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Tribunal Case Update

In *Sunshine Loans v ASIC*, a full bench of the High Court clarified the operation of the apprehended bias rule in civil penalty proceedings where a judge who had criticised a party's witness in giving judgment on liability embarks on the penalty hearing in which the party proposes to rely on the same witness.

In *Vu v Minister [etc]*, a judge held that there is no general rule as to whether, on a remittal without direction, the tribunal should be differently constituted for the new hearing. While the fact that the tribunal was constituted with the same member who had previously decided the matter adversely to a party might give rise to an apprehension of bias, the apprehension was held not to be reasonable.

In *Draper v Victorian Building Authority*, the Victorian Court of Appeal held that in undertaking de novo merits review VCAT could exercise the powers of the primary decision maker only for the purpose of reviewing the decision and not to undertake broader inquiries.

In *Precious Family Day Care v Secretary, Department of Education* the relevant legislation was amended after the AAT conducted a hearing on a review, and before it published its decision. The Full Court of the Federal Court followed *Khalil v Minister for Immigration [etc]* [2025] HCA 33 in holding that ordinarily the tribunal applies the law in force at the date of its decision. In this case that principle was displaced by a transitional provision.

In *Zielinski v Courts Administration Authority*, the tribunal's powers on merits review were limited with respect to the class of decision. The tribunal could not substitute its own decision for the decision under review, nor review a fresh decision made following a remittal with recommendation.

In *Ojala v Haslmayer*, the NCAT Appeal Panel considered whether, in refusing to make a factual inference that a party asked it to make, the tribunal had reached a conclusion 'against the weight of the evidence'.

In *Veterinary Practitioners Board of NSW v Kovac*, the NSW Court of Appeal held that NCAT failed to apply the correct approach to determining whether the Board's failure to comply with a statutory procedure in its investigation deprived NCAT of jurisdiction to determine the Board's application for a disciplinary finding against a vet.

In *Sheehan v Wilson*, the Human Rights Review Tribunal (NZ) determine that administrators of social media accounts are liable for breaches of privacy law in dealing with personal data even if the collection is undertaken by Facebook.

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This issue includes a note on the report of a Judicial Conduct Panel in New Zealand on whether a breach of comity by a judge amounts to 'misbehaviour' warranting consideration of removing the judge from office.

Apprehended bias: two-stage hearing

In Issue 2 of 2025 of the Bulletin (p 7) we reported the decision of the Full Court of the Federal Court in *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [2025] FCAFC 32. The case concerned the application of the principles of apprehended bias to a civil penalty hearing which, as is common in such proceedings, was split into two stages: a first stage to determine liability and, if necessary, a second stage hearing at a later date to determine penalty.

In the liability judgment, the judge made adverse findings about the credibility of a witness whom SunshineLoans intended to call to give further evidence at the penalty hearing. Upon learning this, the judge recused himself from the penalty hearing. On appeal, the Full Court of the Federal Court by majority overturned the judge's recusal decision and remitted the proceeding to him to determine the penalty.

The High Court of Australia granted special leave to appeal the Full Court's decision and dismissed the appeal, holding that no reasonable apprehension of bias arose in the circumstances.

In upholding the Full Court majority decision, the ruling of the High Court full bench reinforces the principle that civil penalty proceedings should ordinarily be heard by the same trial judge at both the liability and the penalty stages. The High Court makes it clear that findings properly made by the judge in determining liability, even if they involve 'robust' adverse assessments of the credit of a witness, do not disqualify the judge from conducting a penalty hearing in which the witness will testify again on issues relevant to penalty.

All judges agreed that, in assessing the reasonableness of an apprehension of bias, the fair-minded lay observer is credited with awareness of 'the relevant legal, factual and statutory context' which *includes* awareness that findings essential to the liability judgment are final and, so far as relevant to the second stage, are binding upon the judge hearing the second stage.

The decision is relevant to the conduct of tribunal proceedings under a range of regulatory statutes, including occupational disciplinary proceedings, where the practice of splitting the liability and penalty stages is common.

SunshineLoans Pty Ltd v Australian Securities and Investments Commission [2026] HCA 8

High Court of Australia (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), 18 March 2026

The regulator, the Australian Securities and Investments Commission ('ASIC'), alleged that SunshineLoans Pty Ltd ('SunshineLoans') had charged prohibited fees to borrowers for an alteration to the loan repayment schedule, in breach of civil penalty and other provisions of the *National Consumer Credit Protection Act 2009* (Cth) ('the Act'). ASIC sought a declaration of contraventions and an order that SunshineLoans pay a pecuniary penalty. An order was made in accordance with r 30.01(1) of the *Federal Court Rules* to hear the proceeding on liability separately from the hearing on penalty.

Following the liability hearing, the primary judge found all the alleged contraventions were established. In the liability judgment, His Honour made findings that were strongly critical of SunshineLoans, and in particular made adverse comments about a director, Mr Powe, whom SunshineLoans had called as a witness. The judge's comments included that parts of Mr Powe's evidence were 'unsatisfactory', 'preposterous', were not given 'in an honest manner', and were given 'in the manner of someone who had been schooled to advance a particular theory'.

SunshineLoans proposed to call Mr Powe to give further evidence at the penalty hearing. It asked the judge to recuse himself from the penalty hearing, arguing that a reasonable apprehension of bias could arise on the basis that the language used by the primary judge about Mr Powe revealed an animus or antipathy towards SunshineLoans ('the broad argument'). In the alternative, Sunshine Loans argued that His Honour's adverse comments about Mr Powe's credibility revealed a prejudgment with respect to the credibility of Mr Powe and the evidence that he would give at the penalty hearing ('the narrow argument'). The judge accepted the narrow argument and recused himself from the penalty hearing ([31]).

Giving judgement on an appeal by ASIC, the Full Court of the Federal Court by majority held that the recusal was not reasonable in the circumstances, allowed the appeal and remitted the proceeding to the judge to conduct the penalty hearing. The High Court granted SunshineLoans special leave to appeal. The appeal was heard by a full bench of seven justices.

The High Court's consideration

All justices dismissed the appeal, holding that no reasonable apprehension of bias arose from the liability judgment on the broad argument (that is, arising from a possible antipathy to SunshineLoans) ([52]), nor on the narrow argument (that is, prejudgment of the credibility and character of Mr Powe as a witness) ([53]-54].

The justices applied the principles laid down in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [6] for determining whether a judge is disqualified for apprehended bias. The test is whether '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 is required to decide'. As refined in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at 163 [38], the application of the test requires analysis in three steps:

1. Identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits
2. Articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and
3. Assessment of the reasonableness of that apprehension from the perspective of the fair-minded lay observer.

In the lead judgment, Gageler CJ and Gleeson J (Steward J agreeing) found that the 'factor' for purposes of step 1 was the findings made by the primary judge concerning the credibility of Mr Powe. The case put by SunshineLoans failed to satisfy stage 2 of the analysis. There was no logical connection between the judge's findings in the liability decision and the anticipated deviation from deciding the penalty question on its merits ([5], [48], [50]).

In considering SunshineLoans' argument as to the 'logical connection' required by step 2, Their Honours considered both the broad and the narrow arguments. The broad argument identified the 'logical connection' as being that the primary judge's 'antipathy' towards SunshineLoans might cause him to deviate from deciding the penalty question on its merits. Their Honours held that the fair-minded lay observer is taken to know that the primary judge was required to make a final determination of the issues presented to him at the liability stage. The primary judge's 'careful but firm rejection of Sunshine Loans' case, albeit expressed in strong terms in parts' did not demonstrate antipathy ([52]).

The narrow argument also failed. The primary judge's findings relating to Mr Powe's evidence were confined to the issues presented to him on liability which were finally determined by him ([53]). The findings provided no basis for a reasonable apprehension that the primary judge would not properly evaluate Mr Powe's further evidence at the penalty stage when determining penalty ([54]). Their Honours added that to take into account at the penalty stage findings on the credibility of witnesses made at the liability stage, to the extent the findings are relevant to the determination of penalty, 'is not a departure from, but rather part of, determining the case on its legal and factual merits' ([50]).

Other justices elaborated on this point. Edelman J said that 'Any judge hearing the penalty aspect of the proceeding, including the trial judge, would be bound by [the] finding' which rejected evidence from the witness in the liability judgment ([116]; see also ([196]-[197] (Beech-Jones J), [137]-[138] (Jagot)). No question of prejudgment arose in the penalty stage because the liability judgment was a final determination on that question and could not be put in issue at the penalty stage (Edelman J [116]).

Gordon J (Beech-Jones and Steward JJ agreeing) said that the fair-minded lay observer is taken to know that 'the primary judge was not required to approach the penalty stage with a "state of suspended judgment"' of the findings at the liability stage' ([72]-[73]). Her Honour distinguished cases such as *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 in which an apprehension of bias was held to arise where a judge who has previously made findings concerning a witness' credibility was subsequently called upon to judge the witness' credibility in a *different* case ([71]); see also [198] (Beech-Jones J), [158] (Beech-Jones J)).

Gordon and Beech-Jones JJ reasoned that Sunshine Loans had articulated a logical connection for the purposes of step 2 of the *Ebner* analysis, but only so far as the broad argument was concerned. The connection was that it was said that the judge had revealed animus against SunshineLoans by making gratuitous criticisms of its witness ([64], [190]). However, that argument failed at the third step of the analysis, which required an assessment of the reasonableness of the apprehension of bias. The judge's findings were not gratuitous but 'were confined to the evidence given by the witness at the liability hearing in respect of the issues in dispute at the liability hearing' ([77]-[89], [201]; see also [163], [166]-[168] (Jagot J)).

Held: Appeal dismissed

Guide to Tribunal Practice 6th ed [3.4.1], [3.4.4.2], [3.4.8]

Apprehended bias: constitution of tribunal following remittal

In *Vu v Minister for Immigration and Multicultural Affairs* (noted below), Shariff J considered the application of the test for apprehended bias where, on remittal, the tribunal is constituted with the same member who previously determined the matter. In Australia, reviewing courts sometimes direct that the remitted proceeding is to be heard by the same, or a different member or panel.

In the *Vu* case the Federal Court set aside an AAT decision for error of law and remitted the proceeding to the ART with no such direction.

His Honour found that in cases such as the one before him, the authorities provide no general rule as to whether the matter should be remitted for hearing by the same member or panel or by a reconstituted tribunal. The application of the bias rule requires that each case be considered individually.

The case also provides an example of a bias analysis in which it was held that a fair-minded lay observer might apprehend bias, but the apprehension was not reasonable. In reaching this conclusion, His Honour credited the observer with awareness of 'the relevant legal, factual and statutory context' ([65]).

Vu v Minister for Immigration and Multicultural Affairs [2026] FCA 413

Federal Court of Australia, Shariff J, 10 Apr 2026

A delegate of the respondent Minister decided not to revoke the cancellation of Mr Vu's visa under s 501CA(4) of the *Migration Act 1958* (Cth) ('the non-revocation decision'). On review, the Administrative Appeals Tribunal affirmed the delegate's decision ('the first review decision'). The Federal Court quashed the first review decision on the ground of error of law in failing to take into account a mandatory consideration and remitted the matter to the Administrative Review Tribunal to determine. Mr Vu's application was then heard by the same member who had made the first decision. The tribunal again affirmed the non-revocation decision ('the second review decision').

Mr Vu applied for judicial review of the second review decision on the ground that it was affected by apprehended bias. He argued that in certain cases (e.g., *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) FCR 300 (‘*Eshetu*’) 313-314 (Davies J); *MZZXM v Minister for Immigration and Border Protection* [2016] FCA 405 (‘*MZZXM*’) [109]-[122]), the Court had recognised that where a judge or tribunal member had reached an adverse view of the applicant’s case in the decision under review, a reasonable apprehension of bias would arise if the same judge or member were to hear the proceeding on a remittal ([52]-[53]).

Is there a general rule for reconstitution on remittal?

Shariff J found that the authorities lay down no universal rule about how a tribunal should be constituted to determine a remitted proceeding ([66], [71]). He distinguished *MZZXM* on the basis that it was a case in which the AAT member had earlier rejected the credibility of parts of the applicant’s evidence ([71]). The question of remitter in the judgment of Davies J in *Eshetu* was *obiter* and was not fully considered by the other members of the Full Court ([71]).

His Honour cited with approval the remarks of Tracey and Flick JJ in *Comcare v Broadhurst* [2011] FCAFC39 [89]-[90] that circumstances may arise in which there is no reason to reconstitute the tribunal and positive advantages in remitting to the same member ([70]).

In the absence of an express order by the reviewing court, it was for the President of the tribunal to determine how the tribunal should be constituted for the remitted hearing: s 37(1) of the *Administrative Review Tribunal Act 2024* (Cth) ([66]).

Reasonableness of the apprehension of bias

His Honour considered whether a reasonable apprehension of bias arose from the constitution of the tribunal by the same member who had decided the first review decision ([72]).

His Honour noted that recent formulations of the *Ebner* test by the High Court set out a three-step enquiry ([59], citing *Charisteas v Charisteas* [2021] HCA 29 [11]), comprising two steps in assessing whether a reasonable apprehension of bias arises, and a final assessment as to the reasonableness of the apprehension of bias.

Applying the *Ebner* test as refined in *Charisteas*, Shariff J reasoned as follows:

1. The member’s prior determination of Mr Vu’s application for review adversely to him was the factor which it is said *might* have led the tribunal member to determine the remitted application other than on its merits ([73]).

2. The ‘logical connection’ between that factor and the apprehended deviation from assessment on the merits existed by reason of the fact that the same tribunal member was called upon to determine Mr Vu’s remitted application ([74]).

Having found that an apprehension of bias arose, the judge proceeded to assess the reasonableness of that apprehension. In assessing the reasonableness of the apprehension of prejudgment, the fair-minded lay observer is credited with awareness of ‘the relevant legal, factual and statutory context’ ([60], citing *SunshineLoans v ASIC* (reported in this issue). Therefore, the observer is taken to know that the tribunal’s role on remitter is to hear and receive evidence and submissions and to determine the matter afresh on the merits, without reliance on earlier evidence and findings ([75]-[85]).

Shariff J was not satisfied as to the reasonableness of the asserted apprehension that the member might not determine the remitted application on its merits ([87]).

The appeal was dismissed.

Guide to Tribunal Practice 6th ed [3.4.1], [3.4.5.2]

Merits review: Scope of the review

In this case an applicant sought to expand the scope of review by VCAT beyond that of the decision under review. The Court applied High Court authorities to hold that VCAT had correctly confined its review to the decision under review, being the Board’s decision following its inquiry into specified allegations.

Draper v Victorian Building Authority [2026] VSCA 64

Supreme Court of Victoria Court of Appeal (Emerton P, Lyons and Richards JJA), 14 April 2026

Mr Draper lodged a complaint with the regulator, the Building Practitioners Board ('the Board'), against a registered building practitioner ('the builder'). The Board gave the builder a notice of inquiry in respect of seven allegations of failing to comply with building laws. After conducting the inquiry, the Board found the seven allegations proven and imposed a reprimand and a fine.

In an application to the Victorian Civil and Administrative Tribunal ('VCAT') to review the Board's decision, Mr Draper argued that VCAT was not limited to the allegations in the notice of inquiry. He urged the tribunal to consider whether the Board's investigation was adequate and whether there was evidence to support other allegations that might be made against the builder.

VCAT ruled that its review was limited to a review of the decision of the Board on the seven allegations. It applied the principle accepted by the plurality in *Frugtniet v Australian Securities and Investments Commission* ('*Frugniet*') [2019] HCA 16 that the tribunal 'must address the same question the primary decision maker was required to address' ([51]). The tribunal affirmed the findings on all but one of the allegations and increased the fine.

Mr Draper sought leave to appeal to the Court of Appeal under to s 148(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act'). For leave to be granted, the Court had to be satisfied that the appeal had a real prospect of success.

The court's consideration

The Court of Appeal noted that the tribunal's functions on review were defined by s 51 of the VCAT Act and s 182A of the *Building Act 1993* (Vic) (the enabling enactment). Section 51(1)(a) of the VCAT Act provides that the tribunal, in exercising its review in respect of a decision, 'has all the functions of the decision-maker'. The provision is similar to s 43(1) of the former *Administrative Appeals Tribunal Act 1975* (Cth) which has been judicially considered by the High Court.

In *Shi v Migration Agents Registration Authority* [2008] HCA 31 ('*Shi*'), Kiefel J (Crennan J agreeing) observed that the Administrative Appeals Tribunal did not acquire all the powers of the primary decision maker, such as its disciplinary powers, but only those necessary to review its decision. The tribunal is not concerned with whether there has been any breach of the law at all by the respondent, but only whether the breaches identified by the decision maker are established [148]. Her Honour added that it is necessary to identify the decision under review precisely, because 'it marks the boundaries of the review' ([134]).

In *Frugtniet* the plurality held that in conducting its review the Administrative Appeals Tribunal 'must address the same question the primary decision-maker was required to address' and in making that decision is required to take into account the same considerations ([61]).

Based on those authorities and the decision of Ginnane J in *Draper v* VCAT [2022] VSC 486, the Court concluded that VCAT's review jurisdiction 'is in respect of a *decision*' ([63]). VCAT was correct to confine the scope of its review to the decision under review. Having regard to relevant provisions of the VCAT Act and the Building Act, the decision under review was 'the decision on the inquiry' ([63], [64], [66], citing *Shi* [147]). Referring to *Frugtniet* [51], the Court added that while VCAT in its review exercises the same functions as the Board, it could do so only for the purpose of reviewing the decision under review but not more generally ([63], [66(d)]). Its functions did not extend to

> further investigating Mr Draper's original complaint … considering additional allegations about [the builder's] conduct or his ability to practise, or reviewing the adequacy of the Boards' investigation …' ([66(e)]).

The Court refused leave to appeal, finding that none of the grounds of appeal had any prospect of success ([97]). The application was 'based on a fundamental misconception of the Tribunal's review jurisdiction' ([1]).

Guide to Tribunal Practice 6th ed [1.4.1.4], [6.2.3.1]

Merits review: Which law applies?

Many of the Australian tribunal statutes confer on the tribunal power to conduct de novo merits review in terms similar to s 43(1) of the (repealed) *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act'). The provision states:

> [F]or the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision.

In *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2025] HCA 33 ('*Khalil*'), a full bench of the High Court held unanimously that, subject to displacement by a contrary legislative provision, the tribunal's power under s 43(1) of the AAT Act required the tribunal to apply the laws governing the exercise of powers *in force at the time of the tribunal's decision*. Rejecting a contrary statement by three judges in *Frugniet v Australian Securities and Investments Commission* [2019] HCA 16 [14] ('*Frugtniet*'), the High Court in *Khalil* said:

> [20] …. The obiter statement by three of the Justices in *Frugtniet* (at [14]) that the Tribunal "should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision", is not replicated in the judgment of the other four Justices and is incorrect.

In the case reported below, the tribunal and the primary judge had relied on the remarks in *Frugtniet* [20] that were disapproved in *Khalil*. However, the result was unchanged on appeal due to the effect of a transitional provision in the amending Act.

Precious Family Day Care Pty Ltd v Secretary, Department of Education [2025] FCAFC 148

Federal Court of Australia Full Court (Wheelahan, Snaden and Meagher JJ), 24 Oct 2025

The appellant (PFDC) sought review by the AAT ('the tribunal') of the respondent's decision to refuse its application for approval as a provider of child-care services. In an appeal which ultimately reached the Full Federal Court, one issue was whether the AAT applied the legislation as in force at the relevant date for the AAT's review.

In 2022, amendments were made to Division 1 of Part 8 of *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) ('the Act'), relating to the conditions for approval of a provider of child care services. The amendments added a new independent condition for approval that the provider and the child care service must satisfy. The amendments commenced operation after the hearing but before the tribunal published its decision.

Did the 2022 amendments apply to the tribunal's review?

The tribunal (and on appeal, the primary judge) decided the case by reference to the Act as it stood before the 2022 amendments. In taking this course, the tribunal and primary judge relied upon the statement in *Frugniet* [14] where Kiefel CJ, Keane and Nettle JJ stated that the tribunal

> is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker *in accordance with the law as it applied to the decision-maker at the time of the original decision.* [Emphasis added].

Subsequently, the High Court in *Khalil* said that the obiter statement in *Frugtniet* was 'incorrect'. It held that, unless the principle is displaced by a statute, the Tribunal is 'to apply all relevant laws governing the exercise of powers and discretions in force *at the time of the Tribunal's decision* including any relevant savings or transitional provision' ([21]. (Our emphasis)).

The Full Court held that the transitional provision in s 4(1) of the 2022 Amending Act formed part of the law that was in force at the time of the Tribunal's decision on review and was determinative of the question [31]). The provision stated that the 2022 amendments applied to an application for approval of a provider that was made before commencement of the amendments but had not been determined before that commencement.

The effect of the transitional provision was that PFDC's application was to be characterised as one that had been determined at the date of commencement of the 2022 amending Act. Therefore, the 2022 amendments did not apply to the AAT's review of PFDC's application ([40]).

The Court held that the primary judge was correct to accept that the Act in the form it took prior to the 2022 amendments was the legislation to be applied in the proceedings ([41]).

The appeal was dismissed.

Guide to Tribunal Practice 6th ed [6.2.3.1], [6.3.2.2]

Editor's note on accrued rights

In neither Khalil nor *Previous Day Care* did the question of which law applies depend upon the preservation of an accrued legal right or privilege.

In *Khalil* the High Court held at [26] that the repeal or amendment of a direction made under s 499(1) of the Migration Act does not attract the operation of s 7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth) ('AI Act') because the direction is not an Act or part of an Act.

In *Previous Day Care*, no party had argued that PFDC's application for approval as a child care service gave rise to any accrued right such as to attract the operation of s 7(2)(c) of the AI Act.

Merits review with limited powers

While judicial review derives from common law, appeals are a creature of statute and can take diverse forms. One form of appeal is de novo review on the merits, for which the former Administrative Appeals Tribunal ('AAT') was both pioneer and paradigm. The functions and powers of the AAT were established by Part IV of the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') and refined through a series of decisions by the AAT, the Federal Court and the High Court of Australia. Merits review on the AAT model has been widely adopted in the tribunal Acts of the Australian states and territories. This has, to a significant extent, enabled the development of a shared Australian jurisprudence relating to de novo merits review by tribunals.

Alongside the AAT merits review model, there is variation in the powers given to administrative tribunals under legislation of the various jurisdictions. Some Acts provide for tribunals to conduct review on the merits by way of rehearing instead of de novo (see further *Guide to Legal Practice 6th ed* [1.6.1]).

The *Zielinski* case reported below deals with another variation, under which the tribunal has some of the powers of the AAT model but cannot set aside a decision nor re-exercise the power of the original decision maker. The case includes some analysis of the purposes that may be served by a limited review provision of this kind.

Zielinski v Courts Administration Authority [2026] SAET 48

South Australian Employment Tribunal (Justice S Dolphin, President), 29 April 2026

District Court judicial associates ('the associates') applied to their employer ('the Authority') for reclassification of their position from ASO level 3 to Level 4. The application was refused. The associates applied to the South Australian Employment Tribunal ('the tribunal') for external review under s 62 of the *Public Sector Act 2009* (SA) ('the first review application'). The tribunal found the decision to be unreasonable and remitted the associates' application to the Authority for further consideration, with recommendations.

On 7 May 2025 the Authority arrived at a decision to the same effect as its earlier decision. The associates filed an external review application for review of that decision ('the second review application'). The Authority argued that the tribunal did not have jurisdiction to hear the second review application.

This was the first decision on that jurisdictional question.

The legislation

Section 62(4)(c) of the *Public Sector Act 2009* ('the PS Act') defines the tribunal's functions and powers on an external review for which application is made under s 62(1). The tribunal is tasked with examining the decision under review to determine whether it is 'harsh, unjust or unreasonable'. If the decision is a 'prescribed decision', the tribunal is empowered to

i. affirm the decision,

ii. rescind the decision and substitute its own decision, or

iii. 'remit matters to the [Authority] for consideration in accordance with any directions or recommendations of the body'.

If the decision is not a 'prescribed decision', the tribunal's powers are limited to (i) and (iii).

Section 62(4a) excludes the application of s 30(1) and (2) of the *South Australian Employment Tribunal Act 2014* ('SEAT Act') to a decision of the tribunal acting as the review body under s 62. This provision has the effect of limiting the dispositive powers of the tribunal to the 'affirm' and 'remit' alternatives in s 62(4)(c)(1) and (iii) of the PS Act.

Section 62(4b) of the Act provides that a decision under s 62 may not be the subject of an application for review or an appeal to the tribunal.

The tribunal's consideration

The President observed that the scheme of s 62 was that review of a 'prescribed decision' is 'akin to what is known as merits review'. Section 62(4)(c) empowers the tribunal to consider the evidence afresh and re-exercise the powers of the Authority to substitute a decision that it considers to be the correct or preferable one ([88]). In conjunction with s 62(8), the section reserves this form of merits review for types of decision which have more serious effects on employees, such as disciplinary actions ([79], [90]).

The President found that neither the Authority's first decision nor the second decision on remittal from the first external review were 'prescribed decisions' for the purposes of s 62(4) of the Act. Therefore, the tribunal did not have power to rescind and substitute its own decision for the decision of the Authority (s 62(4)(c)). The tribunal could only affirm or remit ([52]). In either case, the tribunal did not have the function of making the decision ([96], [97]).

Section 62(4)(b) provides that a decision of the tribunal under s 62 'may not be the subject of an application for review or an appeal under pt 5 of the [SEAT Act]'. The President held that the practical effect of these provisions is 'an absolute prohibition on [the tribunal] hearing a case further, once it has been determined under s 62(4)' ([103]). The tribunal did not have jurisdiction to hear the associates' second application for external review ([108].

The purpose of the limited review

The President considered the purpose of the limited form of review allowed by s 62(4) for non-prescribed decisions. He concluded that '[the tribunal] acts as a piloting presence to guide the decision-maker to the correct outcome' ([96]). If the decision is not found to be harsh, unjust or unreasonable, it will be affirmed. In that case the tribunal provides some assurance to the aggrieved employee that the decision has been checked by an external expert ([95]).

The appeal was dismissed.

Guide to Tribunal Practice 6th ed [1.6.1]

Failure to make an inference of fact

In the following case, an appellant asked the tribunal to make a finding of fact based on an inference which she asked it to draw from primary facts. When the tribunal failed to do so, the appellant argued that its conclusion was 'against the weight of the evidence'. The Appeal Panel was not satisfied that the tribunal's conclusion was of such a character.

Ojala v Haslmayer [2026] NSWCATAP 131

NSW Civil and Administrative Tribunal Appeal Panel (Senior Members D Ziegler, H Woods), 22 April 2026

Ms Ojala ('the tenant') sought compensation from Mr Haslmayer ('the landlord'), under the *Residential Tenancies Act 2010* (NSW) ('the Act') for alleged breaches of tenancy agreement arising from the loss of a gold ring in the rented premises. The tenant alleged that the landlord had, during her extended absence, breached the Act by admitting various persons to the premises, and that the ring had gone missing during the period that those persons had access to the premises.

NCAT found that the available evidence did not establish on the balance of probabilities that the loss of the gold ring was caused by any person whom the landlord had admitted to the rented premises.

The tenant sought leave to appeal to the Appeal Panel on the ground that she may have suffered a substantial injustice because 'the decision of the tribunal was against the weight of evidence' within the meaning of cl 12(1)(b) of sch 4 of the NCAT Act. The tenant conceded that the evidence as to how the ring was taken was circumstantial but argued that the tribunal should have drawn 'the only rational inference', being that one of the persons admitted by the landlord in her absence must have taken the ring.

The Appeal Panel's consideration

The Appeal Panel observed that causation can be established by inference from other facts. The standard for an inference is one of possibility, not mere 'conjecture or speculation' ([51]). To say that the tribunal's conclusion was 'against the weight of the evidence', in the context of sch 4 cl 12(1)(b), of the NCAT Act, means that the evidence as a whole weighs so heavily against the tribunal's conclusion that '"the conclusion was not one that a reasonable tribunal member could reach"' ([45], quoting *Collins v Urban* [2014] NSWCATAP 17 [77]).

The tenant bore the evidentiary onus of establishing the claimed causal link between the landlord's actions in admitting other persons and the circumstances leading to the disappearance of the ring ([52]). There was no evidence before the tribunal as to the location of the ring immediately before the tenant's absence. ([53]). Any inference drawn that the ring was taken by a person admitted by the landlord 'would have involved speculation or conjecture'. In those circumstances, the Appeal Panel could not be satisfied that the evidence before the tribunal weighed so strongly against the tribunal's conclusion that it could be said that the conclusion was not one that no reasonable tribunal could reach ([53]).

The Appeal Panel refused leave to appeal in relation to the compensation claim.

Guide to Tribunal Practice 6th ed [6.2.8]

Breach of statutory procedures: effect on validity

The *Kovac* case noted below applies well-established principles from authorities such as *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 [93] about how a court determines whether an act done in breach of a statutory procedure is valid or invalid. In *Project Blue Sky* the plurality said that 'the better approach for determining the issue of validity is to ask whether it was the purpose of the legislation that an act done in breach of the provision should be invalid'. In determining the purpose, 'regard must be had to "the language of the relevant provision and the scope and object of the whole statute"' ([93]).

Under certain disciplinary statutes, the regulator must carry out an investigation under statutory procedures before applying to the tribunal. In the *Kovac* case the tribunal was asked to determine whether a breach of procedure by the regulator in the investigation deprived the tribunal of jurisdiction to hear the Disciplinary Application.

The decision of the NSW Court of Appeal explains and applies the principles to be followed in construing the legislation. The Court held that the question of validity was a matter going to the tribunal's jurisdiction, which it was bound to consider.

A few Acts, particularly relating to planning decisions, expressly deal with the effect of non-compliance with a prescribed procedure. For example, *Victorian Civil and Administrative Tribunal Act 1988* (Vic) sch 1 Pt 16 cl 62 (Tribunal has jurisdiction despite any failure to comply and may disregard failure to comply); *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 22P(4), s 67A(4) (failure to comply does not affect validity of a decision taken).

Veterinary Practitioners Board of NSW v Kovac [2026] NSWCA 60

NSWCA (Mitchelmore, Adamson and McHugh JJA), 16 Apr 2026

The Veterinary Board received and investigated a complaint against a registered veterinary practitioner Dr Kovac. In the course of its investigation, the Board learned of additional matters against Dr Kovac which also required investigation. The Board provided Dr Kovac with written notice of the additional matters but did not expressly invite a written response (as it was required to do by s 41(2) of the *Veterinary Practice Act 2003* ('VP Act')). Dr Kovac made written representations in relation to the additional matters, which were considered by the Board.

Following its investigation, the Board was satisfied that Dr Kovac had engaged in unsatisfactory professional conduct or professional misconduct. The Board applied under s 50 of the VP Act to the New South Wales Civil and Administrative Tribunal ('the tribunal') for a disciplinary finding against Dr Kovac ('the Disciplinary Application').

Dr Kovac applied to the tribunal for dismissal of the Disciplinary Application in whole or in part, on the basis that the Board had failed to comply with the notice requirement of s 41 of the VP Act with respect to the additional matters. The tribunal concluded that strict compliance with s 41 was required. It found that the Board's breach of s 41 deprived the tribunal of jurisdiction to hear and determine the Board's application in respect of the additional matters and struck them out. The Board appealed and sought leave to appeal from the tribunal's order.

In a joint judgment, the Court dealt with the following issues and resolved them as follows.

1. Did the tribunal err in considering the Board's compliance with procedures required by the VP Act?

Before the tribunal, Dr Kovacs had submitted that the Board had not 'completed an investigation' in accordance with s 47 of the VP Act because it had not complied with the procedure required by Div 2 of Pt 5 of the VP Act. The Board's Disciplinary Application was not made 'in accordance with s 47', because that section applied only after the Board has completed an investigation into a complaint ([57]). Dr Kovacs submitted that the Board's non-compliance operated 'to infect the pathway' to the tribunal's jurisdiction which lay through ss 47(2)(a) and 50 of the VP Act (39]). His argument relied on the High Court's decision in *Barwick v Law Society of New South Wales* [2000] HCA 2 [46].

The Court held that the tribunal was correct to conclude that it was required to consider the challenge to its jurisdiction raised by Dr Kovacs, consistently with its obligation to consider the limits of its authority ([43], [57]).

2. Did the tribunal err in failing correctly to determine the consequences of the Board's non-compliance?

The Court held that the tribunal, in characterising the requirements of s 41 as 'strict', 'assumed the answer to the question of statutory interpretation, namely, 'whether it was the purpose of the legislation that an act done in breach of the provision should be invalid' ([63], quoting *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 [93]). The tribunal failed to apply the correct approach to determining whether the Board's failure to comply with the s 41 procedure deprived the tribunal of jurisdiction to deal with the Disciplinary Application.

The Court held that, properly construed in context and having regard to its purpose, the legislation (ss 41 and 42(5)) did not disclose such an intention ([71]-[77]). In reaching that conclusion, the Court had regard to the following indications:

1. Section 42 of the VP Act prescribes an investigation but does not stipulate its form or duration ([71]).
2. Section 42(5), by its reference to 'with appropriate modifications', recognises that strict compliance with s 41 may not always be practicable or necessary ([72]).
3. The tribunal did not consider the extent and consequences of the departure from the statutory requirement, including the notification given by the Board to Dr Kovacs and the receipt of his written response concerning the additional matters ([73], [74], [79]).

Orders

Leave to appeal was granted, the appeal was allowed, the order of the tribunal was set aside and the application by Dr Kovacs to dismiss the Disciplinary Application was dismissed.

Guide to Tribunal Practice 6th ed [4.2.3]

Liability of social media groups for breach of privacy

The following case is the first by a New Zealand tribunal to address the liability of social media groups under the *Privacy Act 2020* (NZ) ('the Act'). The Act contains no specific exemption for social media. The tribunal referred to European Union jurisprudence holding that social media administrators are liable for breaches of privacy law in dealing with personal data even if the collection is undertaken by Facebook.

Sheehan v Wilson [2026] NZHRRT 10

Human Rights Review Tribunal (NZ) (JS Hancock Deputy Chairman, SM Kai Fong and VY Tan, Members), 13 Apr 2026

On learning that a Facebook group called 'Bad Tenants, New Zealand (Landlords Only)' ('Bad Tenants') had been formed for landlords in a particular locality to share information about tenants, Mr Sheehan contacted Mr Wilson, the administrator of Bad Tenants, via Facebook Messenger to request his personal information. He received no response and was blocked from further access to the Bad Tenants' Facebook page.

Mr Sheehan complained to the Privacy Commissioner, who notified Mr Wilson that the Commissioner had determined that Mr Sheehan's complaint had substance and required Bad Tenants to respond to Mr Sheehan's personal information request. On the same day, Mr Wilson emailed the Office of the Privacy Commissioner stating that 'no information was kept on the server about anyone'. The Privacy Commissioner made an access direction and served it on Mr Wilson. The access direction required Bad Tenants (identified as 'The Agency') to respond to Mr Sheehan's individual access request as required by s 44 of the Act and to provide Mr Sheehan with access to any personal information it held about him.

No response having been received to the access direction by the specified deadline, Mr Sheehan filed and served an application to the tribunal for enforcement of the access direction against Bad Tenants. Neither Mr Wilson nor Bad Tenants engaged at any time with the tribunal proceeding.

The tribunal's findings

The tribunal found that Bad Tenants, an unincorporated body, was deemed a 'private sector agency' under ss 7 and 8 of the Act because its management was based in New Zealand ([35]). The administrator and members of the group were jointly and severally liable for any breach of the Act, although only Mr Wilson had been identified ([36]).

The tribunal found no exemption from liability for social media groups under the Act. Because it was a group and not an individual, Bad Tenants could not rely on the exemption in s 27 of the Act for personal information collected or held for personal or domestic affairs ([51]). The tribunal found support for this conclusion in European Union jurisprudence on the corresponding provision in the General Data Protection Regulation 2016/679, in which the use of Facebook to collect personal data was held not to exempt the administrator from complying with its obligations with respect to the protection of personal data ([48]).

The tribunal found that Mr Wilson as the administrator of the group had received Mr Sheehan's request, and his failure to respond within 20 days was deemed a refusal without proper basis. As such, it was an interference with Mr Sheenan's privacy under s 69(4)(a) of the Act ([44], [45]).

Orders

The tribunal made the following orders against Mr Wilson as representative defendant on behalf of Bad Tenants:

1. A declaration that the defendant interfered with Mr Sheehan's privacy by failing to respond to his information request.
2. An order that the defendant respond to the information request within 20 days
3. An order for damages of $7500 and disbursement costs.

Judge's breach of comity: Was it 'misbehaviour' justifying removal?

This was the first case in which a New Zealand Judicial Conduct Panel found that the conduct of a judge was 'misbehaviour' for the reason that it was a breach of comity ([6], [7]). In this context, 'comity' means 'the reciprocal respect and courtesy owed by the executive and judiciary' as recognised in the Courts of New Zealand *Guidelines for Judicial Conduct* (Nov 2019) [18]. The case was also the first in which a Judicial Conduct Panel had proceeded to a substantive hearing in a matter referred to it by the Attorney-General ([6]).

The case lacks direct application to non-judicial members of New Zealand tribunals who are not subject to the *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) ('JCCJCP Act') (see definition of 'judge' in s 5). The Panel's findings turn on the high threshold for a finding of 'misbehaviour' against a judge warranting consideration of removal ([10]). However, the case provides useful discussion of the meaning of 'misbehaviour' and the principle of comity as between the executive and the judiciary ([5], [22]-[24], [171]-[177]).

Judicial Conduct Panel NZ, Report into the conduct of Judge E. Aitken on 22 November 2024

Judicial Conduct Panel (Hon Brendan Brown KC (Chair), Lt Gen Rt Hon Sir Jerry Mateparae and Hon Justice Mallon).

Under the JCCJCP Act, the Judicial Conduct Commissioner may recommend to the Attorney-General that a Judicial Conduct Panel be appointed to inquire into matters concerning the alleged conduct of a judge if the Commissioner considers that the inquiry is necessary or justified and that the conduct, if established, may warrant consideration of the judge's removal (s 18(1)).

In the case of a District Court judge, removal from office may occur only on the grounds of 'inability' or 'misbehaviour' and is a decision for the Governor-General acting on the advice of the Attorney-General.

A Judicial Conduct Panel was appointed to inquire into, make findings of fact and report on the conduct of a District Court judge for the purpose of enabling a decision to be made about whether her removal for 'misbehaviour' would be justified. The Panel conducted a public hearing and on 1 April 2026 provided its report to the Attorney-General in accordance with s 32 of the JCCJCP Act.

The Panel's findings

The Panel made findings of fact as follows.

On 22 November 2024, a private members club was holding two functions concurrently in different rooms. One was a function for the District Court judges, and the other was an event for the New Zealand First political party at which the Rt Hon Winston Peters, PC was speaking. Judge Aitken was attending the judges' function in her capacity as a judge. As she passed the room in which the political event was taking place, she overhead part of Mr Peter's speech that concerned the teaching of tikanga Maori in law schools. The judge made audible remarks to the effect of: 'this is lies, you don't know what you're talking about', 'how can you be listening to this?' and 'there is a room full of judges who might have a different view'. The judge's intervention caused a disturbance during Mr Peter's speech. The judge did not realise the identity of the speaker until after she had made the remarks.

The Panel found that the judge's actions were a serious breach of comity (as defined above), citing (at [7]) the following remarks from a hearing panel of the Ontario Judicial Council:

> Judges must at all times remain above the political fray and they must conduct themselves so as to avoid any perception that the administration of justice will be influenced by their political views.

The Panel observed that if the judge had promptly tendered an unqualified apology and demonstrated an understanding of the seriousness of her actions, consideration of her removal might not have been warranted ([15]). Nevertheless, the Panel found that the judge's poor understanding could be rectified through education. Taking this into account together with her 19 years of 'highly regarded' service as a judge with no prior conduct breaches, the Panel held that her conduct did not amount to 'misbehaviour', and that consideration of her removal was not justified ([16]). The Panel observed that the purpose of removing a judge is not punishment but 'preservation of institutional legitimacy' ([18]).

Graeme Neate
Memorial Award

Congratulations to David Wenitong, a member of the Mental Health Review Tribunal (Qld), who is the first recipient of the biennial Graeme Neate Memorial Award. He received the award for a project entitled 'Enhancing Cultural Safety and Access to Justice in Regional and Remote Aboriginal and Torres Strait Islander Communities'.

The project seeks to identify and examine the barriers faced by Aboriginal and Torres Strait Islander peoples in accessing justice within regional and remote communities. It will explore how tribunal processes can better support meaningful participation and consider how culture can be appropriately and respectfully incorporated into tribunal hearings.

The project will culminate in the development of a culturally safe framework to guide tribunals in engaging with and facilitating hearings in regional and remote communities.

The next award will be made in 2028. For further details as to the applications process, see the **COAT website.**