

JUSTICE IN TRIBUNALS

2nd edition

UPDATE No 1

- [3.6] An appeal on the merits is an “impermissible task”: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 558 per Tadgell JA.
- [3.11] “This is the original method of subjecting a domestic decision to judicial scrutiny” – proposition approved in *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 552 per Tadgell JA.
- [3.11] To footnote 45 add: *Trustees of the Roman Catholic Church v Ellis* (2007) 63 ACSR 346; [2007] NSWCA 117.
- [3.24] Other reasons for cautious intervention in the affairs of voluntary societies are considered in *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 549.
- [3.44] Complexity of a contract constituting an unincorporated association: *Petros v Beru* [2007] VSCA 226.
- [3.61] Every member has a contractual right, as against the association, to have its affairs conducted according to the rules: *Petros v Beru* [2007] VSCA 226.
- [3.61] A club may remain an unincorporated association while its property is held by a corporate trustee: *Trustees of the Roman Catholic Church v Ellis* (2007) 63 ACSR 346; [2007] NSWCA 117.
- [3.63] Occasionally societies adopt incorporation for such limited purposes as holding a statutory licence or employing staff, while they continue for other purposes as an unincorporated body. In those circumstances relief from decisions of the head

organisation should be sought against representative defendants: *Trustees of the Roman Catholic Church v Ellis* (2007) 63 ACSR 346; [2007] NSWCA 117.

- [3.67] In consequence of disciplinary proceedings, or some other domestic decision, a person may have an action in tort against individual officers, members or servants of the society: *Trustees of the Roman Catholic Church v Ellis* (2007) 63 ACSR 346; [2007] NSWCA 117.
- [4.5] Residential rules for professional teams that have ceased to have any real connection with a particular State or district are now challengeable as unreasonable restraints of trade: *Avellino v All Australia Netball Association Ltd* (2004) 87 SASR 504.
- [4.6] Members need not be contractually bound, but in some livelihood cases contract is an alternative ground of jurisdiction: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546.
- [4.8] “Stacking” for electoral purposes: *Pettit v South Australian Harness Racing Club Inc* (2006) 95 SASR 543.
- [4.11] For present purposes “trade” includes remuneration for all manner of services, regardless of their social status or degree of skill: *D’Souza v Royal Australian & New Zealand College of Psychiatrists* [2005] VSC 161; (2005) 12 VR 42 at [142].
- [4.15] If *Cameron v Hogan* were decided today, would the decision be different if the plaintiff relied on *Buckley v Tutty...?* Refd with approval: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 552.
- [4.17] It is not an unreasonable restraint of trade for examiners to fail a candidate, provided that they act reasonably and without bias: *D’Souza v Royal Australian & New Zealand College of Psychiatrists* [2005] VSC 161; (2005) 12 VR 42 at [245] ff.

- [4.18] Defendant's onus: *D'Souza v Royal Australian & New Zealand College of Psychiatrists* [2005] VSC 161; (2005) 12 VR 42
- [5.13] See also *Coleman v Liberal Party of Australia, New South Wales Division (No 2)* (2007) 212 FLR 271; [2007] NSWSC 736.
- [6.2] Jurisdictional fact as "gateway criterion": *Dowe v Commissioner of Crime Commission (NSW)* (2006) 206 FLR 1; [2006] NSWSC 1312.
- [6.16] Misinterpretation of rules may cause an invalid exercise of jurisdiction: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 578. Generally the rules of an association consist of the by-laws, as well as the constitution: *Rush v WA Amateur Football League Inc* [2007] WASCA 190.
- [6.29] It is not improper for a disciplinary authority to consider that a particular decision may serve as a warning to others within its jurisdiction: *Kamha v Australian Prudential Regulation Authority* (2005) 147 FCR 526; [2005] FCAFC 248.
- [6.33] A conclusion for which there is no evidence is clearly bad in law, whether the tribunal be statutory or consensual: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 557, 568
- [6.35] The question whether there is any evidence of a particular fact is a question of law, but if there is some evidence of the fact, the question whether that evidence ought to be accepted as sufficient to establish the fact, is itself a question of fact and not a question of law: *Rivera v Health Care Complaints Commission* [2006] NSWCA 216 at [82]; *Commissioner of Taxation v A Taxpayer* [2006] FCA 888. Provided that a particular inference is reasonably open, a want of logic in arriving at it is not a reviewable error: *Citicorp Life Insurance Ltd v Smith* [2005] FCAFC 102 at [13].
- [6.36] Findings of fact are more difficult to impugn as unreasonable than discretionary decisions: *Director of Animal and Plant Quarantine v Australian Pork Ltd* (2005) 146 FCR 368; [2005] FCAFC 206.

- [6.41] Add to footnote 217: *Re the State Administrative Tribunal; Ex parte McCourt* (2007) 34 WAR 342; [2007] WASCA 125.
- [7.2] Add to footnote 6: *Police (SA) v LyMBERopoulos* (2007) 98 SASR 433; [2007] SASC 247.
- [7.5] Add to footnote 33: *Henderson v Read* [2006] VSC 304.
- [7.13] Natural justice has been implied in provisions for urgent suspension of medical practitioners to protect the life or health of patients, although the legislation was silent on the point: *X v New South Wales Medical Board* unreported, Levine J NSW SC 15 December 1993 No 30078 of 1993. See however [9.5], below.
- [7.15] Add to footnote 90: *Phan v Kelly* (2007) 158 FCR 75; [2007] FCA 269.
- [7.16] Add to footnote 93: *K-Generation Pty Ltd v Liquor Licensing Court* (2007) 99 SASR 58; [2007] SASC 319.
- [10.21] Insufficient indication of intention to decide: *PRA v MA* (2004) 21 VAR 16; [2004] VSCA 20.
- [10.25] Sufficient time allowed?: *L v Human Rights and Equal Opportunity Commission* (2006) 91 ALD 258; [2006] FCAFC 114; *PRA v MA* (2004) 21 VAR 16; [2004] VSCA 20.
- [11.2] It is no breach of natural justice to decide against a person who chooses not to be legally represented: *Tsigounis v Medical Board of Queensland* [2006] QCA 295 at [57].
- [11.31] Expert as advocate: *Harper v The Racing Penalties Appeals Tribunal of Western Australia* [2001] WASCA 217.

- [12.4] Identity suppressed: *Australian Football League v The Age Company* [2006] VSC 308.
- [12.13] Add to footnote 54: *James v Medical Board (SA)* (2006) 95 SASR 445; [2006] SASC 267.
- [12.14] Onus of proof in application for a licence or professional registration: *Tsigounis v Medical Board of Queensland* [2006] QCA 295 at [78].
- [12.21] “Reasonable satisfaction”: *Gianoutsos v Glykis* (2006) 65 NSWLR 539; [2006] NSWCCA 137 at [47] and [49].
- [12.22] Add to footnote 108: *Belle v Chiropractors Board (SA)* [2006] SASC 250.
- [12.23] Assessment of long-delayed complaints: *Hewett v Medical Board of Western Australia* [2004] WASCA 170.
- [12.24] Add to footnote 130: *Quinn v Law Institute of Victoria Ltd* [2007] VSCA 122; *Filippini v Chief Executive, Department of Tourism, Fair Trading and Wine Industry Development* [2008] QCA 96.
- [12.27] Investigative role where there is a “counsel assisting”: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 580-581.
- [12.28] Add to footnote 187: *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers* (2006) 58 AILR 400-110; [2006] WASCA 49. Add to footnote 194: *Baker v University of Ballarat* (2005) 225 ALR 218; [2005] FCAFC 210.
- [12.31] Adequate disclosure of documents: *Baker v University of Ballarat* (2005) 225 ALR 218; [2005] FCAFC 210; *Petrie v Queensland Community Corrections Board* [2006] QSC 282; *Clarence City Council v South Hobart Investment Pty Ltd* [2007] TASSC 16.

- [12.33] Add to footnote 228: *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114.
- [12.35] Add to footnote 235: *Beling v Dimkovski* (2006) 24 VAR 152; [2006] VSC 17 (unfair refusal of adjournment for a few hours).
- [12.37] There is no general rule that civil proceedings must be suspended until a related criminal case is completed: *Director of Public Prosecutions for Western Australia v Mansfield* [2006] WASC 72; *Goreng Goreng v Jennaway* [2007] FCA 2083. For guidelines see *Olbers Co Ltd v Commonwealth (No 2)* [2003] FCA 177.
- [12.43] The *Bunning v Cross* discretion was not applied in *Martin v Medical Complaints Tribunal* (2006) 15 Tas R 413; [2006] TASSC 73.
- [12.48] Add to footnote 298: *Rivera v Health Care* [2006] NSWCA 216.
- [12.53] When a power is expressed in very general terms it is usually left to the decision-maker to decide what is relevant and what is not: *Tomkins v Civil Aviation Safety Authority* [2006] FCA 1253.
- [12.57] Add to footnote 337: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530.
- [12.58] A person who gives evidence against another in a criminal or civil court is not immune from proceedings, in relation to that evidence, in a disciplinary tribunal: *James v Medical Board (SA)* [2006] SASC 267.
- [12.67] Add to footnote 393: *Street Nation Pty Ltd v Australian Communications Authority* (2004) 40 AAR 68; 86 ALD 413; [2004] AATA 1251.
- [12.70] For an example of a self-executing article (re bankruptcy) see *Union Club v Battenberg* (2006) 66 NSWLR 1; [2006] NSWCA 72.

- [12.74] **Double Jeopardy?** Add to footnote 421: *R v NG* [2006] QCA 218 (leave to appeal to High Court refused). Conversely, add to footnote 425: *R v NG* [2006] QCA 218.
- [12.97] If the tribunal has a severe sanction in mind, the defendant should have an opportunity to deal with that issue separately: *Lloyd v Veterinary Surgeons Investigating Committee* (2005) 65 NSWLR 245; [2005] NSWCA 456.
- [12.98] There may be mitigating factors that do not become clear until the facts relating to guilt have been determined: *Sakalo v The Medical Board of Western Australia* [2002] WASCA 178.
- [13.17] It is not acceptable simply to adopt the submissions made by or on behalf of one party: *Sourlos v Luv A Coffee Lismore Pty Ltd* [2007] NSWCA 203.
- [13.20] Add to footnote 107: *Young v Cesta-Incani* [2007] NSWCA 229 (no explanation for rejecting expert opinion).
- [14.9] Add to footnote 31: *Baker v University of Ballarat* (2005) 225 ALR 218; [2005] FCAFC 210.
- [15.2] Add to footnote 20: *Australian Securities & Investments Commission v Rich* (2005) 190 FLR 242; [2005] NSWSC 149.
- [15.11] Add after the first sentence: “Impartiality calls for a state of mind which is free from any influences extraneous to the merits of the particular case, which is capable of a dispassionate inquiry and an objective judgment, and which is not turned aside by motivation to favour one side as against the other. But the actual state of a person’s mind is not always readily discoverable and absolute perfection may not be readily obtainable ... The law does what it can by recognising that bias may be apparent as well as actual.” *Roylance v General Medical Council* [2000] 1 AC 311 at 318 per Lord Clyde.”

- [15.15] Add to footnote 79: On the other hand, experts must not be accepted as eminent, well-known and respected” before the other side has an opportunity to test their credit: *CSR Limited v Della Maddelena* (2006) 80 ALJR 458; [2006] HCA 1.
- [15.17] After the quoted words “on his mettle”, add: The mere fact that the president of a tribunal knows one of the lawyers appearing before it is not a sufficient reason for self-disqualification. It is an abdication of responsibility to disqualify oneself too readily, or regardless of the parties’ attitudes *Gerondal v Minister for Planning* (2004) 193 FLR 357; [2004] ACTSC 84.
- [15.20] Add to end of this section: Reasonable efforts to clarify issues, or to ascertain the whereabouts of evidence that seems to be missing, are not evidence of bias: *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 81 ALJR 352; [2006] HCA 55.
- [15.24] Add to footnote 169: *Jones v Architects Board of Western Australia* [2004] WASCA 219 at [38].
- [15.24] After the sentence: “It implies an acceptance by the common law that sometimes a tribunal must continue to operate, despite apparent bias, if it is to operate at all” insert the following: That will be the case when the rules require all the members to act collectively in commencing inquiries and conducting them *Harper v The Racing Penalties Appeals Tribunal of Western Australia* [2001] WASC 217.
- [15.24] Add to footnote 176: A similar order may be made, even when there is no suggestion of actual or apprehended bias (*Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518; [2003] HCA 11), but the original decision turned on an assessment of credibility *Seltsam Pty Ltd v Ghaleb* (2005) 3 DDCR 1; [2005] NSWCA 208.
- [15.36] Add to footnote 245: *Smits v Roach* (2006) 80 ALJR 1309; [2006] HCA 36; *Battenberg v Union Club* [2007] NSWSC 265. However, an overnight delay was considered reasonable in *John Fairfax Publications Pty Ltd v Kriss* [2007] NSWCA 79.

- [15.38] Add to footnote 263: As admitted in *Yoon Shin Lee v Bob Chae-Sang Cha* [2008] NSWCA 13.
- [15.41] Add to footnote 275: *Smits v Roach* (2006) 80 ALJR 1309; [2006] HCA 36.
- [15.58] Add to footnote 389: Compare *Gabrielsen v Nurses Board of South Australia* [2006] SASC 199, where several members of the tribunal, dealing with a re-registration application, had previously found the applicant not fit to be a registered nurse.
- [15.61] Add to footnote 404: Bias may arise from a familial relationship between the adjudicator and a person (a brother, in this case) who has an interest in the litigation: *Smits v Roach* (2006) 80 ALJR 1309; [2006] HCA 36 at [112].
- [15.64] Add to footnote 419: Another far-fetched claim of apprehended bias was rejected in *Mathews v Rev Canon Professor Dr John Morgan* [2006] QCA 143.
- [15.68] Add to footnote 451: See also *Yoon Shin Lee v Bob Chae-Sang Cha* [2008] NSWCA 13 (trial running well over time, counsel repeatedly “sniping” at each other, litigant appearing in person with little or no English and no interpreter).
- [16.2] Add to this paragraph: Before a declaration is granted with respect to a dispute in a voluntary society it is relevant to ask whether the parties have agreed to treat an internal adjudication as final and binding: *Coleman v Liberal Party of Australia (New South Wales Division) (No 2)* [2007] NSWSC 736. However, relief was granted in that case.
- [16.5] Add to footnote 21: *Coleman v Liberal Party of Australia (New South Wales Division) (No 2)* [2007] NSWSC 736.
- [16.20] Tasmania adopted modern procedures in the *Judicial Review Act 2000* (Tas). Judicial review of acts other than those of an administrative character is preserved by s 10; *Medical Council of Tasmania v Medical Complaints Tribunal* [2005] TASSC 24.

- [16.33] Add to footnote 156: But for reasons of costs, prohibition should only be granted to halt a case in progress where the evidence of bias is clear: *Yoon Shin Lee v Bob Chae-Sang Cha* [2008] NSWCA 13.
- [16.37] Add to footnote 181: *Applicants A1 v Director of Office of Police Security* [2007] VSC 66. And add to same paragraph: Exclusion of the prerogative writs should not be evaded by a colourable presentation of any error of law or fact as a denial of natural justice: *R v Small Claims Tribunal; Ex parte Amos* [1978] Qd R 127; *Alvaro v Fraser & Downsborough Designers Pty Ltd* (1990) 20 ALD 762.
- [16.64] Add to footnote 286: *Hussain v Canberra Taxi Industry Association* [2007] ACTSC 79.
- [16.66] Add to footnote 289: Or be sued: *Trustees of the Roman Catholic Church v Ellis* (2007) 63 ACSR 346; [2007] NSWCA 117. But as to actions against individual officers, trustees or servants see [3.67], above.
- [16.66] Add to the first paragraph: It is not permissible to commence a representative action on the assumption that others will “opt in” later on: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41. The mere fact that a person, such as an archbishop, is the leader of an unincorporated organisation does not entitle a plaintiff to treat him as a representative defendant: *Trustees of Roman Catholic Church v Ellis* (2007) 63 ACSR 346; [2007] NSWCA 117.
- [16.68] Add to footnote 305: *Trustees of Roman Catholic Church v Ellis* (2007) 63 ACSR 346; [2007] NSWCA 117.
- [17.4] Add to footnote 13: *McGregor & Pearce v The Hon John Gallop & Attorney-General of the ACT* [2002] ACTSC 45.
- [17.11] The propositions in the first two sentences do not apply to litigation privilege, ie, privilege in material prepared predominantly for use in litigation: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530. That privilege does not extend to commissions of inquiry, because it is designed to secure a fair trial only in adversary proceedings leading to a final judgment: *AWB Ltd v Cole* (2006) 152 FCR 382; [2006] FCA 571.