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Tribunal Case Update

Bias by personal association

A tribunal member listed to hear a case may need to assess whether a personal relationship potentially disqualifies them from the proceeding. Relevant case authorities arising from judicial practice are instructive for tribunal members. Tribunal members may find further guidance in the AIJA *Guide to Judicial Conduct* (3rd ed, 2017), which at [3.3.4] considers the assessment of a judge's personal relationships in the context of bias.

In *Adaz Nominees Pty Ltd v Castelway Pty Ltd* (noted below), a judge found himself in a situation which was not expressly addressed in the Guide. He had a long-standing friendship with a partner in the law firm which represented one of the parties, but the partner was not involved in the case. The judge intended to socialise with the partner during the period when it was likely that his decision would be reserved. Having disclosed the circumstances to the parties, he declined to recuse himself. His Honour distinguished the case from *Charisteas v Charisteas* [2021] HCA 29, in which a trial judge was held to be disqualified by undertaking frequent private meetings and communications with counsel for a party without the prior knowledge or consent of the other party.

Bias by prejudgment

On the topic of apprehended bias on the basis of prejudgment, we note two cases in which a court held that a judge's impartiality had been impaired by the judge's statements and conduct during the hearing. The cases *Gindy v Capital Lawyers Pty Ltd* and *DeMarco v Macey* demonstrate that a judge's expressions of anger or hostility, or demeaning, scornful or condescending remarks directed at a party or their representative, may cause a fair-minded

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observer to reasonably apprehend bias. Judicial comments signaling that the judge has ceased to listen to a party are particularly likely to lead the observer to this conclusion.

Copying of reasons from submissions

In issue 3 of 2022 of this Bulletin we published a case note on the Federal Court's decision in *Ultimate Visions Inventions Pty Ltd v Innovation and Science Australia*. The Court found that the AAT had discharged its review function notwithstanding that its reasons for decision included the unattributed and verbatim copying of 64 of 67 paragraphs from the respondent's submissions. The court's decision has since been set aside by the Full Federal Court, for the reasons set out in our case note below.

Other tribunal practice issues

This issue also includes a case on the meaning of 'decision' for purposes of an internal appeal under the NCAT Act (*Cao v Lavish Construction and Developments Pty Ltd*) and a case on the scope of the statutory immunity from suit of an NCAT member (*Singh v Charles* [2022] NSWSC 743).

Apprehended bias by association

A number of cases discuss when a judge or member is disqualified from a hearing on the basis of apprehended bias arising from an association with a party's legal representative. Recently in *Charisteas v Charisteas* [2021] HCA 29, the High Court of Australia held that a Family Court judge was disqualified on the basis of frequent private communications and meetings with a barrister for one of the parties, conducted without the prior consent or knowledge of the other party, during a trial and while judgment was reserved. The judge's failure to disclose the communications to the other party was of particular concern.

In the case noted below, a judge declined to disqualify himself on the basis of a disclosed ongoing personal association with a partner in a law firm acting for of the parties where the partner had no involvement in the case.

After consulting the authorities and the AIJA *Guide to Judicial Conduct* (3rd ed, 2017), Niall JA set out what he understood to be the relevant convention of judicial practice. It is that in the period prior to delivery of judgment:

- social contact with a party's legal practitioner engaged in the conduct of the case should be treated in a similar way to contact with the party, but
- the principle does not extend to partners or employees of the firm who have no involvement in the case ([33]-[35]).

Adaz Nominees Pty Ltd v Castleway Pty Ltd [2002] VSC 600

Supreme Court of Victoria (Niall JA), 6 Oct 2022

Niall JA was listed at short notice to hear the trial of a commercial proceeding in the Supreme Court. The law firm Maddocks acted for the TPG Group who were the plaintiffs in the claim.

Twelve days before the hearing, His Honour directed his associate to write to the parties disclosing that the judge was a personal friend of Mr Newman, a partner of Maddocks, and that the judge intended to continue a long-standing arrangement to spend an annual three-day holiday with Mr Newman. The associate further

advised the parties that there was no reason for the judge to think that Mr Newman would have any involvement in the litigation. Any party who wished to raise any issue with respect to the matters disclosed was asked to do so within a specified time prior to the listed date of the hearing.

Maddocks subsequently wrote to the judge's associate and the solicitor for Castleway, confirming that Mr Newman 'had no involvement in the litigation' ([5]). Maddocks gave assurances that none of the practitioners engaged in the matter had discussed the litigation with Mr Newman. Maddocks further advised that an information barrier had been established to ensure that Mr Newman did not have access to any related files.

Castleway was not satisfied with these arrangements and submitted that the judge ought to recuse himself from hearing the matter on the ground of apprehended bias. Castleway's application focused on the fact that the judge would be on holiday with Mr Newman at the time when judgment was likely to be reserved ([9]).

The judge's reasons for non-recusal

Niall JA observed that Maddocks was not a party to the proceedings and that nobody associated with the firm was to be called as a witness ([14]). There was no suggestion that Mr Newman had a relevant interest in the outcome of the litigation ([25]).

The basis for the disqualification application was therefore a personal association and ongoing social contact between the judge listed to hear the proceedings and a partner in a law firm acting for one of the parties, being a partner who did not have conduct of the party's case ([24]).

His Honour proceeded to consider the authorities on apprehended bias by reason of a judge's association.

In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 ('*Ebner*'), the High Court explained the test to be applied when a question arises about the impartiality of a judge on the basis of apprehended bias. The judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge must decide (*Ebner* [6]).

The application of the test requires a two-step analysis. The first step is to identify what it is said might lead a judge to decide a case other than on its merits. The second stage requires the articulation of a logical connection between the matter and the feared deviation from deciding the case on its merits. Only then can the asserted basis for the apprehension of bias be assessed (*Ebner* [8]).

In a case where the matter involves an association with another person, the High Court in *Ebner* said (at [30]) that the bare identification of an association or an interest will not suffice to answer that question.

These principles were reaffirmed by the High Court in *Charisteas v Charisteas* [2021] HCA 29. The High Court applied the *Ebner* test to a case in which a family court trial judge had taken part in frequent and undisclosed private communications and meetings with the wife's barrister during the proceedings (including while the decision was reserved) without the prior knowledge or consent of the other party.

The judge's conduct was held to be contrary to established judicial practice ([15]-[17]). The court held that a fair-minded observer, credited with this knowledge, might apprehend that the judge's impartiality might have been compromised by the personal relationship or by something said in those private communications ([15], [21]).

Application of the principles to the facts

The association here is between a judge listed to hear a trial and a partner of a law firm which acts for one of the parties but who does not have the conduct of the party's case. Niall JA said that such an association does not provide a proper foundation for a reasonable apprehension of bias ([24]). That is, the association does not provide a logical reason for apprehending that a judge might not bring an impartial mind to the issues in the case ([27]).

His Honour referred to *Viscariello v Tamasoukas (No 2)* [2019] SASC 40 in which a judge held that he was not disqualified on the basis that his sister was a principal of a law firm that was acting for a party but who did not have the carriage of the party's case. Niall JA concluded that the same principle must apply where the relationship is friendship rather than familial ([27]).

His Honour then considered the question of whether reasonable apprehension of bias may be founded on the judge's social contact during

the relevant period with a partner in the law firm acting for a party who does not have carriage of the party's case. After examining the authorities and the *Guide to Judicial Conduct*, His Honour concluded that there is no convention or understanding that a judge should have no social contact with a member or employee of a firm acting for a party who is not involved in the case ([35]). He took the relevant convention to be as follows:

> In those cases, the integrity of the system is adequately secured by professional and ethical obligations that support the understanding that a judge would not discuss a current proceeding with a person who is not involved with it, and a practitioner in such a position would not seek to discuss the matters with a judge ([35]).

Order

His Honour dismissed the application for him to recuse himself from hearing the trial.

Bias by reason of prejudgment

The following case is remarkable for the marked divergence in the evaluation of the judge's conduct by the majority and minority justices. In the view of Chief Justice McCallum and Charlesworth J, the circumstances amply satisfied the test explained in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 1(72) for disqualification on the basis of prejudgment. The dissenting judge found, to the contrary, that the judge showed creditable patience in the context of a lengthy hearing and the 'exceptionally irritating conduct' and irrelevant submissions of the applicant's MacKenzie friend.

The majority was less sympathetic to the judge's frustrations, noting that she could have made better use of her procedural powers to limit the role of the MacKenzie friend and to impose reasonable time limits.

A key difference between the majority and dissenting justices lay in their findings about whether the judge's conduct signaled an unwillingness to consider the MacKenzie friend's submissions on their merits. This difference was important because the test for bias by prejudgment is a state of mind 'so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented' (*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 1 ([72] (Gleeson CJ and Gummow J)). Charlesworth J summarised this statement as meaning that for the purposes of the test for apprehended bias by prejudgment, 'the feared deviation [from impartiality] is that the judge might approach the task other than with a mind open to persuasion' ([129] (her italics)).

Gindy v Capital Lawyers Pty Ltd [2022] ACTCA 66

Australian Capital Territory Court of Appeal (McCallum CJ, Elkaim and Charlesworth JJ), 8 Dec 2022)

Ms Gindy commenced proceedings in the ACT Supreme Court claiming breach of contract and negligence in relation to legal services provided by the respondents, a law firm and two lawyers. The Court allowed Ms Gindy to be assisted in the presentation of her case at trial by her husband Mr Elmaraazey in the capacity of a McKenzie friend (that is, a person who is not a legal practitioner but who is permitted at the court's discretion to assist a party in the presentation of the party's case). Mr Elmaraazey had formerly been a legal practitioner but no longer held a practising certificate. The judge allowed Mr Elmaraazey to participate in the hearing in much the way as counsel for Ms Gindy might have done (151]).

The hearing ran for a total of 88 days over 2 years. On 5 July 2018, on the 51st day of the trial, Mr Elmaraazey made an oral application for the trial judge to recuse herself on the ground of actual and/or apprehended bias. Her Honour refused the application, for reasons which were not provided until 17 December 2021. Throughout the remainder of the trial the appellant continued to assert that the trial judge was biased and should disqualify herself ([141]).

On 17 November 2021, judgment in the actions was given for the defendants ('the liability judgment'). On 17 December 2021, the judge delivered reasons for judgment on the bias application ('the bias judgment'). Ms Gindy appealed both judgments. About half of the 98 grounds of appeal alleged that the trial judge had shown actual and/or apprehended bias.

The ACT Court of Appeal held unanimously that the trial judge had not demonstrated actual bias but divided in their findings on apprehended bias.

Charlesworth J (with whom McCallum CJ agreed subject to some additional remarks) identified several matters that might cause a fair-minded observer to reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of the appellant's claims (applying the 'double might' test for apprehended bias in the form of prejudgment as explained by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17 [72]). The matters included statements made by her Honour in her reasons for decision on the bias application. The appellant was not precluded from raising in the appeal matters which were not raised by the appellant in the bias application of 5 July 2018, as the trial judge was under a continuing obligation to recuse herself if any proper basis for disqualification arose after the bias application ([121], [140] - [142]).

Charlesworth J

Charlesworth J found that a fair-minded observer might reasonably take aspects of the trial judge's conduct of the hearing and comments made in her Honour's reasons for decision to indicate that the judge 'harboured feelings of intense personal disdain for the appellant's McKenzie friend' and 'an associated disregard for the appellant herself'. On that basis the fair-minded observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of Ms Gindy's claims ([121]).

The matters on which her Honour based this finding took account of the whole context of the trial and particularly the following matters.

1. The trial judge had repeatedly remarked that 'counsel [for the respondent] will know better than I do' on procedural matters and admitted her own relative inexperience in these matters ([195]). Charlesworth J said that the hypothetical lay observer would interpret these remarks literally and might reasonably apprehend that her Honour might unquestioningly defer to counsel for the respondent when ruling on procedural matters ([203]).
2. On two occasions the judge used the phrase 'conspiracy theories' to describe at least part of the appellant's case. The remarks were made in the context of the judge dismissing submissions by Mr Elmaraazey who was attempting to object to the taking of evidence from a witness by telephone link. Rather than resolving his submissions according to principle, the judge dismissed them as 'conspiracy theories' [207], [208]). Charlesworth J concluded that the comments might cause a fair-minded lay observer to 'apprehend that the judge might be unable to listen to the appellant's case with a mind open to its factual and legal merits' ([211]).
3. In her Honour's reasons for decision, the trial judge made 'gratuitous aspersions concerning the honesty and integrity of the McKenzie friend as a person' ([283]). In several places the trial judge 'hinted at improper practices on the part of the McKenzie friend' without making findings and explaining their relevance ([294]). Charlesworth J concluded that the hypothetical lay observer would interpret these 'gratuitous diversions' as demonstrating feelings of intense personal disdain for the McKenzie friend, which might cause the observer to apprehend a lack of judicial detachment ([297], [298], [300]).
4. Charlesworth J identified several ways in which the judge demonstrated a hostile attitude towards the appellant and/or Mr Elmaraazey.
    - First, the trial judge made two references to Mr Elmaraazey 'crying wolf' when he attempted to advance an argument about the fairness of procedures. Her Honour also remarked that Mr Elmaraazey had exhausted his credibility ([232], [237]-[244]). These statements might reasonably be taken to indicate that the judge had ceased to take his submissions seriously ([231]-[234]).
    - Second, the trial judge failed to respond appropriately when the appellant complained that the respondent's legal practitioner was laughing at her during her cross-examination. The judge remarked that the appellant was 'not in a position to … complain about people laughing in the course of this'. The hypothetical lay observer might conclude that the judge was displaying an 'overly forgiving attitude towards misconduct alleged against the representatives of the opposing party' ([253]-[256]).

- Third, the trial judge gave the appellant a warning that her case might be dismissed for her failure to attend a hearing, in circumstances where the appellant had been directed by the judge to leave ([270]-[273]). An observer would perceive this disproportionate response by the judge as 'an outward manifestation of a loss of professional detachment' ([275]).

Charlesworth J added that, in considering what the hypothetical lay observer might make of the judge's attitude towards the appellant and Mr Elmaraazey, the lay observer:

> may be taken to appreciate that circumstances that may give rise to a sense of frustration or annoyance on the part of the judge may well be circumstances that are within the power of the judge to avoid or ameliorate. Such was the case here ([157]).

Her Honour observed that, if the trial judge disapproved of the way Mr Elmaraazey was conducting the appellant's case, she could have imposed formal conditions on the grant of permission to act as a McKenzie friend ([158]).

Subject to the requirements of procedural fairness, the trial judge could also have imposed time limits on examination and cross-examination and limits on the length of written submissions and specified the consequences for non-compliance ([159]). Accordingly, in all the circumstances the fair-minded lay observer should not be credited with an unduly sympathetic view such as to avoid the reasonable formation of an apprehension of bias ([160]).

McCallum CJ

McCallum CJ agreed with Justice Charlesworth's findings on apprehended bias and the reasons. The Chief Justice identified three additional matters that contributed to her conclusion that the trial judge displayed the appearance of bias. One of these was the way the judge conducted the bias application ([7]). The Chief Justice noted in particular the judge's response to an argument advanced by Mr Elmaraazey:

> OK. So I'm biased because you didn't ask appropriate questions in re-examination. This is where this is going apparently ([10]).

McCallum CJ observed that the comment was sarcastic, unfairly misrepresented the argument that was being made, and might cause a fair-minded observer to apprehend that her Honour was not engaging with the application in an impartial manner ([10]).

Her Honour characterised the judge's conduct as argumentative, demonstrating hostility towards Mr Elmaraazey, automatically siding with counsel at times, and approaching the bias submissions 'with a measure of disdain' (4]-[7]). The Chief Justice also referred to an instance of differential treatment, and a failure by the trial judge to apologise or moderate her position when her Honour realised that a rebuke which she had given to the appellant proceeded from her misunderstanding of the true position ([11]-[14]).

Elkaim J (in dissent)

Elkaim J would have dismissed the appeal, finding that the trial judge gave sound reasons for rejecting each claim in the bias application ([46]). His Honour emphasised the difficulties that the trial judge faced in conducting the hearing, stemming in part from Mr Elmaraazey's conduct of the appellant's case ([24]-[26]), his 'exceptionally irritating' conduct ([87]) and the 'obfuscation and irrelevance injected by the appellant' ([33]). His Honour observed that it was to the judge's credit 'that she was able to maintain her composure and willingness to listen to the plaintiff's case ([33]).

Elkaim J acknowledged that some of the trial judge's comments 'seemed, at least at first sight, to be inappropriate and unfair to Mr Elmaraazey and the appellant' ([34]). This included her Honour's remark that the appellant was in no position to complaint about people laughing at her during her cross-examination ([91]). In his Honour's view, the remark viewed in the context does not support a finding of apprehended bias ([97]). His overall conclusion was as follows:

> In summary, the overall impression is one of snippets of comments or actions of her Honour being either taken out of context, exaggerated or simply invented to suggest bias (including apprehended bias) and procedural unfairness. On closer examination these allegations dissipate, leaving the appeal on these grounds without basis ([118]).

Orders

The appeal was allowed and the matter remitted for retrial before the Supreme Court

Apprehended bias by prejudgment

The following case provides further illustration of the factors that might lead a reviewing court or appeal body to find apprehended bias by prejudgment. As we saw in *Gindy v Capital Lawyers Pty Ltd* (above), expressions of hostility or anger or demeaning, scornful or condescending comments, particularly where they form a pattern of conduct by the Tribunal towards an unrepresented party, may found a reasonable apprehension of bias by prejudgment. The effect of these instances must be considered cumulatively as well as individually for the purposes of assessing whether the fair-minder observer might reasonably apprehend bias.

DeMarco v Macey [2022] NSWSC 1348

New South Wales Supreme Court (Harrison AsJ), 5 Oct 2022

The respondent married couple, the Maceys, engaged the appellant builder, Mr DeMarco, to carry out renovations on their property. A dispute arose and the Maceys brought a claim in the New South Wales Civil and Administrative Tribunal ('the Tribunal'). On 8 July 2020, the Tribunal constituted by a Senior Member determined that Mr DeMarco was to pay the Maceys a sum of $317,919 ('the Appeal Determination'). On 7 August 2020, Mr DeMarco filed an appeal to the Appeal Panel.

At the hearing before the Appeal Panel, both parties were represented by counsel. The allegation of actual and apprehended bias raised by Mr DeMarco in the grounds of appeal related to two matters. The first was that the Tribunal failed to allow Mr DeMarco, a self-represented party, sufficient time to consider and respond to the Maceys' extensive oral submissions. The second was that the Tribunal ended the hearing without notice without giving a fair hearing and without ensuring that Mr DeMarco was not subject to actual or apprehended bias ([27]).

On 28 Sept 2021 the Appeal Panel varied the orders of the Tribunal in the Appeal Determination by correcting an arithmetical error in the Tribunal's calculation of the money payment. The appeal was otherwise dismissed, and Mr DeMarco was ordered to pay the Maceys' costs.

On 27 Sept 2021 Mr DeMarco lodged a summons to commence an appeal to the Court pursuant to s 83(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') and a summons seeking leave to appeal. The Court granted an extension of time for filing the summons and leave to appeal ([24]).

Reasons of the Appeal Panel

At the hearing before the Appeal Panel, Mr DeMarco withdrew the allegation of actual bias but maintained the allegation of apprehended bias ([29]).

The Appeal Panel adopted the Tribunal's findings that De Marco's preparation for and conduct of his case before the Tribunal had been 'haphazard', that he failed to comply with directions and time limits for filing of documents, and that he did not comply with his duty of co-operation required under s 36 of the NCAT Act (Appeal Panel Decision [39], quoted at [37]). The Appeal Panel further accepted the Tribunal's view that Mr DeMarco 'had a firm grasp on the issues', and that he had been provided with 'repeated indulgences in preparation' (Appeal Panel Decision [41], [42], cited at [37]).

While the Appeal Panel acknowledged that the Tribunal had expressed frustration with Mr DeMarco, it had expressed at least an equal level of frustration with the other party ([49]-[50]. The Appeal Panel concluded that Mr DeMarco had not demonstrated that the Tribunal's conduct gave rise to a reasonable apprehension that the Tribunal would not decide the case other than on its merits ([50]).

Consideration of the appeal grounds by the Court

Mr DeMarco appealed against the Appeal Panel's decision, to the Supreme Court. Harrison AsJ said that isolated instances of frustration expressed by a Tribunal member might not give rise to an apprehension of bias in the mind of a reasonable person. But over the course of the four-day hearing, the Senior Member directed 'numerous demeaning, belittling and condescending comments' to the unrepresented appellant Mr DeMarco. Among the examples of the Senior Member's comments to Mr DeMarco cited by Her Honour were the following:

- suggesting that he was being 'difficult' as a 'ploy',
- questioning his intellect and asking whether a simple task was beyond him, and
- stating that the Senior Member needed to take a break because she was at risk of saying something that she might 'regret' on the basis that the appellant was 'incapable' ([68]).

Harrison AsJ observed that the comments directed by the Senior Member of the Tribunal at Mr DeMarco throughout the proceedings expressed more than frustration. 'The frequency and nature of the comments in and of themselves … are both hostile and at time derogatory' ([47]).

The Appeal Panel's reasons were also deficient, Her Honour found, in the following respects:

- The Appeal Panel did not examine the individual exchanges relied on by Mr DeMarco in support of his appeal, nor did it consider the cumulative effect of the comments ([48]).
- The Appeal Panel made no reference to the objective informed fair-minded observer test in its assessment of apprehended bias ([48])
- The Appeal Panel seems to have made an illogical assumption that if the Senior Member had expressed frustration with both parties, the appellant was given a fair hearing. This reasoning was not relevant to the test for apprehended bias ([50]).

Orders

The decision of the Appeal Panel dated 28 Sept 2021 was set aside and the matter was remitted to a differently constituted Appeal Panel to be determined according to law. The defendants were ordered to pay the plaintiff's costs.

Incorporation of submissions into reasons – an update

Issue 3/2002 (p8) of this publication carried a case note by Jeremy Bonisch on the decision of the Federal Court on an appeal from the Administrative Appeal Tribunal in *Ultimate Visions Inventions Pty Ltd v Innovation and Science Australia* [2022] FCA 606. The appeal raised the question of whether the Tribunal had discharged its review function notwithstanding that its reasons for decision included the unattributed and verbatim copying of 64 of 67 paragraphs from the respondent's submissions. (The copied paragraphs even reproduced typographical errors in the original.) The primary judge (Wheelahan J) recognised that such a practice was undesirable, but declined to set aside the decision because there was enough evidence the Tribunal had brought its own independent mind to bear on the issues.

The primary judge's decision has recently been overturned on appeal by the Full Court of Federal Court Australia. Jeremy Bonisch has contributed the following case note and comment on the Full Court decision.

Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia [2023] FCAFC 23

Full Court of Federal Court Australia (Thawley, McElwaine and Hespe JJ), 2 March 2023

In overturning the decision, the Full Court noted the primary judge's criticisms of the Tribunal's reasons, and commented as follows (at [6]):

> The problem with copying one side's submissions verbatim, and not revealing any real engagement with the case put by the losing party, is that the losing party is left with a real and often justified sense that the party has not been heard and that the party was not afforded the review which the party had a right to receive. It leaves parties before the Tribunal with a sense that they have been dealt with unjustly and unfairly. Irrespective of the legal consequence of such copying, it should not happen. It is damaging to public confidence in the Tribunal.

The Full Court examined the primary judge's reasoning as to why he was not persuaded that the Tribunal failed to bring an independent mind to the review. These reasons were:

1. The decision of the Tribunal included several paragraphs not contained within the respondent's submissions, demonstrating the Tribunal had turned its mind to the matter before it even though the bulk of the decision was comprised of paragraphs copied verbatim.

2. The 'material reordering' of the respondent's submission was evidence of the Tribunal

bringing an independent mind to bear on the issues.

3. There were indications within the Tribunal's reasons that a 'thorough analysis of the evidence' had been undertaken.

As to the first reason, the Full Court held the inclusion of a few additional paragraphs was not sufficient of itself to demonstrate that the Tribunal had engaged with the applicant's submissions ([15]). The Full Court noted that the Tribunal had referred to irrelevant material when responding to submission by the applicant which criticised the respondent's evidence ([15(d)]).

Their Honours also disagreed with the primary judge's second reason, and held the relevant comments only evidenced that the Tribunal had '[considered] the order in which the copied submissions should be put' ([16]).

With respect to the judge's third reason, the Full Court held that comments such as those referenced by His Honour need to be assessed in context ([17]). The Full Court proceeded to set out the factors that should be considered when assessing the Tribunal's assertion that it thoroughly analysed the evidence. These included:

- an absence of any reasons that evidenced the 'thorough analysis',
- the verbatim copying of 64 of 67 paragraphs of the respondent's decision, and
- the lack of any statement or explanation as to why the Tribunal had accepted the submissions of the Respondent.

In all those circumstances, the Full Court concluded that the Tribunal's assertion that it had undertaken a thorough analysis 'has the air of formulaic incantation' ([17]).

The Full Court went on to observe:

> By adopting the respondent's submissions verbatim, the Tribunal adopted the respondent's reasoning, perspective and conclusions, both quantitatively and qualitatively. The submissions which were adopted included conclusions to be drawn as to the credibility of witnesses and the evaluation and weighing of evidence. Adding phrases such as "on balance, the Tribunal finds" to text otherwise copied from the respondent's submissions does not provide any real support for a finding that the Tribunal engaged with and considered the matter afresh ([19]).

The Full Court observed that, despite the obligation of the respondent to assist the Tribunal (s 33(1AA) of the *Administrative Appeals Tribunal Act 1975*), the Tribunal cannot rely on the respondent to undertake the assessment for it ([20]). Instead, the Tribunal's statutory task requires that, 'within the applicable limits of the law', the member hearing the matter 'should bring his or her own perspective, approach, and reasoning to the claims made by the applicant for review' [11].

Order

The Full Court unanimously granted the appeal and ordered that the matter be remitted to the Tribunal to be heard by a different member according to law.

Contributor's comment

It is important to note that although the Full Court overturned the decision of the primary judge, it did not establish a strict rule that copying submissions will lead to legal error. Each set of reasons will need to be examined in all the circumstances for confirmation that the Tribunal has actually engaged with the material and carried out its statutory function. Having said that, the Full Court's decision makes clear that decision makers should hesitate before adopting submissions of either party without clearly identifying cogent reasons as to why they are doing so, and without demonstrating that they have engaged with the submissions of both parties.

For similar reasons, decision-makers should be cautious about slavishly adopting standard text in templates or inserting large blocks of text from other decisions or judgments without proper explanation and analysis.

Jeremy Bonisch
Senior Associate, AAT

Meaning of 'decision' – no appealable decision

The NCAT Appeal Panel dismissed an internal appeal insofar as it related to what the appellant contended was a decision made by the Tribunal on the question of liability. The Appeal Panel found that the appeal was incompetent as no such decision was made by the tribunal within the meaning of section 5(1)(a) of the NCAT Act. The Panel held that there could be no internally appealable decision without an ultimate or operative determination in the proceedings.

Cao v Lavish Construction and Developments Pty Ltd [2022] NSWCATAP 391

New South Wales Civil and Administrative Tribunal Appeal Panel (Senior Members L Wilson and G Blake AM), 16 Dec 2022

Ms Cao filed an application in NCAT against the respondent ('Lavish') seeking relief under the *Home Building Act 1989* (NSW) ('HB Act')' based on a claim that building works provided by Lavish under a contract for the construction of a home were defective. On 31 March 2022 a conclave of the expert witnesses for the parties reached an agreement as to the defective work and the work required to rectify it ('the conclave agreement').

At the hearing on 9 May 2022 Lavish provided short minutes of order providing for a work order in specified terms that was intended to give effect to the conclave agreement, and a costs order.

The liability decision

On the same day the Tribunal published its decision on the liability issues ('the Liability Decision') which said in substance:

- The Tribunal proposes to make orders substantially in accordance with the short minutes provided by Lavish.
- If formal orders are required to give effect to that course of action, the Registry should be notified.
- The parties may make submissions on costs by 31 May 2022 ([10]).

On 22 June 2022, the Tribunal published the Costs Decision.

On 20 July 2022 Ms Cao filed a notice of appeal against the Liability Decision and the Costs Decision.

The appellant also sought an extension of time to appeal against the Liability Decision and leave to appeal against both decisions. [*This case note omits the Appeal Panel's discussion of those applications, both of which were granted*.]

At the commencement of the appeal hearing the NCAT Appeal Panel raised the question of whether the appeal in respect of the Liability Decision was competent by reason of the failure of the Tribunal to make an order. The appellant contended it was a competent appeal, while the respondent submitted it was not.

The applicable legal principles

The Panel referred to authorities on the scope of the term 'decision' in the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') and in other Acts dealing with reviews and appeals. In *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 ('*Bond*') the High Court considered the scope of 'decision' in the *Administrative Decisions Judicial Review Act 1977* (Cth) ('ADJR Act') which was defined in terms almost identical to the definition of 'decision in s 5(1) of the NCAT Act. In *Bond*, Mason CJ concluded that the term 'decision' in the ADJR Act referred to an ultimate or operative decision (at 335, cited [32]).

Authorities on the scope of 'decision' in the NCAT Act

The Panel noted that the NCAT Act differs from the ADJR Act considered in *Bond* in that s 80(2)(a) expressly provides for an appeal (by leave) from an interlocutory decision of the Tribunal ([37]). The term 'interlocutory decision' is defined in s 4(1) of the NCAT Act by reference to a list of types of decisions, all but one of which involve making an order or direction in the exercise of statutory power.

The Appeal Panel referred to two previous decisions of the NCAT Appeals Panel which considered the meaning of 'decision' in the context of an internal appeal under the NCAT Act.

In *Australian Press Council Inc v Southey* [2022] NSWCATAP 127 [31]-[41] the Appeal Panel considered whether a finding on a question

of law made in the reasons given for a final determination was an 'interlocutory decision' within the meaning of the NCAT Act. In the view of the Panel, the final item in the definition: (i) 'any other interlocutory issue before the Tribunal', read in the context of the other items in the list, did not include a finding on a question of law (or other step in the reasoning) in reasons for decision given in a final determination ([40]).

In *Lam v Steve Jarvin Motors Pty Ltd* [2016] NSWCATAP 186 [20] the Appeal Panel held that an expression of doubts or opinions which does not involve making an order or doing any of the things referred to in s 5(1) of the NCAT Act is not a 'decision' and cannot be the subject of an internal appeal under s 80 of the NCAT Act.

Conclusions on the competency of the appeals

The Appeal Panel was satisfied that the Tribunal did not make a work order or any other order in the Liability Decision. The decision stated that the parties were to notify the Registry if they required a work order to be made. It was common ground that the parties had not given such a notification to the Registry ([54]).

Having regard to the authorities, the Panel found that the Liability Decision, other than the procedural order for the making of submissions on costs, was not a decision within the NCAT Act ([55(1)]). While 'decision' is defined inclusively in s 5(1) of the NCAT Act, there could not be a 'decision' unless there is an ultimate or operative determination in the proceedings.

The Tribunal had stated that it planned to make orders substantially in accordance with the short minutes, but had made no order, nor had it determined the precise terms of the work order it planned to make. Accordingly, there was no ultimate or operative determination with respect to liability against which Ms Cao could appeal under s 80(1) of the NCAT Act ([56]). This part of the appeal was dismissed as incompetent.

The Liability Decision included a procedural order for the making of a submission on costs. This was a decision within s 5(1)(a) of the NCAT Act and was internally appealable as an 'interlocutory decision' ([58]). The appeal insofar as it related to the *interlocutory decision* made on 9 May 2022 and the costs decision made on 22 June 2022 was competent.

As the Tribunal made no decision determining the proceedings, it lacked jurisdiction to make a decision relating to the costs of the proceedings ([66]).

Orders

1. The appellant was granted an extension of time for the lodgement of the appeal in respect of the interlocutory decision of 9 May 2022.
2. Leave to appeal against the interlocutory decision and the costs decision of 22 June 2022 was granted.
3. The appeal against the interlocutory decision and the costs decision was allowed and those decisions were set aside.
4. The appeal was otherwise dismissed as incompetent ([70]).

Statutory immunity of NCAT member

Tribunal Acts commonly provide that in the performance of their functions, members have the same common law immunity from civil liability as do judges of the Supreme Court (or other specified court).

In the following case, a Senior Member of NCAT successfully relied upon his judicial immunity in a civil proceeding brought against him in court by a plaintiff who had been a party in proceedings heard by the Senior Member. The judge rejected the plaintiff's argument that the case came within the 'so-called *Sirros* exception' to judicial immunity. Even if the plaintiff's factual allegations could be proved, there was nothing in the pleadings to suggest that the Senior Member's conduct was not purportedly in the exercise of his functions as a member of NCAT.

Singh v Charles [2022] NSWSC 743

New South Wales Supreme Court (Garling J), 19 June 2

Mr Singh had been an applicant in tenancy proceedings between him and his landlords in the New South Wales Civil and Administrative Tribunal ('NCAT'). Mr Singh claimed that his landlords breached the residential tenancy agreement by substantially increasing the rent without notice and by invalidly purporting to terminate his tenancy. The proceedings were heard and determined by a Senior Member of NCAT on 9 November 2021. The Senior

Member made orders with the consent of all parties which terminated the residential tenancy.

On 18 November 2021 Mr Singh filed with the court a Statement of Claim seeking damages, declaratory relief and costs against the Senior Member. Mr Singh alleged that in the course of hearing the tenancy proceedings the Senior Member had committed fraud and misfeasance in public office, had infringed Mr Singh's right to the quiet enjoyment of the rental property and had inflicted emotional distress.

The Senior Member filed a Notice of Motion seeking that Mr Singh's Statement of Claim be summarily dismissed under rule 13.4(1) of the *Uniform Civil Procedure Rules 2005* ('UCPR') or alternatively that it be struck out pursuant to rule 14.20 of the UCPR, with costs awarded against Mr Singh.

The Senior Member argued that the claim was 'doomed to fail' because he was entitled to judicial immunity under sch 2, cl 4 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the Act') with respects to the claims made by Mr Singh, and that therefore the continuation of the proceedings would be vexatious and an abuse of process ([22]). The provision states:

> A member has, in the exercise of functions performed as a member, the same protection and immunities as a Judge of the Supreme Court.

The scope of judicial immunity

Garling J noted that Mr Singh was suing the Senior Member exclusively in respect of his conduct during the course of a hearing at NCAT while the Senior Member was 'apparently exercising his role and function as a member of NCAT to deal with the dispute' in the proceedings before him ([19], [34]).

Garling J observed that:

> Judges of the Supreme Court are immune from civil liability for acts done in the exercise of their judicial functions or capacity ([25]).

His Honour cited *Donaldson v State of New South Wales* [2019] NSWCA 109 [7] where the Court of Appeal framed the relevant principle as follows:

> The existence of [the common law judicial immunity in respect of conduct and judgment in proceedings, *at least whereas here there is no supportable allegation that the judge knowing acted without jurisdiction*, is beyond question [26] [our italics].

The italicised words above refer to an exception to judicial immunity suggested by Buckley LJ in *Sirros v Moore* [1975] 1 QB 118 at 141. Mr Singh relied upon the 'so-called "*Sirros*" exception to the doctrine of judicial immunity' [29]). He argued that the Senior Member acted outside his jurisdiction and in bad faith, and that his acts should therefore be outside the scope of judicial immunity ([23]).

Garling J observed that it was clear and undisputed by Mr Singh that NCAT had jurisdiction to hear the tenancy dispute ([35]-[36]). While Mr Singh claimed that the Senior Member had exercised power without legal authority, there was nothing in the pleadings to suggest that the Senior Member's conduct was not in the purported exercise of his functions as an NCAT Member ([39]). Therefore, the statutory judicial immunity from civil liability applied and there was no arguable claim against the Senior Member. His Honour concluded that 'the Statement of Claim discloses no reasonable cause of action, and the proceedings should be dismissed' ([40]).

Orders

The plaintiff's Statement of Claim against the Senior Member was dismissed under rule 13.4 of the UCCPR, and the plaintiff was ordered to pay the Senior Member's costs of the proceedings.

Postscript

Subsequently to these proceedings, Mr Singh brought further appeals and statements of claim arising from the same matter (the residential tenancies dispute). On 24 March 2023, in *Singh v Singh; Singh v RCMO Pty Limited; Singh v Sharma; Singh v Murphy; Singh v Armstrong; Singh v Tidball* [2023] NSWSC 280, Robert Beech-Jones, Chief Justice at Common Law, dismissed the appeals and statements of claim. The Chief Justice noted the 'vexatious qualities' of the multitude of cases brought by Mr Singh over the preceding 18 months. A number of them were 'manifestly hopeless' and out of all proportion to his original complaint ([83], [84]). Whenever he received a ruling he disagreed with, he sued the tribunal member or judicial officer who made the ruling, taking no real note of the flaws they identified in his claims ([85], [86]). He appeared to act with impunity,

relying on his status as a bankrupt to remove the deterrent effect of a costs order ([87], [99]). And he appeared to be attempting to carry on proceedings on behalf of others (his wife and daughter), exposing them to liabilities under costs orders in the vexatious proceedings he commenced ([88]).

His Honour made an interlocutory order precluding Mr Singh from commencing proceedings in the Supreme Court other than by leave of the court and made a recommendation to the Attorney-General to consider applying for an order under s 8(4) of the *Vexatious Proceedings Act 2008* (NSW). On the making of such application, he would consider making a final order. His Honour also ordered that, in the interests of justice, Singh was not permitted to conduct proceedings on behalf of his wife or daughter ([99]).