

Tribunal Case Update

This issue opens with the problem of fictitious citations and quotations in legal submissions generated with the aid of artificial intelligence (AI) sources. We lead with the *Ayinde* and *Al-Haroun* decision from the UK in which the Kings Bench Division signals a strong regulatory response. Closer to home, an Australian court in *Valu v Minister [etc]* referred a lawyer to the NSW legal regulator and made a costs order against him.

In *Della Bruna v Health Care Complaints Commission* it was held that a disciplinary panel of NCAT erred in rejecting a doctor's oral testimony from her memory because it exceeded her contemporaneous written records.

In *FBLQ v Minister [etc]* the Full Court of the Federal Court discussed how a tribunal might discharge its duty (arising from natural justice) to ensure that a party with limited English and represented by a non-lawyer had a reasonable opportunity to present his case.

In *Lim v The Owners — Strata Plan No 51159* the NCAT Appeal Panel found that a member had erred in conducting a process in which it was unclear whether he was attempting to settle the matter by conciliation or was engaged in hearing and determining it.

We compare a pair of cases on whether there are grounds to summary dismiss a proceeding to review administrative decisions that are no longer operative. *ACC v Mental Health Tribunal* provides the general approach, which is that the proceeding lacks utility and may be characterised as 'frivolous', 'vexatious' or 'lacking in substance'. *INP v Secretary, DFFH* provides a different answer where the applicant was seeking a declaration of invalidity on grounds of breaches of protected human rights and sought to establish that the lapsed decisions had a significant continuing

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adverse effect on his reputation and his relationship with his children.

NHB v Secretary, DFFH concerns the meaning of the undefined term 'proceeding' for the purposes of ss 75 and 76 of the VCAT Act.

Following each case summary or case series, pinpoint references have been provided for the related commentary in the [Guide to Tribunal Practice 6th ed \(2025\)](#) for the purpose of updating the *Guide*.

Quality control in use of AI to produce submissions

A small but constant stream of cases has come before courts and tribunals in which legal practitioners have filed submissions or legal arguments which contain fictitious case authorities and quotations, or misstate the effect of legal principles. The references and citations have been generated using artificial intelligence (AI) tools and submitted without the user having checked them against authoritative sources. These errors waste time, cause delays and increase costs.

One cause of this conduct is that persons using general internet search engines for legal research may not realise that these tools now draw on AI sources.

In the *Ayinde* decision discussed below, the Kings Bench Division in its *Hamid* jurisdiction reviewed the conduct rules and other laws that may be breached when practitioners engage in such conduct. The Divisional Court foreshadowed that it would also scrutinise the professional formation, supervision and regulation of all persons who provide legal services.

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In *Valu v Minister for Immigration and Multicultural Affairs* [2025] FedCFamC2G 94 [85]) a judge of the Federal Circuit and Family Court of Australia (Div 2) made a costs order against a practitioner who had filed submissions, prepared with the aid of AI programs, which cited fictitious authorities and quotations. His Honour subsequently referred the practitioner to the regulator, identifying the Conduct Rules said to have been breached (*Valu v Minister for Immigration and Multicultural Affairs (No 2)* [2025] FedCFamC2G 95).

This case series concludes with a note on what steps courts have taken where self-represented litigants have engaged in the kind of conduct discussed in *Ayinde*. In *Bottrill v Graham (No 2)* (2025) NSWDC 221, Gibson DCJ followed several earlier decisions in which judges had cautioned the litigant and ignored the submission

Ayinde v London Borough of Haringey and Al-Haroun v Qatar National Bank [2025] EWHC 1383

High Court (EW), Kings Bench Division (Dame Victoria Sharp P and Johnson J), 6 June 2025

The combined judgment relates to two cases heard and listed together. Both cases had been referred to the Kings Bench Division under the court's inherent jurisdiction to regulate its own procedures and to enforce duties owed by lawyers to the court (known as the *Hamid* jurisdiction following *R (Hamid) v Secretary of State for the Home Department* [2012 EWHC 3070]). Each case was referred due to the conduct of lawyers relying on fictitious case citations and quotations in written submissions put before the court.

The *Ayinde* case

In *Ayinde v London Borough of Haringey (Ayinde)*, counsel for the claimant, Ms Forey, settled and signed grounds for judicial review which materially misstated the law and referred to five cases that did not exist. On the hearing of the respondent's application for a wasted costs order, Ritchie J did not accept Ms Forey's explanation of how she came to rely on false case data and was critical of her attempts to dismiss the false citations as 'merely cosmetic errors'. His Honour said that upon the errors being brought to their attention, counsel and the instructing solicitors should have reported themselves to their respective regulatory bodies.

His Honour made a wasted costs order against them and referred the conduct to the regulators and the *Hamid* judge. The *Hamid* judge referred the conduct to the Divisional Court (KBD).

In the *Hamid* hearing before the Divisional Court, Ms Forey denied using AI to generate her case list but provided no coherent explanation for how she came to place fictitious citations before the court ([67]). She refused to accept that her conduct was improper and maintained her denial that she intended to mislead the court.

The Divisional Court considered that the threshold for initiating contempt proceedings was met ([86]) but decided against initiating such proceedings due to circumstances peculiar to the case ([69]). The Court made a referral to the regulator, directing the regulator's attention to specified matters including the work allocation and the supervision that Ms Forey had received as a pupil barrister in chambers ([70]).

The Court found that the steps taken by the instructing solicitor when notified of the false citations were inadequate and referred him to the regulator ([72]).

The *Al-Haroun* Case

In the *Al-Haroun* case, a trial judge dismissed the defendant's interlocutory applications and made a referral to the *Hamid* judge. In the referral, the judge reported that in the witness statements of both the complainant Mr Al-Haroun and his solicitor Mr Hussain

... [R]eliance is placed on numerous authorities, many of which appear to be either completely fictitious or which, if they exist at all, do not contain the passages supposedly quoted from them, or do not support the propositions for which they are cited ([73]).

The Divisional Court found that 'the vast majority of the authorities [cited to the court] are made up or misunderstood' ([74]). Mr Al-Haroun acknowledged that the authorities had been generated using AI tools in which his confidence had been misplaced, accepted responsibility and apologised ([79]).

In relation to the solicitor, Mr Hussain, the Court accepted that he had failed to comply with his professional responsibility to check the accuracy of the material that was provided to him by his lay client and which he allowed to be put before the court. The Court found that the threshold for initiating contempt proceedings

was not met and referred the solicitor's conduct to the regulator ([81]).

Systemic responses

In exercising its *Hamid* jurisdiction, the Divisional Court recognised the need for systemic responses to contain risks to the integrity of the court system posed by inappropriate use of AI tools. It stated that it is essential for the administration of justice that courts are able to rely on the professionalism of practitioners appearing before them to ensure that their submissions are fully supported ([5]). It explained the risk posed by injudicious use of AI as follows:

Freely available generative artificial intelligence tools, training on a large language model such as ChatGPT are not capable of conducting reliable legal research. Such tools can produce apparently coherent and plausible responses to prompts [which] may turn out to be entirely incorrect. The responses may make confident assertions that are simply untrue. They may cite sources that do not exist. They may purport to quote passages from a genuine source that do not appear in that source ([6] (footnotes omitted)).

The Court declared that lawyers who rely on AI to conduct legal research or rely on the work of others who have done so have a professional duty to check the accuracy of the work by reference to authoritative sources before using it in their work ([7]). In future *Hamid* hearings, the Court foreshadowed that it would hold to account those with leadership and regulatory responsibilities in the legal profession

to ensure that every person who provides legal services understands and complies with their professional duties in their use of artificial intelligence ([9]).

The Court reviewed the professional rules, guidance notes and regulatory obligations in force in England and Wales relevant to the misuse of AI. It referred also to the court's powers to admonish a lawyer, impose a costs order, strike out a case, refer a practitioner to a regulator, initiate contempt proceedings and make a referral to police ([23]-[31]). It set out the conduct for which each sanction might be appropriate, and the factors which the Court would take into account when considering imposing a sanction ([24]).

Guide to Tribunal Practice 6E [6.3.5.4]

Valu v Minister for Immigration and Multicultural Affairs (No 2) **FedCFamC2G 95**

**Federal Circuit and Family Court of Australia (Div 2) (Judge Skaros),
31 Jan 2025**

The applicant's legal representative ('ALR') filed in the Court an outline of submissions in support of an application for judicial review of a decision of the Administrative Appeals Tribunal ('AAT'). The submission included citations to cases and alleged quotes from the AAT's decision which did not exist. As a result of ALR's conduct, the final hearing could not proceed as listed and a directions hearing was listed instead.

At the directions hearing ALR said that the cases had been identified with the use of an AI program. The Court also made a costs order against ALR (see *Valu v Minister for Immigration and Multicultural Affairs* [2025] FedCFamC2G 94 [85]).

The Court invited ALR to make submissions as to why he should not be referred to the Office of the NSW Legal Services Commissioner (OLSC) (a statutory office which may investigate complaints institute disciplinary action against lawyers, inter alia for contravention of the *Legal Profession Uniform Australian Solicitors' Conduct Rules 2015* (NSW) ('Conduct Rules'). His Honour followed the case of *Dayal* [2024] FedCFamC2F 1166 in which Judge A Humphreys directed the referral of a solicitor to the Victorian authorities in similar circumstances ([32]).

His Honour found that ALR's conduct contravened his obligations under Conduct Rules r 19.1 (duty to ensure that the court is not misled) and r 22.5 (which restricts *ex parte* communications with the Court) ([18], [19]). The Court accepted that ALR's apology was genuine but decided that there was a strong public interest in referring this conduct to the OLSC so that it could monitor the way in which legal practitioners were using AI tools ([34]-[37]).

Order

The Principal registrar was ordered to refer the Court's reasons for decision and other specified documents to the OLSC for consideration of the conduct of ALR.

Note

The conduct in this case pre-dated the Practice Note issued on 21 November 2024 by Chief Justice Bell of the Supreme Court of New South Wales: *Supreme Court Practice Note SC Gen 23 — Use of Generative Artificial Intelligence* which sets out requirements as to the use of Generative AI ('Gen AI') for both legal practitioners and self-represented parties in putting submissions before the court. It includes a requirement that the author must verify in the submissions that all citations and authorities exist, are accurate and are relevant to the proceedings ([16]-[18]).

Misuse of AI by self-represented parties

In *Bottrill v Graham (No 2)* (2025) NSWDC 221, a self-represented defendant in defamation proceedings in the District Court of NSW filed submissions referring to non-existent and misstated authorities and court rules due to her use of AI sources ([71]). This conduct occurred after the District Court had adopted the *Supreme Court Practice Note SC Gen 23* (see previous paragraph). Gibson DCJ noted that a serious view had been taken of such conduct in cases such as *Valu* but observed that 'the same approach may not be appropriate where the use of such persons by a litigant in person occurs'. His Honour referred to three Australian cases in which the court's response had been to ignore the submissions ([75]). His Honour made no costs order against the self-represented party but expressed disapproval of her conduct and cautioned her not to repeat it ([76]).

Guide to Tribunal Practice 6E [6.3.5.4]

Reasons for rejecting oral evidence

In the following case, an NCAT disciplinary panel rejected oral evidence given by a medical practitioner from her memory which went beyond what she wrote in her patient records at the time of the consultations. On an appeal from NCAT, the NSW Court of Appeal held by a majority that NCAT had made legal errors. Their Honours considered that, while it was open to NCAT to reject the doctor's testimony for good reason, it was irrational and unreasonable to deem oral evidence from memory to be 'inherently unreliable' or to reject it 'wholesale' simply because it had not been written down at the time the record was made. Their Honours gave examples of what rational reasons for rejecting DB's evidence might look like ([53]).

Della Bruna v Health Care Complaints Commission [2025] NSWCA 105

**New South Wales Court of Appeal
(Bell CJ, Kirk JA, Adamson JA),
16 May 2025**

In disciplinary proceedings against Dr Della Bruna ('DB') before the NSW Civil and Administrative Tribunal ('NCAT'), the Health Care Complaints Commission (the Commission) complained that DB had inappropriately prescribed and dispensed the human growth hormone Somatropin to ten patients and failed to maintain adequate records. By a majority comprising the medical and lay members of the panel ('the NCAT Majority'), NCAT found DB guilty of professional misconduct. DB appealed on various grounds including that the NCAT Majority erred in rejecting her oral evidence (Ground 2).

The Full Court (Bell CJ and Kirk JA, Adamson JA dissenting), allowed the appeal on three grounds, including the ground discussed below.

The rejection of DB's evidence

Before NCAT, DB admitted that she had failed to make and keep adequate records in relation to ten patients. In oral testimony, DB supplemented her notes with added further detailed information from her memory concerning what she did in the course of prescribing and managing the medications for the patients.

In its Reasons, the NCAT Majority rejected DB's oral evidence, stating that it was not in the contemporaneous patient records, and that her oral evidence given from memory 'some three or four years later' was 'inherently unreliable' (NCAT Majority Reasons [342]- [344], cited at [45]), [355] cited at [46]).

Bell CJ and Kirk JA agreed with DB's submission that

[t]he suggestion that something "did not occur" merely because it was not written down in a contemporaneous record is both irrational and unreasonable ([49], [50]).

Their Honours observed that it was open to the NCAT Majority to reject DB's testimony or part of it as being unreliable or not credible, but it must give reasons such as finding:

- inconsistencies or contradictions in her evidence, or between her evidence from memory and the contemporaneous record,
- that her demeanour cast doubt on the reliability of her evidence; or
- that her memory of relevant matters was so deficient as to be 'completely unreliable' ([53]).

No such reasons were given by the NCAT Majority.

Commenting on the reasons given by the NCAT Majority, their Honours observed that DB's breach of the obligation to make and keep adequate records 'does nothing to establish that her memory is unreliable'. 'The fact that records are generally *better* evidence does not establish that subsequent explanations are of no value', particularly where they expand upon the written record ([57]). Generic statements about the effect of the lapse on time on memory provided no rational basis for rejecting DB's oral evidence, given that courts and tribunals commonly accept evidence from memory as to past events ([58]-[60]).

Having found that the NCAT Majority failed to explain in rational terms why DB's oral evidence was rejected ([59], Bell CJ and Kirk JA held that this was a legal error by 'failure to give adequate, intelligible or logical reasons', a constructive failure to exercise jurisdiction and a breach of procedural fairness ([63]).

Adamson JA in dissent, disagreed with the reasoning of Bell CJ and Kirk JA on the alleged error in rejecting DB's oral evidence. His

Honour considered that, on a fair reading of the Reasons and allowing for some ‘infelicity of language’ in the drafting of reasons by non-lawyers, the NCAT Majority did not apply a blanket rule that such evidence should be rejected unless reflected in the contemporaneous record ([285]).

Order

By a majority, leave to appeal was granted and the appeal allowed. The orders of NCAT were set aside and the matter remitted to a differently constituted tribunal for reconsideration.

Guide to Tribunal Practice 6E [6.2.8], [6.2.9], [6.3.4]

Content of the duty of fairness: party represented by a non-lawyer

In dismissing an appeal from a primary judge’s decision upholding an AAT decision, the Full Court considered the obligations of the AAT towards an applicant who speaks little English and has chosen to be represented by a non-lawyer who is also a witness. In the appeal, the appellant argued that he and his representative had insufficient information about the AAT’s practice and procedure to make effective choices in the conduct of his application for review by the AAT.

The Full Court held that the AAT had both a statutory duty and a common law duty (arising from procedural fairness) to ensure that the appellant had a reasonable opportunity to present his case. The Court reviewed the authorities on what is a ‘reasonable opportunity’ in the context of tribunal proceedings. It assessed the steps taken by the AAT to discharge the duty.

The Court rejected a submission that the AAT was under a duty to counsel the applicant against appointing as his representative his wife who was not a lawyer and whom he wished to call as a witness. The tribunal’s duty to give him a fair hearing did not require the tribunal to ensure that his representation was optimal ([62]).

***FBLQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCAFC 71**

**Federal Court of Australia Full Court
(Murphy, Charlesworth and Snaden JJ),
21 May 2025**

Following the appellant’s conviction and sentence for criminal offences, his Partner visa under the *Migration Act 1958* (Cth) was cancelled on character grounds. A delegate of the Minister subsequently refused to revoke the cancellation decision. The delegate’s refusal was affirmed on review by the AAT. The appellant applied for judicial review of the AAT’s decision, alleging that the AAT made certain jurisdictional errors, each of which turned on disadvantages that the appellant claimed to have suffered in the AAT review proceedings by reason of him being represented by a non-lawyer and having limited English. The primary judge dismissed that application, and the appellant appealed from the primary court’s judgment.

In the appeal, the Full Court held that the AAT was obliged, by s 39(1) of the *Administrative Appeals Tribunal Act 1975* (‘AAT Act’) and by the common law, to ensure that every party to a proceeding before it was given ‘a reasonable opportunity to present his or her case’.

The Court observed that the AAT’s obligation was to ensure that each party has ‘a reasonable opportunity’, not that the party ‘takes the best advantage of the opportunity’ ([6], citing, inter alia, *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342 (Deane J)). What amounts to a ‘reasonable opportunity’ depends on the facts and the relevant circumstances and will be determined objectively ([6], [7]). The obligation to provide a reasonable opportunity may in some circumstances require the tribunal ‘to be proactive, to be flexible and to actively consider the circumstances of a review applicant’ ([7], citing *Kamal v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 200 [108] (Mortimer J)).

The appellant argued that where a party is represented by a non-lawyer, the tribunal’s obligation to provide guidance and assistance to the party was similar to the obligation of a court towards a litigant in person, including in the aspects specified by the Full Court in *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 280 FCR 479, [55] (‘*Flightdeck*’).

The Court observed that the remarks of the Full Court in *Flightdeck* concerning the requirements for procedural fairness in the context of an adversarial court proceeding ‘are not necessarily applicable in the same way to a proceeding before a tribunal’ ([10]). Unlike a court, the AAT was empowered to operate informally and in an inquisitorial manner and to conduct its proceedings as it sees fit ‘and thereby seek to ameliorate any disadvantage that may arise by reason of the appellant and [his representative] having no legal training’ ([13]).

Failure to provide advice and guidance

The appellant submitted that the primary judge erred in rejecting his submissions that the AAT had denied him procedural fairness by failing to provide advice and guidance to him and his representative. In holding that the primary judge did not err in rejecting this submission, the Full Court found as follows:

- The AAT drew the representative’s attention to the procedural requirements of s 500(6H) of the Migration Act at a case management hearing and provided her with a fact sheet containing advice and guidance about the effect of the provision ([18]).
- The AAT provided the appellant and his representative with the Minister’s directive which expressly referred to considerations the tribunal was required to take into account. That instruction was sufficient to put them on notice of the relevant issues in the hearing ([20]).
- The AAT did inform the representative that she could object to questions, and she did so in several instances ([25], [26]).
- The tribunal was under no obligation to counsel the appellant against being represented by his wife who lacked legal training and whom he also wished to call as a witness ([42], [47]). The primary judge was correct in saying that the fact that the wife was also a witness at the hearing was not a basis for questioning his right to choose her as his representative ([53]).

An additional ground of appeal was that the primary judge erred by not finding that the AAT’s failure to have substantive parts of the representative’s testimony translated for the appellant’s benefit denied him a fair hearing. The Court held that the AAT’s obligation to conduct a fair hearing included a requirement that a

party who lacked English comprehension ‘be put in a position to sufficiently understand the proceedings to enable him to give instructions and to receive advice’ ([67]). This ground of appeal failed because the appellant failed to discharge the onus of proving that the relevant testimony was not translated for him ([73]).

Order

Appeal dismissed.

Guide to Tribunal Practice 6E [3.3], [5.5.2.1], [5.5.4], [5.5.8], [5.5.9], [7.3.2]

Confusion as to the nature of the proceedings

As noted in the previous decision, tribunals are under a common law duty (and sometimes also a statutory duty) to act in accordance with the rules of procedural fairness and to take reasonable steps to ensure that the parties to the proceedings before it understand the nature of the proceedings.

In the following case, the proceedings were conducted in an unstructured and confusing manner. It was unclear whether the member was undertaking an alternative dispute resolution process or was engaged in hearing and determining the matter. The NCAT Appeal Panel found on these and other grounds that the hearing did not meet the requirements of procedural fairness.

Lim v The Owners – Strata Plan No 51159 [2025] NSWCATAP 14

**NSW Civil and Administrative Appeal Panel
(K Ransome PM and D Ziegler, SM),
21 Jan 2025**

The appellants (‘the Lims’), the owners of a strata unit, had attached a screen door to an entry door frame which formed part of the common property. The respondent (‘owners corporation’) removed the screen door to obtain an annual fire safety certificate. The Lims sought orders requiring the owners corporation to reinstall the screen door.

NCAT’s Commercial and Consumer Division made orders stating that ‘the respondent agreed to provide an expert report to the applicant whether the screen door may be deemed

compliant if it was hung on the left-hand side of the door frame’ or ‘if the main door frame may be deemed compliant’.

The Lims appealed from NCAT’s decision on the grounds of procedural fairness and failure to give reasons.

The Appeal Panel’s consideration

The NCAT Appeal Panel held that the tribunal had constructively failed to exercise its jurisdiction to determine the application before it on its merits ([58]). The tribunal was required to decide whether in removing the screen door the respondent acted within its powers and whether the door should be reinstated ([51]). The Appeal Panel agreed with the Lims’ submission that ‘there was no real basis for the making of the orders [which] in effect delegated the Tribunal’s decision making function to an expert retained by the respondent’ ([57]).

The Appeal Panel also found that the hearing was not procedurally fair ([45]). While s 38(5) of the Act empowers the tribunal to use ‘resolution processes’ (including alternative dispute resolution) to achieve a settlement or narrow the issues, the hearing had proceeded in a confusing manner as an ‘unstructured discussion between the member, the parties and the expert witness’ ([36]). It was not clear whether the member ‘was acting in the role of conciliator/mediator or hearing the application’ ([43]). The member appeared to be attempting to achieve a settlement but failed to inform the parties that he was not, at that stage, engaged in adjudicating the matter ([36]). Moreover, the member repeatedly stated, incorrectly, that the application had been withdrawn ([44]).

Although several grounds of appeal were upheld, the Appeal Panel concluded that there was no utility in remitting the matter to NCAT to redetermine. Any new solution for the fire door would require a fresh application to the owners corporation for approval.

The appeal was dismissed.

Guide to Tribunal Practice 6E [3.3.3], [4.3], [5.5.4]

Summary dismissal where decisions under review have lapsed

The following pair of cases deal with the principles to be applied where an application is made to summarily dismiss proceedings to review decisions which have ceased to operate.

The decision in *ACC v Mental Health Tribunal* can be seen to lay down the general principle that there is no utility in reviewing decisions which have lapsed and have no ongoing operative effect. From that point the proceedings can be deemed ‘frivolous, misconceived or lacking in substance’.

The second case is one which sets limits to the general principle. In *INP v Secretary, Department of Families, Fairness and Housing*, Ginnane J held that VCAT may decide that there was arguable utility in reviewing child protection decisions which are no longer operative where the applicant:

1. seeks a declaration that the decisions were made unlawfully in breach of the respondent’s duty to give proper consideration to human rights protected by the Victorian Charter decisions, and
2. proposes to demonstrate that the decisions have a significant ongoing adverse effect on him, his reputation and his relationship with his children.

These factual matters could only be determined at a final hearing. Ginnane J held that the case was not one for summary dismissal.

***ACC v Mental Health Tribunal* [2025] WASCA 79**

WA Court of Appeal (Mitchell and Vaughan JJA), 23 May 2025

Under s 22(1) of the *Mental Health Act 2014* (WA) (‘MH Act’) an inpatient treatment order is an order under which a person can be admitted to a hospital and detained there to enable the person to be treated without their consent. The appellant applied to the State Administrative Tribunal (‘SAT’) for review of a decision of the Mental Health Tribunal affirming an inpatient treatment order made in respect of the appellant (‘the review application’). Two days later, a

community treatment order was made in relation to the appellant. Section 88(a) of the MH Act provided for the inpatient treatment order to cease to operate at that time ([17]).

The SAT ordered that the review application be dismissed under s 47 of the *State Administrative Tribunal Act 2004* (WA) ('SAT Act') on the basis that the decision under review no longer existed and so there was nothing for the SAT to review. The appellant appealed under s 503 of the MH Act.

The Court (Mitchell and Vaughan JJA) held that there was no utility in the SAT reviewing the MHT's decision to affirm an order which had expired and ceased to have any operative effect ([31]). Once the decision under review ceased to operate, the proceedings for review of that decision can properly be characterised as frivolous, misconceived or lacking in substance within the meaning of s 47(1)(a) of the MH Act ([33]), even if the application for review was validly instituted ([34], [35]).

The Court added that the dismissal of the review application did not preclude the appellant seeking other remedies for any deficiencies in the process by which the order was made (31], [32]).

The Court dismissed the appeal.

Guide to Tribunal Practice 6E [4.2.2.4]

INP v Secretary, Department of Families, Fairness, and Housing [2025] VSC 31

Supreme Court of Victoria (Ginnane J), 11 Feb 2025

The appellant INP applied to VCAT to review five child protection decisions ('the review application'). The decisions determined *inter alia* that INP was responsible for causing harm to a child and restricted his contact with his children. He sought orders setting aside the five decisions and sought declarations that they were made unlawfully because they failed to have regard to the best interests of the children and to his and their human rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter').

All five decisions had been overturned by the respondent ('DFFH') on internal review. DFFH had provided a letter of apology to INP in

which it conceded that the decisions were made without legal authority. It had also flagged the correction in its case file records.

VCAT found that none of the five decisions had any ongoing effect and had been overtaken by subsequent events. In accordance with *QQQ v Department of Families, Fairness and Housing* [2021] VCAT 372, the tribunal concluded that the proceeding was 'now misconceived and lacking in substance because it was now futile to carry out a review' (VCAT Reasons [93], cited at [36]). The Tribunal made an order summarily dismissing the proceeding under 75(1) of the *Victorian Civil and Administrative Tribunal Act 1988* (Vic) ('VCAT Act').

INP sought leave to appeal the dismissal of the review application.

The Court's consideration

Ginnane J summarised the principles for dismissing a proceeding under s 75 of the VCAT Act. As the applicant for dismissal, DFFH bore the onus of establishing that the proceeding should be dismissed as 'misconceived' and 'lacking in substance'. These terms referred to proceedings 'which it is readily apparent are hopeless and bound to fail' ([52], citing *Chopra v Department of Education and Training* [2019] VSCA 298, [134]). In making this assessment, VCAT

had to reach a high level of satisfaction that INP did not have an arguable case, taking it as its highest, i.e., assuming that he would be able to establish the facts that he alleged' ([52], citing *Towie v State of Victoria* [2008] 19 VR 640 [78]-[79]).

Ginnane J was of the opinion that INP was not likely to obtain orders overturning the five decisions as they were no longer in force. However, His Honour considered that if INP could establish before VCAT that the decisions had ongoing adverse impact on him, his reputation and his relationship with his children, he had some prospect of success in obtaining declarations that the decisions were invalid ([68]). Declarations can be granted to vindicate reputations ([69], citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564).

Even though the decisions had lapsed, INP's application had an arguable utility in seeking declarations of invalidity that might end the claimed adverse effects on him and his relationships with his children ([71], [84]).

Moreover, it was arguable that the grant of declarations involving Charter rights have a wider public interest and an educative utility, particularly in the exercise of statutory powers for the care and protection of children ([74], [86]). Apologies and concessions of error may not always remove the utility of granting declarations, particularly when incomplete ([75]).

In his Honour's view, this was not a case for summary dismissal ([187]. VCAT's wide power to grant a declaration (VCAT Act s 124) 'involves the exercise of a discretion which is very fact dependent' ([85]). His Honour held that VCAT did not give proper consideration to the Charter rights of INP and his children as it was required to do by s 38 of the Charter ([173]-178]), nor had it properly considered the application of the statutory 'best interests of the child' principle to the review. These matters could be properly considered only after INP had presented his complete case ([3]).

His Honour held that VCAT erred in law in deciding that there was no utility in INP being permitted to proceed with the review application and to seek declarations ([77]).

Order

Leave to appeal on certain specified grounds was granted, the order of VCAT set aside and the matter remitted for a hearing by a differently constituted tribunal.

Guide to Tribunal Practice 6E [4.2.2.4]

What is a 'proceeding'?

It is common for tribunal Acts to use the word 'proceeding' without defining it. In the following case, a Senior Member of VCAT considered two provisions of the VCAT Act dealing with how the tribunal's powers of summary dismissal were exercisable, each provision relating to a different set of grounds for dismissal. The Senior Member decided that in this context the phrase 'the Tribunal as constituted for the proceeding' includes the Tribunal as constituted to hear the strike-out application.

NHB v Secretary, Department of Families, Fairness and Housing **[2025] VCAT 455**

Victorian Civil and Administrative Tribunal
(G Nihill SM), 22 May 2025

NHB (a pseudonym) claimed that the respondent department ('DFFH') had discriminated against him in the provision of services. DFFH applied under sections 75 and 76 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act') for the proceeding to be summarily dismissed or struck out. The application was allocated for hearing by a Senior Member of VCAT.

Section 75(1) empowers the tribunal at any time to make an order summarily dismissing or striking out all or any part of a proceeding that in its opinion is frivolous, vexatious or misconceived or lacking in substance or is otherwise an abuse of process. Section 76(1) confers on the tribunal power to summarily dismiss or strike out a proceeding for want of prosecution.

Section 75(3) provides that the tribunal's power under s 75(1) is exercisable by:

- a) the Tribunal as constituted for the proceeding; or
- b) a presidential member; or
- c) a member who is an Australian lawyer.

Section 76(2) provides that the tribunal's power under s 76(1) is exercisable by:

- a) the Tribunal as constituted for the proceeding; or
- b) a presidential member.

DFFH submitted that words 'the Tribunal as constituted for the proceeding' may mean

‘the Tribunal as constituted to finally hear and determine the substantive dispute’, as opposed to the Tribunal as constituted to hear an interlocutory application such as an application under ss 75 and 76. DFFH submitted that where the tribunal has not been constituted for the final hearing, only a presidential member has the power to summarily dismiss an application under s 76(1). DFFH argued that this interpretation was supported by the legislative history of the two provisions, in which s 75(3) had been amended to include any member who is an Australian lawyer, but no corresponding amendment had been made to s 76(2).

VCAT’s interpretation

The Senior Member referred to VCAT Act s 64(2)(a) which provides that if the tribunal is to be constituted at a proceeding by one member only, that member must be an Australian lawyer. She observed that ‘proceeding’ is defined in a circular fashion in VCAT Act s 3 to mean ‘a proceeding in the Tribunal’ with express inclusions of specified types of interlocutory steps. While the meaning of ‘proceeding’ in s 76 had not been previously considered, the Senior Member noted that in *Schneider v Boroondara City Council* [2004] VCAT 843 [12], Morris P found that the term as used in the VCAT Act encompassed all steps taken in the course of a tribunal proceeding. In the Senior Member’s view, this meant that when an application under s 75 or s 76 is listed for hearing before a member who is an Australian lawyer, ‘the Tribunal is constituted for the purpose of the proceeding’ ([26]).

The Senior Member explained the difference in wording of s 75(3) and 76(2) as follows. Dismissal under Section 76 is for want of prosecution. In some circumstances there may be a hearing scheduled before a member who is an Australian lawyer. In other circumstances, an order may be made administratively without a hearing being listed. In the latter case where there is no ‘Tribunal constituted for the proceedings’, s 76(2) provides for the making of an order only by a presidential member ([27]-[30]).

Order

The respondent’s application under ss 75 and 76 was to be listed for hearing before any member of the tribunal who is an Australian lawyer.

Guide to Tribunal Practice 6E [4.2.2.4]

