispute about compliance with the standards arose under the State Act and did not invoke federal jurisdiction.



Graeme Neate Memorial Award

Applications are now open for an award of up to \$10,000 to encourage research and best practice in an area of tribunal excellence in Australia and New Zealand.

The award is made in honour of the late Graeme Neate AM and is open to all, but especially to persons with an interest in tribunals.

The closing date for applications is 1 April 2026, and the closing date for any questions about the application process is 26 February 2026.

For further information, see the COAT website: coat.asn.au/graeme-neate-memorial-award-introduction/

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Unreasonable weight given to party's failure to respond to a notice

The High Court allowed an appeal from a decision of a single judge of the High Court on the basis of a concession by the Minister that his delegate had committed jurisdictional error in cancelling a visa under s 116 of the *Migration Act 1958* (Cth). The error was to have given weight to the appellant's failure to respond to a 'notice of intention to consider cancellation'. The appellant was under no obligation to respond to such a notice and, therefore, the delegate was not entitled to have regard, nor give weight, to that failure to respond.

The decision adds a category of situation in which a decision may be found to be legally unreasonable, viz, 'if the decision-maker gives weight to a consideration to which no weight ought reasonably to have been given': *Lipman Pty Ltd v A-Civil Aust Pty Ltd* [2025] NSWSC 865 [195] (Nixon J) (5 Aug 2025).

***Plaintiff M19A/2024 v Minister for Immigration and Multicultural Affairs* [2025] HCA 17**

High Court of Australia (Gageler CJ, Steward, Gleeson, Jagot and Beech-Jones JJ), 10 April 2025

The case arose on an appeal under s 73(i) of the Constitution from a judgment given by a single judge exercising the Court's original jurisdiction under s 75(v) of the Constitution.

Section 116(1AA) of the *Migration Act 1958* (Cth) ('the Act'), the Minister may cancel a visa if he or she is not satisfied as to the visa holder's identity. Section 119 of the Act requires the Minister, if considering cancelling a visa under s 116, to notify the visa holder in writing specifying the grounds for cancellation which appear to exist and inviting the holder to show within a specified time why the visa should not be cancelled. The Act imposes no legal obligation on the visa holder to respond.

In deciding to cancel the protection visa of the appellant under s 116(1AA) of the Act, the Minister's delegate referred to the visa holder's failure to respond to the s 116 notice, stating 'I give this consideration some weight in favour

of cancelling the visa'. On appeal, the Minister conceded that it was not reasonably open to the delegate to take into account a failure to respond to a s 116 notice in a manner adverse to the visa holder because there was no legal requirement to respond to such a notice. The Minister conceded that in doing so, the delegate had committed a jurisdictional error.

The Court was satisfied that the Minister's concession of error was correct and that the consent orders submitted jointly by the parties were appropriate to be made. ([9]).

Order

The Court allowed the appeal, set aside the judgment under appeal and substituted orders including the issue of a writ of certiorari and a declaration.

See *Guide to Tribunal Practice 6th ed* [6.2.12.1]

Slips in reasons as grounds for review

There have been several recent cases in which applicants for judicial review or leave to appeal the decision of a court or a tribunal decision have relied on slips or textual errors in the reasons for decision to establish a ground of review.

In *Elsharkawi v Minister for Immigration and Multicultural Affairs* [2025] FCA 293, a judge's published reasons purported to adopt the reasons set out in the Minister's submissions which were neither attached to nor quoted in the reasons. While expressing serious concerns about the error, Perry J concluded that the error in the reasons did not justify granting leave to appeal in circumstances where the proposed ground of appeal had no reasonable prospect of success ([22]-[24]).

One way in which errors can occur in a statement of reasons is where the reasons have been produced by overwriting text from another case and one or more particulars from the original case has been inadvertently retained.

In *CRI026 v Republic of Nauru* [2018] HCA 19, a tribunal inadvertently made a single reference to the position in 'Sri Lanka' instead of Pakistan and referred to 'Tamils' rather than the Muttahida Quami Movement. The appellant

submitted that the tribunal had erred in taking into account an irrelevant consideration or by asking itself the wrong question.

Reading the decision as a whole, the Court found that these isolated errors in one paragraph amounted to 'an unintended textual error ... possibly an error in editing a form of words cut and pasted from a previous decision in another matter' ([56]).

In a case where such errors are relied on as grounds of review or appeal, a court will examine the extent to which the error affected the tribunal's reasoning process, and if it did, whether the error is material in the sense that the outcome could have been different if the error had not been made.

***Enkhbat v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FedCFamC2G 308**

**Federal Circuit and Family Court of Australia (Div 2) (Judge B McCabe)
6 March 2025**

In an application to the Court for judicial review of a decision of the Administrative Appeals Tribunal ('the tribunal'), the self-represented applicant cited errors in the tribunal's reasons as evidencing carelessness that called into question the integrity of the decision. One of the errors referred to the applicant's home country as Nepal, instead of Mongolia. Another error referred to 'his application' instead of 'her application'.

Judge McCabe found that the errors were of a typographical nature, it being evident from a fair reading of the tribunal's reasons as a whole that the tribunal understood the applicant was female and was from Mongolia ([24]).

His Honour remarked that tribunal review serves not merely to provide justice in individual cases. It also promotes good government by demonstrating for primary decision makers good practice for deciding like cases in future ([25]). For the tribunal to fulfil that educative role, the quality of its decision making must be maintained.

His Honour explained why typographical errors occur and are easily missed when one is proofing one's own work. Traditionally, courts and tribunals have relied on associates to proof-read their decisions to ensure quality control

([26]). His Honour proceeded to explain that while a judge or tribunal member is responsible for checking what they have written, there is an institutional responsibility on the court or tribunal to ‘provide proper, skilful and timely support for decision making’.

That support comes in many forms, including appropriate listing processes and sensitive workload management, adequate editing and review arrangements, and professional development training on decision-writing. There must be a question over the adequacy of those important quality controls if errors repeatedly occur ([27]).

His Honour concluded that the typographical errors identified by the application were unfortunate but did not of themselves establish material jurisdictional error as required for judicial review ([28]).

The application for judicial review was dismissed.

Guide to Tribunal Practice 6th ed [1.6.2]

Application by a party for amendment of reasons

Tribunal legislation and court rules commonly permit a tribunal member or judge to amend reasons which have been delivered orally or in writing, to correct minor errors and omissions. This is known as a ‘slip’ rule. An example is s 63 of the *Civil and Administrative Tribunal Act 2013* (NSW) (‘CAT Act’), which is considered in the case of *FZK* reported below. Subject to the effect of the particular legislative provision or court rule, judicial authority defines the amendments that can permissibly be made under a slip rule.

In *Spencer v Bamber* [2012] NSWCA 274, Campbell JA (Basten and Macfarlan JJA agreeing) held that the reasons as amended must in substance be the same as those given by the judge at the time of making the orders ([141]). An alteration is permissible where, due to a slip, the reasons previously provided by the judge do not reflect what he or she meant to say ([142]). It is not permissible for a judge who has pronounced reasons to make a material alteration “‘simply because some better idea has come to mind’” ([142], quoting *Bell v Veigel* [2008] NSWCA 36 [221] (Mason P)). If an impermissible amendment has been made to

the reasons, a court of appeal should disregard the amendment ([141], citing Mason P in *Bell v Veigel* [220]).

The principles discussed in *Spencer v Bamber* have been widely applied in cases where judges and tribunal members have amended their reasons.

In the cases mentioned above, the amendment or purported amendment was initiated by the judge or tribunal member. We report below two recent cases in which a party to a tribunal or proceeding has sought to rely upon the slip rule in applying to the tribunal or judge to amend the reasons.

***FZK v Secretary, Department of Communities and Justice (No 2)* [2025] NSWCATAP 144**

NCAT Appeal Panel (Seiden SC DCJ, DP and HJ Dixon SC, SM), 24 June 2025

Two members constituting the NCAT Appeal Panel published separate reasons for the Panel’s decision to refuse the application of the appellant (‘FZK’) for Judge Seiden to recuse herself for actual and apprehended bias. FZK then applied for a correction for what she said was an ‘obvious error’ in para 13 of the Judge’s reasons, relying on s 63 of the *Civil and Administrative Tribunal Act 2013* (NSW) (‘CAT Act’). FZK submitted that the reasons incorrectly summarised her submission as alleging that the judge had exhibited ‘extreme prejudice’ against her.

The Appeal Panel observed that s 63 of the CAT Act is a statutory version of the common law ‘slip rule’ which empowers the tribunal to rectify errors and omissions in orders or reasons ([7]). The power is expressed to apply in cases of ‘obvious error’ (s 63(1)), for which examples are provided by s 63(3). The Appeal Panel found that the power “‘has no application to alleged mistakes that are the consequences of a deliberate decision’” ([7], citing *Expo Aluminium (NSW) Ltd v Pateman Pty Ltd (No 2)* [1991] NSWCA 92). The test for whether a mistake or omission is accidental is: “‘[I]f the matter had been drawn to the court’s attention would the correction at once have been made?’” ([7], applying *Storey & Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446, 453, citing *Hatton v Harris* [1892] AC 547, 558).

The Appeal Panel found no obvious or error in para 13 of the reasons. It was not necessary in the reasons to reiterate the exact words used by parties in their submissions. The words ‘extreme prejudice’ were sufficiently consistent with the tenor of FKZ’s submissions where she alleged that the judge ‘fabricated evidence’, ‘would make anything up’ and that the matter was ‘very personal’ ([8]).

The application to correct the reasons was refused.

Guide to Tribunal Practice 6th ed [6.3.1]

Wu v Registrar Donovan [2025] FCA 647

**Federal Court of Australia (Markovic J),
18 June 2025,**

Having exhausted his avenues of appeal in the Federal Court of Australia, Mr Wu made an interlocutory application seeking ‘clarification’ of the final orders made by Kennett J sitting as a single judge in the Court’s appellate jurisdiction. Relying on r 39.05 of the *Federal Court Rules 2011*, Mr Wu sought variations to the orders on the ground that Kennett J may have accidentally slipped or omitted certain matters in making his decision. A registrar refused to accept the interlocutory application for filing in the Court, finding it to be an abuse of process.

Mr Wu filed an originating application for judicial review of the registrar’s decision. In dismissing the application, Markovic J noted that r 39.05 was a slip rule. It empowers the Court to vary an order if ‘there is an error arising in a judgment or order from an accidental slip or omission’. At [29] His Honour quoted with approval the words of Wheatley J about the operation of r 39.05(h) in *AMO25 v Administrative Review Tribunal (No 2)* [2025] FCA 376 14 [46], which included the following points:

1. The slip rule permits the correction of an error where it is either a unilateral or mutual error or inadvertence by the parties’ representatives, or an error of the Court (*Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* [1995] FCA 943, 389-391 (‘*Elyard*’)).
2. The rule exists to avoid injustice (*L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590 at 597) (‘*Shaddock*’)

3. The rule does not apply where the amendment is a matter of controversy. It can apply where the proposed amendment is one upon which no real differences of opinion can exist (*Elyard* at 391-92)
4. It is in the Court’s discretion to exercise its powers under the slip rule to correct an accidental error or omission and the Court may do so of its own motion (*Shaddock*, 597).

Markovic J held that the matters raised by Mr Wu in the judgment of Kennett J did not fall within the ambit of ‘mere slips or omission’. They were substantive matters of controversy ‘upon which there would be a real difference of opinion’ ([30]). The Registrar was correct to refuse to file the interlocutory application for variation of the final judgment of Kennett J ([32]).

The application for judicial review of the Registrar’s decision was dismissed.

Guide to Tribunal Practice 6th ed [6.3.1], [6.6.1]

Standard of appellate review

Some Australian tribunals have an appeal panel or division vested with an ‘appeal jurisdiction’ to hear an appeal from a decision of a member or panel of the tribunal sitting at first instance. Depending on the terms of the legislation and the circumstances, an appeal may be brought as of right, or only by leave of the appeal panel. It may be limited to an appeal on a question of law.

The legislation is generally silent as to the nature of the error of the decision maker at first instance that is required to uphold the appeal (the ‘standard of appellate review’). In an appeal from a discretionary decision, the appeal can be challenged if there is an error in the decision-making process within the categories of error identified in *House v The King* (1936) 55 CLR 499, 504-55. In other circumstances, the standard of appellate review is one of correctness.

As Edelman J explained at [80] in the case reported below, the determination of which standard of appellate review applies is a complex one. It may therefore be of some comfort to appeal panels that an error in applying the wrong standard is not a jurisdictional error.

Helensburgh Coal Pty Ltd v Bartley [2025] HCA 29

**High Court of Australia (Gageler CJ,
Gordon, Edelman, Steward and Beech-Jones
JJ), 6 Aug 2025**

The respondents, employees at a mine operated by the appellant ('Helensburgh') were dismissed due to a restructure. The Employees applied to the Fair Work Commission ('FWC') for remedies for unfair dismissal under s 394 of the *Fair Work Act 2009* (Cth) ('FW Act'). A Commissioner found that the dismissals were not cases of genuine redundancy within the meaning of s 389 of the FW Act. On appeal, the Full Bench of the FWC held that the decision under review was a discretionary one and could be challenged on appeal only if there was an error within the categories identified in *House v The King* (1936) 55 CLR 499, 504-55.

Helensburgh applied to the Full Federal Court ('FCAFC') for a writ of certiorari to quash the decisions of the FWC and a writ of prohibition to compel the FWC to cease dealing with the Respondent Employees' unfair dismissal applications. This relief was only available if the decisions were affected by jurisdictional error.

Dismissing the applications, the FCAFC held that even if the Full Bench was wrong in finding that the Commissioner's decision was untainted by error, the Full Bench's error would have been an error within jurisdiction.

High Court consideration

In the High Court, Helensburgh argued that the Full Bench of the FWC erred in ruling that the decision under review was a discretionary decision which could be challenged on appeal if there was a *House v The King* error. The appellant contended that the appropriate standard of appellate review in this instance was the correctness standard.

The plurality (Gageler CJ, Gordon and Beech-Jones JJ, Steward and Edelman JJ agreeing) distinguished between 'the nature of the appeal and the standard of review applicable to a decision at first instance. The former goes to jurisdiction, the latter does not' ([54], citing *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 208-09 ('*Coal and Allied*'). The standard of review defines the kinds of error on the part of the court or tribunal at first instance that will lead the

appellate court or tribunal to uphold the appeal. Both the correctness standard and the principles in *House v The King* are standards of review ([54]). An error as to which standard of review to apply, or an identification of the wrong error, are errors within jurisdiction ([55]).

The plurality identified the kinds of error that would amount to 'an error as to the nature of the appeal' and would therefore go to jurisdiction:

There would have only been jurisdictional error on the part of the Full Bench if it had misconceived its role, misunderstood the nature of its jurisdiction, misconceived its duty, failed to apply itself to the questions it was required to answer or misunderstood the nature of the opinion it was required to form. It did not do so ([42], citing *Coal and Allied* [31]).

The plurality found it unnecessary to determine whether the appropriate standard of review in this case was that of *House v King*, as the application of the wrong standard of review would not have been a jurisdictional error ([51]). In his separate judgment, Edelman J agreed, while adding a positive finding that the appropriate standard to apply in this instance was as per *House v The King* ([91]).

Edelman J's judgment includes a detailed discussion of the authorities explaining the relationship between the two standards of appellate review. In determining whether in a particular case the appropriate standard to apply is the correctness standard or the 'standard of review of appellate restraint' in *House v The King* ([88]), His Honour identified the following criteria drawn from the authorities ([80]):

matters including: whether there is a unique outcome or a range of outcomes; the breadth of any evaluative power afforded to the primary decision-maker; the nature of the legal relations in issue, including whether the decision is one of practice and procedure; whether the adjudication concerns individual rights or the general public interest; the manner in which the issue has historically been adjudicated; and the expertise of the primary decision-making body in the area of adjudication.

Order

The appeal was dismissed.

Guide to Tribunal Practice 6th ed [1.4.1.3], [1.6.3]

Distinguishing judicial and administrative power

Following *Burns v Corbett* (2018) 265 CLR 304 and *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, it is clear that the Parliament of a State lacks legislative power to confer upon a State tribunal judicial power relating to 'matters between a State and a resident of another State'. Judicial power in respect of those matters ('diversity jurisdiction') is reserved to the Commonwealth by s 75(iv) of the *Constitution*. The judicial power of the Commonwealth can be conferred only on a 'court of a State' within the meaning of s 77(ii) and (iii) of the *Constitution*.

The case reported below, *New South Wales v Wojciechowska*, arose from proceedings in NCAT's administrative review jurisdiction between the State of New South Wales and a person resident in another State. The key question was whether the power that NCAT was called upon to exercise in the proceedings was of a judicial or an administrative character. A full bench of the NSW Court of Appeal had determined unanimously that the power in question was judicial. On appeal, a full bench of the High Court held that the power was not judicial but administrative in character.

In assessing whether a power given to a body is judicial or administrative, a number of indicators are considered. One of these is whether the body is empowered to enforce its own determinations. In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ('*Brandy*'), it was said:

[T]he fact that [the body] is unable to enforce its own determinations is a strong factor weighing against the characterisation of the power as judicial ((1995) 183 CLR 245, 269 (Mason CJ, Brennan and Toohey JJ)).

In *Brandy*, a registration provision which purported to render a determination of the Commission enforceable as an order of the Federal Court was held to impermissibly confer the judicial power of the Commonwealth on the Commission.

When considering the effect of the registration provision in *Wojciechowska*, the NSW Court of Appeal found no basis to distinguish *Brandy*. In its unanimous decision setting aside the Court of Appeal's decision, the High Court identified

ample grounds for distinguishing *Brandy*. The High Court found a significant difference in the operation of the registration provisions in the two cases. In *Brandy*, it was the Commission's act in registering its determination in the Federal court that gave the determination the effect of a court order. In *Wojciechowska*, NCAT's role in enforcement was limited to certifying its order. It was only when a party took the certified order and registered it in an appropriate court that the legislation deemed it to have the binding and enforceable effect of a court order ([36]).

This case is the latest word from the High Court of Australia on distinguishing judicial from administrative power. While the distinction most commonly arises in the context of the incapacity of State tribunals to exercise federal judicial power, it also arises under human rights legislation of Victoria, Queensland and the ACT which places administrative tribunals under a duty to consider the potential effect of their decisions in limiting the human rights of affected persons. (See *Guide to Tribunal Practice 6th ed* [6.2.12.2]).

***New South Wales v Wojciechowska* [2025] HCA 27**

High Court of Australia (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), 6 August 2025

In administrative review proceedings before the NSW Civil and Administrative Tribunal ('NCAT'), a resident of Tasmania claimed damages under s 55(2)(a) of the *Privacy and Personal Information Protection Act 1998* (NSW) ('PPIP Act') for conduct by a New South Wales public authority which allegedly contravened information privacy principles specified in the Act. A jurisdictional issue was referred to the NSW Court of Appeal to determine whether in making an order for damages under s 55(2)(a) NCAT would impermissibly exercise the judicial power of the Commonwealth.

The Court of Appeal answered the referred question in the affirmative. Kirk JA (Mitchelmore JA and Griffiths A-JA agreeing) declared that NCAT had no jurisdiction to determine the proceedings against the State brought by the applicant, a resident of another State. His Honour reasoned that if an order for damages were made by the tribunal under

s 55(2)(a) of the PPIP Act, s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('CAT Act') would apply. Section 78 purported to provide that NCAT's order, upon registration with a court, would operate as a judgment of the court for debt. As this would give the order of an administrative tribunal the effect of a court order, Kirk JA held that the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ('*Brandy*') required an affirmative answer to the referred question. A State Act could not confer on NCAT administrative power in respect of a 'matter' between a State and a resident of another State. Accordingly, NCAT had no jurisdiction to determine the proceedings.

The State was granted special leave to appeal to the High Court. The High Court allowed the appeal in a joint judgment of all seven justices.

The High Court's reasons

The Court observed that judicial power cannot be exhaustively defined because it requires assessment of multiple factors which can arise in different combinations ([15]). In *Brandy*, a judicial decision was said to be

"a binding and authoritative decision of controversies" between persons, a determination of "existing rights and duties... according to law, that is, by the application of a pre-existing standard" ([16], citing *Brandy*, 268).

A power or function can also take its character from the recipient of the power or from indications in the legislation as to the process and the end to be accomplished ([17]).

The Court distinguished its decision in *Brandy* and held that the power conferred on NCAT by s 55(2)(a) of the CAT Act was non-judicial ([31], [36]). It held that 'each key aspect of the scheme indicates against any exercise of judicial power by the Tribunal' ([31]). The following aspects were of particular significance in distinguishing *Brandy*:

- The *Human Rights and Equal Opportunity Act* ('HREOC Act') considered in *Brandy* creates norms of conduct of general application, breach of which is deemed 'unlawful'. By contrast, the PPIP Act creates norms designated by the Act as 'principles' and 'codes of practice', indicating their character as administrative

standards. The norms are applicable only to public sector agencies, modifiable by privacy codes of practice, and enforceable only under Pt 5 of the PPIP Act ([28]).

- The review provisions in Pt 5 create no enforceable right to a particular remedy, or indeed any remedy ([29]). A finding of contravening conduct and resulting loss or damage does not entitle an applicant to damages; it enlivens NCAT's discretion to consider a range of options ([31]). (The use of the term 'damages', while commonly found in connection with judicial power, is not in this context determinative of the characterisation of the power ([31])).
- The language of PPIP Act ss 53(8) and 55(1) clearly indicates that the review by NCAT is within NCAT's administrative review jurisdiction ([30]).
- The registration provision in s 78 of the CAT Act was not comparable to the provisions considered in *Brandy* ([27], [34]). The latter required the Commission to lodge its determination with the court registry. So, the final act which operated to give the Commission's order the effect of a court order was an act of the Commission. By contrast, s 78 of the CAT Act requires the NCAT registrar to certify the amount ordered to be paid, but the filing of the certificate in a registry of a court involves no further act by NCAT. It is the act of filing the certificate with a court — the separate act of another person — which enlivens the operation of s 78(3) to deem the certificate to have the effect of a judgment of the court ([35], [36]).

Order

The Court allowed the appeal and set aside orders 2 and 3 of the orders made by the Court of Appeal.

Guide to Tribunal Practice 6th ed [1.3.1], [1.3.3]

Federal diversity jurisdiction – whether tribunal exercises judicial power

In the following case, a Senior Member of TASCAT held that the tribunal had power to determine an application to review an enduring power of attorney (EPOA) in proceedings between parties residing in different states. Rejecting a submission that to do so involved an exercise of federal jurisdiction, the tribunal found that its power to determine an application under the relevant legislation was administrative, not judicial.

This was the first time since the TASCAT Act had vested jurisdiction in the tribunal that it had been called upon to determine the character of the power in question. The Senior Member's decision is consistent with court rulings in other states. The reasons provide a clear explanation of why the protective jurisdiction exercised in reviewing an EPOA is characterised as administrative rather than judicial power.

CX (Federal Jurisdiction Issue) [2025] TASCAT 158

Tasmanian Civil and Administrative Tribunal (C Fougere, SM), 20 June 2025

In proceedings before TASCAT under s 33 of the *Powers of Attorney Act 2000* (Tas) ('POA Act') for review of an enduring power of attorney (EPOA), the attorney applied to transfer the proceedings to the Magistrates Court pursuant to Part 9 of the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ('TASCAT Act'). (Part 9 was introduced following the decision in *Burns v Corbett* [2018] HCA 15 to provide a means for the tribunal to transfer proceedings which invoke 'federal jurisdiction' (defined as 'jurisdiction of the kind referred to in section 75 or 76 of the Constitution) to a court.

The attorney submitted that the tribunal did not have jurisdiction under s 33 of the POA to determine the application for review, because it would impermissibly exercise federal jurisdiction if it purported to exercise judicial power to determine a proceeding between residents of different States.

Whether the power was judicial

The question to be decided was whether the tribunal exercises judicial power in determining an application for review under s 33 of the POA Act. If the power exercised was not judicial power, the tribunal would have jurisdiction to determine the application for review regardless of whether the parties were resident in different States ([6]).

The attorney submitted that the tribunal exercises judicial power in review proceedings under s 33 of the POA Act because it must determine whether the donor had capacity to make the EPOA. In deciding that question, the attorney submitted, that tribunal makes a determination as to existing rights.

Opposing transfer, the applicant for review submitted that TASCAT should follow the decision of a predecessor tribunal which had determined that in exercising power under the POA Act s 33(1) it was not exercising judicial power, and that s 75(iv) of the Constitution had no application (*EEC (Review of Enduring Power of Attorney* [2021] TASGAB 18 ('*EEC*')).

Subsequently to the decision in *EEC*, the TASCAT Act vested in TASCAT's Guardianship stream of the Protective Division the functions and powers to hear and determine proceedings under the POA Act. The functions and powers were to be exercised in accordance with the general principles that apply in other proceedings before the tribunal ([33]; TASCAT Act s 79).

TASCAT's consideration

The Senior Member referred to *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 and other authorities which identify various considerations that have been used in the authorities to distinguish judicial power from non-judicial power. She found multiple factors pointing to the conclusion that the tribunal exercised administrative, not judicial powers in proceedings under the POA Act. The factors included the principles that apply to the proceedings by the operation of s 79 of the TASCAT Act, and the constitution of the panel with a mix of legal and other specialist members ([61]).

The determinative factor in characterising the power in question was that the tribunal does not decide a dispute between parties, nor resolve a controversy by ascertaining existing rights ([55]). While the proceedings may be contested,

the tribunal's function is the protective one of determining what is in the best interests of the donor of the EPOA, being the person in need of protection ([48]-[53], quoting *C v W* [2015] NSWSC 1774 [96], [97] (Lindsay J)). The protective jurisdiction exercised in such matters "is essentially a legislated form of the *parens patriae* jurisdiction exercised by the Court"; *JK (request to withdraw application)* [2022] TASCAT 21 [13], [24] (Schyvens P)).

The POA Act s 33(2)(f) vests the tribunal with the power to revoke an EPOA or appoint an administrator, which indicate that the tribunal exercises administrative power. In exercising the protective jurisdiction under s 33 the tribunal is not resolving a dispute between parties or determining existing rights. It is determining 'what rights should be created in respect of the donor' ([55]).

While the characterisation of the power exercised by the tribunal in guardianship proceedings 'had not been squarely determined in Tasmania', the Senior Member noted 'highly persuasive' interstate authorities holding the power to be administrative in nature ([58], citing *GS v MS* [2019] WASC 255; *German v State Trustees Ltd* [2023] VSC 7).

Order

The application to transfer the proceedings was dismissed.

Guide to Tribunal Practice 6th ed [1.3.1], [1.3.3], [1.4.1.1]

Federal jurisdiction: Interaction of State and Commonwealth Acts

In the following case, a State Act incorporated standards made under a Commonwealth Act into a test of whether adjustments made for a person's disabilities were reasonable. While neither party raised an objection to the jurisdiction of VCAT to hear the matter, the tribunal was bound to determine for itself whether it had jurisdiction. The tribunal decided that the dispute arose under the State Act and did not require the exercise of federal jurisdiction.

WUJ v Victoria University (Human Rights) [2025] VCAT 11

Victorian Civil and Administrative Tribunal (B Steele, Senior Member), 30 January 2025

A law student ('WUJ') alleged, in relation to her sitting a law examination, that the respondent ('University') had discriminated against her on the basis of disabilities and failed to make reasonable adjustments for them, in breach of the *Equal Opportunity Act 2010* (Vic) ('EO Act'). The University denied the claim on the facts, and as a possible alternative, defence, submitted that it had complied with the relevant disability standards made under the *Disability Discrimination Act 1992* (Cth) ('DD Act').

Section 40(3)(g) of the EO Act provides that in determining whether an adjustment for a disability is a reasonable one, one of the relevant facts and circumstances to be considered is any relevant action plan made under Part 3 of the DDA.

Section 40(4) of the EO Act provides that an educational authority is not required to make an adjustment under s 40(2) to the extent that the authority has complied with or been exempted from a relevant disability standard made under the DD Act in relation to the subject matter of the adjustment.

Did the case invoke federal jurisdiction?

The tribunal addressed the question of its jurisdiction to determine the dispute, noting that VCAT lacks power to exercise judicial power in relation to a federal matter ([14], citing *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226). The University submitted that the questions of (1) whether it had a relevant action plan and (2) whether it complied with the standards applied by s 40(4) were simply questions of fact.

Since the standards made under the DD Act applied in Victoria of their own force, the tribunal found that the mention of the disability standards in section 40(3)(g) of the EO Act was intended to incorporate the standards into the EO Act. Therefore, the claim about the standards in the instant proceeding arose from the EO Act, not from the DD Act. Accordingly, the DD Act was not the source of the claim, nor of the first defence, and so the dispute did not arise under that Act ([16]).

The tribunal found that it had jurisdiction ([19]). The dispute was not about whether the respondent's access plan met the standards under the DD Act, but whether the adjustments made by the respondent were reasonable as required by the EO Act s 40.

Taking the standards into account to determine in determining whether the adjustments were reasonable as required by s 40(3)(g) did not raise a federal matter ([19]).

On the evidence, the tribunal was satisfied that the university made reasonable adjustments for WUJ's disabilities based on the information it had before the examination. There was no evidence that the university had discriminated against her on the ground of her disabilities ([114]).

WUJ's claim was dismissed.

Guide to Tribunal Practice 6th ed [1.3.1], [1.3.3.1], [1.3.3.2]

Briefs

In Issue 3 of 2025 at page 4, in a note on the case of *Valu v Minister for Immigration and Multicultural Affairs (No 2)* [2025] FedCFamC2G 95, the Bulletin mentioned that in a case of *Dayal* [2024] FedCFamC2G 1166 a judge directed the referral of a solicitor to the Victorian Legal Services Board (VLSB). The judge had found that the solicitor Mr Dayal (a pseudonym) had provided to the court a list and summary of cases generated through the use of artificial intelligence that included inaccurate information and had failed to check and verify the information.

On 19 August 2025 the VLSB reported that Mr Dayal's practising certificate as a principal had been varied to an employee certificate. He was limited for two years to practising as an employee under supervision with a requirement for quarterly reporting to the Board.

<https://lsbc.vic.gov.au/news-updates/news/statement-mr-dayal-matter>