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Tribunal Case Update

We begin this issue with *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 ('*QYFM*'), in which six justices of the High Court of Australia discuss the preferable procedure for dealing with an application that one member of a multi-member bench recuse themselves on the basis of apprehended bias. In *Masi-Haini v Minister for Home Affairs* [2023] FCAFC 126, the Full Court of the Federal Court reflected on the implications of *QYFM* for its practice in dealing with such applications.

In *Medical Board of Australia v Adams* [2023] WASCA 41 the Court of Appeal (WA) rejected an argument that s 326(c)(ii) of the *State Administrative Tribunal Act 2004* (WA), properly construed, conferred on a party a right to cross-examine a witness.

In *BET (Application for a Treatment Order)* [2023] TASCAT 79, the tribunal rejected an argument that the applicant for a treatment order under the *Mental Health Act 2013* (Tas) bore an evidentiary onus to establish that the subject person had a mental illness. The tribunal formulated a test for the sufficiency of evidence suitable to be applied in all applications for an order under the Act.

In *TJ v Public Trustee of Queensland & Anor* [2023] QCA 158 the Court of Appeal cleared the way for a compensation claim against the Public Trustee of Queensland for proven loss occasioned by its failure to comply with its statutory obligations in the exercise of its power as administrator to dispose of real property owned by CRG. The Court found there was no evidence that the Public Trustee had considered alternative courses of action, assessed the consequences for CRG's accommodation needs and continued entitlement to government benefits, or met its consultation obligations.

In *Jain v Dr N Kalokerinos Pty Ltd* [2023 NSWCATAP 141, an NCAT Appeal Panel decided that it should consider an admission in a defence signed by the party's solicitor and filed in the tribunal in the same manner as an agreed fact within s 191 of the *Evidence Act 1995* (NSW) which would not have to be proved by evidence.

Contents

Application for recusal in a multi-member bench – who decides?

QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 15

High Court of Australia (Kiefel CJ Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ), 17 May 2023

In 2013 the appellant QYFM (a pseudonym), a citizen of Burkina Faso, was convicted in 2013 of a drug importation offence and sentenced to imprisonment for 10 years with a non-parole period of seven years. The appellant unsuccessfully appealed against his conviction on the ground that it was based on the alleged wrongful admission of evidence.

In 2017 a delegate of the respondent minister determined, under s 501(3A) of *the Migration Act 1958* (Cth) to cancel the appellant's visa under the so-called 'character test' because of the sentence of imprisonment. In 2019 another delegate of the Minister decided not to revoke the cancellation of QYFM's visa ('the Decision'). QYFM applied for review of the Decision by the Administrative Appeals Tribunal ('AAT'). In 2020 the AAT affirmed the Decision and an application for judicial review of the AAT decision was subsequently refused by the Federal Court. The appellant appealed to the Full Court of the Federal Court ('the Full Court') which was constituted for the appeal by McKerracher, Griffiths and Bromwich JJ.

Before becoming a judge, Bromwich J was a senior counsel appointed to the position of the Commonwealth Director of Public Prosecutions. In this capacity he had appeared as leading counsel for the Crown to argue points of law in the appellant's appeal against his conviction for the drug offences. On becoming aware that he had previously appeared against the appellant, Bromwich J instructed his associate to notify counsel for the appellant.

At the commencement of the hearing of the appeal before the Full Court, the appellant's counsel applied for Bromwich J to recuse himself from hearing the appeal on the basis that his appearance as counsel against the appellant in the conviction appeal gave rise to a reasonable apprehension of bias. Bromwich J heard and decided the application alone and declined to recuse himself. His Honour proceeded to sit with the Full Court bench which heard and dismissed the appeal. The joint judgment of the two other members of the Full Court did not comment on the recusal application in their reasons for judgment.

In his reasons for his decision not to recuse himself, Bromwich J said that the conviction appeal turned wholly on a legal question as to admissibility of evidence. Further, the fact of the conviction was not in issue in the appeal, it being common ground that the appellant failed the 'character test'. Bromwich J added that he had not obtained by reason of that appearance any knowledge of the appellant's criminal history beyond that which was apparent from the material on record in the Full Court's appeal book.

Appeal to the High Court

The appellant was granted special leave to appeal to the High Court. There were two questions in the appeal. The first question was whether the circumstances gave rise to a reasonable apprehension of bias on the part of Bromwich J which would deprive the Full Court of its jurisdiction to determine the appeal. The second question was whether the objection taken by counsel for the appellant to the jurisdiction of the Full Court as constituted should have been determined by the Full Court or by Bromwich J alone.

The High Court allowed the appellant's appeal, holding by a majority that the relevant circumstances gave rise to a reasonable apprehension of bias on the part of Bromwich J. Although this conclusion on the first question rendered it unnecessary for the disposal of the appeal, six justices proceeded to consider the second question, which concerned whether the Full Court or Bromwich J alone should have determined the bias application.

Determining the bias question

Five justices (Kiefel CJ & Gageler J, Gordon, Edelman and Jagot JJ) held that apprehended bias should have been found in the relevant circumstances, applying the established test of the 'fair-minded lay observer' in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

Kiefel CJ and Gageler J in their joint judgment, and Gordon J in a separate judgment, held that the judge's prior appearance as counsel

against the appellant in the conviction appeal was sufficient to give rise to a reasonable apprehension on the part of a fair-minded lay observer that the judge might not bring an impartial mind to the resolution of the issues in the appeal then before the Full Court ([44] -[55] per Kiefel CJ and Gageler J, [80]-[85] per Gordon J). Their Honours cited the remarks of Gageler J in *Isbister v Knox City Council* (2015) 55 CLR 135 [63] that:

> a person who has been the adversary of another person in the same or related proceedings can ordinarily be expected to have developed in that role a frame of mind which is incompatible with the degree of neutrality required dispassionately to weigh legal, factual and policy considerations relevant to the making of a decision which has the potential adversely to affect interests of that other person'.

The reasonableness of the lay observer's apprehension was enhanced by the causal connection between the appellant's conviction and the visa cancellation, given that the lawfulness of the decision not to revoke the visa cancellation was at issue in the appeal before the Full Court ([55] per Kiefel CJ and Gageler J).

Edelman J agreed that the judge's prior appearance as counsel against the applicant raised a reasonable apprehension of bias in the relevant circumstances. Those circumstances included the seriousness of the offence and the extent to which the character of the accused was in issue on appeal ([170]-[175]).

Jagot J agreed that reasonable bias was established in the circumstances. The appeal before the Full Court was about the lawfulness of a decision not to revoke the cancellation of the appellant's visa, and Bromwich J had appeared as counsel against the appellant to sustain the conviction which caused the cancellation. This provided the 'logical connection' between the appearance of Bromwich J against the appellant, and the 'feared deviation' from his adjudication of the appeal on its merits and also established the reasonableness of the apprehension of bias ([292]).

Steward J and Gleeson J gave separate dissenting judgments, holding that this was not a case in which a fair-minded lay observer might reasonably have apprehended that Bromwich J might not bring an impartial mind to adjudication of the issues in the Full Court appeal. Their Honours said that the hypothetical lay observer should be taken to know that the role of DPP was different from the role of judge. Moreover, the appellant's conviction was an unchallenged fact that was not in issue before the Full Court. Ther Honours found no logical connection between the judge's previous role as DPP and any reasonable apprehension that Bromwich J might deviate from deciding the appeal on its merits (Steward J [214]- [217], Gleeson J [267]).

Multi-member panel – who decides?

Six of the justices addressed the question of whether the application for Bromwich J to recuse himself should have been considered and determined by the Full Court rather than by the judge alone. Three different approaches are evident in these judgments.

1. The Court as constituted determines the question

Kiefel CJ and Gageler J said that the recusal application made by the appellant's counsel should have been heard and determined by the Full Court, not by Bromwich J alone ([35]). The application was in substance an objection to the jurisdiction of the Full Court as constituted to hear the appeal ([18]). Impartiality is indispensable for the exercise of judicial power. Therefore, as a general rule, a reasonable apprehension of bias is a matter of jurisdiction as its presence 'negates judicial power' ([26]). The constitution of the court with impartial judges is a matter of jurisdiction which the Court must decide for itself ([27]-[29]). If the members of the Court reach different conclusions on apprehended bias, there is no reason why the judgment of the majority should not prevail ([33]).

2. The judge in question considers the matter initially

Gordon J said that there could be no 'single set of universally applicable procedures for dealing with recusal applications in multi-member courts' ([66]). The 'preferable, if not the proper course' is that the judge in question should be given the opportunity initially to decide to recuse themselves. This might happen informally before the hearing, or after hearing an objection from a party. If the judge does not recuse themselves and the objection is maintained, or if the other members of the Court

consider there is a real potential for apprehended bias, the Full Court as a whole must determine the question ([66], [93], 94]).

Steward and Edelman JJ in their separate judgments agreed with Kiefel CJ and Gageler J and Gordon J that the judge in question should first have the opportunity to consider the application, personally and independently of other members of the Full Court. If the judge decides not to recuse themselves and the application is pressed, the Court should not proceed until satisfied that it had jurisdiction ([133] per Edelman J, [191] per Steward J).

Edelman J agreed with Gordon J as to the procedure for determining the recusal application ([193]). His Honour added that where the bias issue needs to be determined by the whole Court, the judge in question should be included unless the judge considers that they cannot be, or cannot be perceived to be, in a position to decide the renewed application impartially ([134]).

3. The judge, not the Full Court, decides

Jagot J noted that the process undertaken in this case by the Full Court for dealing with the bias application was consistent with a long-standing convention observed in Australia and other common law countries. Her Honour found that there were many good reasons of practicality and of principle to support it ([317]-[342]). The convention is that, whether a court is constituted with a single or multiple judges, it is the judge in question who determines the question of whether disqualifying bias exists ([306]). That judge's decision cannot be gainsaid by any other judge of co-ordinate jurisdiction but may be challenged by an appeal or other proceeding in a higher appellate court ([311]-[315], [333]).

Orders

The appeal was allowed, the orders of the Full Court set aside and the matter remitted to the Federal Court to be heard and determined by a differently constituted Full Court.

Consideration of QFYM by Federal Court

In *Masi-Haini v Minister for Home Affair* [2023] FCAFC 126, a Full Bench of the Federal Court was constituted for the hearing of an appeal with Kennett J as a member. In accordance with the procedure then in place, the application for Kennett J to recuse himself was heard and decided by the judge alone in chambers. Kennett J declined to recuse himself. At the time the High Court had reserved its decision in *QYFM*.

In its final reasons for decision, delivered after the High Court delivered judgment in *QYFM*, the Full Court noted that, in the view of the majority justices in *QYFM*,

> the 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: ([95], citing *QYFM* at [94]-[100] (Gordon J), [108], [131]-[135] (Edelman J) and [193] (Steward J).

The Court found that the recusal application was first considered by the judge in question alone. No application was made to the Full Court to consider the application, nor did other members of the Full Court express any concerns. Having seen his Honour's reasons, the other members of Full Court agreed with them. ([97]).

Apprehended bias – judge ruled against party in previous application

In this case, Bond JA gives reasons for his refusal to recuse himself on the basis of apprehended bias simply because, in a previous unrelated matter, he had ruled against a party to the proceedings.

The challenge was made to Bond JA sitting as a member of an appeal panel. The objection on the basis of bias was heard and determined by Bond JA alone, prior to the publication of the High Court's decision in *QYFM v Minister for Immigration etc* noted above.

Dupois v Queensland Police Service & Anor [2023] QCA 43

Supreme Court of Queensland (Bond JA), 17 March 2023

Mr Dupois was charged with multiple offences including stalking, harassment, personation, forging and uttering. He filed an originating application in the Supreme Court's Trial Division for a permanent stay of the hearing of the charges on the ground that by reason of 'judicial misconduct/corruption and police corruption' he would never obtain a fair and impartial hearing in the Magistrates Court ([9]). The judge responsible for case managing the originating application ('the primary judge') made an interlocutory order for the sealing up of affidavits and exhibits. Mr Dupois appealed from the order, arguing that there was no lawful basis for the sealing up of affidavits and that the primary judge had demonstrated bias ([13]).

Mr Dupois' appeal was listed to be heard on 14 March 2023 before an appeal panel of the Supreme Court comprising Justices Gotterson, Henry and Bond. Mr Dupois, who was self-represented, moved at the outset that Bond JA should recuse himself from the hearing on the ground of bias (without specifying whether he meant actual or apprehended bias). After hearing Dupois' submissions on that point, Bond JA refused to recuse himself. The reasons for His Honour's decision on the recusal application are the subject of this case note.

Ground of refusal application – judgment in earlier case

Mr Dupois' application was based upon the reasons given by Bond JA for his judgment in an earlier case, *Dupois v Queensland Police* [2022] QCA 137, published on 3 August 2022 ('the 2022 decision'). The 2022 decision involved an appeal from interlocutory orders in which Mr Dupois unsuccessfully sought an order vacating trial dates in the Magistrates Court. The Court of Appeal panel constituted to hear the 2022 appeal, which included Bond JA, required Mr Dupois to show cause why the proceedings should not be struck out as an abuse of process. After hearing from Mr Dupois, the appeal justices unanimously ordered his appeal and his interlocutory application to be struck out and refused to stay Mr Dupois' criminal trial in the Magistrates Court.

In support of his application for Bond JA to recuse himself from hearing the current appeal, Mr Dupois cited various remarks made by the judge in his separate concurring judgment in the 2022 decision. He referred to his Honour's observation that Mr Dupois' submissions and the documents on which he relied were 'so riddled with irrelevant editorial comment and hyperbole as to be almost incomprehensible' ([18(a)]). Mr Dupois also pointed to his Honour's rejection of his claim that he was treated unfairly by the primary judge, and his agreement with Morrison JA that the appeal was hopeless and an abuse of process ([18(d), (e)]). Mr Dupois argued that the observations of Bond JA in the 2022 decision were wrong and defamed him and were motivated by his Honour's desire to protect the primary judge ([19]).

Application of the test for apprehended bias

Bond JA evaluated Mr Dupois' arguments for recusal through the lens of the law of bias as summarised in *Charisteas v Charisteas* [2021] HCA 29 [11]). His Honour observed that a fair-minded lay observer would note that all member of the Court of Appeal panel in the earlier case had agreed with the judge's reasons ([22]). No fair-minded lay observer would conclude that the judge's remarks amounted to revenge or was motivated by a desire to protect the primary judge ([23]-[24]).

His Honour then turned to whether Mr Dupois' submission had articulated a 'logical connection' between the matter that it was suggested might

lead him to decide the proceedings before him other than on their merits ([25]). His Honour said that there was no necessary connection between the criticisms he had made about Dupois' submissions and documents made in the earlier case and the different submissions and documents made in the present proceedings involving a different interlocutory order made by a different primary judge ([25 (a), (b)]).

If the submissions and documents and criticisms in the present proceeding were similarly flawed and devoid of merit as those pertaining to the earlier case, the fair-minded observer might anticipate that he would be similarly critical of them. But that is not sufficient to support a case of apparent bias. His Honour cited with approval the following statement from *Day v Woolworths Group Ltd* [2021] QCA 42, Henry J (with whom Mullins JA and Williams J agreed):

> Contrary to the position occasionally taken by some losing litigants, the fact a judge has found against them in one proceeding does not of itself raise a reasonable apprehension the judge might not bring an impartial and unprejudiced mind to the resolution of further proceedings in which they are a party. A mere expectation of an adverse ruling in a pending application, premised on the failure of the same types of inadequate arguments advanced in a pervious application before the same judge, does not equate to an apprehension the judge will not decide the pending application impartially.

In view of those matters, Bond JA found that a fair-minded lay observer could not reasonably apprehend that he might not bring an impartial mind to the resolution of the questions arising in the present appeal (26]). His Honour refused to recuse himself from the appeal.

No 'right' to cross-examine

Australia has a Health Practitioner Regulation National Law which takes effect in the states and territories by force of legislation of each jurisdiction. Section 156 of the National Law provides that the relevant Board is empowered to take immediate action in relation to a registered health practitioner if the Board reasonably believes that, because of the practitioner's conduct, performance or health, the practitioner poses a serious risk to persons and the Board reasonably believes that it is necessary to take immediate action to protect public health or safety. Section 155 defines 'immediate action' to include the suspension or imposition of a condition on the practitioner's registration. The Board's decision may be appealed to the appropriate responsible tribunal.

Proceedings under s 156 are generally brought with some urgency to protect the public until such time as disciplinary proceedings against the practitioner can be brought and concluded. Questions can arise about the sufficiency of the evidence upon which the Board is able to form a reasonable belief that immediate action is necessary and determine what form of action to take. In the following case, the State Administrative Tribunal ('SAT') had set aside a decision of the Medical Board of Australia to suspend a medical practitioner after the SAT declined to permit the Board to cross-examine the practitioner on factual statements in his affidavit. The Board sought leave to appeal the SAT's decision to the Court of Appeal.

The Court of Appeal refused leave to appeal and dismissed the appeal, finding that the reasons given by the SAT were well open to it. In its unanimous judgment the Court rejected the Board's argument that the denial of permission to cross-examine was in breach of natural justice and in breach of section 32(6)(c)(ii) of the SAT Act. (A provision in similar terms is found in some other tribunal Acts, such as the VCAT Act s 102(1)(b)).

Medical Board of Australia v Adams [2023] WASCA 41

Supreme Court of Western Australia, Court of Appeal (Mitchell, Beech and Hall JJA), 22 Feb 2023

On 15 June 2021 the Medical Board of Australia ('the Board') exercised its statutory power under s 156 of the Health Practitioner Regulation National Law ('National Law') to suspend the registration of Dr Adams, a consultant paediatrician who worked at a public hospital. The Board had received two notifications by medical practitioners under mandatory reporting that Dr Adams had engaged in misconduct of a sexual nature. The Board had formed the belief that the doctor posed a serious risk to persons and that immediate action was necessary to protect public health or safety.

Dr Adams applied to the State Administrative Tribunal ('the SAT') for review of the Board's

decision to suspend his registration. He provided an affidavit in which, while denying the alleged misconduct, he proposed that, instead of a suspension, an undertaking which he would give to the Board in specified terms would be sufficient to protect persons and the public.

The Board sought leave to cross-examine Dr Adams on his affidavit with a view to demonstrating that he lacked candour and could not be trusted to comply with his undertaking. The SAT refused leave to cross-examine Dr Adams, giving three reasons:

a) The SAT was not satisfied that cross-examination of Dr Adams on his affidavit would assist it to assess the prospects of his compliance with the proposed undertaking.

b) There was 'a real risk of unfairness' to Dr Adams in being cross-examined on matters which might ultimately be the subject of substantive disciplinary proceedings, particularly as he had not had the opportunity to hear what the complainants might say in their evidence.

c) The SAT was not persuaded that what Dr Adams said in his affidavit in response to the allegations would materially assist its determination of the central question before it, namely what form of immediate action was required for the protection of the public ([44]-[47]).

Having considered Dr Adam's concession, the SAT found the evidence was sufficient to found a reasonable belief that Dr Adams posed a serious risks to persons and that it was necessary to take immediate action to protect the safety of the public. It determined that an undertaking in the terms proposed by Dr Adams was sufficient to protect the public and set aside the Board's decision to suspend his registration.

The Board appealed on the ground that the SAT's refusal to permit cross-examination of Dr Adams was an error of law because it was inconsistent with s 32(6)(c)(ii) of the *State Administrative Tribunal Act 2004 (*WA) ('the SAT Act') and because it was a denial of procedural fairness.

Under s 105(1) of the SAT Act, a party to a proceeding may appeal from a decision of SAT only by leave of the court. Leave will be granted 'if, in all the circumstances, a grant of leave is in the interests of justice' ([61], citing *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97 [16]). The Board submitted that leave to appeal should be granted because, inter alia, it raised an important point of principle and procedure being 'whether practitioners who make affidavits in applications for review of decisions to take immediate action can do without being cross-examined' ([57]).

The Court of Appeal's reasons for refusing leave to appeal

The Court of Appeal was not satisfied that it was in the interests of justice for leave to be granted, based on the following considerations:

1) The SAT decision in question concerned the nature of immediate action that should be taken pending the outcome of the substantive disciplinary proceedings commenced by the Board against Dr Adams. It would be the latter proceedings which would determine the substance of the allegations against Dr Adams ([63]).

2) The Board's interests in the proceedings lay in the protection of public health and safety, but the appeal was not directed to the SAT's determination on that question. Rather, the appeal was concerned with the procedural question of the refusal of leave to cross-examine Dr Adams ([64]).

3) If leave were granted and the appeal upheld, any different order of SAT upon the remitted hearing would have effect only for quite limited duration pending the hearing of the substantive disciplinary proceedings ([65]-[69]).

4) A different decision following a remitted hearing 'cannot be said to be probable'. Given that the undertaking put in place would by then have been current for over 15 months, it would be open to the SAT to determine that the prospect of Dr Adam's breaching it might be insufficient to require his suspension ([70]-[72]).

5) Remitter of the immediate action proceedings could slow down the progress of the substantive proceedings, which would not serve the interests of justice ([73]).

6) The Court agreed with the observations of the SAT regarding the risk of unfairness to Dr Adams.

7) The Court rejected the Board's submission that the appeal raised important points of principle as to SAT's procedures. The SAT's

decision did not mean that practitioners can make affidavits in applications for review of immediate action decisions without being cross-examined. The appeal turned instead on whether in the particular circumstances of the case, procedural fairness requires leave to cross-examine ([76]).

The Court refused leave to appeal and in so doing considered the merits of the proposed appeal.

The proper construction of s 32(6)(c)(ii) of the SAT Act

Section 32(6) of the SAT Act relevantly provides:

> (6) the Tribunal is to take measures that are reasonably practicable —
>
> (c) to ensure that the parties have the opportunity in the proceeding —
>
> (ii) to examine, cross-examine or re-examine witnesses;

The Board contended that s 32(6)(c)(ii) of the SAT Act conferred on a party a right to cross-examine the deponent of an affidavit that is relied on by the opposing party, leaving the SAT no discretion to decline to permit cross-examination of an available deponent.

The Court rejected the Board's interpretation as erroneous. It observed that section 32 utilises the language of procedural fairness and 'articulates specific aspects of what procedural fairness to the parties entails'. It 'requires the Tribunal to take measures that are reasonably practicable towards the ends identified in each of pars (a), (b) and (c)' ([81]). Moreover, the Board's interpretation of s 32(6) would conflict with s 32 as a whole and with the powers and flexibility conferred on the SAT by other subsections ([84]-[86]). To construe s 32(6) as creating a right to cross-examine in all cases would remove flexibility from the Tribunal, contrary to the evident intent of the section ([87]).

Procedural fairness

The Court noted that the requirements of procedural fairness are variable and depend on 'the circumstances of the case, the nature of the inquiry, the legislation and rules under which the decision maker is acting, and the subject matter being dealt with' ([89]). That general principle applies also to the question of whether a person should be permitted to cross-examine witnesses ([90]).

In the statutory context of immediate action under s 156 of the National Law, the Court observed that two features militate against the grant of leave to cross-examine ([92]). First, the inquiry required by the statute is directed to identification of risks to persons and the immediate steps required to be taken to control the risks. For the Board to act under s 156, it is generally sufficient for it to know what is alleged, what evidence supports the allegation and whether it is contested, without attempting to determine its merits ([93]).

The second feature arising from the statutory context is that the proceedings under s 156 may well be followed by disciplinary proceedings under div 12 of pt 8 of the National Law. Any cross-examination of a practitioner in the context of immediate action could give rise to unfairness when the merits of the allegations are substantively examined in the subsequent proceedings ([94]-[95]).

Why procedural fairness did not require leave to cross-examine

The Court found that the SAT was amply justified in declining to allow cross-examination of Dr Adams ([96]). At the outset of its hearing, and in its reasons for decision, the SAT had made it clear that it placed no weight on Dr Adam's evidence concerning the allegations. It was common ground between the parties that Dr Adams posed a serious risk to persons by his alleged conduct and that it was necessary to take immediate action to protect the public ([98]).

The Court said that the proposed undertaking did not depend on Dr Adam's veracity in his response to the allegations. The SAT relied on other mechanisms for ensuring his compliance, including reports from the hospital, monthly audits, and the consequences for Dr Adams of any breach. It was open to the SAT to take into consideration that it would not be materially assisted by the responses that might be adduced from Dr Adams in cross-examination ([103], [104]). It was also well open to the SAT to consider that:

> there was real potential for unfairness in exposing Dr Adams to cross-examination as to matters liable to undermine aspects of his response, at a hearing of the substantive allegations, to those allegations ([109]).

Orders

The Court refused leave to appeal and dismissed the appeal.

Onus and standard of proof in application for treatment order

In a contested application for a treatment order for a person under s 38 of the *Mental Health Act 2013* (Tas) ('the Act'), TASCAT rejected the proposition that the applicant bore a legal or evidentiary onus of proof to establish that the person had a mental illness. The tribunal resolved the question by applying the 'common sense' approach to evidence as stated by Woodward J in *McDonald v Director-General of Social Security* (1984) 1 FCR 35 [8], which has been applied to statutory decision making in many administrative contexts. TASCAT also considered the standard of satisfaction required for the tribunal to exercise its powers under the Act. It noted that the principle in *Briginshaw v Briginshaw* applied to the making of a treatment order. The tribunal formulated a test for the sufficiency of evidence suitable to be applied in all applications for an order under the Act.

BET (Application for Treatment Order) [2023] TASCAT 79

Tasmanian Civil and Administrative Tribunal (M Schyvens, P, G Storr, Ordinary Member, M McArthur, Ordinary Member (Psychiatrist)), 1 May 2023

On 8 March 2023 the applicant, a medical practitioner, filed with the Tasmanian Civil and Administrative Tribunal ('the tribunal') an application for a treatment order for the patient BET (a pseudonym), a 45-year-old woman who was at the time an involuntary patient at the Royal Hobart Hospital ('the hospital'). The application was made pursuant to s 37 of the *Mental Health Act 2013* (Tas) ('the Act'). It stated that the patient had a diagnosis of Bipolar Affective Disorder. She had been admitted to the hospital with a 10 cm laceration to her neck which appeared to have been self-inflicted. The hospital's psychiatry team had reviewed her and considered she was experiencing a relapse of Bipolar Affective Disorder. On the date of the application a member of the tribunal made an interim treatment order which was subsequently extended.

The further hearing of the application was conducted in person at the hospital on 4 April 2023 with the patient's legal representative participating via videolink. The patient's current treating hospital psychiatrists (the substitute applicants) participated at the hearing, together with the patient and a registered nurse.

The tribunal found that the procedural requirements of the Act had been complied with and proceeded to consider whether the patient met the treatment criteria provided under s 40 of the Act ([21]). The first criterion required that the subject person have a 'mental illness' within the meaning of s 4(1) of the Act. Evidence was given by three hospital psychiatrists (being the applicant and the two substituted applicants) that the patient had a mental illness. The applicant said it was Bipolar Affective Disorder, and said that the patient was paranoid due to, inter alia, her concern about people stealing from her and being out to get her. The substitute applicants said that while the formal diagnosis was initially Bipolar Affective Disorder, it was more likely that she had schizoaffective disorder given the symptoms observed in the hospital setting ([22]-[25]).

The patient objected strongly to the evidence of the treatment team that she had a mental illness ([26]). Her legal representative submitted that the tribunal could not be satisfied that the patient had a mental illness. He pointed to the contested accounts of the factual matters on which the treating team had formed its opinions about the patient's diagnosis.

Is there an onus of proof on the applicant for a treatment order?

The tribunal understood the legal representative to be suggesting that the applicant and the treating team 'ha[d] not satisfied an apparent onus to provide sufficient evidence to justify the basis upon which they have formed their opinion that the patient has a mental illness' ([29]). The tribunal proceeded to evaluate the submission against the applicable legal principles.

The *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 79(b) states that the tribunal is not bound by the rules of evidence and may otherwise inform itself as it sees fit. The tribunal considered judicial comments on the meaning of similar provisions in other tribunal legislation. In *McDonald v Director-General of Social Security* (1984) 1 FCR 35 [8], in interpreting the equivalent provision in the *Administrative Tribunal Act 1975* (Cth) s 33(1)(c), Woodward J said '…there can be no

evidential onus of proof in proceedings before the AAT unless the relevant legislation provides for it …'. His Honour added the following remarks ([2]):

> It is true that facts may be peculiarly within the knowledge of a party to an issue, and a failure by that party to produce those facts may lead to an unfavourable inference being drawn —but it is not helpful to categorise this common-sense approach to evidence as an example of an evidential onus of proof.

The approach in *McDonald* has been adopted in other administrative and inquisitorial jurisdictions and proceedings, in which it has been held that no party to the proceedings bears a legal or evidential onus of proof ([31] citing cases including *NOM v DPP & Anor* [2012] VSCA 198 [84], *Dr Butler v Fourth Medical Services Review Tribunal and Anor* (1997) 47 ALD 647 [80]).

The tribunal considered the applicable standard of satisfaction required for the tribunal to exercise its power to make a treatment order under the Act. The tribunal cited the comments of Wood J in *J v Guardianship Board and Anor* [2019] TASSC 15 as to the level of satisfaction that the then Guardianship Board must achieve to be satisfied that the criteria have been met to make a guardianship order under the *Guardianship and Administration Act 1995* (Tas). Wood J found that the principle expounded by Latham CJ in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 343-4 applied, and formulated the correct approach as follows [33]:

> The Board must be satisfied on the balance of probabilities of the statutory criteria keeping in mind the nature of the order and the consequences for the individual which might flow from the findings made*: Briginshaw v Briginshaw* per Dixon at 362.

The tribunal summarised the principles to be applied in this case as follows [34]

> There is no evidential onus of proof on an applicant for a treatment order, or any other form of order, that an applicant requests be made by the Tribunal under [the Act]. Rather, in light of the protective nature of the jurisdiction being exercised, a common sense approach to evidence should be taken. The approved medical practitioner as applicant, or other member of a patient's treating team supporting an application, must present evidence and information sufficient to enable the Tribunal to conclude, having taken account of the nature of the order requested and the consequences which might flow to the patient, that on the balance of probabilities each criterion required to enable an order to be made has been met.

Application to the evidence

The tribunal found that the treating team had provided cogent evidence to explain their view that she had a mental illness. The evidence included the circumstances in which she was found by paramedics and admitted to hospital, the assessment that her injuries were likely self-inflicted, her lack of knowledge of what caused them, her long standing history of mental illness, her own account of her history and her observed behaviours while an inpatient ([36]-[39]).

While taking account of the patient's evidence and the consequences for her if she were to remain an inpatient under a treatment order, the tribunal was satisfied to the requisite standard that the patient had a mental illness ([39]) and that the other criteria in s 40 were met ([40]-[71]). In exercising its discretion as to whether to make a treatment order, the tribunal also considered the objects of the Act in s 12 and the mental health delivery principles in schedule 1.

Having found that the patient had a mental illness and was 'discernibly unwell', the tribunal considered that she required a treatment order to ensure that she was treated and kept under observation ([72]). It concluded that the patient was currently incapable of making autonomous decisions about the treatment she needed for her illness ([72]). The tribunal was satisfied that a treatment order should be made in the terms sought by the applicant for a period of six months, the order to be reviewed by the tribunal within 60 days (73]).

Orders

A treatment order in the terms requested by the applicant was issued by the tribunal on the date of the hearing, its substantial provisions being in identical terms to the interim treatment order made by the tribunal on 18 March 2023.

Admission in a filed defence treated as agreed fact

In the following case, an NCAT Appeal Panel held that an admission by a party in its points of defence signed by a solicitor and filed with the tribunal should have been treated as an agreed fact that is not required to be proved by evidence.

Jain v Dr N Kalokerinos Pty Ltd [2023] NSWCATAP 141

NCAT Appeal Panel (G Blake AM SC, M Gracie, Senior Members) 30 May 2023

The respondent ('the lessor) and the appellant ('the lessee') were parties to a lease of a retail shop from 12 August 2020. From 10 June to 11 October 2021, COVID-19 public health orders prohibited the premises being generally open to the public. On 24 November 2021 the lessor served a termination notice on the lessee, citing breaches including failure to pay rent, and subsequently re-entered the premises. Each party commenced proceedings against the other seeking relief under the *Retail Leases Act 1994* (NSW).

In his points of claim the lessee had pleaded that he was an impacted lessee within the meaning of the *Retail and Other Commercial Leases (COVID-19) Regulation 2021* (NSW) ('the COVID-19 Regulation'). The lessor had generally admitted that paragraph in its points of defence. In written closing submissions, the lessor submitted that it had not been proven on the evidence that the lessee was an impacted lessee. The tribunal dismissed the lessee's proceeding. In the lessor's proceeding it ordered that the lessee pay to the lessor a sum of $60,025.34 and in both proceedings the lessee was to pay the lessor's costs. The lessee appealed from the orders in both proceedings.

The NCAT Appeal Panel ('the Appeal Panel') identified two questions of law available to the lessee, finding that the lessee had an appeal as of right on those grounds. The first question of law was whether the tribunal had constructively failed to exercise jurisdiction by not addressing a material issue, being the admission in the lessor's points of defence that the lessee was an impacted lessee. The second required determination of the proper construction of s 133A(1) of the *Conveyancing Act 1919* (NSW) to determine whether it applied to certain clauses of the lease.

The points of claim

The respondent lessor argued that the paragraph in the points of defence should not be deemed to be an admission because the lessee had failed to articulate with precision the time at which and the regulation under which he claimed to be an impacted lessee. These arguments were rejected because they relied upon the *Uniform Civil Procedure Rules 2005* (NSW) which do not apply in NCAT proceedings, and there is no equivalent provision in the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') ([111]-[112]).

While acknowledging that it was not bound by the rules of evidence, the Appeal Panel considered that the tribunal should consider an admission in a defence signed by a solicitor and filed in the tribunal in the same manner as an agreed fact within s 191 of the *Evidence Act 1995* (NSW). A fact admitted in this way will not be required to be proved by evidence. That approach was found to be permitted by ss 38(1) and consistent with 36(1) and (2)(a) of the NCAT Act ([115]). The Appeal Panel found no reason why the agreed fact should not be accepted by it as true, as it was not inherently incredible and there was no contradictory evidence. Therefore the absence of evidence from the lessee as to whether he was an impacted lessee was irrelevant ([118]).

The Appeal Panel was satisfied that the lessor's re-entry to the premises was prohibited by cl 6C of the COVID-19 Regulation ([131]). It was therefore a repudiation of the lease by the lessor which had been accepted by the lessee ([131], [132]). As a result of the tribunal's material error on this point, the Appeal Panel determined the appeal by way of a new hearing, limited to the determination of whether the lessor suffered loss as a result of the repudiation of the lease ([133]).

The Appeal Panel did not find any amounts claimed by the lessee to be damage arising from the repudiation ([153]. It awarded nominal damage of $100 in recognition that a breach of contract is actionable without proof of loss or damage ([152]-[153]).

Decision

Leave to appeal was granted and the appeal allowed in part. Orders 1 and 2 made by the

tribunal were set aside and in substitution orders were made that the respondent pay the applicant $100. The proceedings were otherwise dismissed and the respondent ordered to pay the applicant's costs.

Compensation claim against the Public Trustee

In a recent unanimous decision, the Queensland Court of Appeal highlighted the standards required of administrators for a person when making decisions concerning the disposition of the persons' assets. The Court cleared the way for a compensation claim to be brought under s 59 of the *Guardianship and Administration Act 2000* (Qld) against the Public Trustee of Queensland for any losses that may be proved to have occurred as a result of its decisions to rent and sell properties owned by a man under administration. The Court found that there was no evidence before QCAT and QCAT (Appeals) that the Public Trustee had complied with its obligations which included considering and evaluating alternative courses of action and assessing their financial consequences for the person, and satisfying the consultation and participation requirements.

TJ v Public Trustee of Queensland & Anor [2023] QCA 158

Queensland Court of Appeal (Bond and Boddice JJA and Callaghan J), 4 Aug 2023

On 26 April 2017 the applicant was appointed by the Queensland Civil and Administrative Tribunal ('QCAT') as administrator for his stepson CRG, replacing the Public Truste of Queensland ('the Public Trustee') as administrator. The applicant sought an order under s 59 of the *Guardianship and Administration Act 2000* (Qld) ('the G & A Act') for compensation to be paid to CRG by the Public Trustee for loss said to have been caused by its decisions as administrator in relation to dispositions of two properties owned by CRG.

On 12 May 2020 QCAT dismissed the application for compensation. On 28 November 2022 the Queensland Civil and Administrative Tribunal (Appeals) ('QCATA') granted the applicant leave to appeal, refused leave to rely upon fresh evidence, and dismissed the appeal. The applicant sought leave to appeal QCATA's decision.

Background to the appeal

In December 2000, CRG, an indigenous man then aged 18 years, was awarded $500,0000 damages for personal injuries. At the time he lacked capacity to manage his own affairs. The Public Trustee was appointed as administrator.

From 23 August 2002 until 12 December 2003 CRG's mother and aunt replaced the Public Trustee as joint administrators. During this period they used part of CRG's funds to purchase two properties in his name, being a unit at Sunshine Coast for his accommodation ('the unit') and vacant land ('the bush retreat'). CRG chose not to live at either property.

The Public Trustee was reappointed from 12 December 2003 on the basis that the joint administrators were not complying with their obligations as trustees or QCAT's directions. By this time all of CRG's funds had been used up, and the applicant and CRG's mother were living at the unit without paying rent.

The Public Trustee recovered possession of the unit, which it rented out from 2004, then sold in 2007. It sold the bush retreat at significant profit in 2005 and invested the funds. From 2009 CRG lived on a permanent basis with his mother and the applicant. In 2017 QCAT appointed the applicant as administrator for CRG in place of the Public Trustee.

The compensation claim

The compensation claims were brought by the applicant on the basis that CRG had suffered financial loss by reason of the Public Trustee's decisions to rent the unit and to sell the bush retreat and the unit. Had CRG resided in his own home, its value would have been disregarded in the assessment of a disability pension. As a consequence of the Public Trustee's decisions, the applicant said, CRG was homeless and ineligible for public housing, had no income, his assets were depleted and he had lost eligibility for disability support services. The applicant argued that the Public Trustee's decisions were made in breach of the G & A Act and its General Principles.

Consideration by QCAT

QCAT found that the Public Trustee did nothing to prevent CRG from living with his mother at the unit when he owned it. By 2009 he was

sufficiently settled to live in his own home with care from his family, but that course was by then impractical due to the depletion of his funds. QCAT found no breach of the Act or its General Principles by the Public Trustee.

On the applicant's appeal, QCATA found no basis for finding that QCAT erred in the determination of any relevant fact or in applying the law. It also found that, while CRG was not consulted by the Public Trustee in relation to the decisions to rent and sell the unit, it had obtained his views to the extent practicable at the time.

The legislative regime

Section 24 of the *Trusts Act 1973* (Qld) ('Trusts Act') provides a list of matters to which a trustee must have regard in exercising a power of investment. Section 34 of the G & A Act provides that an administrator must apply the General Principles (which are now set out in s 11B(3) of the Act). Section 35 of the G & A Act requires the administrator to exercise the power for an adult 'honestly and with reasonable diligence to protect the adult's interests'. Section 22 of the Trusts Act with s 51 of the G & A Act requires the Public Trustee to 'exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons'.

Consideration by the Court of Appeal

Boddice JA (with whom Bond JA and Callaghan J agreed) gave the judgment of the Court as follows.

The Court found that at the hearings before QCAT and QCATA, the Public Trustee led no direct evidence of its decision-making processes relating to any of its decisions concerning the disposition of CRG's properties ([39]). There was indirect evidence of a discussion with CRG's father and his wife in 2011 about renting the unit and selling the bush retreat but no record that alternative options were considered ([40]).

The Court found that, consistently with its obligations under the above legislative provisions, the Public Trustee had an obligation to analyse and evaluate different courses of action which might reasonably be taken by a prudent person and assess the financial consequences of those actions before determining whether to rent CRG's unit in 2004, to sell the bush retreat in 2005, and to sell the unit in 2007 ([41]).

In determining whether to sell or retain the unit, the Public Trustee was required to have regard to the consequences for CRG of not having his own residence available to him, and the financial implications of the investment of the proceeds upon his eligibility to receive ongoing government benefits ([42]).

The Court found that there was:

> simply no evidence before QCAT or QCATA as to any analysis of assessment of what were reasonable alternative courses of action, or as to their consequences for CRG, in respect of such decisions ([43]).

Furthermore, in exercising its powers, the Public Trustee was obliged to apply the General Principles set out in the Act. Principle 7 (now Principle 8) required the Public Trustee to recognise and take into account CRG's right to participate, to the greatest extent practicable, in decisions affecting his life.

The Court found that there was no evidence that the Public Trustee sought or attempted to learn CRG's views prior to making the decisions to sell his properties ([45]-[46]). There was also no evidence that, in relation to those courses of action, the Public Trustee followed the principles of substituted decision making by seeking the views of CRG, his support network, an Aboriginal support officer, or other members of his family ([50]). In relation to its decision to rent the unit in 2004, only limited enquiries were made of CRG's support network ([48]).

The Court concluded that, in relation to those decisions, 'there was no evidential basis upon which QCATA could conclude that the Public Trustee had … complied with its obligation as administrator under the Act to apply General Principle 7' ([51]). It was not open to the Public Trustee to argue that the course of action was taken for CRG's proper care and protection 'where it was undertaken without having first analysed and assessed other reasonable courses of action and without seeking CRG's views or those of his mother and other support networks.' ([52]).

The Court therefore found that QCATA made an error of law in:

1. finding that there was evidence that the Public Trustee had applied General Principle 7 in making the relevant decisions, and
2. finding that the Public Trustee had exercised the power with reasonable diligence to

protect CRG's interests, in the absence of evidence that the Public Trustee had applied General Principle 7 ([53]).

Therefore, an order for compensation may be made pursuant to s 59 of the G & A Act for proven loss caused by failure to comply with the Act in the exercise of the power to make the decisions ([54]).

Grounds for leave to appeal

QCAT had originally made a direction that if were to decide that a compensation order should be made, it would make directions for the presentation of evidence to quantify the loss. The applicant was not given that opportunity before QCATA found that there was no evidence that the breaches of the Act caused loss to CRG. ([59]). To rely on an absence of evidence in such circumstances was a breach of procedural fairness.

The applicant had therefore established a substantial injustice which justified a grant of leave to appeal in the circumstances ([61]).

Orders

Leave to appeal was granted and leave to adduce further evidence was refused. Order 3 of QCATA's decision of 28 November 2022 was set aside and in its place it was ordered that the appeal to QCATA be allowed, and the applicant's application for compensation be remitted to QCAT for rehearing.

A note on the *Bugmy Bar Book*

In *Bugmy v The Queen* [2013] HCA 38 the High Court referred to sentencing case law and principles that allow for consideration of disadvantage within indigenous communities but rejected the argument that 'courts ought to take judicial notice of the systemic background of Aboriginal offenders' in sentencing. The court found that this approach would be 'antithetical to individualised justice' ([41]).

The case inspired a project to establish a Bar Book which would 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 was envisaged as providing an evidence-based and accessible research resource to assist in the preparation, presentation and evaluation of evidence to establish the application of sentencing and rehabilitation principles. It was not intended to displace the need for expert assessment and evidence at the individual level.

The Bar Book, which is available to download without charge on a website hosted by the NSW Public Defenders, has chapters covering the impacts of experiences such as acquired brain injury, hearing impairment, homelessness, cultural dispossession, child abuse and neglect, exposure to domestic and family violence, interrupted school attendance, cultural dispossession and social exclusion. Each chapter is reviewed by experts and by an advisory panel including at least one indigenous member.

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 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).

Justice Dina Yehia of the New South Wales Supreme Court has addressed tribunal audiences on the potential use of the Bar Book in tribunal proceedings beyond the criminal justice system.

The NSW Public Defenders website (see link above) includes a summary of all court decisions in which the Bugmy Bar Book has been considered by the court. To date these mentions have been confined to the criminal justice system. In *YDB v NSW Land and Housing Corporation* [2023] NSWCATAP 55, the Bugmy Bar Book Executive Summary on Homelessness was relied on by the appellant in an appeal related to termination of a social housing residential tenancy, but was not considered by the NCAT Appeal Panel ([21(6)]).