Quality standards for tribunal decision making in strata disputes

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Abstract

Purpose – This study aims to investigate Australian civil tribunal decisions to ascertain compliance with decisional quality standards in Australian law, with a particular focus on strata and community title cases.

Design/methodology/approach – An orthodox doctrinal legal analysis and assessment of cases and tribunal policies was adopted. All Australian jurisdictions were surveyed, including federal, state and territory jurisdictions. The case law in each jurisdiction was screened to identify whether the principles applicable to decisional quality were engaged and then analysed as to the extent of that engagement.

Findings – Where a party presents a substantial, clearly particularised argument relying upon established facts, tribunals are obliged to address those facts and the arguments by way of an active intellectual process. However, appellate decisions disclose a degree of deference not often accorded to judicial officers, and there is a need for a more disciplined approach to ascertain whether any errors have been made by a tribunal lie on the critical path to the decision. As strata and community title disputes become more complex, the importance of decisional quality standards can only increase.

Research limitations/implications – Up to date as of 1 March 2023.

Practical implications – The present position would appear to be that where a party presents a substantial, clearly particularised argument relying upon established facts, a tribunal must address its mind to those facts and the arguments by way of an active intellectual process. The requirement is limited to circumstances prescribed by a statute and factual and legal issues which are necessary to be determined in order for the tribunal to be satisfied as to circumstances prescribed by a statute. However, where the errors are not gross and plainly obvious, appeals from defective tribunal decisions are unlikely to succeed. There is a degree of deference not often accorded to judicial officers. That deference is unfortunate when tribunals are allocated jurisdiction over what quite often are significant property disputes.

Social implications – The impact on community living of uncorrected poor quality tribunal decisions can be immense, depending on the degree of error. For example, water ingress into people's homes might remain unremedied for many years, as, for example, occurred in the Marinko case.

Originality/value – The research and analysis is entirely original. A search of journals and textbooks did not identify any prior analysis, at least in the Australian context, relating to decisional quality standards of tribunals.

Keywords Quality, Decision, Remedies, Shared property interests, Strata and community title, Tribunal

Paper type Research paper

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No prior analysis of the issues addressed in this article in the strata and community title context have been identified.

The law cited is up to date as of 1 March 2023.

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Introduction to Australian strata and community title

In Australia, each state and territory has its own legislation relating to strata and (in some states) community title, and each has tribunals set up to provide just quick and cheap resolution of strata and community title disputes [1].

For those not familiar with these concepts for shared property interests, the Law Society of NSW (the largest state jurisdiction in Australia) defines "strata title" as follows:

> *Strata title is a system for owning units [which some commonwealth jurisdictions, call "flats" or "apartments"] and townhouses, which generally have a combination of private residences as well as communal spaces [in one combined real estate development comprising one or more buildings].*
>
> *When you buy into a strata plan you buy a "lot", which may include the main unit area and possibly a balcony, garage or even storage area. Other parts of the property – such as a foyer, stairways and driveways – are usually common property [2].*

Each home unit or flat or apartment is called a "Lot", and the Lot owners each own no more than the cubic space inside the four walls, the ceiling and the floor slab (or floor finishes if they are in place when the strata scheme documents were registered with the Land Titles Office). The building and shared spaces, known as the common property, are owned by an owners corporation.

Lots have what are called "unit entitlements" within a strata scheme. They are based on the market value of the lot [3]. The beneficial interest in the common property vests in the owners of the lots in the strata scheme, as tenants in common, in shares proportional to the unit entitlements of their respective lots. The legal estate in the common property, however, is vested in the owners corporation. This relationship is embedded in strata legislation. For example, in the NSW legislation, the following appears:

> *28 Holding common property and dealing with lots and common property*
>
> (1) *The owners corporation of a strata scheme holds the common property in the scheme as agent for the owners as tenants in common in shares proportional to the unit entitlement of the owners' lots.*
>
> (2) *An owner's interest in the common property cannot be severed from, or dealt with separately from, the owner's lot* [4].

In the case of community title, instead of dividing the space based on building parameters, each lot owner is entitled to their respective parcels of land with its own title, defined by surveyed land measurements. Community titles provide for sharing of common infrastructure in a way that conventional subdivisions do not [5]. They are most commonly used for gated estates, large development lots and other similarly structured properties that contain shared infrastructure and services. Both strata and community titles have common property areas.

The foregoing is provided by way of legal context only. This paper does not delve into how legal and beneficial interests interact.

By way of background, as of 19 August 2020, there were now almost three million strata and community title properties in Australia [6]. Roughly two-thirds are small schemes with five or fewer lots. Yet, despite being deployed in industrial and commercial contexts as well as for residential housing, the legislative schemes have only been designed to accommodate their use in the residential context.

An introduction to dispute resolution for strata and community title disputes

In a system designed to enable community living, strata and community title disputes were expected to be relatively straightforward. That which was envisaged were disputes among

neighbours which could be relatively and quickly resolved at low cost. They were allocated to tribunals to keep the costs of resolving them as low as practicable. Tribunals were meant to be substitutes for courts; quicker, cheaper, less formal and more accessible [7].

However, strata and community title disputes often are neither simple nor straightforward, and tribunals set up to deal with straightforward disputes sometimes struggle in terms of decisional quality when faced with more complicated disputes. There are only the bluntest tools for assessing and improving decisional quality above minimum standards set by the common law. That is in part because decisional quality is not about whether a decision is right or wrong from a party's perspective. It is about whether a decision maker has adequately engaged with the factual and legal issues to be determined, and if they have, whether the reasons for decision as published are themselves adequate. As to what is "adequate" opens up a range of issues, only some of which can be explored in this short article.

Can judicial or even quasi-judicial decision-making quality be measured?

Quality standards for tribunal decision-making. Context is important, and before coming to the ways in which the quality of tribunal decision-making can be challenged, it Is necessary to describe the variable context across the various Australian jurisdictions.

The Judicial College of Victoria speaks of a judge's ability to identify "critical issues", "clarify uncertainty" and "weigh relevant issues and matters of law" by formulating "reasoned and coherent decisions" [8]. Judges in England and Wales have a framework within which they are expected to keep improving their decision-making [9]. Can we ask whether similar frameworks exist for our busy and important tribunals?

At least in NSW, the most populous Australian state, ensuring that the decisions of the New South Wales Civil and Administrative Tribunal ("NCAT") are timely, fair, consistent and of high quality is a statutory objective [10]. The tribunal is to adopt fair procedures [11].

In those regards, NCAT's most recent annual report does state as follows: "The professional development of Members plays an important role in promoting the quality and consistency of tribunal decisions". The tribunal also has:

- a "Member Reference Manual" apparently designed "to ensure consistency and high-quality decision-making;" [12] and
- a Member Competency Framework which identifies seven essential areas of competence: knowledge and technical skills, fair treatment, communication, conduct of hearings, evidence, decision-making and professionalism and efficiency [13].

A comprehensive assessment of performance against these competencies is impossible. One reason is that NCAT does not require publication of decisions to enable transparency and public accountability to be assessed openly [14].

It is an unfortunate fact of legal life in Australia that many tribunal decisions do not appear even on free internet services such as "Austlii", where unreported judicial decisions generally are available. Sometimes, even important decisions of principle made by tribunals remain unpublished.

In the context of the NSW Tribunal's Consumer and Commercial Division which has jurisdiction over strata and community title disputes, "NCAT Policy 2 – Publishing Reasons for Decisions" indicates that a decision is likely to be published if the reasons establish or consider principles that could be applied, or could be of assistance, in other proceedings and if the reasons or the proceedings raise issues of general public interest or importance. The tribunal itself manages that gateway. Other reasons for publishing or not publishing a

decision are undisclosed [15]. The decision as to which decisions to publish is inevitably imperfect.

For example, "Curry v. The Owners – Strata Plan 84245 [2022] NSWCATCD (2 November 2022 [amended 7 November 2022]" resolved a much-vexed dispute about whether owners corporations in NSW strata schemes could pass resolutions without a meeting where pre-meeting electronic voting is adopted and no votes on an issue are to be cast at a meeting. Strata managers had developed a practice in such cases of stating on the notice which called for pre-meeting voting a statement that: "ATTENDANCE IS NOT REQUIRED" or "DO NOT ATTEND THIS MEETING". In Curry, lot owners successfully moved to invalidate decisions taken without an actual meeting at which lot owners could discuss the matters the subject of the meeting, including the results of the voting. The tribunal ruled that a meeting was required because the legislation provided for the votes to be counted at the meeting and the results of the voting were to be announced at the meeting. The decision plainly contains important guidance for the operation of owners corporations, but it has not been published.

The disclosed framework for NCAT does not identify whether there is, for example, internal peer-review. If there is, how robust and resistant to biases such as expectations of conformity is it? Does it promote a culture in which high-quality reasoning is recognised appropriately?

Further, tribunal members are appointed for fixed terms. Some sit full-time, and some sit part-time. Unlike judges in the Supreme and District Courts, they are mostly not drawn from the most senior ranks of the Bar and do not have security of tenure. They generally are paid less than a local court magistrate.

In NSW, most strata or community title appeals go first to two (occasionally three) member appeal panel within the tribunal. An internal appeal can, subject to a leave gateway, re-examine the merits of the decision below as well as address errors as to questions of law by the primary tribunal member. A decision of an appeal panel can be appealed to the Supreme Court as to an error as to question of law [16].

The process in the ACT is similar [17]. The Northern Territory provides for internal review of decisions [18] or appeals on a question of law to the Supreme Court [19].

In other states and territories, the internal appeal panel option is not available. Appeals are to the courts, and generally are restricted to errors as to questions of law [20].

In relation to internal appeals, the NSW Tribunal's most recent annual report states as follows:

> *One of the most significant and effective ways in which NCAT ensures the fairness, as well as the consistency and quality, of its decisions is through the internal appeal process. But appellate decision-making is no less fraught with inherent biases. Appellate decision-makers are no less human than those whose decisions they review [21].*

The appeal option is little used. During 2021–2022, in the 50,000-plus matters heard, 813 appeals were lodged with the NSW Tribunal and 863 appeals were finalised [22]. Of the 813 appeals, 695 came from the Commercial and Consumer Division, of which it appears that 75 related to strata and community title matters [23]. Interpreting those figures is beyond the scope of this paper. Many factors affect the decision of whether to appeal a first instance decision.

Relevantly, of the 50,000 plus matters heard, only 1,540 of the 50,000 applications fell into the strata and community schemes categories. The vast bulk, some 30,503, of the disputes which the Commercial and Consumer Division deals with are tenancy disputes [24].

It is hard to compare the Victorian experience, Victoria being the second largest jurisdiction. In the 2021–2022 year, the Victorian Civil and Administrative Tribunal received

68,095 applications [25]. Its Civil Division received 12,185 of those, and the Owners Corporations List (which covers strata disputes) constituted 2,263 of those [26]. In Victoria, there is no equivalent to the NSW internal appeal mechanism; there are only appeals on questions of law to the Supreme Court or the Court of Appeal [27]. And the Victorian Civil and Administrative Tribunal ("VCAT") does not refer in its annual report to qualitative performance measures.

This paper is not about appeals to redress wrong decisions. It is about redress for failures to engage with the issues at hand, and failures to adequately reason decisions as the basis of appeal.

It is assumed that there has been a hearing in which all parties have had a fair opportunity to present their cases, and that there is no issue of bias or apprehended bias. These of course are the classical concerns of natural justice. No longer, however, do these two concerns exhaust the field, as the following discourse should illuminate (to some degree).

Engaging on the facts and the issues at hand

The common law requires certain minimum standard of decisional engagement, and minimum standards of decisional quality [28]. It is to those minimum standards to which this paper now turns.

Back in 2000, the NSW Court of Appeal decision in Weal v. Bathurst City Council had before it whether a local council had taken into account properly the noise impact of a proposed development [29].

The then President of the Court of Appeal, Justice Keith Mason, saw the Court's task as identifying the minimal levels of rationality, efficiency, accountability or participation that a decision maker, as part of the executive branch (which a tribunal is) must take into account. His Honour also proposed that there were levels of imperfection as to matters of detail which should be tolerated [30].

In an effort to set a threshold, minimum standard, Justice Mason adopted Justice Gummow's formulation in Kahn v. Minister for Immigration and Ethnic Affairs [31], which was to ask whether the decision maker had undertaken a "proper, genuine and realistic consideration upon the merits".

In Kahn, Justice William Gummow (subsequently elevated to Australia's High Court) took the view that if a decision maker had failed to give proper, genuine and realistic proper consideration to the merits, the decision could not be a proper exercise of the relevant jurisdiction. Importantly, in that case, an applicant family was contesting the refusal of visas for two young children and the mother when the father was already a permanent resident and the oldest child was an Australian citizen. Their application was to be considered on compassionate grounds. The departmental decision maker had noted a psychological report about the likely impact of denying the children a visa, namely, that they would have to go to live in Bangladesh, followed by a singular assertion by the decision maker that the report was not considered a persuasive reason for granting the application on strong compassion or humanitarian grounds. The decision maker referred to relevant evidence, identified evaluation of it and stated a conclusion. Enough, surely?

Not so, according to the Federal Court of Australia. The Court took the view that this statement was:

> *so limited as to be indicative of a perfunctory and cursory consideration rather than a proper genuine and realistic consideration of what was a substantial element in the merits of the particular cases.*

The decision at issue in Kahn was far from atypical. Many tribunal decisions note evidence presented and in a single sentence express the evaluation of it. Applying the *Kahn* principle, those decisions cannot be a proper exercise of jurisdiction [32]. Yet, as many practitioners tell this author, the practice persists.

In Weal, Justice Mason went on to state as a matter of general principle that "Understanding the scope of a problem is a pre-requisite to addressing its solution" [33].

Weal concerned a series of statutory conditions that a local council was obliged to take into consideration. When taking something into consideration, the law requires weighing up the merits for and against [34]. As Justice Giles put it, "There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration" [35]. In respect of the issue of noise pollution, the Council simply had referred the matter to the Environmental Protection Authority without itself considering the noise aspect of the development. The failure to engage with a mandatory consideration meant that the jurisdiction had not been properly exercised.

The principles were further developed and indeed reframed in 2003 by the High Court in Dranichnikov v. Minister for Immigration and Multicultural and Indigenous Affairs [36]. While the facts are of little moment in the present context, the statement of principle is cited often:

> *[24] To fail to respond to a substantial, clearly particularised argument relying upon established facts was at least to fail accord Mr Dranichnikov natural justice* [37].

As Kirby J put the proposition: a tribunal is not exercising its jurisdiction where it has made:

> *[. . .] a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant [38].*

These statements of principle have had the effect of extending the scope of natural justice. Beyond allowing a fair opportunity to present a case to an unbiased decision maker, it is also necessary that the decision maker "respond to a substantial, clearly particularised argument relying upon established facts". To comply, the decision maker must demonstrate "an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration" [39].

The High Court in 2010 developed these principles further still in Saeed v. Minister for Immigration and Citizenship and held that where a tribunal excludes from consideration some factor which should affect the determination, an appealable error occurs [40]. Such exclusion of a consideration means that the decision maker has disabled him or herself from being able to be satisfied as to a fact about which the decision maker needs to be satisfied [41].

In Minister for Immigration and Citizenship v. Khadgi (Stone, Foster and Nicholas JJ), the Full Federal Court formulated the principle somewhat differently in requiring that a decision maker is required to actively and genuinely engage with circumstances prescribed by a statute [42].

In Li v. Minister for Immigration and Citizenship, Barker J formulated the rule as a requirement that a tribunal engage in "an active intellectual process" [43].

So, then, how does one bring these statements of principle back to strata and community title cases?

In Western Australia, in Re The Owners Of High Rise Strata Plan 8245 [2022] WASC 450, Strk J upheld an appeal from the State Administrative Tribunal and remitted the case to be

reconsidered by a differently constituted tribunal. The case concerned the Lawson Apartments in located at 17 Welsh Street, South Hedland, Western Australia, approximately 8.5 km southwest of the Port Hedland airport, in a primarily residential area. The strata company (as the owners corporation is known in Western Australia) wished to self-insure and needed an exemption from statutory insurance requirements on the basis that they could not obtain insurance on reasonable terms to satisfy section 97 of the *Strata Titles Act 1985 (WA)* which provided a route to exemption [44]. For the Lawson Apartments, the premiums being offered exceeded the building values and were on any view unaffordable for the lot owners.

After a review of the legislative history and context, the Court decided at [118]–[123] that there were three critical considerations, namely:

- whether it would be reasonable for the strata company not to insure having regard to all material circumstances;
- whether the strata company has taken all reasonably practicable steps available to it to obtain the required insurance, but no insurer has been willing to enter into a contract of insurance on reasonable terms that meets the requirements; and
- whether the strata company has taken all reasonably practicable steps available to it to obtain the required insurance, but no insurer has been willing to enter into a contract of insurance on reasonable terms that would closely meet the requirements of subsection 97(1)(a).

The strata company succeeded on multiple grounds, one of which was that the tribunal failed to consider and determine the issue of whether the appellant had taken all reasonably practicable steps available to it to obtain the insurance required by subsection 97(1)(a) for the relevant insurance period. The court held at [170]–[171] that the tribunal should have found that the strata company had taken all reasonably practicable steps available to it. There was no contradictor and there was detailed lay evidence as to the steps which the strata company had taken. Importantly, the Court effectively found that the tribunal decision did not evince any realistic engagement with that evidence.

In 2014, the Victorian Supreme Court adopted these principles in Vellios Electrical Contractors Pty Ltd v. Barton, albeit not in respect of a strata case [45]. There appears to be no Victorian strata case in which the principles have been applied. However, they have been applied in the strata context in NSW.

In 2016, in Colbert v. MacDonald, the Supreme Court of NSW was called on to apply these principles to a strata case where an owners corporation had rejected a bylaw which would have permitted structural alterations to benefit a particular lot in a strata scheme [46].

Section 149 of the *Strata Schemes Management Act* 2015 enables lot owners to challenge an unreasonable rejection by an owners corporation of such a proposed by-law (known now as a common property rights by-law). These bylaws usually give a lot owner rights over part of the common property – often a garden, balcony or roof area. Section 149 also applies where a lot owner's consent to such a by-law is needed, and the lot owner unreasonably withholds that consent.

Her Honour Justice Natalie Adams identified at [83] that in respect of the particular by-law at issue the tribunal must have regard to:

- the interests of all owners into the use and enjoyment of their lots and common property; and
- the rights and reasonable expectations of any owner deriving or anticipating a benefit under a proposed bylaw.

The court held that absence of exposed genuine consideration and actual active intellectual engagement with both of those issues constituted jurisdictional error [47].

The Owners Strata Plan No 69140 v. Drewe [2017] NSWSC 845 is another example of a case where the tribunal identified all relevant facts but failed to engage with the required statutory test, leading the Supreme Court to reverse the tribunal decision.

In 2020, a NSW tribunal appeal panel applied these principles in Gelder v. The Owners – Strata Plan No 38308 [48]. That was a case where a lot owner had exclusive use of a common property garden outside her ground floor apartment and the owners corporation subsequently passed a by-law to which she had withheld consent.

The by-law to which she would not consent not only gave other lot owners a right of access to her exclusive use area for the purposes of installing, maintaining and repairing air conditioning units directly above her garden, but it excised parts of her exclusive use area and required her to indemnify the owners corporation against demands and liabilities arising from the exercise of the other lot owners' rights of access.

The Appeal Panel determined that the tribunal at first instance did not consider the ground floor lot owner's "reasons for refusing consent beyond a cursory and dismissive reference to those reasons" [49]. What was the "cursory and dismissive reference"? In evaluating the impact of the new by-law on the ground floor lot owner, the first instance tribunal merely held as follows:

> *81. [. . .] it is hard to assess what in fact is the degree of the adverse impact alleged . . . and matters such as photographic evidence do not assist.*

The Appeal Panel zeroed in on:

> *the failure of the Tribunal to engage critically with the fact that the effect of the proposed amendments would be to remove proprietary rights [50].*

The ground floor lot owner's appeal was upheld.

However, challenging a refusal to approve has been made more difficult for lot owners by the recent Supreme Court decision in Kaye v. the Owners Strata Plan No.q 4350 [2022] NSWSC 1386. In dismissing an appeal from an Appeal Panel decision, Basten AJ set out a novel approach to the construction of section 149. An owners corporation now can raise speculative concerns (such as about noise or amenity) about how an exclusive area might be used so as to reasonably refuse a by-law. If his Honour's approach is sound, the scope for challenging refusals of common property rights by-laws has been significantly reduced.

Perhaps the saddest story evidencing a lack of decisional quality in the tribunal is that of Dr Neville Marinko. In 1978, Dr Marinko purchased a top floor apartment in a luxury block in Kirribilli, with beautiful harbour views. He was looking forward to a peaceful retirement from medical practice. As it happened, Dr Marinko got about with a walking stick and trusty assistance dog, "Crosby". Commencing in 2015, there was water ingress from multiple sources into his home, and, separately, as part of concrete cancer repairs, the owners corporation did work on parts of the floors in his home. However, when the workers left the site, they left him with different levels of floor, and other parts of his home were left in a state of disrepair. Even with Crosby's assistance, Dr Marinko could not easily get about his home.

In settlement of a first set of proceedings, a settlement agreement was reached on 18 July 2016. Regrettably, it was dishonoured, leading to the second set of proceedings.

The second set of proceedings resulted in consent orders made by the tribunal on 20 February 2019. Underpinning those consent orders, structural engineers for both parties reached agreement as to that which needed to be done, but the consent orders also were dishonoured by the owners corporation.

A third set of proceedings were commenced in 2020, seeking the appointment of a compulsory manager to effect the long overdue repairs.

The hearing took place on five days commencing in May 2020, then on 1 September 2020, 18 January 2021, 25 May 2021 and 31 May 2021. The tribunal dismissed the application on 25 November 2021.

An appeal was allowed, and as observed by the Appeal Panel: "the principal ground was that the tribunal had failed to engage with significant aspects of the appellant's case" [51].

The Appeal Panel acknowledged that the tribunal had expressly recognised that Dr Marinko was running his case in the third set of proceedings on the premise that the owners corporation had not complied with the consent orders and much of the rectification work which was required by the 2019 consent orders had been delayed or, if done, only partially and inadequately done.

The tribunal further recognised that Dr Marinko alleged that the owners corporation was incapable of complying with the consent orders and had applied to have a compulsory manager appointed [52].

The consent orders required, for example, repairs to balconies to stop water ingress from them. The owners corporation ran its case by adducing evidence from a third expert (not a structural engineer) to challenge the need to do the work to repair the balconies so as to stop water ingress from that source. The tribunal failed to address the proposition that the consent orders actually required work to the balconies and also failed to address the contention by Dr Marinko that to not do the work was a breach of consent orders. It also failed to engage with a substantial submission that even on the third expert's approach, the balcony works were needed.

Next, the consent orders required level floors for Dr Marinko to be able to walk around his apartment. The owners corporation's evidence accepted that the floors were on three different levels but asserted that the levels had been blended so that there would be no tripping hazard. This was considered to be an acceptable solution by the tribunal member at first instance.

The Appeal Panel correctly noted that that simply reducing the tripping hazard was not what the consent orders required and so the tribunal member had asked herself the wrong question.

Similarly, there was a failure to comply with orders relating to repair of cavity flashings, again to stop water ingress.

Each of these matters was the subject of submissions on behalf of Dr Marinko, which simply were not appreciated nor understood by the tribunal member at first instance. The Appeal Panel went to great lengths to identify Dr Marinko's contentions as "detailed and meritorious" [53].

The Appeal Panel upheld the Appeal and, while recognising that it was close to impossible to successfully resist the application, rather regrettably decided to remit it to be heard by a different tribunal member, rather than make the appointment of a compulsory manager as Dr Marinko had sought.

Fortunately for Dr Marinko, in the meantime, there was a coup at the owners corporation. A different group of lot owners formed the strata committee, and the new committee decided to attend to the overdue work and indeed to contribute to Dr Marinko's costs.

Thus, after a seven-year-long, very expensive battle, Dr Marinko finally was able to secure a safe and watertight home.

Dr Marinko's case would appear to be the high water mark for appeals based on poor decisional quality in the tribunal. For example, last year, 2022, in Benson v. Owners Strata Plan 17676 [54], an appeal panel was concerned with gaps in the first instance tribunal's

reasons that disclosed inadequate engagement on some but not all issues. However, when compared to the Marinko case, these gaps are much more limited. The errors were not anywhere near as gross. Ms Benson's appeal was unsuccessful. The Appeal Panel in Benson made particular mention of the Full Federal Court decision in Applicant WAEE v. Minister for Minister Immigration and Multicultural and Indigenous Affairs, where French, Sackville and Healy JJ emphasised that a tribunal's failure to expressly deal with an issue ought not readily lead to an inference that the tribunal had failed to consider an issue in circumstances where a tribunal has expressed reasons which were otherwise comprehensive [55].

A more disciplined and less impressionistic approach would be to adopt the concept of critical path well known in administrative law. In Australia, it stems from the Full Federal Court decision in Curragh Queensland Mining Ltd v. Daniel [56]. In that case, Black CJ, with whom Spender and Gummow JJ agreed, relevantly explained that a decision is based on a particular fact if the substance of the fact is critical to the making of the decision. If that fact and a party's contentions about it are not the subject of active intellectual engagement by a tribunal, the decision should be set aside.

It is, of course, trite that there is no obligation on a tribunal to consider every piece of evidence presented if not on that critical path [57].

That said, Colbert, Drewe, Gelder and Marinko present a series of decisions addressing poor decision-making quality at the NSW tribunal, to a degree one would not expect from a court.

If there has been engagement, are the reasons adequate?

It may well be that the disputed facts and issues are fully engaged with, but the reasons are unintelligible insofar as they leave the reader to wonder about the process of reasoning that has been followed. Poor judgement writing does occur from time to time.

In 1986, the High Court of Australia decided that any duty of statutory tribunals to give reasons for decisions must come from the governing statute [58]. Back then, no state legislation provided a general right for a person aggrieved by a decision made under an enactment to receive a statement of reasons from the decision maker. Since then, however, a broader common law duty has been developed [59].

Where a decision is subject to appeal, reasons need to be given for two reasons. Firstly, reasons are necessary to enable the losing party to decide whether to appeal. Secondly, reasons are necessary to enable the appellate body to determine the appeal.

In any event, the tribunals which decide most strata and community title matters in the major states, NSW and Victoria [60], are required to give reasons pursuant to a statute that sets out "the minimum characteristics that the tribunal's reasons must possess" [61].

As observed above, not every fact or argument relied on by the losing party must be addressed in reasons for a decision [62]. Back in 1993, before the law relating to adequacy of a tribunal's engagement with the issues had developed, in Collector of Customs v. Pozzolanic Enterprises Pty Ltd [63], the Full Court of the Federal Court said: "[t]he reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error". This language was repeated with approval by the High Court in Minister for Immigration and Ethnic Affairs v. Wu Shan Liang [64].

Relying on that general aphorism, the Supreme Court of Victoria – Court of Appeal has expressed a reticence in disciplining the Victorian Tribunal. In 2018 in Scott Ferris v. Victoria [65] and Secretary to the Dept of Justice and Regulation v. OUX (a pseudonym), the Court said:

> *Under s 148 of the VCAT Act, this Court's jurisdiction is, as we have mentioned, limited to the resolution of questions of law. In a not dissimilar legislative context, this limitation has been said to*

> *impose a "significant constraint" upon the role of the Court in reviewing a Tribunal's decision. This "practical as well as principled restraint" means that the Court "will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts". Hence, the reasons of the Tribunal for the decision under review "are not to be construed minutely and finely with an eye keenly attuned to the perception of error". The reality is "that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed". We have endeavoured to take a broad and practical approach to the interpretation of the Tribunal's reasons, bearing the foregoing principles steadily in mind [66].*

In neither case were the inadequacies in the tribunal decision considered sufficient for the Court to intervene. Mere "loose language" did not warrant intervention [67]. The court even went so far as to divine that which the tribunal meant to say.

A similar and equally unsatisfactory example of appellate review deciding to uphold a tribunal decision based not on that which the tribunal said, but on that which an appeal panel thought the tribunal meant to say arose in NSW in Owners of Strata Plan No 12289 v. Donaldson [68]. That case concerned the appropriation of a large part of a small common property parking area for a five lot scheme. The lift was to serve only the top floor apartment, and was needed because Mr Donaldson was disabled. He sadly passed away before the appeal was heard. The lift that was being built by the Donaldsons involved more and different encroachment on the car parking area than lift plans which had been approved some time earlier. The owners corporation's concerns about the impact on safety in the parking area were also dismissed summarily. Whether the same result would be achieved today following the Supreme Court decision in Kaye, *supra*, is doubtful.

A middle ground is that a tribunal needs to make it sufficiently clear, on a plain reading of the decision as a whole, whether it accepted (and if so to what extent) or whether it rejected the evidence and substantial arguments on the one side or the other [69]. The reasons must also be intelligible. As set down by Kyrou J in the Supreme Court of Victoria: "Reasons are not intelligible if they leave the reader to wonder about the process of reasoning which has been followed" [71].

So, what then is the standard? The current Chief Justice, then President of the Court of Appeal, Bell P, in NSW Land and Housing Corp v. Orr in 2019 laid out the following principles [citations omitted]:

i. Decision makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily, they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole";

ii. the court should not read passages from the reasons for decision in isolation from others to which they may be related;

iii. the reasons must be read fairly and as a whole;

iv. the reasons recorded ought not to be inspected with a fine-tooth comb attuned to identifying error; and

v. there should be a degree of tolerance for looseness in the language of the tribunal, unhappy phrasing of the tribunal's thoughts or verbal slips [71].

In Orr at issue was whether hardship was taken into account in deciding whether to terminate a public housing lease. The majority view in the Court of Appeal expressed by Bell P was that reference to the hardship plus a statement that all the circumstances had

been taken into account was sufficient. The dissenting judge, McCallum JA, now Chief Justice of the ACT (and the primary judge, Adamson J, recently elevated to the NSW Court of Appeal) took the opposite view. McCallum JA said:

> *[122] The primary judge said at [67] that, as the potential hardship was a mandatory relevant consideration in the decision whether to terminate the tenancy, "the Tribunal was obliged, when setting out the pathway of its reasoning, to indicate that it was taken into account and how it was taken into account".*
>
> *[123] In my respectful opinion, that was a correct approach. . . .*

In a powerful dissent, her Honour relied on Weal v. Bathurst City Council (2000) 111 LGERA 181, where Giles JA said at [80] (Priestley JA agreeing at [33]):

> *"[80] [. . .] Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration" [72].*

Her Honour would have ruled as follows:

> *[141] In my respectful opinion, the incantation of "all the circumstances" that had been referred to in the discussion of the first stage was insufficient to expose the tribunal's reasons [. . .]. It was formulaic and did not engage with the merits of the mandatory consideration of hardship.*

In Volkswagen Group Australia Pty Ltd v. Saad [2022] NSWCATAP 133 at [58], albeit not in a strata case, an NCAT appeal panel summarised the applicable principles as follows:

> *The NSW Court of Appeal in NSW Land and Housing Corporation v. Orr [2019] NSWCA 231 (per Bell P) helpfully set out the principles relevant to adequacy of reasons at [66]–[77]. They are summarised as follows*:
>
> (1) The function of the appeal court is to determine not the optimal level of detail required in reasons for a decision but rather the minimum acceptable standard.
>
> (2) The quantity (or detail) of reasons, necessary for those reasons to be adequate may vary both with the nature of the decision maker, i.e. whether or not it is a court or tribunal, and, if the latter, possibly the type of tribunal, and the nature of the question being decided.
>
> (3) As to the quality of reasons, it is generally accepted that the sheer volume of work undertaken by tribunals is such that a perhaps more relaxed standard of review of reasons is appropriate than may be the case when an appellate court is hearing an appeal from another court.
>
> (4) Even in the less formal setting of a tribunal, there are certain minimum characteristics that a tribunal's reasons must possess. These are supplied, in relation to the tribunal, by s 62(3) of the NCAT Act, which requires there to be set out in reasons (when requested by a party):
>
> (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based;
>
> (b) the tribunal's understanding of the applicable law; and
>
> (c) the reasoning processes that lead the tribunal to the conclusions it made.
>
> (5) At least a basic explanation of the fundamental reasons which led the tribunal to its conclusion is necessary.

(6) It is not necessary for a judge to detail each factor which he or she has found to be relevant or irrelevant. Nor is a judge required to make an explicit finding on each disputed piece of evidence. It will be sufficient if the inference as to what is found is appropriately clear.

(7) Reasons need not be elaborate.

(8) Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole.

(9) The court should not read passages from the reasons for decision in isolation from others to which they may be related.

(10) The reasons must be read fairly and as a whole.

(11) The reasons recorded ought not to be inspected with a fine tooth-comb attuned to identifying error.

(12) There should be a degree of tolerance for looseness in the language of the tribunal, unhappy phrasing of the tribunal's thoughts or verbal slips.

There appears to be no reported strata case on point.

Conclusions

While there are many grounds of review of tribunal decisions that inferentially raise questions of decisional quality, such as failure to take relevant considerations into account or taking irrelevant considerations into account as well as making a decision for an improper purpose, only in the present century has the law in Australia developed minimum standards for decisional quality.

The position would appear to be that where a party presents a substantial, clearly particularised argument relying upon established facts, a tribunal must address its mind to those facts and the arguments by way of an active intellectual process. The requirement is limited to circumstances prescribed by a statute and factual and legal issues which are necessary to be determined for the tribunal to be satisfied as to circumstances prescribed by a statute.

However, where the errors are not gross and plainly obvious, appeals from defective tribunal decisions are unlikely to succeed. There is a degree of deference not often accorded to judicial officers. That deference is unfortunate when tribunals are allocated jurisdiction over what quite often are significant property disputes.

A better, and as recommended above, more disciplined approach, would be to ascertain if the errors lie on the critical path to the decision, and if yes, to uphold the appeal.

Further, it may well be that the disputed facts and issues are fully engaged with, but the reasons are unintelligible insofar as they leave the reader to wonder about the process of reasoning that has been followed. Expressing these standards is relatively easy, but enforcing them has proven to be both costly and somewhat unpredictable as a matter of practice.

As strata and community title disputes become more complex, the importance of decisional quality standards can only increase.

Notes

1. The main statutes are as follows – listed by jurisdiction:

   Unit Titles Act 2001, Unit Titles (Management) Act 2011 and *Community Title Act 2001*, Australian Capital Territory (ACT);

   Unit Titles Act 1976, NT;

Strata Schemes Development Act 2015 (NSW), Strata Schemes Management Act 2015 (NSW), 1989, Community Land Development Act 2021, Community Land Management Act 2021, New South Wales (NSW).

Property, Stock and Business Agents Act 2002 (NSW), (which sets out some of the obligations for strata managing agents);

Body Corporate and Community Management Act 1997, Queensland (QLD);

Strata Titles Act 1988 and *Community Titles Act 1996 (SA)*, South Australia (SA);

Strata Titles Act 1998, Tasmania (TAS);

Subdivision Act 1988, and *Owners Corporation Act 1998*, Victoria (VIC); and

Strata Titles Act 1985 and *Community Titles Act 2018*, Western Australia (WA).

There also are regulations in place under various Acts.

Much other legislation affects strata and community schemes. See generally: Sherry C. 2017 (esp. Appendix D), *Strata Title Property Rights: Private governance of multi-owned properties*, Routledge.

2. The Law Society of NSW "Strata title", accessed April 2023 <www.lawsociety.com.au/for-the-public/know-your-rights/strata-title#:~:text=What%20is%20strata%20title%3F,garage%20or%20even%20storage%20area>.
3. *Strata Schemes Development Act 2015 (NSW)*, Schedule 2, NSW.
4. *Strata Schemes Management Act 2015 (NSW)*, §28, NSW.
5. *Strata Titles NSW*, Community schemes – Commentary at [6100], NSW.
6. Easthope *et al.* (2020).
7. Ng (2018, at p. 116). Both courts and tribunals in Australia are not required to meet state-imposed political ends. In contrast, in one-party dictatorships, judges are under direct party control and required to implement state plans. Judicial independence is something we in the common law world take for granted, sometimes without acknowledging that only a minority of nations enjoy independent courts and tribunals.
8. Judicial College of Victoria 2008 Framework of Judicial Abilities and Qualities, cited by Gar Yein Ng at p. 111, n. 29.
9. Courts and Tribunals Judiciary (2014).
10. *Civil and Administrative Tribunal Act 2013 (NSW)*, §3(3).
11. *Victorian Civil and Administrative Tribunal Act 1998*, §97 and 98(1)(a); *Civil and Administrative Tribunal Act (NSW) 2013*, §38(2).
12. *NCAT 2022*, at 8/107. In excess of 50,000 matters came to the Tribunal's Consumer and Commercial Division in the past reporting year.
13. NCAT 2022, at 26/107. Yet, decisional quality is not one of the eight areas of tribunal excellence set out in the Australia and New Zealand Tribunal Excellence Framework (June 2017), published by the Council of Australasian Tribunals. Those are: Independence, Leadership and Effective Management, Fair Treatment, Accessibility, Professionalism and Integrity, Accountability, Efficiency and User Needs and Satisfaction: NSW Civil and Administrative Tribunal: NCAT Annual Report 2021–2022 ("NCAT 2022"), at 6/107.
14. With limited exception, tribunal hearings are open to the public.
15. *NCAT Policy 2* October 2019, Publishing Reasons for Decisions.

16. It should be noted that while a strata dispute can be brought before the Supreme Court directly, there are barriers to taking that course. In particular, if issues can be determined by the tribunal, the Court usually transfers the proceedings.
17. *Unit Titles (Management) Act 2011 (ACT)*, Part 8; *ACT Civil and Administrative Tribunal Act 2008*, §86.
18. *Northern Territory Civil and Administrative Tribunal Act 2014*, §140.
19. *Northern Territory Civil and Administrative Tribunal Act 2014*, §141.
20. See, e.g. *Civil and Administrative Tribunal Act 1998 (Victoria)*, §148; *State Administrative Tribunal Act 2004 (WA)*, §105; *Body Corporate and Community Management Act 1997 (Qld)*, ss 286, 287 and 289–294.

    In South Australia, disputes go directly to the Magistrates Court, or in some case to the District Court: *Strata Titles Act 1988 (SA)*, s 41A(9); and *Community Titles Act 1996 (SA)*, s 142(8).
21. *NCAT 2022*, 18/107.
22. *NCAT 2022*, 19/107.
23. *NCAT 2022*, 53/107.
24. *NCAT 2022*, 39/107.
25. *VCAT Annual Report 2021-22* ("*VCAT 2022*"), 10(12/108).
26. *VCAT 2022*, 34 (34/108).
27. Victorian Civil and Administrative Tribunal Act 1998 §148. " The existence of a question of law is now not merely a qualifying condition to ground the appeal, but also the subject matter of the appeal itself:. . .: " TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation (1988) 82 ALR 175 at 178. A mixed question of fact and law is not a question of law: The Owners Strata Plan No 68976 v Nicholls [2018] NSWSC 270 at [15] [16].
28. Resource Pacific Pty Ltd v. Wilkinson [2013] NSWCA 33 at [48].
29. Weal v. Bathurst City Council (2000) 111 LGERA 181.
30. 111 LGERA at 1184[8].
31. (1987) 14 ALD 291 at 292.
32. See also: Weal 111 LGERA at 185-86[13] per Mason P.
33. 111 LGERA at 186[17]. Justice Mason was in the minority; his Honour would have decided that the Council decision was adequate. Giles JA, with whom Priestly JA agreed, considered that the Council's decision was deficient. There was, however, unanimity as to the principles to be applied.
34. Some doubt as to this requirement has appeared recently in a single judge NSW Supreme Court decision: Kaye v. The Owners Strata Plan no. 4350 [2022] NSWSC 1386.
35. 111 LGERA at 201[80].
36. (2003) 197 ALR 389; (2003) 77 ALJR 1088.
37. However, breach of the rules of natural justice was not a ground upon which an application for review of a visa could be made under the *Migration Act* as it then stood. To get around that barrier, their Honours held that failure to decide the first question was nevertheless a failure to exercise the jurisdiction: 197 ALR at 394[27].
38. 197 ALR 389 at 407[87].

39. Dranichnikov has been explicitly recognised in the NCAT: Rice Marketing Board for the State of NSW v. Forbidden Foods Pty Limited; Forbidden Foods Pty Limited v. Rice Marketing Board for the State of NSW [2020] NSWCATAP 182 at [170]–[175]; Secretary, NSW Department of Education v. Gabriel's Family Day Care Pty Ltd [2021] NSWCATAP 263 at [108]–[111].
40. (2010) 241 CLR 252.
41. This proposition had earlier been expressed by Justice Dixon in Avon Downs Pty Ltd v. Federal Commissioner of Taxation (1949) 78 CLR 353 at 360.
42. (2010) 190 FCR 248; (2010) 274 ALR 438 at [57]–[59].
43 [2013] FCA 825 at [48]–[49]; cited with approval by Mansfield J in DZADQ v. Minister for Immigration and Border Protection (2014) 143 ALD 659 at [44].
44. Strata Schemes Management Act 2015 (NSW), section 172, is in analogous terms.
45. [2014] VSC 664 at [78]-[79].
46. [2016] NSWSC 1291.
47. Colbert at [83]; Macey's Group Pty Ltd v. Owners SP33591 [2021] NSWCATAP 7 at [54].
48. [2020] NSWCATAP 227.
49. [2020] NSWCATAP 227 at [49].
50. [2020] NSWCATAP 227 at [67].
51. Marinko v. The Owners – Strata Plan No 7596 [2022] NSWCATAP 187 at [29].
52. Id. at [46]–[47].
53. For example, Id. [61]. There also were complaints about consent orders requiring resolutions to be passed, which had not been passed. The tribunal Member, at first instance, simply waived these away.
54. [2022] NSWCATAP 348.
55. (2003) 75 ALD 630 at [46]–[47]. See also: Minister for Immigration and Citizenship v. SZJSS (2010) 273 ALR 122; (2010) 85 ALJR 306; Zental v. Honourable Brendan O'Connor (No 3) (2010) 270 ALR at 534 [290].
56. (1992) 34 FCR 212 (Black CJ, Spender and Gummow JJ) followed in Clarke v. Detective Senior Constable Ryan [2005] VSCA 311 (Habersberger AJA with whom Warren CJ and Ashley JA agreed) at [25], [28]–[29].
57. Allianz Australia Insurance Ltd v. Cervantes (2012) 61 MVR 443; [2012] NSWCA 244; BC201206209 at [22] per Basten JA.
58. Public Service Board (NSW) v. Osmond (1986) 159 CLR 656.
59. Soulemezis v. Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 at 279 per McHugh JA; Campbelltown City Council v. Vegan (2006) 67 NSWLR 37. (No jurisdictional error [as distinct from an error on the face of the record] merely because reasons were inadequate, but jurisdictional error because the inadequacy of the Appeal Panel's reasons disclosed a failure to address the correct issues); Wainohu v. New South Wales (2011) 243 CLR 181, [56], [58], citing AM Gleeson, "Judicial Accountability" (1995) 2 The Judicial Review 117, 122 per French CJ and Kiefel J.
60. *Civil and Administrative Tribunal Act 2013 (NSW)*, §62; *Civil and Administrative Tribunal Act 1998 (Vic)*, §46.
61. New South Wales Land and Housing Corporation v. Orr (2019) 100 NSWLR 578 at 595[66].

62. Whisprun Pty Ltd v. Dixon (2003) 200 ALR 447 at 463[62] Per Gleeson CJ, McHugh and Gummow JJ; Strbak v. Newton [1989] NSWCA 202, cited in Xuereb v. Viola (1989) 18 NSWLR 453 at 469.
63. (1993) 43 FCR 280 at 287 (Neaves, French and Cooper JJ).
64. (1996) 185 CLR 259 at 272.
65. [2018] VSCA 240 at [7].
66. [2018] VSCA 178 at [36].
67. [2018] VSCA 240 at [21].
68. [2019] NSWCATAP 213 at [65] and [74].
69. Baker v. David [2015] NSWCA 235 at [24] (Meagher JA; McColl JA and Sackville AJA agreeing), quoting Hunter v. Transport Accident Commission (2005) 43 MVR 130 at [21] (Nettle JA; Batt and Vincent JJA agreeing). *Also see*: Greenwood v. NWF Retail Ltd [2011] ICR 896, EAT at 908[38]; Meek v. City of Birmingham District Council [1987] IRLR 250.
70. Paul & Paul Pty Ltd v. Business Licensing Authority [2010] VSC 460 at [69].
71. (2019) 100 NSWLR 578, at 597-98 [77].
72. To the same effect are Zhang v. Canterbury City Council (2001) 51 NSWLR 589; [2001] NSWCA 167 at [64] and Azriel v. NSW Land and Housing Corporation [2006] NSWCA 372 at [49].

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