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Tribunal Case Update

In *Forrest & Forrest Pty Ltd v Minister for Aboriginal Affairs*, the Court of Appeal (WA) found that, in conducting merits review of a Minister's decision, the SAT made an error of law in placing weight upon the Minister's decision (as distinct from the reasons for it).

Some tribunal Acts empower the tribunal to summarily dismiss 'vexatious' proceedings. NCAT has such a power, but the authorities do not agree on whether NCAT can grant a permanent stay. In *WW v AJFW*, a party seeking to block a second application for certain guardianship orders unsuccessfully applied to the Supreme Court in its *parens patriae* jurisdiction and alternatively under the *Vexatious Proceedings Act 2008* (NSW).

In *YCJ v Public Guardian* the NCAT Appeal Panel demonstrated the reasoning process for determining whether a proposition of law said to have been decided by a higher court is binding on the tribunal, either as the ratio decidendi or as 'seriously considered dicta'.

In *Hermes Nominees Pty Ltd v Shepherd*, the NCAT Appeal Panel identified inadequacies in a tribunal's statement of reasons which failed to explain why the evidence of one witness was preferred to the evidence of another witness.

In *Fleger v Joubert*, QCAT Appeals refused an application to stay an order to evict a party from rented premises pending the outcome of proceeding between the parties in a court to resolve a claim for equitable proprietary relief based on other dealings. QCAT Appeals considered the likelihood of the applicant obtaining an order from the Court that would provide a right of indefinite occupation.

In *Stojonoff v Webber (No 2)*, the NCAT Appeal Panel dismissed an appeal, finding that the applicant had failed to establish that the

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member who heard the matter had fallen asleep during the hearing.

In *Skordou v CFMG Administration Pty Ltd*, a claim for recovery of unpaid commissions in QCAT's civil debt jurisdiction required QCAT to consider the extent of its jurisdiction with respect to employment-related entitlements.

In *Henderson v South Australian Housing Trust*, the Court of Appeal (SA) considered the circumstances in which hoarding behaviour by a tenant may amount to breach of the tenant's obligation to keep the premises in 'good tenantable condition'.

Giving weight to the decision under review

In the following case the Court of Appeal (WA) held that it was an error of law for the State Administrative Tribunal ('the tribunal'), when reviewing a Minister's decision on the merits, to place weight upon the decision under review.

In concluding that the general interest of the community did not warrant the giving of consent for proposed works on an Aboriginal significant site, the tribunal had given weight to the fact that the Minister decided that consent to the proposed use should be declined.

The Court acknowledged the possible exception admitted in *Collins v Minister for Immigration and Ethnic Affairs* for a case where the decision under review was made by a tribunal which possessed special expertise. The Court found that no such possible exception was raised by the case. In his separate concurring judgment, Mitchell JA provided further reasons as to why the Minister should not be regarded as possessing special expertise relevant to the decision.

Following the case summary is a comment on provisions of other Acts which *require* a merits review tribunal to have regard to, and give appropriate weight to, the decision of the original decision maker.

Forrest & Forrest Pty Ltd v Minister for Aboriginal Affairs [2024] WASCA 96

Court of Appeal (WA) (Buss P, Mitchell and Vaughan JJA), 9 Aug 2024

The appellant company ('Forrest'), the lessee of a pastoral property in the Pilbara region, proposed to construct certain works ('Proposed Works') on land which was an 'Aboriginal site' under s 4 of the *Aboriginal Heritage Act 1972* (WA) ('the AH Act'). Forrest needed the consent of the respondent ('Minister') under s 18 of the AH Act for the use of the land for the Proposed Works.

In determining whether to give or refuse consent to a proposed use of land, the Minister was required by s 18(3) of the AH Act to have regard to 'the general interest of the community' and to consider the recommendations of a specialist committee.

The committee recommended to the Minister that consent for Forrest's proposed use of the land not be granted. The Minister declined to consent.

Forrest applied to the tribunal for review of the Minister's decision. The tribunal affirmed the Minister's decision.

The appeal from the tribunal

Forrest appealed from the tribunal's decision to the Court of Appeal (WA) pursuant to s 105(1) of the *State Administrative Tribunal Act 2004* (WA) ('SAT Act'), which provides for an appeal on a question of law where the Court gives leave to appeal.

Ground 1 of the appeal notice alleged that, in determining whether to consent to the Proposed Works under s 18(3) of the AH Act, the tribunal erred in law by giving weight to the decision under review. The Court identified the question of law raised by this ground as being: 'Could the Tribunal lawfully give weight to the decision under review?'

The court unanimously granted leave to appeal and allowed the appeal on Ground 1 (dismissing all other grounds). Vaughan J agreed with the reasons of Buss P for allowing the appeal. Mitchell JA gave separate reasons to similar effect and concurred in the outcome.

The Court's conclusions on Ground 1

Buss P (with whose reasons Vaughan JA agreed) noted that the hearing before the tribunal was a hearing *de novo*, in which the tribunal had the functions, powers and discretions given to the Minister by the AH Act. Its function was to consider the material before it and form its own view as to whether, having regard to 'the general interest of the community', it should give its consent to the use of the land for the Proposed Works ([35], [57]).

Buss P considered the authorities on whether it is lawful for a tribunal conducting merits review to give weight to the decision under review. In *Re Control Investment Pty Ltd v Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88, Davies J reasoned that it is a necessary inference from ss 37 and 38 of the *Administrative Appeals Tribunal Act 1975* (Cth) that the statement of reasons that must be provided to the tribunal by the decision-maker was 'a relevant matter which the [AAT] may take into account in its review' and that 'the Tribunal may have regard to the findings of fact and the reasons for decision of the decision-maker' (92-93 per Davies J, cited [39], [41]).

In *Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407 a Full Court of the Federal Court remarked that it is 'unsound in determining the correctness of a decision to treat the decision itself as being probative of its own correctness' (*Collins* 411, cited at [58]). The Court in *Collins* noted that in AAT proceedings there is 'no presumption that the decision under review is correct'. The tribunal may give weight to the reasons of the decision maker if it finds itself in agreement with them, but 'the actual decision does not, in itself, carry any weight' (*Collins* 412, cited [49], [50]). The Court acknowledged a possible exception where 'the decision maker is a person or Tribunal having special expertise' (*Collins* 412, cited [50]).

Buss P found that in determining where the general interest of the community lay and whether consent to the proposed use should be granted, the tribunal did place weight on the Minister's decision (as distinct from the reasons for it) ([67]). In his separate concurring judgment, Mitchell JA added that the tribunal 'did not … express its own view as to where the general interest of the community lay' ([202]).

The Court found that this was not a case within the possible exception mentioned in *Collins*. The matters considered by the Minister in his reasons for decision were not ones which the Minister had special expertise to evaluate ([60] (Buss P, [200] (Mitchell JA)). Mitchell JA added that, in determining where the 'general interest of the community' lay, the Minister had regard to only one interest, being the importance of the land for the Thalanyji people. The Minister was in no better position than the tribunal to assess that interest ([200]).

The tribunal's reliance on the decision under review was held to be an error of law. The error was a material one, as there was a real possibility that the tribunal's decision could have been different if it had not erred by giving weight to the Minister's decision when making its assessment of where the general interest of the community lay ([68], [69] (Buss P); [202] (Mitchell JA)).

Orders

Leave to appeal on Ground 1 was granted and the appeal allowed.

The tribunal's order was set aside and the matter remitted for reconsideration by a reconstituted tribunal in accordance with directions.

A note on the SACAT and TASCAT Acts

Many Acts that establish tribunals to review administrative decisions on the merits include provisions such as those considered in *Forrest,* which empower the tribunal to hear matters *de novo*. Some Acts depart from this model. For example, the *South Australian Civil Administrative Tribunal Act 2013* (SA) ('SACAT Act') s 34(3) provides that in exercising its review jurisdiction, the tribunal shall proceed by way of rehearing. Section 34(4) provides:

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

Similar provisions are found in other Acts, eg *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 75(4) and *South Australian Employment Tribunal Act 2014* s 27.

The operation of the SACAT provisions was recently discussed by the South Australian Court of Appeal in *Henderson v South Australian Housing Trust* (see report below). The Court quoted with approval (at [22]) the remarks of

Parker P in *Re AKS* [2016] SACAT 19 ([35]). Parker P observed that the requirement in s 34(3) to 'give appropriate weight' to the decision under review differs from the procedure of an appeal *de novo*. However, SACAT's fundamental task is to arrive at the correct or preferable decision. SACAT is empowered to quash or vary the decision under review or remit the matter for rehearing *without having identified any error in it* if it considers that it is not the preferable decision [emphasis added]. In this respect, SACAT's powers differ from the powers of a court deciding an appeal by way of rehearing.

Court declines to find tribunal proceedings vexatious

NCAT has powers under s 38(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) to determine its own procedure for which no provision is otherwise made. It also has power under s 55(1) to dismiss at any stage any proceedings if it considers that they are 'frivolous or vexatious, or otherwise misconceived or lacking in substance'. The question of whether NCAT has the power to grant a permanent stay on its proceedings is presently unsettled. In the following decision, Rees J said that he found the affirmative view 'compelling' but found it unnecessary to rule on the question.

The Court dealt with two applications, one in the Court's inherent *parens patriae* jurisdiction and one under the *Vexatious Proceedings Act 2008* (NSW). Both applications sought a permanent stay of pending proceedings in the Guardianship Division and orders to prohibit the respondent from instituting any further proceedings concerning the plaintiff.

WW v AJFW [2024] NSWSC 754

New South Wales Supreme Court (in Eq), (Rees J), 21 June 2024

The plaintiff ('the mother') applied to the Court relying on the *parens patriae* jurisdiction, or alternatively under s 8(1) of the *Vexatious Proceedings Act 2008* (NSW) ('VP Act'), seeking an order prohibiting the defendant ('the son') from instituting any proceedings in New South Wales against or concerning her. The mother further applied for a permanent stay of proceedings commenced by the son in the Guardianship Division of the New South Wales Civil and Administrative Tribunal ('the tribunal') seeking the appointment of a guardian and financial manager for her ('the Second Application').

The tribunal had heard and dismissed a similar application from the son in February 2023 ('the First Application') In the Second Application filed on 8 March 2024, the son alleged changed circumstances. Before the tribunal had the opportunity to adjudicate the Second Application, the mother applied to the Court.

The *parens patriae* jurisdiction

The scope of the Court's inherent jurisdiction 'to do what is best for the benefit of the incompetent' was discussed by the High Court of Australia in *JWB v SMB* ('*Marion's Case*) 1992] HCA 15 (1992) 175 CLR 218, 259: [1992] HCA 15. Noting that 'there must be some clear justification for a Court's intervention', Rees J was not satisfied that the Court should exercise its *parens patriae* jurisdiction to injunct the son from instituting any further proceedings against the mother ([109]-[109]). The mother was able to attend to her own welfare, had lawyers acting for her and was competent to instruct them ([110]. Moreover, the terms of the orders sought by the mother were overly wide, given that circumstances relating to the mother's care and the capacity might change ([114]).

The *Vexatious Proceedings Act* s 8(1)

Section 6 of the VP Act does not specify the matters that the Court should take into account in deciding whether proceedings are 'vexatious proceedings' for the purposes of s 8(1) of the VP Act.

The tribunal that adjudicated the First Application recorded no finding or observation that the proceedings were an abuse of process or had been brought without reasonable grounds ([123], [124]). It would be for the tribunal that adjudicates the Second Application to determine if there was fresh evidence to support it ([125], [126]).

Elements of the VP Act were found to be not satisfied ([132]).

Comment on NCAT's power to dismiss

Rees J observed that, pursuant to s 55(1) of the *Civil and Administrative Tribunal Act 2013* (NSW), the tribunal has power under s 55(1) to dismiss the Second Application if the proceedings are found to be vexatious. The tribunal was best placed to judge the extent to which the Second Application raised new evidence, taking into account any changed circumstances ([106]).

His Honour noted that there is conflicting authority as to whether the tribunal has the power to grant a permanent stay of its own proceedings ([97]). While His Honour found the affirmative position as explained in *Council of Law Society of NSW v Clarke* [2017] NSWCATOP 142 [77] to be 'compelling', it was not necessary for him to determine the point ([104]).

The mother's summons was dismissed with costs.

Applying the doctrine of precedent in tribunal decisions

In the decision below, the NCAT Appeal Panel ruled that it was bound to apply both the ratio of relevant decisions of the NSW Court of Appeal and Supreme Court, and 'seriously considered dicta' of those courts, unless the Appeal Panel considers the dicta to be 'plainly wrong'.

The Appeal Panel's reasons demonstrate its reasoning process to determine whether a principle said to have been established by a court decision formed the ratio of that decision, 'seriously considered dicta', or mere obiter dicta.

YJC v Public Guardian [2024] NSWCATAP 160

NCAT Appeal Panel (Armstrong P, A Britton DP, JV Le Breton, GM), 16 Aug 2024

A mother appointed three of her six children as her attorneys and enduring guardians, and subsequently revoked the appointment of two of them (the appellants). The appellants applied to the New South Wales Civil and Administrative Tribunal ('the tribunal') to review the purported revocation of their appointment as the mother's attorneys.

The tribunal made a financial management order in respect of the mother and exercised its power under s 25M(1)(b) of the *Guardianship Act 1987* (NSW) to commit the management of her estate to the NSW Trustee and Guardian ("T & G'). The tribunal otherwise dismissed the appellants' applications.

The appellants appealed the tribunal's decisions to the NCAT Appeal Panel ('the Appeal Panel'). A key issue in the appeal was whether by committing the management of the mother's estate to the T & G the tribunal had made an error of law in failing to apply the so-called 'last resort principle', which the appellants contended had been determined by the NSW Court of Appeal in *Holt v Protective Commissioner* (1993) 31 NSWLR 227 ('*Holt*'). Under that principle, the appellants submitted, the tribunal's power given by s 25M of the *Guardianship Act* to commit the estate of a 'protected person' to the T & G can only be exercised as a 'last resort', where there is no suitable person available to be appointed as manager.

Doctrine of precedent

The Appeal Panel noted that courts are bound by the ratio decidendi of a decision of any court above them in the judicial hierarchy. In addition, they are bound to apply 'seriously considered dicta' of any court above them in the judicial hierarchy unless they consider that dicta to be 'plainly wrong' ([35], citing inter alia, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, [134]-[135]).

While not a court, the Appeal Panel was likewise bound by the ratio decidendi of the NSW Court of Appeal and Supreme Court, and also by seriously considered dicta of those courts, unless it considers the dicta to be 'plainly wrong' ([37]).

What was the ratio decidendi in *Holt*?

To determine whether the 'last resort principle' was incorporated into the ratio decidendi in *Holt*, the Appeal Panel examined the issues which the Court of Appeal needed to resolve in that case, and the reasons the Court gave for its decision [39]).

The Appeal Panel found that the ratio of the Court's decision on this aspect of the appeal was that 'in applying s 22 of the *Protected Estates Act 1983* (NSW) [which was in materially identical terms to s 25M of the Guardianship Act)] the welfare of the protected person is the

dominant consideration' ([48]). The Court held that Powell J at first instance erred in suggesting that to make the order applied for would require:

> a clear and convincing demonstration that the form of management proposed by [the applicants] would better advance the interests of the protected person than the existing management' ([42], citing Powell J).

Only after finding this error did the Court of Appeal refer to a 'sensible hierarchy of choices' for courts when exercising the power to appoint or remove a manager under s 22 ([47, quoting *Holt* at 238-39). It was by these remarks that the so-called 'last resort principle' was said to have been laid down. The Appeal Panel decided that these remarks were 'neither essential nor necessary to the outcome of *Holt* and [do] not form part of the ratio of that decision' ([48]).

Neither could the remarks be characterised as 'seriously considered dicta'. The Court made no reference to legal ruling, legal authorities in which the point had been argued, principles of statutory construction nor any expert sources ([49]).

The Appeal Panel discussed three other NSW Supreme Court cases in which *Holt* had been considered. It found that in none of these cases was the 'last resort principle' essential to the decision reached or endorsed in 'seriously considered dicta' ([61]-[65]. While the remarks of the Court of Appeal in *Holt* had undoubtedly changed administrative practice in New South Wales, the tribunal held that it was not bound by the 'last resort principle' as a matter of law ([66]).

This ground of appeal accordingly failed.

Order

The appeal was allowed in part. The decision to make a financial management order in respect of the mother and to commit the management of her estate to the T & G was affirmed. Other matters were referred to the tribunal for reconsideration.

Adequate reasons – conflict of expert evidence

The following decision provides a clear and concrete analysis of what the tribunal must do to provide adequate reasons for preferring the expert evidence called by one party to contradictory evidence led by another party.

Hermes Nominees Pty Ltd v Shepherd 2024 NCATATAP 36

NCAT Appeal Panel (R Seiden, PM and DAC Roberston, SM), 8 March 2024

The respondent (Mr Shepherd) purchased a car with fitted accessories from the appellant ('Hermes Nominees'). Mr Shepherd brought a claim against Hermes Nominees in the NSW Civil and Administrative Tribunal ('the tribunal') relating to damage to the roof of the car said to be caused by the faulty installation of a roof platform and wind fairing prior to its delivery.

Before the tribunal, each party called an expert.

Mr Shepherd relied upon a written report from Mr Consalvi, who did not give oral evidence. He did not inspect the vehicle and was given very limited instructions about the use of the vehicle ([34]). The witness concluded that the damage to the roof could only have occurred if the bolts holding the roof platform were not tightened.

Hermes Nominees called Mr Meers who gave oral and written evidence and was cross-examined. The witness had conducted a physical inspection and viewed a video demonstration of how the roof platform performed when traveling with the bolts loosened. The witness detailed his observations and explained his conclusion that damage to the roof was not caused by movement of the roof platform.

The tribunal at first instance appears to have found that, on delivery, three nuts on the roof platform were loose and the resulting vibration of the rack platform and flexing of the wind fairing caused the damage to the roof during the vehicle's first journey ([5], [33]). The tribunal ordered Hermes Nominees to pay a monetary sum to Mr Shepherd ('the Decision').

Hermes Nominees applied for written reasons for the Decision and appealed from the Decision to the NCAT Appeal Panel.The Appeal Panel

identified a question of law raised in the appeal as being whether the tribunal provided adequate reasons ([17]).

Adequacy of the reasons

The Appeal Panel observed that, at least in a case like this where a party has requested a written statement of reasons under s 62 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act'), it should be clear from the reasons whether the tribunal has complied with its duty to evaluate the evidence ([16]). The reasons provided were deficient in several respects. The tribunal did not explain:

- why the evidence of Mr Meers was rejected,
- why the opinion of Mr Consalvi was, at least implicitly, preferred to the contrary evidence of Mr Meers, and
- the basis for the tribunal's assumptions about how the wind fairing would have operated on a moving vehicle ([34]).

The Appeal Panel was not satisfied that the reasons complied with the requirements of s 62(c) to set out the reasoning process that led to the tribunal's conclusions ([35]). This breach of the Act amounted to an error of law ([36]).

Order

The appeal was allowed, the Decision was set aside, and the proceedings were remitted to the tribunal for determination.

Stay application – proceedings in another forum

In the following case, QCAT was asked to stay an order to evict a party pending the outcome of proceedings for equitable relief in the District Court between the parties concerning the same property. QCAT's order and its refusal to grant the stay were the subject of an appeal to the QCAT Appeal Tribunal. The appellants asked the Appeal Tribunal to stay the eviction order pending the outcome of their application for leave to appeal. The matters considered by the Appeal Tribunal in refusing the stay included the likelihood of the District Court granting proprietary relief relating to the premises.

Fleger v Joubert [2024] QCATA 13

QCAT Appeals (Member Lember), 14 Feb 2024

Ms Joubert applied to the Queensland Civil and Administrative Tribunal ('the tribunal') for orders to terminate a residential tenancy. The premises were occupied by Mr and Mrs Fleger ('the Flegers') who had commenced proceedings in the District Court claiming an equitable interest in the nature of a right to reside in the premises. The tribunal lacked jurisdiction to determine the equitable claim but had exclusive jurisdiction to determine the residential tenancy dispute ([32]).

The tribunal refused to stay or adjourn the application for termination pending the outcome of the District Court proceedings. The tribunal found that the Flegers occupied the premises under a residential tenancy agreement and ordered that the agreement be terminated in two months' time.

The Flegers applied for leave to appeal and to appeal the tribunal's decision, including the tribunal's refusal to grant a stay. The QCAT Appeal Tribunal addressed the stay application as follows.

Criteria for granting a stay

An application to stay a decision where leave to appeal has not yet been granted may be considered under s 58(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'). Queensland Court of Appeal authority indicates that 'to succeed in an application for a stay, the party must satisfy the Appeal Tribunal that there is good reason for the stay, including:

- that the application has a good arguable case on appeal; and
- that the applicant will be disadvantaged if a stay is not ordered; and
- that competing disadvantage to the respondent, should the stay be granted, does not outweigh the disadvantage suffered by the applicant if the stay is not granted' ([14])

A good arguable case

Ground 1 of the appeal alleged that the tribunal erred in failing to grant a temporary stay or adjournment.

The Appeal Tribunal observed that the refusal to grant a stay or adjournment is a discretionary decision. Where such a decision is challenged on appeal, it must be shown that the decision was affected by an error within the classes of error outlined in *House v The King* (1936) 55 CLR 499, 504-05.

The Appeal Tribunal found no such error in the tribunal's reasons for refusing to stay or adjourn, which included the following reasons:

- The Flegers' claim before the District Court for equitable relief in the form of a right of occupation differed fundamentally from the residential tenancy proceeding before the tribunal. A decision in one proceeding would not determine the decision in the other.
- Adjourning or staying the tenancy proceeding would waste the tribunal's time and prolong the dispute (*Reasons* [50], cited at [22]).

The Appeal Tribunal found that the Flegers' claim to equitable relief, if it succeeded on the basis of either proprietary estoppel or constructive trust, would be 'highly unlikely' to result in the grant of an indefinite right to the Flegers to occupy the property. Given the terms of the parties' agreement and the requirements of justice and equity to Ms Joubert, the more appropriate relief would be the payment of a monetary sum ([24], [41]). The Appeal Tribunal found that these considerations supported the tribunal's view that:

> there was no benefit to staying or adjourning the termination application …because the relief given (if any) is likely to be very different across the two jurisdictions ([25])

The Appeal Tribunal noted that s 126(2) of the QCAT Act has the effect that a final decision in a minor civil dispute such as tenancy does not prevent a court or another tribunal making a decision about an issue decided or considered by the tribunal if the issue is relevant to a proceeding for another matter ([30]-[32]). Accordingly, the tribunal's refusal to grant a stay did not affect the Flegers' right to pursue their equitable claims, including injunctive relief, in the District Court ([35], [37]).

The Appeal Tribunal found no reasonably arguable case on ground 1 ([19]), nor on any other ground.

Disadvantage – both parties

The Appeal Tribunal rejected the Flegers' argument that their appeal would be rendered nugatory if the stay were not granted. They did not have a strong prospect of obtaining a right to reside in the property ([74]). Any inconvenience to them was outweighed by the disadvantage to Ms Joubert if the stay were refused, considering her excessive and ongoing financial hardship and the protracted delay in recovering possession of the property from the Flegers ([75]-[76].

Order

The application to stay the tribunal's decision was refused. Directions were given for further steps to be taken in relation to the appeal.

Appeal – member alleged to fall asleep during hearing

In the following decision, the NCAT Appeal Panel found that an appellant failed to establish that the tribunal member fell asleep for short periods of time during the hearing. The decision shows how the Appeal Panel tested the appellant's allegations without the benefit of a video recording.

Stojonoff v Webber (No 2) [2024] NSWCATAP 137

New South Wales Civil and Administrative Tribunal Appeal Panel (Senior Members G Blake and P Durack), 16 July 2024

Ms Stojonoff appealed from a decision of NCAT's Consumer and Commercial Division ('the tribunal') constituted by a single member. One of the grounds argued in the appeal was that the tribunal failed to afford procedural fairness to Ms Stojonoff by reason of the member allegedly falling asleep during the hearing while Ms Stojonoff was speaking.

The evidence

Both Ms Stojonoff and the respondent Ms Webber gave oral evidence at the hearing before the tribunal on 7 September 2023.

Ms Stojonoff gave evidence that the member fell asleep several times during the hearing for

periods between 30 seconds and one to two minutes. Ms Stojonoff had reviewed the sound recording of the hearing but was unable to give a specific point in time when the member fell asleep.

In her declaration, Ms Webber gave evidence that she was looking at the member throughout the hearing and did not see the member fall asleep.

The Appeal Panel listened to the sound recording of the hearing which ran for about one and a half hours.

Evaluation of the evidence

The Appeal Panel found the evidence of Ms Stojonoff was unsatisfactory in several respects. In response to questioning from the Appeal Panel, she said that when she observed the member 'fall asleep', she observed the member's head drop at an angle greater than 45 degrees. Citing Refshauge J in *Commonwealth of Australia v Davis Samuel Pty Ltd (No 4)* [2008] ACTSC 112 [47], the Appeal Panel found that the head movement was equally consistent with the member looking down to read the papers. Ms Stojonoff offered no other evidence that the member was asleep at any time ([40]).

The Appeal Panel found Ms Webber's evidence that she would have noticed if the member had fallen asleep for as long as 30 seconds was persuasive.

The sound recording showed that the member was 'alert and an active participant throughout the entirety of the hearing' ([40(3)]).

Conclusion and orders

As Ms Stojonoff had not established that the member fell asleep during the hearing, the Appeal Panel was not satisfied that the tribunal had failed to afford her procedural fairness ([41]). After dismissing other appeal grounds, the Appeal Panel refused leave to appeal and dismissed the appeal.

Jurisdiction in employment entitlements

It is clear that a tribunal must satisfy itself that it is acting within its jurisdiction, even if the parties raise no objection. Difficult questions as to the scope of the civil jurisdiction of State tribunals can arise in the context of employment law, due to:

1. the complex interaction of statute law and contract as a source of worker entitlements, and
2. the interaction of the *Fair Work Act 2009* (Cth) and the State Act under which the tribunal is established.

Skordou v CFMG Administration Pty Ltd [2024] QCAT 236

Queensland Civil and Administrative Tribunal (Adjudicator A Wilson), 9 May 2024

The applicant filed an application for minor civil debt in the tribunal. By an agreement in writing the respondent ('CFMG') employed the applicant Mr Skordou as a sales manager on a specified salary plus commission to sell off-the-plan properties. Mr Skordou claimed that commissions due to him under the agreement amounting to a specified sum were owing to him.

In an interlocutory proceeding, the tribunal raised on its own motion the question whether the entitlements claimed were within the tribunal's jurisdiction.

Jurisdiction question

In Ford v Thexton [2014] QCATA 180 [5] ('*Thexton*'), an appeal bench of the tribunal held that the question of the tribunal's jurisdiction to adjudicate an employment contract dispute depends upon the source of the entitlement claimed. That source may be in contract or statute or both. If the claim arises pursuant to a contract, the tribunal has jurisdiction only if the claim is for a liquidated sum (that is, a debt) ([45(c), citing *Thexton* [10]). If the claimed entitlement arises under a statute, it is necessary to construe the statute.

The tribunal in *Thexton* held that the tribunal had no jurisdiction to deal with claims for entitlements arising under the *Fair Work Act 2009* (Cth) ('FW Act') because the Act does

not confer jurisdiction on the Tribunal (*Thexton* [32]-[38]).

Applying the *Thexton* principles to Mr Skordou's claim, the tribunal found:

- The source of the claim was the employment agreement, not the statutory provisions of the FW Act or an award made under it ([54]).
- The claim was for a debt or liquidated amount of money, being the sum of unpaid commissions payable pursuant to an employment agreement ([53]).
- The exclusion of FW Act claims in the definition of 'minor civil disputes' in sch 3 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) was not relevant because the claim was for a contractual debt ([55]).

The tribunal found that the claim was within the tribunal's minor civil dispute jurisdiction ([53]). Orders and directions were made to prepare the matter for hearing.

When hoarding becomes a breach of lease

In an appeal from a decision of the President of SACAT, the South Australian Court of Appeal considered the meaning and content of a lease term which requires the tenant to keep the premises in 'good tenantable condition'. Although this expression has long been used in leases, judicial authority on its meaning and content is sparse. The question arose in the context of a public housing tenant with a long and intractable history of hoarding behaviour. The Court clarified the tenant's obligation and identified several different scenarios in which the excessive accumulation of goods in the rented premises could involve a breach.

Henderson v South Australia Housing Trust [2024] SASCA 55

Supreme Court South Australia Court of Appeal (Lovell, Doyle and Kimber JJ), 9 May 2024

The appellant ('the tenant'), who had a hoarding disorder, leased residential premises from the respondent ('the landlord') under a tenancy agreement. A Senior Member of the South Australian Civil and Administrative Tribunal found that the tenant had 'failed to keep the premises … clean and in good tenantable condition' as required by cl 6(c) of the tenancy agreement. The tribunal ordered that the tenancy be terminated, and that the tenant deliver vacant possession.

In an internal review of the decision, the President affirmed the decision of the Senior Member.

The tenant sought leave to appeal from the President's decision to the Court of Appeal under s 71 of the *South Australian Civil and Administrative Tribunal Act 2013* (SA). An appeal under s 71 is by way of rehearing, in which the Court has power to affirm, set aside or vary the decision or to remit the matter for rehearing by the tribunal.

In Ground 1 of the appeal, the tenant contended that the President erred in her interpretation of 'good tenantable condition' and in finding that there was a breach of cl 6(c). The Court granted leave to appeal on the basis that Ground 1 raised an issue of principle of general importance.

Good tenantable condition

The Court reviewed the authorities on the meaning and content of the tenant's obligation to keep the premises in good tenantable condition ([49]). Their Honours concluded that the expression 'encompasses an obligation that the premises be fit for letting to another tenant' ([55]). Read in conjunction with cl 8(b), which required the tenant to deliver vacant possession on termination, the obligation to maintain the premises in good tenantable condition was continuous throughout the 90-day tenancy ([62]).

The Court considered that excessive accumulation of possessions may give rise to a breach of the obligation. Depending on other provisions in the lease and the circumstances of the case, a breach could occur where the accumulation is of such an amount and distribution that:

- the cleanliness, hygiene or safety of the premises is placed at risk, or
- the premises are no longer in a condition suitable for the use and occupation by another tenant, or
- the tenant will be unlikely to be able to restore the premises to a suitable condition within a reasonable timeframe ([65]-[68]).

Application

The Court found that, by reason of the excessive accumulation of goods, the rented premises were not in a fit state to function as residential premises ([69]). Moreover, the tenant could not, even with assistance, deliver vacant possession within the 90-day period of the tenancy ([70]). The Court concluded that the tenant had not kept the premises in good tenantable condition and was in breach of cl 6(c) ([71]).

The Court considered the tenant's argument that there was insufficient evidence to support the President's additional basis for finding the tenant to be in breach of cl 6(c), namely, her conclusion that the quantity and placement of the tenant's goods created a fire risk. The Court ruled that, even without the benefit of expert evidence, the photographic evidence and the landlord's submissions were sufficient for the President to form the view that access to the premises by fire rescue services would be severely restricted, thereby increasing the risk to life and property in the event of a fire ([81]). The Court reached the same conclusion on this point as the President ([85]).

Order

The Court gave leave to appeal and dismissed the appeal. Leave to appeal on another ground was refused.

[Note the discussion at p3–4 above, of the Court of Appeal's Note discussion of the type of review procedure required by s 34 of the SACAT Act.]