COUNCIL OF AUSTRALASIAN TRIBUNALS

Issue 1
2025

Tribunal Case Update

Dealing with the consequences of crime

Four cases in this issue explore different circumstances in which tribunals deal with the civil or administrative consequences of conduct which has been the subject of criminal charges.

In *Medical Board of Australia v Zhao*, a doctor who had been acquitted of rape was in a disciplinary proceeding found to have penetrated a woman with his penis without her consent during a medical examination.

In *Gailunas v Victorian Institute of Teaching*, a man appealing the refusal of his registration as a teacher failed to discharge the 'heavy onus' on a person seeking to challenge the essential facts on which a conviction was based.

In *Sharma v Psychology Board of Australia*, a man refused registration as a psychologist sought to dispute evidence from the prosecution as to the gravity of an aggravated assault of which he had been convicted on his plea of guilty.

A ruling on referred questions of law in *Badea v Department of Human Services – Central Assessment Unit* provides clear guidance on how SACAT should approach a request by a party to exclude relevant evidence arising from withdrawn criminal proceedings.

Turning to other matters, decisions arising from NCAT and QCAT reject different devices by parties to circumvent statutory monetary limits on their civil jurisdiction: *Hawkins v Wimbledon 1963 Pty Ltd* and *DB v CB.*

Cases continue to arise in which reasons for decision disclose extensive copying from the submissions of one party. While copying is strongly discouraged, it does not always amount to a jurisdictional error. In *Atanaskovic Hartnell Corporate Services Pty Ltd v Kelly*, the Full Court of the Federal Court endorsed the views of the ACT Court of Appeal in *Porter v The Queen*, clarifying the test for determining the point at which copying rises to jurisdictional error.

Finally, *State of Tasmania (Department of Health) v BB* raises the question of the extent to which a tribunal's 'incidental' or 'anterior' jurisdiction to determine the limits of its own jurisdiction enables it to determine a question of fact on which its jurisdiction turns.

Contents

Disciplinary finding after acquittal

In a disciplinary proceeding, VCAT found that in the course of a medical consultation with a woman, a GP conducted a vaginal examination with no clinical justification for his own sexual gratification, and that he sexually penetrated her with his penis without her consent. The GP had previously been charged with rape on the same alleged facts and acquitted by a judge upon a no-case submission. The tribunal noted that it did not have access to the same evidence as was provided to the Court, that it had additional evidence that was not before the Court, and that it was required to apply a different standard of proof to the assessment of the facts ([71]).

Medical Board of Australia v Zhao [2024] VCAT 774

Victorian Civil and Administrative Tribunal (Members N Campbell, R Mason and A Sungaila), 20 Aug 2024

Under s 193 of the *Health Practitioner National Law (Victoria) Act 2009* (Vic) ('National Law'), the Medical Board of Australia ('the Board') made a referral to the tribunal with a Notice of Allegations, alleging professional misconduct by Dr Zhao, a medical practitioner. The Board alleged that in the course of a medical consultation Dr Zhao conducted a vaginal examination of a woman ('the patient') with no clinical justification for his own sexual gratification, and that he sexually penetrated her with his penis without her consent.

The Board commenced an investigation in 2014 following notifications from the Police and the patient. In 2016, after criminal charges of rape had been laid against Dr Zhao, the Board suspended his registration as a medical practitioner. In 2019, Dr Zhao was acquitted on the charge of rape in the County Court of Victoria, after the judge ruled that the evidence before the jury was not capable of supporting a conviction on the criminal standard of beyond reasonable doubt. (The acquittal at this point in the trial meant that the defence was not required to open its case). Interlocutory orders were made which included orders for the provision of specified documentary evidence.

Neither Dr Zhao nor the patient gave oral evidence before the tribunal. Dr Zhao and the Board relied on written submissions and documentary evidence including the police interview statements of the patient and Dr Zhao, and the transcript of the patient's evidence in the rape trial. In his submissions, Dr Zhao denied the allegations. He claimed that the manual examination of the patient was clinically justified and that he did not penetrate her vagina with his penis.

Consideration by the tribunal

The tribunal acknowledged that no inference could be drawn against either Dr Zhao or the patient by reason of their failure to testify at the hearing ([67], [70]). In relation to the relevance of the acquittal on the rape charge, the Board observed as follows:

1. The criminal trial in which Dr Zhao was acquitted of rape was for a different purpose and was decided under a different standard of proof.
2. The tribunal did not have before it all the evidence on oath that was heard by the Court (as the transcript of the trial provided by the Court to the Board was incomplete).
3. The tribunal had before it additional evidence that was not before the Court, such as expert evidence from two additional medical experts and additional evidence from a forensic scientist ([71]).

After reviewing the evidence the Board made the following findings of fact, on the civil standard of the balance of probabilities and keeping in mind the *Briginshaw* principle.

- In the course of a medical examination, Dr Zhao penetrated the patient's vagina with his penis without her consent ([213]–[214])
- On the same date Dr Zhao purported to perform a bimanual vaginal examination on the patient without informed consent, without reasonable clinical justification, and for his sexual gratification ([217])

Orders

This decision communicates VCAT's findings of fact relevant to the Board's allegations. A further hearing was to be held on the characterisation of the proven conduct and the appropriate determination.

Dispute as to the facts on which a conviction is based

In the following case, an applicant for registration as a teacher sought review of the refusal of his registration. VCAT applied the principles in *Secretary to the Department of Justice and Regulation v LLF* [2018] VSCA 155 ('*LLF*') [42] (which have been often applied in migration cases such as *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202 [22]).

Since the conviction was not the basis of the tribunal's jurisdiction, it was open to the applicant to contest the essential facts on which the conviction was based, but in doing so he bore a 'heavy onus'. In this case, the applicant failed to discharge that onus.

Gailunas v Victorian Institute of Teaching [2023] VCAT 720

Victorian Civil and Administrative Tribunal (A Dea SM, P Gysslink, Member) 29 June 2023

The Victorian Institute of Teaching ('VIT') is responsible for registering members of the teaching profession in Victoria. The applicant sought review by VCAT of a decision by VIT to refuse his application for registration as a teacher on the ground that he had failed to provide evidence which satisfied VIT of his suitability to teach.

The applicant had been charged with 171 counts of obtaining property by deception. He refused to enter a plea. All but one of the counts were withdrawn. He was convicted on one count and sentenced to a Community Correction Order for 12 months.

The applicant maintained that he was innocent of the offence of which he was convicted. The charges arose from claims for payment that he made as a driving instructor in a program operated by the Australian Automobile Association ('AAA'). The police alleged that he created 171 email accounts and false learner's permit numbers for fictitious learner drivers and used them fraudulently to obtain payment from AAA for lessons that he did not provide.

The applicant gave oral testimony before the tribunal in which he claimed that he was wrongly convicted and that he would have been able to prove the validity of the payment claims if he had retained his records.

The legislation

The *Education and Training Reform Act 2006* (Vic) ('ETR Act') s 2.6.9(2) provides:

> The [VIT] may refuse to grant registration to an applicant on any one or more of the following grounds –
>
> (c) that the applicant has engaged in category C conduct and –
>
> (ii) it is not in the public interest to allow the applicant to teach in a school because of the conduct engaged in;
>
> ….
>
> (f) that the applicant has not produced evidence which satisfies the [VIT] of his or her suitability to teach.

The tribunal's consideration

VIT's decision to refuse registration relied solely on the ground in s 2.6.9(2)(f). The tribunal decided that, as it was required to make a fresh decision, it was not limited to that ground and would also consider the ground in s 2.6.9(2)c)(ii).

For purposes of the ETR Act, obtaining property by deception is a 'category C' offence (ETR Act s 1.1.3C(1)(a)). Since the applicant had been convicted of that offence, the tribunal applied the principles stated by the Victorian Court of Appeal in *Secretary to the Department of Justice and Regulation v LLF* [2018] VSCA 155 ('*LLF*') [42] ([77]–[78]). This was not a case in which a conviction is the basis for the tribunal's jurisdiction, but one in which 'the circumstances of the conviction can be reviewed for a purpose other than impugning the conviction itself.' In such a case, the Court in *LFF* said (at [42])—

> the essential facts underlying the conviction are not immune from challenge and the conviction is conclusive only of the fact of the conviction itself, but there is a heavy onus on a person seeking to challenge the facts upon which the conviction is necessarily based.

Applying this principle, the tribunal said that it was for the applicant to produce compelling evidence that the facts upon which the conviction was based were open to challenge ([78]).

After considering the evidence from the criminal proceedings and from the applicant, the tribunal entirely rejected his claim that the charge was only proven because of a lack of records and that his claims for payment from AAA were valid and honestly made ([88], [122]).

Having found that he had engaged in category C conduct, the tribunal found that 'it would not be in the public interest to allow him to teach in a school' because of that and other conduct ([134]). The primary public interest consideration under the ETR Act is the wellbeing and safety of children (s 2.6.3(1A). The tribunal also considered the applicable teaching codes of conduct and ethics which define the behaviours required to affirm the public accountability of teachers ([114]–[117]).

The tribunal took into account the applicant's continued denials of his offending, his dishonest testimony and his lack of insight or remorse for his conduct, finding him to lack a character founded on honesty and integrity ([123]-[127].

The tribunal found:

- under ETR Act s 2.6.9(2)()(ii), that it would not be in the public interest for him to be registered as a teacher ([134]).
- under ETR Act s 2.6.9(2)(f)), that he had not produced evidence which satisfied the tribunal of his ability to teach (ETR Act s 2.6.9(2)(f)) ([128]).

Order

The decision under review was affirmed.

Guilty plea – circumstances of the offending

The following decision discusses the proof of the circumstances of offending in a disciplinary proceeding where a person has previously been convicted on his plea of guilty. Marshall AJ accepted that 'when a person pleads guilty to an offence, one is pleading guilty to the essential elements of the offence and no more' ([26]). Mr Sharma 'was entitled, and did, contest the allegations made by the cross-examiner about his acceptance of the material statement of facts [provided to the magistrate by the prosecution]' [27].

His Honour's comments at [27] indicate that greater weight may be placed on the factual statements about the offending in the trial judge's sentencing remarks.

Sharma v Psychology Board of Australia [2024] TASSC 62

Supreme Court of Tasmania (Marshall AJ), 12 Nov 2024

The Health Practitioner Regulation National Law ('National Law') applies in Tasmania by force of the *Health Practitioner Registration National Law (Tasmania) Act 2010* (Tas) s 4.

Section 55(1)(b) of the National Law provides that the Board may decide an individual is not a suitable person to hold registration in a health profession if:

> having regard to the applicant's criminal history to the extent that is relevant to the individual's practice' … the individual is not, in the Board's opinion, an appropriate person to practice the profession …

Under that provision the Psychology Board of Australia ('Board') refused Mr Sharma's application for registration as a psychologist due to circumstances associated with a 2005 conviction recorded upon his plea of guilty to aggravated assault on his ex-wife. He applied to the Tasmanian Civil and Administrative Tribunal ('the tribunal') for review of the Board's decision.

Before the tribunal, Mr Sharma sought to dispute the intent with which force was applied in the assault, the extent of the force and the nature of the ex-wife's injuries.

The tribunal affirmed the Board's decision. In its reasons, it made findings of fact as to the circumstances of the assault. In support of its conclusion the tribunal referred to the magistrate's sentencing remarks indicating the gravity of the offence; Mr Sharma's continuing denigration of his ex-wife during the hearing; his rejection of rehabilitation and his lack of insight into his behaviour.

Mr Sharma appealed to the Supreme Court under s 136 of the *Tasmanian Civil and Administrative Tribunal Act 2020* (TASCAT Act). An appeal under s 136 is conducted by way of a rehearing on the evidence that was before the tribunal ([2]). The evidence included a statement of material facts tendered by the prosecution to the sentencing hearing, the transcript of the magistrates' sentencing remarks, a medical report detailing the ex-wife's injuries, the order sentencing Mr Sharma to a suspended term of imprisonment of seven months and the tribunal's reasons.

Among the grounds of appeal, Mr Sharma argued that the tribunal's findings against him were not open in circumstances where the tribunal had failed to resolve the factual dispute about what happened during the assault on his ex-wife.

The Court's consideration

Marshall AJ acknowledged that 'when a person pleads guilty to an offence, one is pleading guilty to the essential elements of that offence and no more' ([26]).

His Honour noted that the tribunal's findings of fact relating to the assault did not go as far as the prosecution's statement. The tribunal 'placed less emphasis' on those matters that were in dispute and did not treat Mr Sharma's guilty plea as conceding all allegations in the prosecution's statement of material facts ([12], [27]). The findings were, with two exceptions, confined to matters of fact that were not in dispute ([28]). As to other findings, his Honour found:

- The sentence imposed and the magistrate's sentencing remarks were sufficient for the tribunal to conclude that the assault was of a very serious order ([30]).
- The tribunal was able to observe from Mr Sharma's evidence that he was attempting to 'downplay the seriousness of what occurred' in the offending and to make 'gratuitously adverse comments' about his ex-wife ([20], [30]-[31]).

The Court found that the tribunal did make findings as to what occurred in the incident that give rise to the 2005 conviction, and the findings were reasonably open on the 'ample evidence' before it ([31]). It was reasonably open for the tribunal to find that Mr Sharma was not an appropriate person to practice as a psychologist by reference to the criteria in s 55(1)(b) of the National Law concerning his criminal history ([33]).

The appeal was dismissed and the decision of TASCAT affirmed.

Scope of merits review after *Frugtniet*

In the last issue of this Update series, we noted that the provisions for merits review of administrative decision in the SACAT Act s 34 differ from those given to most other Australian administrative review tribunals. Subject to other legislation, review by SACAT is by way of rehearing (s 34(3)), with discretion to admit further evidence or other material in addition to that which was before the original decision maker (s 34(5)(b)). 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 (s 34(4)).

In the following case, a party applied to the Supreme Court for a declaration that would effectively confine the scope of the tribunal's review to the grounds identified in the reasons of the original decision maker and limit the evidence that could be considered to that

on which the reasons were based. The party argued that this limitation flowed from the ruling in *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250; [2019] HCA 16 ('*Frugtniet*') that the Administrative Appeals Tribunal exercised the same power as the original decision maker within the same constraints.

In declining to make the declaration sought, the Court distinguished *Frugtniet*, holding that nothing in the SACAT Act justified narrowing the tribunal's jurisdiction in the manner proposed. In arriving at the correct or preferable answer to the statutory question — whether the applicant's licence should be renewed — the tribunal must review all evidence or other material before it.

MGB Residential Care Pty Ltd v Eastern Health Authority [2024] SASC 109

South Australia Supreme Court (McDonald J), 22 Aug 2024

MGB Residential Care ('MGB') was an approved National Disability Insurance Scheme ('NDIS') provider that was licenced to operate a supported residential facility ('the Village') for residents with disabilities ('the licence'). Under s 27 of the *Supported Residential Facilities Act 1922* (SA) ('SRF Act'), the Eastern Health Authority ('the Authority') declined to renew MGB's licence as proprietor of the Village. The decision was based on complaints received by the Authority and the NDIS concerning MGB's management of a camp for residents of the Village in January 2022 ('the camp') and the behaviour of MGB's sole director at the camp. The Authority's decision not to renew MGB's licence to operate the Village was based on a report from an independent investigator that found some allegations made in the complaints to be substantiated ('the Red Wagon Report').

MGB sought a review of the Authority's decision by the South Australian Civil and Administrative Tribunal ('the tribunal'). Among the documents lodged by the Authority with the tribunal were confidential documents relating to complaints about the sole director's actions after the camp.

MGB made a submission to the tribunal that it had no jurisdiction to consider new circumstances that were not relied upon by the Authority in making its decision. At a directions hearing the tribunal refused to list an interlocutory hearing to determine MGB's submission about the scope of its review jurisdiction.

MGB applied to the Supreme Court for judicial review on the basis that the tribunal committed jurisdictional error in failing to determine the issue concerning its jurisdiction in advance of the trial. MGB sought a declaration that the tribunal was limited to considering the same questions that the Authority considered in the decision under review, namely the grounds referred to in the Authority's decision which were based on findings in the Red Wagon Report ([34]).

Consideration by the court

McDonald J noted that ss 28 and 31 of the SRF Act require a two-stage process. First, the tribunal must consider whether it is satisfied on reasonable grounds of any of the matters set out in s 31(1) of the Act. Secondly, if so satisfied, it must consider whether to exercise its discretion to decline to review the licence.

> In undertaking that exercise, the question that the Authority was addressing was "should the applicant's licence be renewed?" [37].

His Honour then considered the provisions of the SACAT Act dealing with the scope of review by the tribunal. Section 34(4) provides that a review within the tribunal's review jurisdiction is by way of a rehearing. Section s 34(5)(a) obliges the tribunal to examine the evidence or material before the decision-maker and s 34(5)(b) permits the tribunal to examine any further evidence or material that it decides to admit. The Act prescribes no criteria or conditions for the exercise of the tribunal's discretion to admit further evidence ([42]). In *WWZ v Department for Child Protection* [2022] SASC 94 at [88], President Hughes identified factors which should generally be considered in exercising the discretion, such as the likely relevance of the further evidence and the delay that may be occasioned in obtaining it (cited at [83]–[84]).

MGB's submission required reading s 34(5)(b) down by implying that the 'further evidence or material' admitted under s 34(5)(b) must be limited to material on which the Authority based its reasons, namely the findings in the Red Wagon Report ([62]). McDonald J found that nothing in the text, purpose or context of the Act justified narrowing the tribunal's discretion in

the manner proposed by MGB ([63], [85]). The tribunal's duty is to review all the evidence or material before it, not the evidence or materials before the original decision maker ([71]).

MGB's submission relied on *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250; [2019] HCA 16 ('*Frugtniet*') in which the High Court of Australia ruled that, subject to applicable legislation, the Administrative Appeals Tribunal in reviewing a decision exercises the same statutory powers as were vested in the original decision maker and is subject to the same limits. His Honour distinguished *Frugtniet* as a case in which the tribunal had considered material that it was statutorily mandated not to consider, namely a spent conviction. In the instant case the tribunal had not gone beyond the scope of the statutory question before it ([65]–[66]).

His Honour held that neither the scope of SACAT's jurisdiction to review nor its discretion to admit new evidence was restricted by reference to the original decision-maker's reasons. The question that SACAT was required to consider was more broadly defined as whether the applicant's licence should be renewed ([85]).

The application was dismissed.

Procedural fairness — opportunity to cross-examine

An Act deemed criminal charges, regardless of their outcome to be 'assessable information' in determining whether to prohibit a person from working with children. The applicant argued that, by analogy with s 52(3) of the *Evidence Act 1929* (SA), procedural fairness to the applicant required that SACAT should not receive or rely upon witness statements from the criminal proceeding unless the witnesses were available to be called to testify and be cross-examined. Upon a referral of questions of law, the President provided guidance on the requirements of procedural fairness having regard to indications in the legislative scheme.

Badea v Dept of Human Services – Central Assessment Unit [2024] SACAT 37

South Australian Civil and Administrative Tribunal (Hughes J, President), 21 June 2024

The applicant was required to undergo a working with children check to work as a driving instructor. Under s 25(5) of the *Child Safety (Prohibited Persons) Act 2016* (SA) ('CSPP Act'), the Department of Human Service Central Assessment Unit ('CAU') determined that the applicant posed an unacceptable risk to children and issued a notice under the CSPP Act s 32 prohibiting him from working with children.

The CSPP Act s 8(2)(c) provides that 'assessable information' for this purpose includes criminal charges, irrespective of their outcome.

Among the 'assessable information' considered in reaching its decision, DHS had regard to allegations of aggravated indecent assault on a 16-year-old learner driver and the laying of police charges in relation to the assault ('the charges'). Mr Badea denied the offending alleged in the charges which had been dismissed by the court.

In his application for review of the CAU's decision under s 34 of the *South Australian Civil and Administrative Tribunal Act 2013* (SA) ('SACAT Act'), the applicant maintained that it would be unfair for the tribunal to rely on material from the criminal proceeding in circumstances where the CAU refused to make certain witnesses available to be cross-examined. The applicant invoked the principle in s 52(3) of the *Evidence Act 1929* (SA) that a document asserting facts is not to be relied upon if the deponent can and should be called by the party tendering the document. While acknowledging that the tribunal is not bound by the rules of evidence (SACAT Act s 39(1)(b)), the applicant argued that in exercising its discretion as to whether to receive or rely on the contested affidavit material, the tribunal should be guided by its duty of procedural fairness to exclude or not rely on the material.

At a directions hearing an order was made under s 26 of the SACAT Act to refer questions of law to a Presidential member.

The President's ruling

The President observed that it is procedural fairness, not the rules of evidence, which constrains the receipt of evidence under the SACAT Act s 39 ([84]). The content of the requirements of procedural fairness depends upon the nature of the decision to be made and the process that the legislation requires ([84]).

The President found 'no basis for the Tribunal to take an approach to the admission of documents that is modelled on s 52(3) *Evidence Act 1929*' [39]. The tribunal had no discretion to exclude 'assessable information' because the CSPP Act deems such information to be *prima facie* relevant. Any unfairness to the applicant must be dealt with by considering the weight to be given to disputed and untested evidence, having regard to its reliability ([102]).

The President ruled that the tribunal must afford the applicant sufficient opportunity to respond to assessable information, but that does not under the CSPP legislation necessarily require an opportunity to cross-examine the authors of the witness statements. Her Honour identified a number of indications in the CSPP Act that the scheme was intended to be administered on the basis of documentary evidence without a child witness being required to testify and be cross-examined ([86]-[92]). The President noted the following indications among others:

- 'It can be inferred from the CSPP Act, being an Act to protect children, that the legislature did not envisage that a child would be required or asked to give evidence of alleged sexual offending against them in an administrative review hearing of the alleged offender's right to work with children' ([87]).
- 'That inference can be made from the objects of the CSPP Act, and from the lack of any protection afforded to a child witness in such proceedings … [which suggests] that the scheme is intended to operate on the basis of the CAU relying on existing documentary evidence …' ([88]).
- Section 34(5) of the SACAT Act expressly acknowledges 'that material may be excluded where another … law requires it' ([89]).

The President provided written answers to the tribunal's questions of law accordingly.

Circumventing a monetary limit on jurisdiction

When legislation grants jurisdiction to a lower court or a tribunal to determine classes of civil disputes, it often imposes an upper limit on the quantum of the monetary orders that the court or tribunal can make. Claims for an amount above the monetary limits on the tribunal's jurisdiction must be brought in a court. From time to time, parties attempt to circumvent the monetary limits to have the matter resolved in the lower cost environment of a tribunal. The two cases below, one arising in NCAT and one in QCAT, reject different devices seeking to achieve this end.

Hawkins v Wimbledon 1963 Pty Ltd [2024] NSWSC 1465

NSW Supreme Court (Griffiths AJA) 19 Nov 2024

In a residential tenancy dispute between a tenant and a landlord, NCAT made multiple orders by consent for the payment of rental arrears by the tenant to the landlord in amounts which cumulatively exceeded the monetary limit fixed by legislation.

Without exercising his right of appeal to the NCAT Appeal Panel under s 80 of the *Civil and Administrative Tribunal Act 2013* ('NCAT Act'), the tenant applied to the Supreme Court for judicial review under s 69 of the *Supreme Court Act 1970* (NSW), seeking to have the consent orders set aside for excess of jurisdiction.

The Court had discretion to refuse to grant relief on the ground that the tenant had an adequate alternative remedy by way of internal appeal under the NCAT Act s 80. Griffiths AJA decided to exercise his supervisory jurisdiction, in part because the application raised 'an important question of legal principle' on which NCAT Appeal Panel authority was divided and which had not previously been considered by the Court ([27]).

The monetary limit of $15,000 was specified in *Residential Tenancies Regulation 2019* (NSW) reg 40, made pursuant to the *Residential Tenancies Act 2010* (NSW) ('RT Act') s 187(4). The tribunal was empowered by the RT Act s 187(1) to make various kinds of order and was not limited to making only one order in a

proceeding. The 'important question of legal principle' was whether the tribunal could make multiple orders totalling more than $15,000, so long as no single order was for an amount greater than $15,000. NCAT Appeal Panel decisions were divided on the question ([27], [92]-[100]).

The Court's consideration

Griffiths AJA held that where, as in this case, multiple orders for payment of rent arrears were made in a single proceeding, the monetary limit of $15,000 caps the total amount that can be ordered in the same application ([110]. In his Honour's view, to divide the rental arrears into two or more sums, each of which is below the $15,000 cap but cumulatively above the cap, would subvert the clear legislative intent in RT Act s 187(4) ([110]). His Honour found that the orders which were fixed with that intention were beyond the power of the tribunal and should be set aside ([111]).

The landlord had argued that the breaking down of the monetary orders was lawful on the basis that each failure to make a monthly payment of rent was a separate breach, and the claim was therefore for multiple breaches. (This argument had been accepted by the NCAT Appeal Panel in *Nunez v Sampson* [2022] NSWCATAP 125 [76]). His Honour held that the question did not arise in the instant case, as each monthly rental payment due was for an amount above the $15,000 monetary limit ([115]).

Orders

The orders of NCAT were set aside and the proceedings were remitted to NCAT for reconsideration according to law.

DB v CB [2023] QCAT 511

Queensland Civil and Administrative Tribunal (A Walsh, Adjudicator), 24 Aug 2023

In this case, a party attempted to bring a claim for civil debt within the monetary limit on the tribunal's jurisdiction fixed by s 12(3) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) by splitting the debt across three claims for smaller amounts and applying to have them heard together. The tribunal found that the cause of action was essentially the same in all three claims, which cumulatively exceeded the monetary cap. This 'thinly veiled attempt to circumvent the $25,000 claim limit' was found to be an abuse of process ([58]–[60]). The claims were dismissed on this and other grounds.

Copying a party's submissions into reasons

Cases continue to arise in which a judge or tribunal member has copied a substantial amount of text from a party's written submissions into the statement of reasons without attributing the source and with little or no evidence of critical evaluation. In *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 [121] the Full Court of the Federal Court noted that courts in Australia, the USA and Canada agree that a judge's unattributed copying of substantial material from a party's submissions could amount to a 'failure to perform the judicial function', but the Australian authorities are divided on the characterisation of the jurisdictional error.

Courts have observed that there are two schools of thought on this question. One holds that there is a failure to exercise jurisdiction if there is no adequate explanation for the decision (see eg, Basten JA in *Li v Attorney General for New South Wales* (2019) 99 NSWLR 630 (*Li*) [144]–[148]. The alternate view is that the reasons will be inadequate if 'justice is not seen to have been done' insofar as the reasons would 'leave a reasonable person in the position of the unsuccessful party with a justifiable sense of grievance' that the judge 'has not independently and impartially engaged with [their] claims and submissions and given serious consideration to them (Brereton JA in *Li* [116], [143]).

In two recent decisions, appellate court have considered these different characterisations. The Australian Capital Territory Court of Appeal delivered its decision in *Porter v The Queen* [2024] ACTCA 9 ('*Porter*') shortly before the Full Court of the Federal Court of Australia decided *Atanaskovic Hartnell Corporate Services Pty Ltd v Kelly* (reported below). The Full Court adopted the principles distilled from the authorities by the Court of Appeal in *Porter* to conclude on the facts before it that the primary judge had failed to exercise his judicial function.

In *Porter*, the Court of Appeal applied the same principles to reach a different conclusion in a

case where a sentencing judge had adopted 20 paragraphs from a prosecutor's submission without attribution. The judge had undertaken her own analysis of the evidence, formulated her conclusions in her own words and engaged with the offenders' submissions. Read as a whole, the Court was satisfied that the reasons demonstrated that the primary judge gave independent and impartial consideration to the issues ([89]–[90]).

Atanaskovic Hartnell Corporate Services Pty Ltd v Kelly [2024] FCAFC 137

Federal Court of Australia, Full Court (Collier, Logan and Goodman JJ), 31 Oct 2024

The respondent ('the employee') brought a claim against the appellants ('the employer') for damages for breach of employment rights. The employer made a cross-claim alleging the employee had breached the employment contract. The appeal before the Full Court turned on the inadequacy of the primary judge's reasons for dismissal of the employer's cross-claim.

In individual judgments, the justices discussed the differences between the views of Brereton JA and Basten JA in *Li* but found it unnecessary to resolve the controversy. Each expressed agreement with the conclusions of the ACT Court of Appeal in *Porter v The Queen* [2024] ACTCA 9 ('*Porter*') that in cases where the judge was under a duty to give reasons, the key principles are as follows:

- A judge does not necessarily make a legal error by incorporating a party's submissions into the reasons 'so long as the reasons sufficiently reveal that the [judge] gave independent consideration to the relevant issues' (*Porter* [36]–]37], quoting Brereton JA in *Li* [122]), [78]).
- '[R]easons will be inadequate where, when objectively assessed as a whole, they do not demonstrate that the judge "gave independent and impartial consideration to the evidence and the issues"' (*Porter* [51], [79]).

(See Collier J [32]–[33], [55], [58], Logan J [148] –[149], Goodman J [155]– [158]).

Key findings of the Court in relation to the primary judge's reasons on the cross-claim were as follows:

- The primary judge was obliged to give reasons as the duty is inherent in the exercise of Commonwealth judicial power (*Wainohu v New South Wales* (2011) 243 CLR 181 [104]–[109])
- Eighty-two paragraphs of the reasons were copied with only 'cosmetic' changes from the employee's written closing submissions, without attribution or critical analysis ([38], [41], [56], [97], [107], [157], [160]).
- The cross-claim required the judge to resolve credibility issues and factual disputes including whether any loss had been sustained ([144], [161]–162]).
- The reproduced material included claims as to credit, contentious value judgments and conclusions of law and fact' relating to the cross-claim that required the judge's independent consideration, which did not occur ([56], [164]–[165]).
- There was no discussion of the other party's written and oral submissions refuting the factual basis of the cross-claim ([57]–[58], [101], [107], [161]–163]).

All three justices agreed that the primary judge failed to bring an independent mind to the determination of the cross-claim ([55] – [59] (Collier JA) [145] (Logan J), [154], [166] (Goodman J).

Orders

The appeal in relation to the dismissal of the cross-claim was allowed and consequential orders made for remittal for a re-trial.

Transfer of a 'federal jurisdiction proceeding'

In *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15 the High Court of Australia determined that the Anti-Discrimination Tribunal of New South Wales did not have jurisdiction to adjudicate a 'matter' between residents of different states arising under the *Anti-Discrimination Act 1977* (NSW) s 49ZT. (In this context, a 'matter' is a justiciable controversy between specified parties about existing rights and liabilities). Only a 'court of a state' can exercise the 'diversity jurisdiction' of the Commonwealth given by s 75(iv) of the

Constitution to determine a 'matter' arising between residents of different states (*Burns v Corbett* [43], [64]).

Following that decision, the states amended their legislation to provide for the transfer to a court of a proceeding commenced in a state tribunal that invokes federal jurisdiction, and to confer on the court jurisdiction to determine the transferred proceeding.

The provisions envisage that the tribunal will determine that a proceeding is a 'federal jurisdiction proceeding' before ordering its transfer to the court.

Determining whether a proceeding invokes federal jurisdiction may turn on a question of fact, such as whether a party is a resident of another state.

It is clear from *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216; [2022] HCA 16 ('*Citta Hobart*') that a state tribunal has an incidental jurisdiction to determine whether it has jurisdiction to hear and determine an application. In doing so it does not exercise federal judicial power ([21]–[26], [62]–[65]). In the case of a non-judicial tribunal, this is characterised as a power to form an opinion about the limits of its own jurisdiction for the purpose of "moulding its conduct to accord with the law" ([24]). The Court did not indicate whether this incidental jurisdiction extends to a factual inquiry to establish the existence or non-existence of a fact on which the tribunal's jurisdiction turns.

In the following case, a state tribunal formed the opinion that it could not undertake further steps to determine whether the fact existed. On the basis of a doubt about its jurisdiction, the tribunal transferred the proceeding to the Magistrates Court under s 131(2) of the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ('TASCAT Act'). Viewing the transfer as invalid, the Magistrates Court sent the proceeding back to the tribunal with directions to take steps to ascertain the worker's state of residence.

State of Tasmania (Department of Health) v BB [2024] TASCAT 160

Tasmanian Civil and Administrative Tribunal (LD Jack, Senior Member), 4 June 2024

In response to a claim for workers compensation under the *Workers Rehabilitation and Compensation Act 2020* (Tas) ('the WRC Act'), the State of Tasmania ('the employer') made a referral to TASCAT under s 81A of the WRC Act. The tribunal identified a diversity jurisdiction issue, namely, that the worker may have been resident in another state at the time the proceeding commenced ('the relevant time'). Without further inquiry into the fact, the tribunal ordered the transfer of the proceedings to the Magistrates Court under s 131(2) of the TASCAT Act which provides

> (2) If, … the Tribunal considers that –
>
> (a) it does not have, or there is some doubt as to whether it has, jurisdiction to determine the application because its determination may involve the exercise of federal jurisdiction; and
>
> (b) the Tribunal would otherwise have had jurisdiction enabling it to determine the application –
>
> the Tribunal may order that proceedings on the application be transferred to the Magistrates Court.

The Deputy Chief Magistrate found that there was no evidence that the tribunal had conducted the consideration required by s 131(2). He decided that the transfer order was invalid and consequently the Court had no jurisdiction to determine the proceeding. He remitted the matter to the tribunal under s 131(8) of the TASCAT Act with a direction under s 131(9) to conduct the consideration process required by s 132(2) after 'taking such procedural steps as it sees fit in order to determine as a matter of fact … whether the worker is presently a resident of another State' (*Reasons* quoted at [16]).

In the meantime, the employer had conceded that the worker was a resident of another state at the relevant time. The tribunal found that the proceeding was a 'federal jurisdiction proceeding' in which it had no jurisdiction. The previous order for transfer had been made under the second limb of s 131(2), being that there was doubt as to whether it had jurisdiction. Since the employer's subsequent concession had removed the doubt, the tribunal held that it could re-transfer the proceedings to the Court, this time under the first limb of s 131(2) ([36]-[38]).

An order was made accordingly.