

Tribunal Case Update

In *Plaintiff M27/2025 v Minister [etc]* the High Court of Australia held that the Minister’s delegate erred in failing to consider the whole of a document submitted by the applicant which contained untranslated material.

In *H v C*, a court modified the *Harman* obligation, in the interests of justice, to allow a party to use in a tribunal proceeding material obtained under subpoena in an unrelated court proceeding.

In *Chalik v Chalik*, the NSW Court of Appeal disapproved a statement by Adamson JA which ‘significantly overstates’ a court’s responsibility to a self-represented litigant.

In *McNeill v Clarence Valley Council*, the NCAT Appeal Panel held that the tribunal’s statutory duties of fairness under the NCAT Act were to be interpreted in the light of the principles stated in *Chalik v Chalik*.

In *IP Property Botany Street Pty Ltd v Territory Planning Authority* a tribunal departed without notice from its stated intention as to the procedure it would follow. A party who relied on the statement thereby lost the opportunity to present material to the tribunal and was denied procedural fairness.

In *Mazi v Kao*, a judge found that inadequate time allocated to the hearing was a contributing factor in breaches of procedural fairness.

In *TMC v QPS*, a tribunal faced with conflicting decisions followed a non-binding decision of the tribunal. In doing so, it adopted a widely used approach for reconciling adjudicative independence with the values of consistency and comity.

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Untranslated evidence

Courts and tribunals commonly require foreign language material relied upon by parties to be translated into English by an accredited translator. In the following case, a delegate of the Minister required the applicant for a protection visa to provide a translation of the parts of documents that had not been translated into English. When the applicant declined to do so, the delegate refused the visa on the ground that the delegate was not satisfied that the criteria for the visa had been met.

The High Court quashed the delegate's decision for jurisdictional error in failing to comply with the statutory obligation to have regard to all the material. Although it was entitled to 'afford minimal weight' to the untranslated parts of the documents, they could not be 'wholly put aside'.

In this case the decision maker was under an express statutory obligation to have regard to all the information provided by the applicant. Under some other statutes there may be an implied obligation to consider a particular matter that is raised by information submitted by a party (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, [29–[30] (Mason JJ)).

It may be inferred from this decision that where untranslated material is submitted in support of an application, and its relevance and general nature is explained in English, it should not be wholly disregarded for this reason. An administrative decision maker should decide what weight (if any) it is appropriate to give the material.

The Court did not comment on the plaintiff's suggestion that the delegate use a program such as Google Translate. While online translation tools such as Google Translate are becoming more expert, there may be concerns about their accuracy as well as the implications of uploading evidential material to the platform.

Tribunals need to consider how to proceed when a party presents untranslated material and is unable to provide a translation. One approach may be to ask the party to identify the particular passages that he or she relies upon, then ask the party's interpreter to translate those passages from a document or video. For example, in the circumstances of the instant case, a tribunal might ask the person to indicate where in a video they are seen holding a sign at a demonstration, then ask the interpreter to translate the characters on the sign or interpret what people in the video are saying.

Plaintiff M27/2025 v Minister for Immigration and Multicultural Affairs [2025] HCA 40

High Court of Aust (Gageler CJ, Gordon and Beech-Jones JJ), 15 Oct 2025

The plaintiff applied for a protection visa on the ground that if he were returned to the People's Republic of China ('PRC') he would likely be subject to persecution for his political activities. He attached to his visa application a pdf document which contained screenshots of online searches with embedded 'thumbnail' images of YouTube videos with titles in Mandarin. He presented this material as evidence of his participation in protests in Hong Kong and his public support for an alleged opponent of the ruling Chinese Communist Party. The pdf document also included English text added by the plaintiff which described the online searches he had conducted to retrieve the video material and provided a broad description of the contents of the videos.



Graeme Neate
Memorial Award

Applications are now open for an award of up to \$10,000 to encourage research and best practice in an area of tribunal excellence in Australia and New Zealand.

The award is made in honour of the late Graeme Neate AM and is open to all, but especially to persons with an interest in tribunals.

The closing date for applications is 1 April 2026, and the closing date for any questions about the application process is 26 February 2026.

For further information, see the COAT website: coat.asn.au/graeme-neate-memorial-award-introduction/

On behalf of the Minister, an officer wrote to the plaintiff under s 56 of the *Migration Act 1958* (Cth) ('the Act') asking him to provide additional information and an English translation of the material linked to the pdf document. In his response, the plaintiff said that the 'vast number and length' of the videos made it impossible for him to comply with the request. He suggested that the officer use the automatic translation tool in the Google Translate application to translate the titles of the videos on his Youtube channel.

The delegate refused the protection visa, referring in reasons to the applicant's inadequate response to the s 56 letter. The delegate said that the plaintiff 'did not provide any official translations of his documents which he claims are evidence of social media and online content that supports his claims' ([17]).

The plaintiff applied to the High Court for a constitutional or other writ to be issued in the Court's original jurisdiction under s 75(v) of the *Constitution*. The plaintiff sought the writs of certiorari and mandamus on the ground of jurisdictional error. He contended that it was legally unreasonable for the delegate not to take some further steps to resolve the translation issue prior to making a decision to refuse the visa application.

The legislation

Section 54(1) of the Act obliges the Minister, in determining whether to grant or refuse a visa, to have regard to all the information in the application which includes information in an attached document. Section 56(1) requires the Minister to also have regard to the information in a response provided by the applicant to a request under that subsection.

Section 62(1) of the Act provides that if an applicant for a visa has not given additional information requested under s 56 within the time allowed, the Minister may decide to grant or refuse the visa without taking any further action to obtain the additional information. Section 56(1)(b) requires the Minister to refuse the visa if not satisfied that the visa criteria have been satisfied.

Unreasonableness

The Court noted that s 5AAA(2) of the Act imposed an obligation on the plaintiff to provide sufficient evidence to establish his claim. The plaintiff could have provided a translation of the pdf documents, the titles of

the videos and a sample of their content but did not do so. In those circumstances the Court was doubtful that the failure of the delegate to exercise the discretion under s 56 to obtain further information or the discretion under s 62 to make the decision without further inquiry could be characterised as legally unreasonable ([24]). The Court found it unnecessary to finally determine that question because the delegate's decision was invalid by reason of another breach of statute amounting to material jurisdictional error ([25]).

Failure to have regard to all the information

The Court noted that parts of the pdf document and the s 56 response were in English. The untranslated parts of the documents 'appeared to be at least consistent with the plaintiff's descriptions of their contents' contained in parts of the documents for which the plaintiff had provided an English translation.

While it would have been open to the delegate to afford minimal weight to those parts of the documents (and recordings) that were not translated into English, it was not open to the delegate to treat all documents involving untranslated components as having not been "included as part of this assessment" (as the delegate's reasons state). Sections 54 and 56 of the Act obliged the delegate to have regard to those documents. They could not be wholly put aside ([26]).

The Court found that the delegate had made jurisdictional errors in failing to comply with ss 54 and 56. The errors were material as there was 'a reasonable possibility that the decision that was in fact made could have been different if the error(s) had not occurred' ([29]).

Orders

The Court granted an extension of the statutory period for the commencement of the proceedings; certiorari was issued to quash the delegate's decision; and mandamus was issued to command the Minister to redetermine the visa application.

[*Guide to Tribunal Practice 6th ed* [3.3.3], [5.8], [6.2.12.1]]

The *Harman* obligation in tribunal proceedings

Where a person is compelled by a court rule, order or direction to disclose documents or information for the purpose of a particular legal proceeding, the party who obtains the disclosure must not use it for any other purpose without the leave of the court through which the materials were obtained. This is known as the *Harman* principle or obligation (so-called after the UK House of Lords decision in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280).

While the *Harman* obligation has been described as an implied undertaking, a majority of the High Court of Australia in *Hearne v Street* (2008) 235 CLR 1125 [102] said that it was more accurately characterised as:

an obligation of law arising from circumstances in which the material was generated or received ([102] (Hayne, Heydon and Crennan JJ))

The majority identified the wide classes of material to which the *Harman* obligation may apply as including:

documents inspected after discovery, answers to interrogatories, documents produced on subpoena... documents produced pursuant to a direction from an arbitrator... witness statements served pursuant to a judicial direction and affidavits... [96].

The majority said that where the obligation applies, it is a contempt of court for a person to knowingly use the material for a purpose other than that of the legal proceeding for which it was disclosed ([103]).

In tribunals, the *Harman* principle may apply in an administrative or a civil proceeding, where a party seeks to use documents or information obtained under legal compulsion in another proceeding.

In administrative proceedings, the *Harman* obligation is subject to an overriding statutory obligation, such as where a government agency is obliged to notify the Children's Guardian of any information relevant to whether a person poses a risk to the safety of children (*FWI v Children's Guardian* [2026] NSWCATAD 8). In *La Mancha Africa SARL v Commissioner of Taxation* [2021] FCA 1564, Davies J held that the *Harman* obligation did not constrain the Commissioner of

Taxation from using documents obtained under subpoena in the lawful exercise of his statutory functions and powers.

The following case is an example of how the *Harman* obligation can arise in tribunal proceedings and the criteria to be applied in deciding whether to grant a release or partial release of the obligation.

H v C [2025] WASC 446

Supreme Court of Western Australia (Whitby J), 16 October 2025

[The names of the parties in the following case are redacted in the official report].

'The father' had a major stroke which led 'the son' to apply to the Supreme Court of Western Australia for declarations as to whether the father had capacity to appoint and remove directors of a company ('the company proceeding'). At an interlocutory hearing, the court at the son's request issued a subpoena to a third party to produce medical records and reports relating to A's medical diagnosis, treatment, capacity and prognosis ('Subpoena Documents'). The son was duly provided with copies of the Subpoena Documents in his capacity as a plaintiff in the company proceeding.

Separately, the son applied to the State Administrative Tribunal ('tribunal') under the *Guardianship and Administration Act 1990* (WA) ('the Act') seeking guardianship & administration orders with respect to the father ('the guardianship proceeding').

The son then sought an order from the Court to partially release him from the *Harman* obligation in relation to the Subpoena Documents, so that he might be permitted to refer to and use the documents for the purposes of the guardianship proceeding. The application was opposed on privacy grounds by one of the co-defendants ('the Objector'). The father neither consented to nor objected to the proposed order.

The Court's consideration

Whitby J observed that the court can dispense with or modify the *Harman* obligation if it finds special circumstances, the most important consideration being 'the likely contribution of the document or documents to achieving justice in the other proceeding' ([14]– [15], citing *Murray Riverside Pty Ltd v Toscana (WA) Ravenswood Estate Pty Ltd* [2022] WASCA 67

[73]-[76]). His Honour found that the Subpoena Documents:

contain important information relevant to [the father's] past and current ability to make reasonable judgments concerning himself and his estate by reason of mental disability ([17]).

His Honour rejected the Objector's submission that the proposed modification of the *Harman* obligation would destroy the father's privacy. He found that no party would thereby gain access to the documents who did not already have them, and that the documents were protected by statute from disclosure outside the tribunal ([20]-[21]).

The Court held that there were special circumstances justifying the modification of the *Harman* obligation where the subpoena documents were reasonably required for the purpose of doing justice in the SAT proceeding.

Order

The [son] was permitted to use the Subpoena Documents in the guardianship proceeding.

Guide to Tribunal Practice 6th ed [5.6.8]

Duty to self-represented party – civil cases

In the case reported below, the New South Wales Court of Appeal discussed the authorities on the scope of the duty of a court in civil proceedings to assist an unrepresented litigant. The Court expressly disagreed with a recent statement of Adamson JA in *MTH v State of New South Wales* [2025] NSWCA 122 [66].

***Chalik v Chalik* [2025] NSWCA 136**

New South Wales Court of Appeal (Bell CJ, Payne and Free JJA), 19 June 2025

In 1998 and 2013 a woman ('the deceased') executed two wills. The 1998 Will split her estate equally between her two sons, while the 2013 Will left her entire estate to one son ('the Appellant') and made him sole executor of the estate. He commenced proceedings for probate of the 2013 Will. The other son ('the Respondent') opposed the application. Admitting the 1998 Will to probate, the primary judge held that the 2013 Will was invalid. Her Honour found that the deceased lacked testamentary capacity to make the 2013 Will due

to impaired cognition and had not known and approved its terms.

The Appellant appealed the primary judgment, arguing that the judge applied the incorrect test to determine testamentary capacity. The Appellant also relied on the ground that the primary judge denied him procedural fairness by considering the deceased's testamentary capacity.

Dismissing his appeal, the Court of Appeal held that the primary judge did not err in finding that the deceased lacked testamentary capacity to make the 2013 will. The Court further held that the primary judge did not deny the Appellant procedural fairness in considering the Respondent's Amended Defence that expressly raised the question of lack of testamentary capacity. The Court held that it was at all times clear and known to the Appellant that the question of the deceased's testamentary question was in issue ([60]).

Scope of the court's duty to a self-represented party

The Court then turned to the Appellant's submission on appeal that parts of the Amended Defence should have been struck out by the court below. No such application had been made at that time. The Court rejected the Appellant's submission that the primary judge had breached her duty to him as a self-represented party in failing to make orders for the Amended Defence to be re-pleaded. In its review of the authorities on 'the extent, if any, of assistance which a trial judge or appellate court should afford to an unrepresented litigant in civil proceedings', the court approved the following statements:

- 'An unrepresented litigant should be provided with sufficient information about the practice and procedure of the court to ensure a fair trial takes place' without disturbing 'the balance which the rules of practice and procedure are designed to afford both parties' ([69], emphasis in original).
- 'The duty of a trial judge to assist an unrepresented litigant "does not extend to advising the litigant as to how his or her rights should be exercised"' ([70], quoting *Bauskis v Liew* [2013] NSWCA 297 [69] (Gleeson CJ)).
- A trial judge does not "have a duty to advise [a self-represented litigant] as to the inadequacies in their evidence having regard to the pleaded case or to adjourn the proceedings in order to permit them further

time to re-plead their case...” ([70], quoting *Cicek v Estate of the Late Solomon* [2014] NSWCA 278 [13] (Ward JA)).

- “The role of a judge in a civil case... is to act as the umpire and he or she has no active role such as may occur under our system in criminal proceedings where a citizen is facing the State as prosecutor” ([71], quoting *Rowett v Westpac Banking Corp* [1993] NSWCA 240 (Handley JA)).
- “The court must be patient in explaining [the rules] and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed...” ([68], quoting *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal (NSW), 16 June 1986, unreported), 25 (Samuels JA), approved by the High Court in *Nobarani v Mariconte* (2018) 265 CLR 236 [47]).

The Court expressed its disagreement with the views of Adamson JA in *MTH v State of New South Wales* [2025] NSWCA 122 [66] that “the primary judge *had an obligation to ensure* that [an unrepresented party] did not because of lack of legal skill, fail to claim rights or put forward legal arguments” ([their emphasis]). Their Honours considered that the expression “an obligation to ensure” ‘significantly overstates a court’s responsibility’ and is not supported by the High Court of Australia’s decision in *Nobarani v Mariconte* (2018) 265 CLR 236 ([68]).

Guide to Tribunal Practice 6th ed [5.5.8], [5.5.9]

Duty to self-represented party – statutory provisions

In the following case, the NCAT Appeal Panel accepted that the principles endorsed by the Court of Appeal in *Chalik v Chalik* were applicable to NCAT proceedings, both civil and administrative, and that the tribunal’s statutory obligations under ss 36 and 38(5) of the NCAT Act are to be interpreted in the light of those principles.

The Appeal Panel closely examined the conduct of the hearing and the tribunal’s interactions with the appellant, concluding that the tribunal had not breached its duty to him as a self-represented party in administrative review proceedings.

McNeill v Clarence Valley Council [2025] NSWCATAP 184

NCAT Appeal Panel (Armstrong J, P, K Robinson, PM), 5 Aug 2025

The appellant appealed from a decision of the NSW Civil and Administrative Tribunal (‘the tribunal’) affirming a decision of the respondent to refuse his application for access to certain documents under the *Government Information (Public Access) Act 2009* (NSW) (‘GIPA Act’).

By appeal ground 5, the Appellant contended that the tribunal committed a material breach of procedural fairness in the conduct of the hearing and contravened ss 36 and 38(5) of the *Civil and Administrative Tribunal Act 2013* (NSW) (‘NCAT Act’) by curtailing his cross-examination and oral submissions. He contended that the tribunal:

failed in its obligation to assist him; contravened s 38(5)(c) of the NCAT Act by failing to ensure he had a reasonable opportunity to be heard; and failed to act justly in accordance with s 36 of the NCAT Act by [disallowing some of his questions in cross-examination and his oral submissions]’ ([193] (emphasis added)).

The Panel’s consideration

The panel noted that appeal ground 5 raised the question of the extent of the tribunal’s duty to assist a self-represented party in administrative proceedings at first instance. The panel took the principles laid down by the NSW Court of Appeal in *Chalik v Chalik* to be applicable to administrative and civil proceedings in NCAT. Moreover, the principles set out in the NCAT Act at s 38(5), and s 38(2) are to be interpreted with reference to the principles enunciated in *Chalik v Chalik* ([189]).

In finding that appeal ground 5 was not made out, the Panel made the following findings and comments in relation to the alleged breaches of procedural fairness and the NCAT Act.

- There was no failure by the Senior Member constituting the tribunal to accord procedural fairness to the appellant in the conduct of the hearing ([210]). The Senior Member explained the limitations of NCAT’s jurisdiction to the appellant and outlined for him the issues for determination. The transcript of the hearing did not support the appellant’s claim that he was prevented from asking questions in cross-examination that were relevant to an issue for determination. The Senior Member

gave reasons for disallowing certain questions ([208], [229]). She asked the appellant on several occasions if he had any further questions for the witness ([209]).

- Regardless of the appellant’s status as a self-represented party, there was no failure by the tribunal to comply with the obligation in s 38(5)(a) to ensure that the parties understood the nature of the proceedings. The Senior Member took reasonable steps to ensure that the appellant understood the issues for determination by the tribunal. [214]).
- The appellant had not made out a case that the tribunal failed, when requested to do so, to explain aspects of procedure or any decision or ruling, as required by s 38(5)(b) of the NCAT Act ([213]).
- The tribunal did not contravene its duty under s 38(5)(c) of the NCAT Act to afford him a reasonable opportunity to be heard and have his submissions considered ([225]). The tribunal was under no obligation to allow him to make oral submissions on matters that lay outside its jurisdiction or were not relevant to the issues that the tribunal was required to determine ([222]-[224]).
- In support of its conclusion that the tribunal did not breach its obligation under s 36 of the NCAT Act to act ‘justly’, the Panel referred to the above findings.

Orders

Leave to appeal was granted and the appeal was allowed on other grounds, not including ground 5. The tribunal’s decision was set aside and the matter remitted to the tribunal for reconsideration with directions as to evidence.

Procedural fairness – departure from representation

In *Re Minister for Immigration and Multicultural and Indigenous Affairs: Ex parte Lam* [2003] HCA 6 (*Lam*), Gleeson CJ described a particular scenario in which a hearing process lacks procedural fairness. A decision maker makes a representation or statement of intention to follow a specified procedure, in reliance upon which a party refrains from putting material

before the decision-maker. If the decision maker then departs without notice from the expected procedure, and this departure creates ‘practical injustice’ such as by depriving the party of an opportunity to rely on the material, there is a breach of procedural fairness (*Lam* [36]-[37]).

In the case reported below, the tribunal received written witness statements provisionally, indicating that parties’ objections would be heard later. Without giving the expected opportunity, and in denial of the applicant’s request to call further evidence, the tribunal proceeded to affirm the decision under review.

Timing pressures played a role in the tribunal’s decision to dispose of the application without hearing the objections and the further evidence. The tribunal was mindful that the statutory 120-day period for it to give its decision would shortly expire. Having read the witness statements, the tribunal said it was not minded to permit the parties to call further evidence going beyond the scope of the statements. Such evidence, it said, would not assist the tribunal to overcome its ‘provisional view’ that it lacked power to make the proposed conditions ([113]).

***IP Property Botany Street Pty Ltd v Territory Planning Authority* [2025] ACTSC 346**

**ACT Supreme Court (Muller AJ),
5 August 2025**

The applicant (‘developer’) applied to the ACT Civil and Administrative Tribunal (‘tribunal’) for review of a decision of the respondent (‘Authority’) to refuse a development application, which the developer sought to have approved subject to proposed conditions. While the tribunal had power to approve the development application subject to conditions, the Authority argued that the proposed conditions were of such a nature as to require the lodging of an amendment to the development application. The application was to be determined under transitional provisions to a repealed Act which precluded such amendment.

At the start of the oral hearing, the tribunal expressed a provisional view that, on the written material before it, it appeared that the proposed conditions went beyond the tribunal’s power to impose ([22]). The developer asked the tribunal to hear and consider the written and oral evidence, including that of expert witnesses,

before determining the application ([54]). The tribunal heard oral submissions but did not allow the parties to object to the written evidence or to call further evidence.

In its reasons, the tribunal indicated that it was mindful that the 120-day statutory period for the tribunal to give its decision was due to expire in ten to twelve days ([64]). While the period could be extended at the discretion of the President under s 22P(3) of *ACT Civil and Administrative Tribunal Act 2008* (ACT) ('ACAT Act'), the tribunal considered that there 'would be no prospect' of such an extension being granted, and therefore 'no prospect of the tribunal being in a position to make the conditions requested' ([67], quoting transcript). The tribunal then affirmed the decision under review.

The Court's consideration

The Court granted the developer leave to appeal and allowed the appeal on the grounds of material errors of law by ACAT:

1. The tribunal erred by denying the developer procedural fairness. The tribunal received written evidence provisionally and subject to objection, indicating that there would be further consideration of the material at a later time. The tribunal's reasons showed that it then took that material into account, denying 'the applicant's request to hear all of the evidence before forming a concluded view about its capacity to impose suitable conditions' ([113], [115]). While the tribunal allowed oral submissions, it did not inform the parties what it relied on in the filed material to form its 'preliminary view' that it lacked power to impose the conditions. 'The applicant was denied a reasonable opportunity to respond to [the tribunal's] preliminary view' that the approval subject to the proposed conditions was 'incapable of being given proper shape and coherently understood' ([117], [118]).
2. His Honour found that there was a constructive failure by the tribunal to exercise jurisdiction.

The tribunal's conclusion in this case that there was, as a consequence of the time limitation, an inevitability as to the outcome of the proceedings was, in my view misconceived. In confirming the [Authority's] decision on the basis of the lack of any prospect of an extension to the time period for determination of the application, the Tribunal, in effect, failed to determine the claim... ([135]).

Orders

The application for leave to appeal was granted, the appeal was allowed, the orders of the tribunal were set aside and the matter was remitted to the tribunal to be heard and determined according to law 'with the hearing of such further evidence as the parties may wish to lead' ([138]).

Guide to Tribunal Practice (6th ed) [1.6.2], [3.3.3]

Procedural fairness — rushed hearing

In high-volume jurisdictions, tribunal members can find themselves under pressure to complete a hearing within the time allocated. In the case reported below, a judge was critical of the tribunal's pre-emptive dismissal and failure to deal with the applicant's submissions. The half-hour time slot allocated for the hearing did not allow for a full airing of the issues in the complex dispute. His Honour observed that the hearing 'should have been adjourned and completed on a different date' ([166]).

The case raises questions about the practicalities of adjourning the hearing of complex matters. In busy jurisdictions, hearings can be listed months in advance to 100% capacity, with the consequence of a long delay to complete an adjourned hearing.

In this case there were indications of complexity that could have been taken into account when deciding how much time to allocate for hearing the matter. These included a history of disputes between the parties in the tribunal, and the nature of the tenant's arguments ([124]).

Mazi v Kao (No 3) (Notice to Vacate) **[2025] VSC 630**

Supreme Court of Victoria (Finanzio J), 7 October 2025

The Owners of a rental property ('landlord') gave a tenant notice to vacate under s 91ZZB of the *Residential Tenancies Act 1977* (Vic) ('RTA') on the ground that the property was to be sold with vacant possession. When the tenant failed to leave within the notice period, the landlord applied to the Victorian Civil and Administrative Appeals Tribunal ('tribunal') for a possession order pursuant to RTA s

322(1). The tenant contested the notice's formal validity, disputed that the landlord had a genuine intention to sell the property, and argued that in the circumstances it would not be reasonable and proportionate to evict her.

The tribunal delivered oral reasons *ex tempore* and later provided written reasons at the tenant's request. The tribunal found that the notice to vacate was valid, rejected the tenant's argument that the landlord lacked a genuine intention to sell, and found that it was reasonable and proportionate to make an order for possession. Pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act), the tenant sought the Court's leave to appeal the tribunal's decision to grant a possession order.

The Court's consideration

An appeal under VCAT Act s 148 is for an error of law. While the unrepresented tenant's grounds of appeal were 'inexpertly drawn', Finanzio J understood that the substance was the tenant's complaint that her arguments before the Tribunal were either not understood, not addressed or not dealt with fairly.

Whether that complaint is framed as a denial of natural justice, or as a failure to actively engage with [her] case—it is capable of describing legal error of a kind which falls within s 148(1) of the VCAT Act ([88]).

Allowing the tenant's appeal from the possession order granted by VCAT, Finanzio J found that VCAT 'was dismissive of the applicant's claims and did not engage with them in any meaningful way' ([162]). 'It was apparent that the Tribunal was rushed, and that it had not reviewed all of the material provided by the Application, or if it had, had not understood that material' ([200]). The tenant 'was not provided with an opportunity to fully ventilate the matters on which she sought to rely, or to properly interrogate the matters advanced against her ...' ([165]). The tribunal had 'pre-emptively dismissed one of the main planks of the [tenant's] case' and did not engage with her arguments ([166]). The errors were material as the tenant was thereby 'deprived of a realistic possibility of a different outcome' ([84]).

Finding that the notice to vacate was invalid for breach of a mandatory statutory requirement, and that VCAT had failed to provide a fair hearing and to engage with the tenant's arguments ([117], [220]), the Court set aside

the possession order and dismissed the landlord's application for a possession order.

Time constraints

Finanzio J observed that the tribunal's unwillingness to allow the tenant to develop her case:

may well have been a function of the time allocated to the hearing by the tribunal, and its insistence upon progressing the matter quickly to meet the allocated timeframe ([168]).

It appeared that only a half-hour had been set aside for the tribunal hearing ([161]). In His Honour's view, it should have been evident that this was a complex case which required a closer examination of the factual issues in dispute. Even in this high-volume jurisdiction, the duty to provide efficient resolution of disputes is 'qualified by the need to ensure a proper consideration of the matters before the Tribunal' ([166]). His Honour added:

If the scheduled amount of time for the hearing was or became insufficient to properly deal with the matters raised, it should have been adjourned and completed on a different date' ([166])

Orders

Leave to appeal was granted, the appeal was allowed, the tribunal's decision was set aside, the application for possession orders was dismissed.

Guide to Tribunal Practice 6th ed [3.3], [5.5.9]

Prior tribunal decision — Consistency and comity

Tribunals place value on consistency in their decision-making. A number of tribunal Acts list consistency among their objects. The QCAT Act s 4(d) specifies that to achieve the objects the tribunal must ensure that like cases are treated alike.

In the judicial context, a principle of judicial comity applies to a court's consideration of a prior decision made at an equivalent level of the court.

There is no rule of law which binds a Judge to abide by the decision of another judge of coordinate jurisdiction; but a Judge of first instance will, as a matter of judicial comity, usually follow the decision of first instance in the same jurisdiction, unless convinced that the judgment was wrong (*Michael Realty Pty Ltd v Carr* (1975) 2 NSWLR 812, 820 (Holland J)).

In *Undershaft (No 1) Ltd v Commissioner of Taxation* [2009] FCA 41 (*'Undershaft'*), Lindgren J enunciated a four-step method to guide himself in considering the application of judicial comity ([68]-[73]). As noted by Porter DCJ in *Vukovic v Browning* [2022] QDC 279 [118], Justice Lindgren's method has been frequently cited and applied in the federal and state courts.

Although the principle of judicial comity does not apply to tribunals, there are good reasons for a tribunal to consider following a prior decision made at an equivalent level in the tribunal unless persuaded that the earlier decision is wrong (*Australian Postal Corporation v Williams* [2024] NSWCATAP 168 [31]).

In *TMC v QPS* (reported below), QCAT acknowledged Justice Lindgren's method in *Undershaft* in considering whether it should follow a decision of QCAT made at first instance.

The first step in Justice Lindgren's method is for the court to undertake its own independent consideration of the issues for decision. If its independent conclusion is consistent with the prior decision of the co-ordinate court, the prior decision provides a supporting authority (*Undershaft* [70]). The second to fourth steps apply only if the prior decision is found to be inconsistent with the independent conclusion. In *TMC v QPS* the analysis ended with step one, as the prior decision was found to be consistent with the tribunal's independent conclusion in the instant case.

TMC v Queensland Police Service – Weapons Licensing [2025] QCAT 91

QCAT (Member S Deane), 10 Feb 2025

TMC applied to QCAT for review of the decision of the respondent ('QPS') under s 29 of the *Weapons Act 1990* (Qld) ('WA') to revoke TMC's weapons licence on the ground that, in considering the public interest, TMC was no longer 'a fit and proper person to hold a licence' due to it not being within the public interest (a mandatory consideration under WA s 10B(1)(e)). To support that conclusion, QPS relied solely upon TMC's recent conviction and \$1500 fine (although no conviction was recorded) upon his plea of guilty to drug-related offences.

Section 12(3) of the *Penalties and Sentences Act 1992* (Qld) ('PSA') provides that 'a conviction without recording the conviction is taken not to

be a conviction for any purpose'. The tribunal noted that there were conflicting decisions from QCAT on the effect of PSA s 12(3) with respect to whether offending may be taken into account in weapons licensing decisions where no conviction has been recorded ([13]).

In its submissions, QPS relied upon *Liseo v QPS* [2006] QDC 496 in which the PSA and the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) were read together so as to permit consideration of charges without a conviction in circumstances where the applicant had deliberately given a false answer to a question in an application.

TMC relied upon the decision of QCAT in *XPR v QPS - Weapons Licensing* [2025] QCAT 1 (*'XPR v QPS'*) which expressly considered the application of s 12(3) of the PSA in a weapons licensing decision. In that case, QCAT concluded (at [87]) that 'regard cannot be had to convictions for offences for which no conviction has been recorded or the facts and circumstances of those offences.' *XPR v QPS* was a decision of QCAT at first instance constituted with the President Mellifont J and Member Olding).

At [14]-[21], the tribunal considered the following:

- There were no distinguishing factors in the circumstances of TMC and the applicant in *XPR v QPS* ([16]).
- There was a distinguishing factor in the circumstances of the applicant in *Liseo v QPS*, as in the instant case the QPS presented no evidence that TMC had provided false or misleading information ([18]).
- The tribunal was not bound by the tribunal's interpretation in *XPR v QPS*, a first instance decision of the tribunal.
- Sections 3(c) and s 4(d) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) include consistency and treating like cases alike among the objects of the Act.
- The tribunal acknowledged the suggested approach to reconciling the principles of judicial comity and adjudicative independence adopted by Lindgren J in *Undershaft* and applied by Porter DCJ in *Vukovic v Browning* [2022] QDC 279 [117]-[123], [142]-[150]).

- After considering the issues for decision and making its own assessment of the persuasiveness of the reasoning in *XPR v QPS* (taking into account it was a decision of the President), the tribunal ‘found nothing in the reasoning in *XPR* which indicates to me that it is clearly wrong and ought not to be followed’ ([20]).
- The tribunal found that it was not permitted to have regard to the drug offences, TMC’s plea of guilty or the circumstances leading to the charges ([21]).

Order

The decision under review was set aside.

Subsequently to the decision in *TMC v QPS*, the question of statutory interpretation in issue was answered in *Commissioner of Police v XPR* [2025] QCA 93, in which the Court of Appeal upheld QCAT’s decision in *XPR v QPS*.

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