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Tribunal Case Update

This issue notes a decision by AAT President Justice Kyrou on the AAT's approach to applying agency policies in merits review. In *Karamian and ASIC*, the President found that ASIC regulatory guide 98 was not a policy of the type to which Brennan J in *Drake No 2* was referring when he recommended that the AAT adopt a practice of applying the policy provided that it is lawful and there are no cogent reasons why it should not. On this point the President disagreed with a presidential panel of the AAT in *Tarrant v ASIC* [2013] AATA 926.

In *XTrade.AU Pty Ltd v ASIC* the AAT said that, as it was part of the decision-making continuum under the Corporations Act, it must consider the Act's regulatory objectives when reviewing a decision under the Act. The objectives fell within the public interest consideration in the framework of considerations for stay applications proposed by Downes J in *Scott and ASIC.*

In *Pegasus Supply Solutions Pty Ltd v Collector of Customs*, the AAT was held to have made a material error of law and denied procedural fairness in refusing to inspect goods, where the party had a statutory right to account in that way for customisable goods held in a bond store.

In *Steelbond Aust Pty Ltd v Wein* the NCAT Appeal Panel held that the tribunal did not breach procedural fairness in failing to adjourn or delay a hearing when the representative of a party arrived late.

In *Tuck v Kanti-Paul* a magistrate sitting as QCAT was found to have breached procedural fairness. The Appeal Panel cautioned that the object of achieving justice must not be sacrificed for the object of speed.

The construction of appeal provisions can raise difficult questions. A pair of cases noted in this

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issue clarify the difference between an appeal against 'a decision of [eg, the Tribunal] in point of law' and an appeal 'on a question of law'. See *Fisher v Nonconformist Pty Ltd* with a note on *Kudrynski v Orange City Council.*

This issue concludes with *Johnston v Carroll,* in which directions requiring employees to be vaccinated for COVID-19 were successfully challenged by Queensland police employees for breach of the procedural requirements of the *Human Rights Act 2019* (Qld).

Judge unable to deliver reserved decision

It occasionally happens that a judge reserves their decision after a hearing takes place and subsequently becomes unable to complete the proceeding due to an extended absence or leaving office.

Some courts have the benefit of statutory provisions providing for reconstitution of the court. In the absence of such provision, can the court be reconstituted? In *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642, a judge was unable to continue due to illness after deciding a matter, and another judge decided how the costs of the matter should be borne. The New South Wales Court of Appeal rejected an argument that the substitute judge had no power to decide the costs issue. Priestley JA (Glass JA agreeing) said at 653:

> If a judge is unable through absence to make an order which needs to be made for some proceeding before the court to be completed, there must be jurisdiction in the court enabling another judge to make the order.

That authority was recently applied where a judge of the Supreme Court of Tasmania had agreed not to sit as a judge while criminal charges were pending against him.

Ding v De Wit [2024] TASSC 6

Supreme Court of Tasmania (Blow CJ)
1 March 20

The applicant was convicted by a magistrate on three counts of assault and sentenced to a term of imprisonment. He applied to the Supreme Court of Tasmania for a review of the orders.

A judge of the Court ('the judge') conducted a hearing of the applicant's motion for review. The judge reserved his decision and remanded the applicant on bail to appear at a specified date. Before the return date, the judge was served with a police family violence order. He agreed to the Chief Justice's request that he refrain from sitting as a judge until further notice. The judge was subsequently charged with assault. The Chief Justice requested the judge to disqualify himself from these proceedings, but the judge did not respond.

In February 2024, the parties requested the Chief Justice to determine this matter in place of the judge. The charges against the judge were due to be heard in April 2024. The applicant had been on bail for six months with a sentence of imprisonment stayed. The parties agreed that the Chief Justice would rely on a transcript of the hearing conducted by the judge, and that the parties would make no additional submissions.

Blow CJ referred to *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 as authority for his view that where a judge is unable through absence to complete a proceeding by making an order, 'the court has jurisdiction enabling another judge to make the order' ([4]).

His Honour proceeded to determine the motion for review.

Note: Some tribunal statutes offer a partial solution to the problem of a member being unable to finalise a matter. The enabling legislation may in certain circumstances empower a person who has ceased to be member to complete heard or part-heard matters. See for example, *Civil and Administrative Tribunal Act 2013* (NSW) sch 2, cl 8. Some tribunal statutes address the problem in a reconstitution provision. For example, the *Queensland Civil and Administrative Tribunal Act 2009* s168 empowers the President to reconstitute the tribunal for a part-heard matter, including by reducing the number of members, and the reconstituted tribunal may have regard to the decisions and record of evidence in proceedings before the tribunal as previously constituted.

Less ‘quick’, more ‘fair and just’

Many tribunal Acts include in their objects that the tribunal shall deal with matters in a way that is informal and quick, but also fair and just. Balancing these objects is a continuing challenge for many tribunals, particularly in jurisdictions where heavy caseloads generate pressure for quick hearings. In the following case, QCAT’s Appeal Tribunal found that justice was not achieved.

Tuck v Kanti-Paul [2024] QCATA 57

Queensland Civil and Administrative Appeal Tribunal (Judicial Member DJ McGill SC), 12 June 2024

The applicant (‘the tenant’) sought leave under s 142(3)(a) of the Queensland Civil and Administrative Tribunal Act 2009 (Qld) (‘QCAT Act’) to appeal to the Appeal Tribunal from a decision of a magistrate sitting as QCAT (‘the magistrate’) in a minor civil dispute. The dispute concerned the retention by the respondent (‘the landlord’) of rental bond monies paid by the tenant after the end of his residential tenancy.

Both parties attended the hearing of the matter, which ran for 28 minutes and was conducted by the magistrate in an inquisitorial manner. The magistrate determined that $1075.30 of the rental bond should be paid as to the landlord, and the balance of $524.70 to the tenant. No findings or reasons for the decision were given during or after the hearing.

The question on the application for leave to appeal was whether ‘there is reasonable argument that the decision was attended by error, and an appeal is necessary to correct a substantial injustice caused by that error’ ([11]).

The magistrate was required by s 28(3)(a) of the QCAT Act to observe the rules of natural justice and was also required to observe the procedural requirements in ss 28 and 29.

The Appeal Tribunal found that the hearing was not conducted according to law due to the following deficiencies.

- The magistrate made no ‘systematic attempt to identify the relevant issues to be decided’ ([17] and made no findings on them [24]).
- The magistrate failed to ensure that both parties had been given the opportunity to present all the evidence on which they relied, to make submissions or to ask questions of the other party ([12], [14]).
- When the tenant was permitted to make a submission on one point, the magistrate cut him off, saying that she had already made a decision ([17]).
- The magistrate failed to give reasons for decision, as required by the QCAT Act s 28(3)(a).

The Appeal Tribunal concluded that leave to appeal should be granted and the appeal allowed, stating in its reasons:

> The QCAT Act [s 3(b)] identifies among its objectives that the Tribunal deal with matters in a way that is informal and quick, but also in a way that is fair and just. It is made clear by s 4(c) that the objective of achieving justice is not to be sacrificed to conducting proceedings quickly. One manifestation of this is the obligation to comply with the rules of natural justice. In the present case the parties did not receive a fair hearing, the rules of natural justice were not complied with, and I cannot be confident that justice was achieved. I consider there is no reason to think it was achieved [20]).

Material error of law in refusing a ‘view’

In the following case, Goodman J held that the AAT made an error of law when it refused a party’s request to visit the party’s business premises to inspect goods, where the party had a statutory right to account for the goods in this way.

The Court had power to set aside the tribunal’s decision if the error of law was ‘material’. Goodman J applied the ‘threshold of materiality’ enunciated by the High Court of Australia in its recent judgment in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 (‘*LPDT*’) at [14]–[16], [32]–[36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

In *LPDT* the AAT made an error in failing to comply with Ministerial Direction 90 when deciding whether there was ‘another reason’ why the cancellation of a visa should be

revoked. The High Court unanimously held that the error was material because the decision could realistically have been different had the error not occurred ([35]). The court found that the error contributed to the AAT's decision, adding that it is not for the court to speculate about how the AAT might have weighed the matters if the error had not been made ([36]).

Pegasus Supply Solutions Pty Ltd v Collector of Customs [2024] FCA 450

Federal Court of Australia (Goodman J), 1 May 2024

The appellant ('Pegasus') operated warehouses in which it stored customable goods. Officers of the Collector of Customs ('Collector') attended the warehouses and conducted a stock take count of goods. Subsequently the Collector issued a request to Pegasus to account for specified goods ('the subject goods') in accordance with s 37 of the *Customs Act 1901* (Cth). As part of its response to the request to account, Pegasus asked the Collector's representative to return to the warehouses to view the subject goods. The request was declined.

The Collector proceeded to issue a demand to Pegasus under s 35A of the Customs Act for the payment of a sum equal to the customs duty on the subject goods. Pegasus applied to the AAT ('tribunal') for review of that decision. Pegasus requested that the tribunal conduct a site visit to the warehouses to sight the subject goods. The tribunal declined the request on the ground that 'it saw no utility in such an exercise' ([75]).

The tribunal set aside the decision under review and remitted the matter to the Collector for reconsideration.

Pegasus lodged an appeal from the tribunal's decision under s 44 of the Administrative Appeals Tribunal Act 1975 ('AAT Act'). (Although called an 'appeal', an application under s 44 is a proceeding in the court's original jurisdiction, and its scope is limited to a question of law ([30])).

The statutory provisions

The power of the Collector under s 35A of the Customs Act to issue a demand for payment of a sum is subject to preconditions. One is that the person to whom the demand is directed, when requested by a Collector, 'does not account for those goods to the satisfaction of a Collector in accordance with s 37'. Section 37 provides:

> A person accounts for goods or a part of goods to the satisfaction of a Collector in accordance with this section if, and only if:
>
> (a) the Collector sights the goods; or
>
> (b) if the Collector is unable to sight the goods—the person satisfies the Collector that the goods have been dealt with in accordance with this Act.

Since the Collector did not in fact sight the subject goods after the demand under s 35A was made, the question was whether the Collector was 'unable to sight the goods' for purpose of s 37(b) ([35]). Goodman J rejected the Collector's argument that the phrase 'unable to sight the goods' in s 37(b) should be construed as including where the Collector (or the tribunal on review) is unwilling to sight the goods.

Procedural fairness

Pegasus contended that, in refusing Pegasus' request that it sight the subject goods for the purposes of s 37(a), the tribunal had made an error of law in denying Pegasus procedural fairness, and in breaching its statutory duty to allow Pegasus a reasonable opportunity to present its case (s 39(1) of the AAT Act). Goodman J upheld the appeal on both grounds ([68], [76]).

His Honour noted that the tribunal stood in the shoes of the Collector when undertaking its review and was obliged to consider the material before it at the time of its decision ([69], [70]; *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; [51]). He found that on the first day of the hearing before the tribunal, Pegasus had stated that it wished to show the subject goods to the tribunal for the purposes of s 37(a) ([71], [72]).

His Honour held that the tribunal's reasons for refusing the request indicated that it had misconstrued the legislation. The tribunal's response, that it saw no utility in inspecting the goods, was an insufficient reason for denying Pegasus the avenue to account for goods provided to it by s 37(a) ([75]). It was also a breach of the tribunal's statutory duty to give Pegasus a reasonable opportunity to present its case. The decision was therefore attended by an error of law ([76]).

Was the error of law material?

Before the court could proceed to set aside the decision, it had to be satisfied that the error of law was material to the decision. Applying the test endorsed by the High Court of Australia in *LPDT* at [16], Goodman J found the error was material, as:

> [t]here appears to be a realistic possibility that the outcome might or could have been different if such an inspection [of the goods] had occurred.

In other words, His Honour was 'not satisfied that the outcome would inevitably have been the same if the error had not been made' ([80]).

Orders

The appeal was allowed, the tribunal's orders was set aside, and the matter remitted to the tribunal for determination according to law.

Procedural fairness – failure to adjourn

In the following case, the NCAT Appeal Panel refused leave to appeal and dismissed an appeal on multiple grounds. Of particular interest is its rejection of the argument that NCAT should have adjourned or delayed the hearing (of which notice had been given) when a party's representative was not present at the commencement of the hearing. The Appeal Panel found that the duty of procedural fairness did not require NCAT to adjourn or delay the hearing in these circumstances.

Steelbond Aust Pty Ltd v Wein [2024] NSWCATAP 20

New South Wales Civil and Administrative Tribunal Appeals Panel (G Blake AM SC, SM and P Durack SC, SM), 16 Feb 2024

The proceedings were an appeal to the NCAT Appeals Panel from a decision of NCAT on an application made by the respondents Mr and Mrs Wein ('the landowners') concerning a building dispute with the appellant ('the builder').

A substantial issue in the appeal was whether NCAT denied the builder procedural fairness by taking evidence from Mrs Wein for eight minutes in the absence of the builder's representative who arrived late for the hearing.

Scope of the right to appeal

An internal appeal from NCAT to the Appeal Panel may be made as of right on a question of law, or with the leave of the Appeal Panel, on any other ground: *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') s 80(1), (2). One ground on which the Appeal Panel may grant leave to appeal is where it is satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision of NCAT was 'not fair and equitable' (cl 12(1)(a) of Sch 4 of the NCAT Act).

Whether failure to adjourn was a breach of procedural fairness

NCAT is required to afford procedural fairness to parties pursuant to s 38(2) and (5)(c) of the NCAT Act.

The Appeal Panel accepted that if there has been a denial of procedural fairness, the decision under appeal can be said to have been 'not fair and equitable' ([30]). If an appellant satisfies the requirements of cl 12(1) of Sch 4 of the NCAT Act, the Appeal Panel must take the further step of considering whether to exercise its discretion to grant leave to appeal under s 80(2)(b) of the NCAT Act ([32]).

It was argued for the builder that NCAT's obligation to afford procedural fairness to parties required it to adjourn or delay the commencement of a hearing where the party's legal representative arrived ten minutes late. Notice of the starting time of the hearing had been given, and no request for adjournment or delayed commencement had been made. After considering the authorities relied upon by the builder (*Kioa v West* (1985) 159 CLR 550; *Minister for Immigration and Citizenship v Li* [2013] HCA 18; *Italiano v Carbone* [2005] NSWCA 177), the Appeal Panel found that nothing in those authorities nor in the NCAT Act required an adjournment or delay of the hearing in the circumstances of this case ([55]).

Even if the Appeal Panel had found that the failure to adjourn amounted to a breach of procedural fairness, it would not have been satisfied that the oral evidence of Mrs Wein heard in the builder's absence was material to the findings on which the decision was based ([58]). NCAT's reasons showed that its findings were not based on Mrs Wein's evidence.

Orders

Leave to appeal was refused and the appeal dismissed.

Stay of a decision or order pending appeal

The filing of an application for review of an administrative decision by a tribunal does not of itself stay the operation of the decision. In the following case, the AAT was asked to exercise its discretion under s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) to stay the operation of a decision of ASIC to cancel the applicant's Australian Financial Services (AFS) licence so that she could continue to trade while the review was pending. The AAT had regard to the regulatory objectives of the legislation as a relevant consideration in deciding whether to stay the order for cancellation.

XTrade.Au Pty Ltd and ASIC [2024] AATA 1372

Administrative Appeals Tribunal (BJ McCabe, DP and D Benck, SM), 4 June 2024

The applicant was in the business of providing financial services as the Australian subsidiary of an overseas group. The Australian Securities and Investments Commission ('ASIC') found that the applicant had failed to comply with several of its general obligations under s 912A of the *Corporations Act*, including complying with the financial services laws. ASIC determined to exercise its power under s 915C of the *Corporations Act 2001* (Cth) to cancel the applicant's AFS licence.

The applicant applied to the Administrative Appeals Tribunal for review of the cancellation decision. The applicant did not contest ASIC's findings but sought to persuade the tribunal that her operations would be compliant in future and that a non-cancellation outcome was preferable.

The applicant also made an interlocutory application for an order under s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') to stay the operation of the decision to enable her to continue to trade pending the review on appropriate conditions.

Section 41(2) of the AAT Act provides that the tribunal's stay power is 'for the purpose of securing the effectiveness of the hearing and determination of the application for review'. The section provides that the tribunal must have regard to the interests of persons affected by the review but does not otherwise specify the considerations relevant to the exercise of the discretion.

As the tribunal is 'part of the decision-making continuum' under the Corporations Act, the tribunal said that it must consider the regulatory objectives of that Act when exercising its powers under the AAT Act ([14]). Section 760A of the Corporations Act indicates that consumer protection and market efficiency are key purposes of the provisions for the regulation of holders of AFS licences ([15]).

In considering an application for a stay, the tribunal had regard to the non-exhaustive framework of considerations proposed by Downes J in *Scott and ASIC* [2009] AATA 798 [4] ([16]. The tribunal made the following findings on these considerations.

- As to the applicant's prospects of success in its endeavour to have the cancellation of its licence set aside, the tribunal found that it had an arguable case. This consideration did not influence the outcome of the stay application either way ([23]).
- The consequences for the applicant if the stay were not granted did not weigh heavily in favour of granting the stay.
- In considering the public interest, the tribunal had regard to the regulatory objectives it had identified. The adverse findings of ASIC raised serious concerns for the protection of consumers. The public interest weighed against a stay ([34]).
- The tribunal was not satisfied that a stay of the decision would compromise the efficacy of ASIC's performance of its functions, so long as ASIC was not restrained from publishing its decision ([38]).
- The denial of a stay would not defeat the purpose of the review ([42]).
- The delay in disposing of the review, given the time needed by the applicant to prepare her case, did not count against a stay but the tribunal accorded it limited weight in the circumstances ([43]).

Upon weighing the considerations, the tribunal was not satisfied that it should grant the stay order. The application for a stay order was refused.

Applying agency policy in merits review

Members of Australian tribunals that review administrative decisions on the merits will be familiar with the oft-cited remarks of Brennan J in *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 ('*Drake No 2*') at 643-45 concerning the role of policy in the AAT's review of administrative decisions.

In *Drake No 2* Brennan J was considering a guiding policy adopted by a Minister for the purpose of determining whether or not to exercise his statutory power to deport an immigrant or alien on the basis of a criminal conviction. Brennan J identified considerations which 'warrant the Tribunal's adoption of a practice of applying lawful Ministerial policy, unless there are cogent reasons to the contrary', such as 'working an injustice in a particular case' (at 644).

In later cases Brennan J's recommended approach has been extended to policies issued by an administering agency to guide the exercise of its statutory discretions by its authorised officers. For example, in *Tarrant v ASIC* [2013] AATA 926 ('*Tarrant*') the AAT extended it to a document (RG 98) issued by ASIC explaining how it exercises its discretion under s 920A of the *Corporations Act 2001.*

In *Karamian v Asic* (noted below) the AAT constituted by President Kyrou expressed his disagreement with the AAT's approach in *Tarrant*, holding that RG 98 was not a document within the class to which the remarks of Brennan J in *Drake No 2* were directed.

Taken in conjunction with President Kyrou's earlier decision in *GJDB v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 3245, *Karamian v ASIC* indicates a need for the AAT (and other merits review tribunals) to consider carefully whether a given policy lies within the scope of the policies to which the decision in *Drake No 2* refers.

Karamian and ASIC [2024] AATA 2006

Administrative Appeals Tribunal Appeal (Justice E Kyrou, President), 25 June 2024

Mr Karamian, applied to the Administrative Appeals Tribunal for review of a decision of ASIC to issue an order permanently banning him from (in broad terms) providing any financial services ('Banning Order').

In deciding to make the Banning Order, ASIC's delegate relied upon ASIC's powers under paras 920A(1)(d) and (da) of the *Corporations Act 2001* (Cth). In broad terms, those provisions empower ASIC to make a banning order where it 'has reason to believe that a person is not a fit and proper person to provide … financial services' or 'is not adequately trained, or is not competent' to do so.

The tribunal (constituted by President Kyrou) found that the power to make a banning order was enlivened under paras 920A(1)(d), (da) and (e) of the Corporations Act. The tribunal decided that a banning order should be made which had the same scope as ASIC's Banning Order except that the duration of the ban was reduced from permanent to seven years ([287]).

In relation to the duration of the Banning Order, the tribunal considered and weighed a number of factors which had been identified as relevant in previous tribunal and court decisions. ASIC submitted that the tribunal should in addition have regard to ASIC's Regulatory Guide 98, *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders*, November 2022 ('RG 98'). Table 3 in part C of RG 98 was headed 'Factors and examples of conduct relating to specific periods of banning', and was divided into 3 columns headed 'Outcomes', 'Factors' and 'Examples of conduct (indicative only)'. The 'Outcomes' column specified different durations for which a banning order may be made.

While agreeing that RG 98 was not a mandatory relevant consideration, ASIC submitted that the tribunal should follow the approach of the tribunal in *Tarrant v ASIC* (2013) 62 AAR 192; 199–200; [2013] AATA 926. In *Tarrant* the tribunal decided that it should apply the policy formulated by ASIC as expressed in RG 98 and Regulatory Guide 175 when reviewing a decision to impose a banning order against a financial services licensee. At [21]) the tribunal (constituted by President Kerr and Senior Member Redfern) reasoned as follows:

> [I]nsofar as they set out the policy formulated by ASIC, the Tribunal accepts it should apply the policy expressed in the Regulatory Guides 79 and 175, notwithstanding it is an agency rather than high level ministerial policy. …. [They]

> appear to be carefully calibrated documents produced by an agency which has responsibility for prudential regulation of the provision of financial advice … [W]here a policy on its face is uncontentious the Tribunal is lawfully entitled to have regard to such policy and to apply it subject to the right of an applicant to put the matter in issue and subject to the policy not working unfairness in the particular case.

In response to ASIC's submission, the tribunal referred to President Kyrou's remarks in *GJDB v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 3245 ('*GJDB*') at [19]-[21] where His Honour recognised that there are different types of policies. In *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 ('*Drake No 2*'), the remarks of Brennan J were directed to a type of policy which offers guidance to administrators about how they should exercise a discretionary power given by legislation.

In *GJDB,* President Kyrou found that ASIC guide CPI 16, which instructed officers on the process of reasoning they should follow to satisfy themselves that a particular statutory entitlement was met, was not a policy of the type considered in *Drake No 2* (*GJDB* [26]-[27]).

In the present case, President Kyrou found that RG 98 was not the type of policy described by Brennan J in *Drake No 2* because it was in the nature of an educative guide for regulated entities rather than guidance for delegates in their exercise of ASIC's statutory powers ([283]). Moreover, RG 98 did not set out legal principles or criteria that could be 'applied' in the sense indicated by Brennan J.

While the information in Table 3 of RG 98 was derived from actual cases which were themselves relevant for the tribunal to consider, the format gave the misleading impression that 'the duration of a banning order can be determined by reference to established "tariffs"'. The impression thus created was inconsistent with the tribunal's duty in merits review to consider the facts and circumstances of each case ([284]). To the extent that the tribunal expressed a different view in *Tarrant* [21], the President respectfully disagreed ([285]).

The President explained that he had regard to RG 98 as part of the material before him but did not 'apply' it. His decision was based on applying the legal principles set out in his decision to his findings based on the evidence and submissions ([286]).

Order

The tribunal varied the decision under review by changing the duration of the banning order to seven years.

Scope of appeals from tribunal to court

Provisions in legislation giving a right of appeal from a tribunal to a court can be expressed in various ways. New South Wales legislation includes examples which provide for a right to appeal to a court against 'a decision of [the tribunal] with respect to a point of law'. This type of wording may create ambiguity as to whether it is the decision or the appeal which must be 'with respect to a point of law'.

If the correct answer is 'the decision', a further question arises as to whether the appeal must relate to an issue that was expressly raised and separately decided on a question of law. The problem with this reading is that it would significantly limit the scope of the appeal provision. Basten JA observed in *Seltsam Pty Limited v Ghaleb* [2005] NSWCA 208 [149]):

> [T]ribunals do not usually make separate decisions on points of law; rather, they identify legal principles and apply those principles to the facts, in order to reach an operative decision.

In the following decision, the NSW Court of Appeal summarised and applied the principles laid down in previous authorities on the construction of similarly worded appeal provisions.

Fisher v Nonconformist Pty Ltd [2024] NSWCA 32

New South Wales Court of Appeal (Meagher and Kirk JJA, Simpson AJA), 20 February 2024

The appellants lodged claims for compensation under the *Workers Compensation Act 1987* (NSW) ('WC Act'). The claim was denied on the ground that it was not compensable under the WC Act. The denial was upheld by a member of the Personal Injury Commission, and an appeal to the President of the Commission

was dismissed. The appellants appealed to the Court of Appeal under s 353(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) which provides:

> If a party to any proceedings under the Workers Compensation Acts before the Commission constituted by a presidential member is aggrieved by a decision of the presidential member in point of law, the party may appeal to the Court of Appeal.

Construing the appeal provision

A threshold question in the appeal was whether the appellants were 'aggrieved by a decision of the presidential member in point of law' within the meaning of s 353(1).

Kirk JA (with whom Simpson AJA and Meagher JA agreed) identified two possible interpretations of these words in s 353(1). First, on the broader reading, the grievance must 'raise a point of law' whether or not that relates to a point of law decided by the presidential member'. Second, on the narrower reading, the appeal relates to 'a grievance where the presidential member has made an erroneous decision on a point of law' ([33]).

The Court preferred the broader interpretation for the following reasons:

- It corresponds to the natural meaning indicated by the text. 'The provision does not refer to a decision of the presidential member *on* a point of law' ([33], emphasis in original).
- The broader construction extends the appeal provision beyond the class of errors which could provide grounds for judicial review of a decision made on a point of law. For example, a breach of procedural fairness by reason of apprehended bias does not depend on a decision on a point of law ([36]).

Scope of the appeal right

Having accepted that the broader view of s 353(1) was correct, the Court spelled out the consequences. It would be open to an appellant to argue that both the presidential member and the member who heard the matter at first instance misdirected themselves. For the appeal to succeed, the misdirection must have affected the conclusion reached by the presidential member ([50]-[52]).

In an appeal under s 353(1), the appellant must identify some issue on a point of law in the decision of the presidential member. If the presidential member wrongly rejects an argument that the non-presidential member made a legal error, the presidential member manifests an error of law ([48]). Any error of law must be material in order for relief to be granted ([50], [51]).

Application of the principles to the appeal grounds

The Court considered the three grounds of appeal, each alleging an error of law by the presidential member.

On the first ground the Court found that the member did not misdirect himself as to the test of causation in any of the ways argued by the appellants, and the President did not err in finding accordingly ([115]).

The second ground raised a constructive failure of jurisdiction based on the alleged failure by the Member to respond to a critical argument. The Court rejected this ground as the appellants failed to identify a 'clear material argument' which the President had not addressed ([121]).

The third ground as to the adequacy of the member's reasons was not made out and the President made no error in finding accordingly ([147]).

Order

None of the appellants' grounds of appeal having been made out, the Court dismissed the appeals.

Note: Two days after delivering the judgment in the case above, the Court of Appeal considered a differently worded appeal provision in *Kudrynski v Orange City Council* [2024] NSWCA 33. The appeal was brought under s 57(1) of the *Land and Environment Court Act 1979* (NSW) which provides for an appeal 'against an order or decision … of the Court *on* a question of law' [our emphasis]. Meagher JA and Griffiths AJA had no difficulty in concluding that 'it is the order or decision of the court, and not the appeal, which must be on a question of law' ([40]).' Section 57(1) had a different effect from other legislative provisions which provide for an appeal 'on a question of law' ([41]).

For an appeal under s 57(1), an order or decision based on a question of law must be identified, but the decision does not have to be explicit. An appeal may lie if a decision on a question of law was 'necessarily implicit' in the tribunal's

decision ([42], [43], citing *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* (2010) 241 CLR 390; [2010] HCA 32.

Kirk JA, who otherwise agreed with Griffiths AJA, found it unnecessary to express any concluded view on the proper construction of s 57(1).

Human rights: procedural challenge to vaccine mandate

During and after the COVID-19 emergency of 2020-2021, cases arose before courts, administrative and industrial tribunals in which aspects of the public health regulatory regimes introduced during that time were challenged. Many of the cases related to 'vaccine mandates' which required classes of workers to be vaccinated for COVID-19 or other diseases.

In the following case, the Supreme Court of Queensland held that directions made by the Queensland Police Commissioner requiring police service workers to be vaccinated for COVID-19 were unlawful for breach of procedural requirements in s 58 of the *Human Rights Act 2019* (Qld) ('HRA').

The applicants argued that several human rights protected by the HRA were limited by the directions. The court found that only one human right was limited, being the right of a person not to be subjected to medical treatment without their consent. The court found that limitation of the human right was reasonable and justifiable in the circumstances.

So far, the directions could have survived the applicants' challenge. However, the Court found that the Commissioner failed to turn her mind to the effect on human rights before making the directions. As the directions were made in breach of the Commissioner's duty under HRA s 58, they were unlawful. The Court restrained the Commissioner from enforcing them against the applicants.

Johnston v Carroll [2024] QSC 2

Supreme Court of Queensland (Martin SJA), 27 February 2024

During the COVID-19 public health emergency of 2021, the Queensland Commissioner of Police ('the Commissioner') issued directions to staff of the Queensland Police Service ('the QPS directions') requiring QPS employees to be vaccinated, subject to exemptions. QPS employees challenged the lawfulness of the directions. One ground for the challenge was that the Commissioner had failed to give proper consideration to relevant human rights, in breach of the procedural obligation imposed upon her by s 58 of the *Human Rights Act 2019* (Qld) ('HRA').

The statutory provisions

The HRA sch 1 states that 'human rights', being the rights stated in pt 2, div 2 and 3, are protected.

HRA s 58(1) provides that it is unlawful for a public entity:

> (a) to act or make a decision in a way that is not compatible with human rights; or
>
> (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Section 58(5) sets out a two-step process for giving proper consideration to a human right for the purposes of s 58(1)(b). First, the public entity must identify the human rights that may be affected by the decision (s 58(5)(A)). Second, the public entity must consider whether the decision would be compatible with human rights (s 58(5)(B)).

Section 8 provides that a decision will be compatible with human rights if it does not limit a human right, or if it limits a human right 'only to the extent that it is reasonable and justifiable in accordance with s 13'. Section 13(1) provides:

> A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Section 13(2) sets out a list of seven 'factors that may be relevant' in deciding whether a human right is reasonable and justified within the meaning of s 13(1).

Section 58(6)(a) states, for the avoidance of doubt, a decision of a public entity is not invalid merely because it was made in contravention of s 58(1).

Section 59(2) provides that a person may seek relief or a remedy in relation to the act or

decision of a public entity on the ground that the act or decision was unlawful under s 58.

General approach to 'proper consideration'

Martin SJA observed that the human rights assessment for the purposes of s 58(1) requires a 'common sense and practical' approach. The decision-maker must demonstrate an understanding in general terms which human rights may be affected and must seriously consider whether and how the proposed decision will limit those rights. If the decision will limit a human right, the decision-maker must identify the countervailing public and private interests and balance them with the implications of the decision for affected persons. 'There is no formula for such an exercise and it should not be scrutinised over-zealously by the courts' ([284], citing *Castles v Secretary, Department of Justice* (2010) 28 VR 141, [185] (Emerton J)).

Which human rights were limited?

The applicants contended that a number of human rights protected by the HRA were unreasonably and unjustifiably limited by the directions. Martin SJA examined the content of each right, having regard to the legislation, case law and international human rights jurisprudence. He also considered the manner in which the directions would affect each right. He found that the following human rights raised by the applicants were not limited by the directions:

- Recognition and equality before the law (HRA s 15(2) and (4)), ([287- [299])
- The right to life (HRA s 16) ([300]- [307])
- The right to freedom of thought, conscience, religion and belief (HRA s 20) ([334]- [353])
- The right to take part in public life without discrimination (HRA s 23), ([354]- [356])
- The right to privacy and reputation (HRA s 25), ([357]- [372])
- The right to liberty and security of person (HRA s 29), ([373]-[379])

Only one of the rights contended for by the applicants was found to be limited by the directions. HRA s 17 provides:

> A person must not be … (c) subjected to medical … treatment without the person's full, free and informed consent.

It was not disputed that the administration of a vaccine was 'medical treatment'. Having regard to the word 'free' in s 17(c), His Honour decided that where to refuse the vaccine entailed a serious threat to a person's livelihood, the person's consent to vaccination cannot be deemed 'full, free and informed consent' for the purposes of s 17(c) ([332]).

The proportionality analysis

Having found that the human right of affected persons referred to in s 17(c) of the HRA was limited by the directions, Martin SJA considered whether that limitation was reasonable and could be demonstrably justified for the purposes of HRA s 13 ('the proportionality analysis') [429]. His Honour accepted that, in reviewing the proportionality analysis undertaken by the decision-maker, the court must go beyond the normal scope of judicial review, to review 'the balance which the decision-maker has struck' and 'the weight accorded to interests and considerations' ([433], quoting Bell J in *Patrick's Case* (2011) 39 VR 373 [145).

His Honour proceeded to make findings on each of the considerations specified in s 13(2), having regard to the evidence and the submissions ([436]-[452]. He then considered the balance between the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation. He noted that at the time the directions were made, the proportionality analysis was affected by the public health emergency and the limited and developing state of knowledge about the COVID-19 virus and its transmission.

His Honour was not satisfied that the balance was in favour of the applicants and concluded that the limit imposed on the human right had been demonstrably justified for the purposes of HRA s 13.

The directions were unlawful

Martin SJA was not satisfied that the Commissioner had demonstrated that she gave 'proper consideration' to the human rights that might have been affected before making the QPS directions ([104], [126], [135], [136]).

The Commissioner's evidence was that she undertook the 'proper consideration' exercise required by HRA s 58(1)(b) by reading and agreeing with a Human Rights Compatibility Assessment (HRCA) that was provided to her ([100]). Martin SJA found that the Commissioner did not consider the matters

raised in the HRCA before she made her decision ([104], [135]]).

It followed that the directions were unlawful (although not invalid, due to HRA s 58(6)(a)). As the directions had been revoked before the date of judgment, it was not appropriate to make an order to set them aside. An injunction was granted to prevent their enforcement against the applicants ([466]).

Orders

The Court declared that QPS directions to be unlawful under s 58 of the Human Rights Act 2019. The Commissioner and the Director General were restrained from taking any steps with respect to enforcement of the directions or any disciplinary proceedings against any of the applicants based upon the requirements of the directions.