

# RECENT DEVELOPMENTS IN CASE LAW

Reg Graycar

Emeritus Professor, Sydney Law School

Barrister, NSW

Senior member, NCAT (AEOD)

**DOES NCAT EXERCISE JUDICIAL  
POWER? *NSW v WOJCIECHOWSKA***



**PROCEDURAL FAIRNESS AND  
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# Does NCAT (impermissibly) purport to exercise Judicial Power?

*Wojciechowska v State of New South Wales* [2023] NSWCA 191; (2023) 379 FLR 256  
NSWCA held that it did.

Applicant, a resident of Tasmania, brought proceedings in NCAT under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) and the *Privacy and Personal Information Protection Act 1998* (NSW) (**PPIP Act**).

PPIP Act s55(2)(a): Tribunal can make an “order requiring the public sector agency to pay to the applicant damages not exceeding \$40,000 by way of compensation for any loss or damage suffered because of the conduct”. CAT Act s78: once certified, order could be registered with a state court that had jurisdiction to award damages. Then operates as a judgment of that court.

NSWCA: none of the functions exercised by the Tribunal under the GIPA Act involved the exercise of judicial power.

But a claim for damages under the PPIP Act was found to do so. The decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (**Brandy**) found to be indistinguishable.

# *State of NSW v Wojciechowska* [2025] HCA 27; (2025) 99 ALJR 1125

- High Court allowed appeal by NSW
- A “*State Parliament lacks legislative capacity to confer on a State tribunal that is not a court of the State within the meaning of s77(ii) and s77(iii) of the Constitution judicial power with respect to any matter of a description in s75 or s76 of the Constitution. This included s75(iv) which refers to “matters ... between a State and a resident of another State”*: at [10], referring to *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216; *Burns v Corbett* (2018) 265 CLR 304 : at [10]
- NSWCA had held (at [140]-[141]): once Tribunal made an order under s55(2)(a) of the PIPP Act, s78 of the CAT Act would have the effect that the order would operate as a judgment of the court in which it was registered. On that basis, *Brandy* found to be indistinguishable.
- *Brandy* concerned a former iteration of the HREOC. At that time, it had the power to award damages, though such an award was not binding: it had to be registered in the Federal Court, whereupon it operated as an order of that Court. It was the registration provision that led the HCA to find in *Brandy* that HREOC was impermissibly purporting to exercise judicial power.

# Wojciechowska (HCA) cont

- HCA: important distinguishing features between the statutory scheme considered in *Brandy* and that in this case.
- After noting the “impossibility of exhaustively and exclusively defining” judicial power, the HCA stated that a judicial decision is a:
  - “*binding and authoritative decision of controversies between subject or subjects and the Crown made by a tribunal which is called up to take action*”: *Brandy* at 268
  - “*determines existing rights and duties and does so according to law*” ... “*by the application of a preexisting standard*” and is an “*enforceable decision reached by applying the relevant principles of law to the facts as found*”: *Brandy* at 268: [16]

# Wojciechowska (HCA) cont

- The HCA considered PPIP Act in some detail: [18]-[21].
- Then considered the ADR Act, extracting ss63, 64 and 66 .
- An application under s55(1) of the PPIP Act for an administrative review involves the Tribunal’s “administrative review jurisdiction” of an “administratively reviewable decision” in accordance with ss6, 7, 8 and 9 of the ADR Act: [23]-[24].
- An order made by the Tribunal pursuant to the review has the effect of an order made by the agency that made the original decision (ADR Act s66(2)(a)): [25]

# Wojciechowska (HCA) cont

- Other features of the CAT Act “*speak against the Tribunal exercising judicial power on an administrative review*”:
  - Tribunal need not be composed of lawyers: CAT Act ss13 and 27(1)(a)
  - Not bound by rules of evidence: CAT Act s38(2)
  - NCAT required to act with little formality and without regard to technicalities and legal forms: CAT Act s38(4) – at [27]-[32]
- HCA went on to distinguish *Brandy*:
  - The power being exercised by HREOC (which included power to make a declaration) created a “*norm of conduct binding on an individual*” in respect of conduct that was “*unlawful*”; PPIP Act does not.

# Wojciechowska (HCA) cont

The internal review process (PPIP Act Part 5) is “manifestly an exercise of administrative power”: [29].

The “right” of review conferred by s53(8)(c) is “only to have the findings “administratively reviewed by the Tribunal”. - evidences the “manifest intention” of NSW Parliament that review is administrative (and see also s55(1)

*“In making the correct and preferable decision based on the material then before it, the Tribunal is exercising a broad and evaluative power which must give effect to any relevant Government policy in force at the time the “administratively reviewable decision” of the public sector agency alleged to have contravened the PPIP Act was made”. [31]*

Section 53(7) of PPIP Act: the public sector agency can pay “monetary compensation” to an applicant for internal review: [31].

Neither the fact that “damages... by way of compensation” can be awarded nor that an order is effectively binding renders what NCAT is doing judicial in nature”

# Wojciechowska (HCA) cont

The NSWCA had found CAT Act s78 decisive but HCA distinguished it from the registration provisions that applied in *Brandy*.

Under s78, Tribunal's function is complete once Registrar certifies. The status as something enforceable as a judgment of a court is conferred on the registrar's certificate "*by the taking of a separate step by a person other than the Tribunal*"

HCA held: s55(2)(a) of PPIP Act does not involve a purported exercise of judicial power by Tribunal nor engage Chapter III of the Constitution because Ms Wojciechowska is a resident of a state other than NSW: [37]

# Reasons for decision and procedural fairness: *Della Bruna v HCCC* [2025] NSWCA 105

- NSWCA (by majority- Adamson JA dissented) allowed an appeal from a decision of NCAT's Occupational Division (**OD**)
- The majority of the OD had found a doctor guilty of professional misconduct. The presiding (judicial) member had dissented.
- The Court of Appeal found the Tribunal had made a number of errors:
- While the majority had made a finding of professional misconduct, the reasons did not refer to or discuss the statutory definition of professional misconduct (see *Health Practitioner Regulation National Law* (NSW) 2009 (the **Law**), s139E)

*It is axiomatic that in considering whether or not a medical practitioner has engaged in professional misconduct the Tribunal must identify and apply the correct test: at [7].*

# Reasons and procedural fairness: *Della Bruna* (cont)

- Section 165M of the National Law:
  - (2) The statement of a decision must—
    - (a) set out any findings on material questions of fact; and
    - (b) refer to any evidence or other material on which the findings were based; and
    - (c) give the reasons for the decision.

[11] ... ***The reasons must be sufficient to enable a court to see whether the opinion does or does not involve any error of law: note analogously *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [54]; *New South Wales Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231 at [71]-[73]. Given the serious nature of the issues and the potential consequences, there may be little difference in substance from the duty of a court to give reasons: *Gautam v Health Care Complaints Commission* [2021] NSWCA 85 at [55]. (emphasis added)***

# Reasons for decision: *Della Bruna* (cont)

- Need to avoid reading reasons with an “eye keenly attuned to the perception of error”: see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287: [12]-[14]
- But:
  - [I]t is not for the Court to fill gaps in reasons by speculating about what further unarticulated considerations, if any, lie behind what the decision-maker said. The Court’s duty is to read the reasons fairly and as a whole, making due allowance (where relevant) for the fact that the authors are not lawyers accustomed to writing in a legal manner : [16]*

# Procedural fairness: *Della Bruna* (cont)

- The majority had found that it was “*plausible that*” the practitioner’s objectivity was influenced by her having an “*expensive level of ongoing inventory*” as that “*may have generated considerable pressure on the practitioner to maintain the turnover of her stock*” of a particular medication: see [19]-[20].
- However, despite the majority’s reasons implying that there was “*some pressure on the appellant to dispose of a large stockpile*”, there was no evidence before the Tribunal to that effect. Nor was it how the HCCC had put its case.
- Thus the finding was speculative. That matter had also had not been put to the practitioner: [21] and see generally [22]-[41].
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# Procedural fairness – *Della Bruna* (cont)

[42] *A foundational requirement of procedural fairness is that a person liable to be adversely affected by a decision be fairly apprised of the case against them and given a reasonable opportunity to meet it: ...The person should not be left to guess, nor required to box at vague shadows. It would not have been difficult for the Commission to articulate the point. If it intended to rely on the type of serious finding made by the Majority then it could and should have been articulated in clear terms in the Amended Complaint or, failing that, at least in its answer to the relevant question in the request for further particulars. Neither was done. The Commission's strained reading of two part-sentences in two expert reports does not meet the required standard.*

[43] *The Court may readily infer that the appellant may have been able to give evidence in response, such that the failure to comply was a material error: note LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12; (2024) 98 ALJR 610 at [15]. ...[T]he impugned part of the decision appeared to have constituted one significant step in the Majority's reasoning process, presaged by its own heading. ... The finding made by the Majority at [313] of its reasons breached the requirements of procedural fairness in a material manner.*

# ***Della Bruna (cont): rejection of appellant's evidence***

- The majority had rejected the practitioner's oral evidence, apparently on the basis of the inadequacy of her patient records and the fact that she had not produced written evidence to support her case.

*[52] It was of course open to the Majority to reject the extensive evidence of the appellant, in whole or in part, as being unreliable or not credible. But to do so requires reasons. Giving such reasons is not mere verbiage; it is a critical step in explaining a conclusion.*

*[53] For example, the Majority might have referred to any inconsistencies or contradictions in her evidence; identified some examples of what she said that was unreliable; given instances where her claimed memory was shown to be contrary to something in a record; or expressed the view that the appellant's demeanour whilst giving evidence cast doubt over what she said. ... To infer that any one of these possible explanations was the Majority's real reason, beyond the reasoning they actually expressed, is speculative.*

# *Della Bruna (cont): rejection of appellant's evidence*

- [54] *Where a judge is “bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result”*: *Waterways Authority v Fitzgibbon* [2005] HCA 57; (2005) 79 ALJR 1816 at [130] (Hayne J). This principle has been applied to administrative decision-makers who are obliged to give reasons: *D’Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [101]-[105] per Beazley P, Bathurst CJ agreeing at [1]. It applies here.
- [59] ... *[I]f her evidence was to be rejected it was critical to explain why that was done, in rational terms.*

# ***Della Bruna (cont): rejection of appellant's evidence***

- *[63] The Majority's approach involved error that can be expressed in various ways. Reversal of onus of proof (ground 2) might be a way in which the error could be expressed. Regardless, it was certainly a legal error by failure to give adequate, intelligible or logical reasons (raised by ground 6). It was also a constructive failure to exercise jurisdiction insofar as it involved a failure to grapple with a substantial and clearly articulated aspect of the appellant's case (raised by ground 4). That type of error can also be expressed in terms of procedural fairness (as raised by ground 5(b)): *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [24].*

# Procedural Fairness – *Plaintiff S22/2025 v Minister for Immigration* [2025] HCA 36

- The High Court (Gageler CJ; Edelman and Jagot JJ) dismissed an application to quash a decision of a delegate of the Minister who had determined not to revoke a mandatory cancellation of the applicant’s visa pursuant to s501CA(4) of the Migration Act.
- There were four grounds. By ground 4, the plaintiff contended that he had been denied procedural fairness as the delegate had relied on legal advice (which was subject to LPP) that had been (mistakenly) provided by the plaintiff about his prospects of appealing against the sentence for his conviction.

# ***Plaintiff S22/2025 (cont)***

- The legal advice had concluded that an appeal against severity of sentence was unlikely to succeed. The plaintiff contended that the delegate was on notice that the advice was subject to LPP; it contained material adverse to the plaintiff, and thus he was denied procedural fairness.
- HCA: First, it cannot be inferred that delegate knew advice was provided in error: [32]
- Second, the quote from the legal advice was a quote from the sentencing judge's remarks which had been separately provided to the delegate.

# ***Plaintiff S22/2025 (cont)***

- And there was no suggestion that the advice “had any effect on the delegate’s assessment of the seriousness of the P’s offending”: [33]
- [34] ... *[T]he legal advice did not constitute relevant material adverse to the interests of the plaintiff such as to attract an obligation of procedural fairness requiring disclosure to the plaintiff of his error and an opportunity for the plaintiff to claim legal professional privilege over the legal advice. Nor was any practical injustice caused to the plaintiff by not having been given that opportunity.*

# Tribunal jurisdiction

*Frugtniet v ASIC* [2019] HCA 16; (2019) 266 CLR 250 at [51]:

*[T]he jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, is to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review:*

The decision that can or should be made is variously described as the “correct and/or preferable decision”

Cth: *ART Act* s56(1)(a); s63(2): refers to the “correct or preferable decision”;

NSW: *ADR Act* s63 (1): In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it ...

# Tribunal jurisdiction (cont)

- *Shi v MARA* (2008) 235 CLR 286 (**Shi**); *Frugtniet*: the role of a merits review tribunal is to decide a case by reference to all the material before it. That can include, where relevant to the decision that was before the primary decision maker, new evidence.
- Compare judicial review: concerns reviewing the validity of the decision by reference to the decision maker's jurisdiction (ie, it is not to make the correct or preferable decision). In judicial review, the evidence before a court will be the material that was before the decision maker.

# Tribunal jurisdiction (cont)

## Qualifications on that principle

- There may be indications in the legislation that a Tribunal can't consider material that postdates the decision. See *Shi* at [101] where Hayne and Heydon JJ referred by way of example to “*legislation providing for pension entitlements in which the critical statutory question is whether a criterion was met or not met at a particular date*”. The *Migration Act* has a number of provisions that refer to “date of application” requirements (vs date of decision requirements).
- Decision makers need to consider the specific statutory provision being challenged to determine what material can be considered.

# Tribunal jurisdiction: the law may have changed: *Khalil*

- 2<sup>nd</sup> potential qualification: the law may have changed.
- ***Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2025] HCA 33***
- Applicant sought review in the AAT of a decision not to grant him a visa. At the time the visa was refused, there was in place a Ministerial Direction, pursuant to s499(1) of the *Migration Act*, as to how the power to grant the relevant visa should be exercised by a delegate or the Tribunal. That Direction was revoked and replaced by a new Direction. The Tribunal affirmed the decision, applying the Direction in force at the time of its decision. The applicant argued that he had an “accrued right” to have the Tribunal determine the issue in accordance with the Direction in force at the time of the primary decision.

# Tribunal jurisdiction – *Khalil* (cont)

- The Federal Court, and on appeal, the Full Federal Court rejected his argument about an “accrued right”.
- The High Court dismissed his appeal. “[T]he power conferred on the Tribunal by s43(1) of the AAT Act was to exercise “all the powers and discretions that are conferred by any relevant enactment” on the original decision maker. This indicated that the Tribunal’s task was to apply the laws governing the exercise of powers and discretions in force at the Tribunal’s decision” (subject to any statutory provision excluding or modifying s43(1)): [15]
- The Court referred to some of its earlier decisions as follows:
  - *Esber v Commonwealth* (1992) 174 CLR 430 at 448 per Brennan J: “Where, on a rehearing de novo, the question for decision is whether an applicant should be granted a right, the law as it then exists is applied, not the law as it existed at an earlier time”

# Khalil (cont)

- The proposition in *Esber* was said to be consistent with the principle stated by Mason J in *Minister for Aboriginal v Peko Wallsend* (1986) 162 CLR 24 at 45 that an “*administrative decision maker is required to make [their] decision on the basis of material available to [them] at the time the decision is made*”: [16]
- In *Shi*, Kirby J relied on *Peko Wallsend* to conclude that the merits review conducted under the AAT Act “was to be conducted on the basis of the most up to date evidence available”: (2008) 235 CLR 286 at [60] and see also Hayne and Heydon JJ in *Shi* at [101] : *Khalil* at [18].
- “*The principle that the Tribunal was to apply the laws governing the exercise of powers and discretions in force at the time of the Tribunal’s decision may be displaced by a provision ... excluding or modifying s43(1) of the AAT Act ...*” : [21]

# Khalil (cont)

- In the specific case, s499(2A), which required decision makers to comply with a Direction, applied directly to the Tribunal (cf the Tribunal standing in the shoes of the decision maker): at [22].

*“Through s499(2A), the direction-making power conferred by s499(1) facilitates the consistent, but not inflexible, application of government policy and practice as it may be expected to change from time to time”*: at [22]

(but compare s64(1) of the *Administrative Decisions Review Act 1997* (NSW):

- **64 Application of Government policy**
- (1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal must give effect to any relevant Government policy **in force at the time the administratively reviewable decision was made** except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case (*emphasis added*).

# Khalil (cont)

- The appellant’s contention that he had an “accrued right to a review by the Tribunal in accordance with” the Direction in force at the time of the primary decision must fail, and in the absence of such a right, his attempt to rely upon s7(2) of the *Acts Interpretation Act 1901* (Cth) “goes nowhere”: *Khalil* at [24].

[24] Section 7(2) of the AIA provides that “[i]f an Act ... repeals or amends an Act (the **affected Act**) or a part of an Act, then the repeal or amendment does not ... (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or ... (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment”. Section 7(2) continues by providing that “[a]ny such investigation, legal proceeding or remedy may be instituted, continued or enforced ... as if the affected Act or part had not been repealed or amended”.

See also in NSW, *Interpretation Act 1987* (NSW), s30(1)

# LEGAL CAPACITY

*BIF23 by his Litigation Guardian the Public Advocate v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 44*

- Applicant was citizen of Cambodia whose visa was subject to mandatory cancellation pursuant to s501(3A) of the *Migration Act 1958* (Cth). He was invited to make representations as to why his visa should not be cancelled within 28 days of the notification.
- He also suffered from schizophrenia. It was common ground that at the date of the invitation, he did not have legal capacity to respond to that invitation or to empower someone to do so on his behalf. A guardian had been appointed for him under Victorian law, but that was more than 28 days after he received the invitation to respond.

# BIF23 (cont)

- Decision to cancel set aside by High Court: unanimous decision but two separate judgments;
- Gordon ACJ, Edelman and Steward JJ:
  - “[I]t is a fundamental principle that, in order for a person to do a legally effective act, they must have the necessary legal capacity to do so”: [37]
  - “Given the concern of the law to protect those who lack capacity, it would require very clear language to support a conclusion that Parliament intended that valid invitations could be made to persons who have no legal capacity. No such language may be found in s501CA”: [43]
  - Rationale found in the statutory language, context and purpose of s501CA from which they concluded that “it would be anomalous to conclude that the Minister can efficaciously give a notification, for the purposes of s501CA(3) to a person who equally lacks legal capacity”: [48]

# BIF23 (cont)

- Majority also distinguished earlier decision in *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at [3]-[12]: there the respondent did not understand English: his inability to understand the notification was not a lack of legal capacity such that he could respond only through a legal guardian.
- Jagot and Beech-Jones JJ referred to the
  - *underlying predicate that a person subject to mandatory visa cancellation will not be subject to a relevant mental incapacity at the time ...” of the relevant decision.* [80]
- Their Honours also noted that “the absence of a requisite mental incapacity of the person whose visa has been cancelled is an implicit “inviolable limitation or restraint” on the Minister’s discharge of the duties in s501CA(3)” : [80]

# Power of Tribunal to appoint a guardian ad litem

- Under s45(4)(a) of the *Civil and Administrative Tribunal Act 2013*, the Tribunal has power to “appoint a person to act as guardian ad litem for a party”.
- No statutory criteria: but see Guideline 2: “Representatives for people who cannot represent themselves (GALs)”  
[https://ncat.nsw.gov.au/documents/guidelinesncat\\_guideline\\_guardian\\_ad\\_litem.pdf](https://ncat.nsw.gov.au/documents/guidelinesncat_guideline_guardian_ad_litem.pdf)
- Considered by the Tribunal in *Dezfouli v Justice Health and Forensic Mental Health Network* [2024] NSWCATAD 288; leave to appeal refused in *Dezfouli v Justice Health and Forensic Mental Health Network* [2025] NSWCATAP 265
- Compare *Administrative Review Tribunal Act 2024* (Cth), s67:  
**67 Tribunal may appoint litigation supporter** – detailed criteria set out

# Does a tribunal owe a duty to assist a litigant in person? *Chalik v Chalik* [2025] NSWCA 136

- Appeal from a decision of a single judge of the Supreme Court in a wills and estates dispute. Appellant: court “*should have made orders for the pleadings to be repleaded so I actually didn’t know about lack of testamentary capacity until I saw the judgment*”: at [66].
- CA: “the Court was not under an obligation of the kind referred to”: [67].
- CA was critical of recent decision of Adamson JA in *MTH v State of New South Wales* [2025] NSWCA 122 at [66] : HH had suggested that the primary judge “*had an obligation to ensure that the appellant did not, because of lack of legal skill, fail to claim rights or put forward legal arguments*” . CA: this passage “*significantly overstates a court’s responsibility to an unrepresented litigant and is far too absolute in its use of the expression ‘an obligation to ensure’*”: *Chalik* at [68]

# Duty to litigant in person? (*Chalik v Chalik* cont)

[69] *The question of the extent, if any, of assistance which a trial judge or appellate court should afford to an unrepresented litigant in civil proceedings is nuanced and has been the subject of many intermediate appellate judgments of this Court since Rajski was decided almost 40 years ago. Those decisions have emphasised that an unrepresented litigant should be provided with sufficient information about the practice and procedure of the court to ensure a fair trial takes place: ... Even then, care must be taken not to disturb the balance which the rules of practice and procedure are designed to afford both parties:*

*In Bauskis v Liew [2013] NSWCA 297 at [69], Gleeson JA (Beazley P and Barrett JA agreeing) noted that 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. That is, it is not the function of the court to give judicial advice to, or conduct the case on behalf of, the unrepresented litigant” : Chalik at [70]*