IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B37 of 2016

BETWEEN:

KJERULF AINSWORTH
First Appellant
AND
LISA MARTOO
Second Appellant
AND
JOHN MORRIS
Third Appellant
AND
MARK LANG
Fourth Appellant
AND
JOHN MAINWARING
Fifth Appellant
AND
MARTIN ALBRECHT
First Respondent
AND
BODY CORPORATE FOR VERIDIAN NOOSA RESIDENCES CTS 3404
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Table of Abbreviations

ANOA	Appellants' Amended Notice of Appeal of 23 June 2016
AS	Appellants' Submissions of 29 June 2016
BCCM Act	*Body Corporate and Community Management Act 1997* (Q)
CA	Reasons for Judgment of the Court of Appeal of 6 November 2015
QCATA	The Appeal Tribunal under the *QCAT Act*
QCAT Act	*Queensland Civil and Administrative Tribunal Act 2009* (Q)
NOC	First Respondent's Notice of Contention of 14 June 2016
RD(A)	Reasons for Decision of the Adjudicator of 2 September 2013
RD(QCATA)	Reasons for Decision of the QCATA of 17 October 2014

Part I: Suitability for publication

1. The First Respondent certifies that these submissions are in a form suitable for publication on the internet.

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Part II: Statement of Issues

2. The issues in the appeal involve the proper interpretation of provisions of the *BCCM Act* and the *QCAT Act*, and may be summarised as:

   (a) whether (as raised by the Appellants in the ANOA), the Adjudicator erred in law:

      (i) by reaching her own conclusion as to whether the First Respondent's motion should have been passed ("the role of the Adjudicator issue");

      (ii) by applying an incorrect test as to reasonableness in determining whether the opposition to the First Respondent's motion was unreasonable ("the test for unreasonableness issue");

      (iii) by reversing the onus of proof ("the onus reversal issue");

   (b) whether (as raised by the First Respondent in the NOC):

      (i) the Adjudicator was not bound by any rule relating to onus of proof ("the onus issue");

      (ii) in the event that an error of law raised by the Appellants and upheld by the QCATA were made good, it was open to the QCATA to substitute its own decision for that of the Adjudicator ("the scope of the appeal issue").

Part III: Section 78B Notice

3. The First Respondent certifies that, following due consideration, no notice needs to be given in compliance with s.78B of the *Judiciary Act 1903*.

Part IV: Contested material facts

4. The Appellants' statement of the factual background in Part V of the AS is generally correct, so far as it goes, but it does not draw attention to all the findings of the Adjudicator; in summary, they were:

   (a) the total area of common property required was about 5m², and the common property involved was simply airspace[1];

   (b) the air space was of no material use to any other owner or occupier[2], and the First Respondent's use of that air space would not result in any loss of the use of the space by any other person[3];

   (c) the First Respondent's proposal would improve the amenity of the external areas of his lot, and the First Respondent had a legitimate interest in doing that[4];

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1 RD(A)[45]
2 RD(A)[46]
3 RD(A)[47]
4 RD(A)[42]

(d) the deck amalgamation would have no adverse impact on other owners or the scheme as a whole[5];

(e) the significant level of interrogation that the proposal had been through was unlikely to lead other owners to believe that they had an automatic right to have any and all alterations approved[6];

(f) it was not reasonable to seek to prevent any deviation from the original design intent, or indeed any alteration at all to the exterior of the community titles scheme[7];

(g) no submission demonstrated that the extension would have any noticeable detrimental impact on the appearance, structure or functionality of the architecture of the scheme[8];

(h) it was very difficult to discern a difference between the "before" and "after" images of the appearance of the deck[9];

(i) no visual disruption or other appreciable change to the appearance, character or openness of the scheme from the proposed deck based on those images, or from the other material submitted by both parties, could be perceived[10];

(j) there was no demonstration that any increased use of the new deck would cause a disturbance[11];

(k) any impact on the privacy and views from the adjacent lot 10 would be minimal[12] or slight[13];

(l) there was no reason for concern about the structural framework or supports for the deck extension[14];

(m) the plans do not include a change in the roof[15];

(n) there was no basis upon which the proposal could financially impact the body corporate[16].

Part V: Applicable statutory provisions

5. The Appellants' statement of applicable statutory provisions in Part VII of the AS is accepted, save that, in view of the NOC, reference should also be made to-

- ss.227, 248 and 271 of the *BCCM Act* (as attached to these submissions)

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5 RD(A)[49]
6 RD(A)[51]
7 RD(A)[56]
8 RD(A)[61]
9 RD(A)[62]
10 RD(A)[62]
11 RD(A)[67]
12 RD(A)[77]
13 RD(A)[87]
14 RD(A)[78]
15 RD(A)[79]
16 RD(A)[84]

- ss.147, 153 and 154 of the *QCAT Act* (as attached to these submissions)

Part VI: Answer to the Appellants' argument

The issues below

6. This proceeding has been the subject of 3 decisions below.

7. Given the terms of s.269(1), s.276(1), s.276(3) and Item 10 in Schedule 5 of the *BCCM Act*, the primary issue for the Adjudicator was whether she was satisfied that the First Respondent's motion was not passed because of opposition that in the circumstances was unreasonable.

8. Given that the Appellants' subsequent appeal against the orders of the Adjudicator was limited to a question of law only (*BCCM Act* s.289(2)), the primary questions that arose in that appeal were:

   (a) did the Adjudicator err in law?

   (b) if so, did the error warrant intervention by the QCATA?

   (c) if so, what orders should the QCATA make?

9. The First Respondent's appeal to the Court of Appeal was similarly restricted to a question of law only (*QCAT Act* s.150(3)(a)) (and was subject also to a grant of leave to appeal: *QCAT Act* s.150(3)(b)). As the QCATA had held that the Adjudicator had erred in law, from a practical perspective, the primary issue in the Court of Appeal was whether that conclusion of the QCATA was correct (because, if it was not, it followed that the QCATA had erred in law).

The Appellants' issues in this Court

10. The Appellants' issues in this Court are set out in paragraph 2(a) above. With reference to the reasoning of the Court of Appeal, the 3 issues are identified in para 39 of the AS, where they are also linked to Grounds 1 to 4 in the ANOA.

Some regrettable lack of clarity or consistency

11. The Appellants' 3 issues fall to be determined against the background of some regrettable lack of clarity in the Appellants' arguments throughout the proceedings, and in the reasons of the QCATA.

12. The Appellants' arguments have lacked clarity (and consistency), because:

   (a) the role of the Adjudicator issue, which the Appellants now link to 3 of their grounds of appeal, was not an issue raised by them before the QCATA[17];

   (b) confusingly, in the context of dealing with the role of the Adjudicator issue, the Appellants appear to submit that the QCATA was correct in concluding that the

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17 the grounds of appeal are set out in RD(QCATA) [28]-[30]

Adjudicator had, in this respect, erred in law (AS para 47) (ie even though it was not a ground of appeal in the QCATA), and the paragraph in the RD(QCATA) to which the Appellants then refer ([87][18]) throws no light on the confusion; it is possible that the explanation lies in some apparent overlap between the role of the Adjudicator issue and the test for unreasonableness issue[19], but that is not made clear;

(c) the Appellants' grounds of appeal in the QCATA were, as McMurdo P aptly recorded[20], *"lengthy, rambling and unfocussed"*;

(d) the Appellants correctly note that each of the Adjudicator and the QCATA rejected a *Wednesbury* test[21] in determining whether the opposition to the First Respondent's motion was unreasonable, but then incorrectly state that the present case was the first occasion on which the Court of Appeal was required to decide the issue[22] (that is incorrect, because neither the First Respondent nor the Appellants raised the issue in the Court of Appeal);

(e) the Appellants then contend that the test propounded by them requires a higher level of satisfaction than *Wednesbury* unreasonableness[23], but the basis for that contention is unclear;

(f) the Appellants submit that reasonableness cannot be decided in the abstract, and must take account of the activity being considered[24], but that submission is consistent with the approach taken by the Adjudicator[25], and raises a question about whether the test propounded by the Appellants is materially different to the approach taken by the Adjudicator; as discussed further below, the Appellants' references to the decision in *Waters v Public Transport Corporation 1991 173 CLR 349* seem odd[26]; they first submit that that case involved a quite different statute, but they then seek to place reliance upon aspects of the judgments; and yet, when those aspects are fairly considered, they support the approach taken by the Adjudicator.

13. The reasons of the QCATA lack clarity, because:

(a) the reasons are lengthy, and deal with a range of legal propositions, but they do not identify with clarity each of the errors of law which was held to have been made, and the reasons for each such conclusion[27];

(b) the reasons set out the Appellants' numerous grounds of appeal (many of which were evidently factual in nature), without any critical comment, and without later identifying which (if any) of those grounds were made out.

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18 AS fn.27
19 see eg AS paras 46, 50
20 CA [44]
21 taken from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 1 KB 223*
22 AS para 49
23 AS para 50
24 AS para 52, para 63
25 see eg RD(A) [41]
26 AS paras 62-64
27 see eg RD(QCATA) [96][146]

The role of the Adjudicator issue

14. The Appellants' reliance upon this issue is based upon a misreading of the reasons of both the Adjudicator and the Court of Appeal.

15. The question posed by the Appellants is whether *"an adjudicator is entitled to make findings of fact and reach his or her own conclusion on the merits of the proposal contained in the motion, rather than determine whether the opposition to the motion was objectively unreasonable"*[28] The Appellants then state that the reasoning of the Court of Appeal was erroneous in *"Its acceptance at [82] that the Adjudicator was required to reach her own conclusion as to the correctness of the decision of the Body Corporate.....The Adjudicator only had to decide whether the opposition to the motion was in the circumstances unreasonable"*[29]. With reference to CA[82], the Appellants then seize on the sentence *"She was required to reach her own conclusion after considering all relevant matters"*[30], and then assert: *"The President was referring not to a conclusion as to whether the opposition was unreasonable, but a conclusion as to the merits of the opposition."*[31].

16. The Appellants have wrongly taken the sentence out of context, and have attributed a wrong meaning to it. Considering the sentence in its context, it is apparent that the President did proceed correctly on the footing that the issue for the Adjudicator was whether the opposition to the motion was in the circumstances unreasonable.

17. That context included the following (footnotes omitted and underlining added):

(a) *"Her role under s 276 and Item 10 in Schedule 5 BCCM Act, consistent with the objects of the BCCM Act and the obligation on bodies corporate in carrying out their general functions to act reasonably under s 94 BCCM Act, was to determine whether she was satisfied the body corporate did not pass the applicant's motion because of opposition from the respondents that was in the circumstances unreasonable. This was a question of fact to be determined by objectively considering all relevant circumstances....."*[32]

(b) *"In determining the ultimate question of fact (whether the respondents' opposition to the applicant's motion is in the circumstances unreasonable), the adjudicator appreciated that....."*[33]

(c) *"The adjudicator's reasons make clear that she conscientiously considered all the material and submissions relied upon by the applicant and the respondents, made findings of fact, all of which were open on that material, and was ultimately satisfied as a matter of fact that the applicant's motion was not passed because of the respondents' opposition to it that in the circumstances was unreasonable."*[34]

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28 AS para 2
29 AS para 39.1
30 AS para 41
31 AS para 41
32 CA[82]
33 CA[83]
34 CA[91]

(d) *".....She made primary findings of fact, after considering the competing material and submissions, that she was not satisfied the specific objections raised by the respondents were made out. But she did not reverse the onus on the ultimate question....."*[35]

(e) *".....In referring to these matters, she was rightly taking into account material considerations in determining the ultimate question: whether the respondents' opposition to the motion was in the circumstances unreasonable....."*[36]

18. The sentence in CA[82] seized upon by the Appellants is also explained by the terms of Item 10 in schedule 5 of the *BCCM Act*. That item only permitted the Adjudicator to give effect to the First Respondent's motion if she was *"satisfied"* that the motion was not passed because of opposition that in the circumstances was unreasonable – that is, as the President correctly indicated, the Adjudicator could only make the order identified in Item 10 if she reached her own conclusion that the opposition to the motion was unreasonable.

19. In that regard, the Appellants' reliance[37] on passages from *McKinnon v Secretary Department of Treasury 2006 228 CLR 423* is misplaced. As Hayne J pointed out in that case, the question presented by the particular statutory provision there[38] *"makes no reference to the state of mind of any person"*, and *"notions of persuasion or satisfaction...are unhelpful in this context"*[39]. In contrast, the making of the order identified in Item 10 is conditioned upon the Adjudicator being satisfied as to a particular state of affairs.

20. Moreover, the issue is whether the Adjudicator erred in law in misunderstanding her role, and the Appellants do not point to any statement in the Adjudicator's reasons which supports the Appellants on the role of Adjudicator issue.

21. The reasons of the Adjudicator show that she correctly approached her task: for example:

(a) the Adjudicator stated:

(i) *"the issue...is whether the opposition to (the) motion was unreasonable in the circumstances..."*[40];

(ii) *"I will consider the basis for the proposal and the objections to it to ascertain whether the opposition to the proposal was unreasonable in the circumstances, and consequently whether the decision of the Body Corporate not to approve the proposal was unreasonable"*[41];

(b) in the orders made, the Adjudicator declared that the motion *"was not passed because of opposition that was unreasonable in the circumstances"*.

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35 CA[92]
36 CA[93]
37 at AS para 42 fn.24; AS para 68
38 s.58(5) of the *Freedom of Information Act 1982* (Cth), which empowered the AAT to determine whether there existed reasonable grounds for a claim that disclosure of a document would be contrary to the public interest
39 228 CLR at 445[59]
40 RD(A) [4]
41 RD(A) [41]

The test for unreasonableness issue

22. The Appellants contend that the appropriate test to be applied is whether a reasonable person could have opposed the motion on the bases identified[42].

23. There are various answers to this contention.

24. First, the Appellants' suggested test does not reflect the language of Item 10. With its specific reference to *"opposition that in the circumstances is unreasonable"*, it is apparent that Item 10 requires a consideration of all relevant circumstances and, as the Adjudicator here correctly recognised, those circumstances will include the subject matter of the motion, as well as the bases of opposition. The Court of Appeal was correct in concluding that the Adjudicator was not limited to determining whether the Appellants opposition could have been reasonably held[43].

25. Secondly, as has been recognised by this Court, in judging the reasonableness of a decision, unreasonableness is not limited to irrational or bizarre decisions[44], and even a rational decision may be unreasonable[45]. Similarly, opposition to a motion may be unreasonable, even though the opposition is, or may be, rational. The test proposed by the Appellants is inconsistent with this principle.

26. Thirdly, the approach taken by the Adjudicator, and by the Court of Appeal, is supported by the judgments in *Waters v Public Transport Corporation 1991 173 CLR 349*. There, the Equal Opportunity Board had held that, in determining whether a requirement or condition was reasonable, it should look solely to the circumstances of the complainants, and that it was precluded from considering considerations which might have motivated the Public Transport Corporation *"in the balance against the facts presented by the (complainants)"*[46]. Both the Supreme Court of Victoria (Phillips J) and this Court held that that conclusion was erroneous, that *"reasonable"* meant reasonable in all the circumstances of the case, and that a determination of reasonableness involved considering not only the position of the complainants but also the position of the corporation. The notions of striking *"a balance"* between the competing positions[47], of *"weighing all the relevant factors"*[48], and of an inquiry that would *"necessarily include a consideration of evidence viewed from the point of view of (both parties)"*[49] were highlighted in the various judgments. The decision cuts across the Appellants' contention that no balancing exercise is involved in judging whether opposition to a motion is, in the circumstances, unreasonable[50].

27. The requirement to weigh all relevant factors in determining an issue of unreasonableness has also been upheld in various decisions of the Federal Court[51].

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42 AS para 50
43 CA[82]
44 *Minister for Immigration & Citizenship v Li 2013 249 CLR 332, 364[68]*
45 *Minister for Immigration & Citizenship v Li 2013 249 CLR 332, 351-352[30]*
46 *173 CLR at 383* (in the judgment of Deane J)
47 *173 CLR at 379*, per Brennan J (as he then was)
48 *173 CLR at 359*, per Dawson & Toohey JJ
49 *173 CLR at 411*, per McHugh J
50 AS para 55, para 56, para 57, para 70
51 see eg *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission 1997 150 ALR 1, 32-33*, and authorities referred to therein

28. So, as foreshadowed above[52], it is not easy to see how the Appellants' reliance upon *Waters v Public Transport Corporation* assists their contention.

29. Fourthly, while the Appellants support their contention by reference to such matters as the level of opposition to the motion[53], or the requirement that the resolution must be made without dissent[54], or principles developed in other contexts (such as the corporate field)[55], previous decisions at the level of the Queensland Court of Appeal on Item 10, or its predecessor[56], have not been influenced by matters of this kind to do other than apply the language of the provisions, according to their ordinary meaning:

(a) in *Independent Finance Group Pty Ltd v Mytan Pty Ltd 2003 1 QdR 374* (at 383), after reference to various objects of the *BCCM Act*[57], Thomas JA said[58]:

> *"In this context it is not surprising to find a provision such as (Item 10 of Schedule 5) which permits a virtually direct managerial solution to defeat a certain type of unreasonable conduct that might otherwise frustrate an objective that could otherwise only be attained by a resolution without dissent. Such a power may be surprising to those used to the independent management of companies, but there seems little doubt that the legislature has here deliberately established a mechanism for the resolution of community titles scheme disputes in this way"*;

(b) in *Hablethwaite v Andrijevic 2005 QCA 336*, an adjudicator made an order under Item 10 of Schedule 5 which overrode the exercise by owners of their controlling majority vote in respect of a number of motions because their opposition was unreasonable, and, in dismissing a challenge to that order, Keane JA (as he then was) said (footnote omitted):

> *"[33] The effect of the adjudicator's conclusion...was that the applicants did not demonstrate that they would be adversely affected in the use and enjoyment of their rights as lot owners (other than their voting rights) by the nullification of their voting rights on the motions in question. The adjudicator's statutory powers extend to making orders resolving disputes about the exercise of voting rights by lot owners. The statutory conferral of power upon the adjudicator to make an order which is 'just and equitable in the circumstances' necessarily contemplates a decision by the adjudicator which may be 'just and equitable in the circumstances' even though it overrides the exercise of voting rights by a scheme member."*

30. Fifthly, the Adjudicator's approach to the test of reasonableness was consistent with other decisions by adjudicators in relation to item 10[59], and with a decision of the QCATA in relation to s.94(2)[60]. Consistency in decision-making is expected of tribunals[61].

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52 para 12(f)
53 AS para 53
54 AS para 56
55 AS para 61
56 s.223(3)(u) of the *BCCM Act* (replaced by a schedule in the *BCCM Act* by ss.93 and 116 of Act no. 6 of 2003)
57 now reflected in s.2, s.3(b), s.4(b) and s.4(i) of the *BCCM Act*
58 substituting Item 10 for the former s.223(3)(u)

31. To respond now to some of the Appellants' supporting arguments:

(a) the Appellants rely upon the decision of an adjudicator in *Sirocco Resort 2006 QBCCMCmr 426* in support of their suggested test of unreasonableness[62]; *Sirocco Resort* was not concerned with item 10 of schedule 5, but with whether the refusal of a body corporate to consent to an assignment of two agreements was reasonable; the Appellants' reliance upon that decision was correctly rejected by QCATA in the present proceeding, on the ground that it applied different principles to a different problem[63];

(b) in the same context[64], the Appellants rely upon *George v Rockett 1990 170 CLR 104* (at 112), but it too was concerned with a different situation – namely, the issue of a search warrant by a justice, and the requirement (in s.679 of the Criminal Code (Q)) that it must appear to the issuing justice that there are reasonable grounds for entertaining the relevant suspicion and belief[65];

(c) the Appellants' suggestion that the approach taken by the Adjudicator means that a decision of a body corporate can only be regarded as provisional, tentative or interim[66] is unhelpful; the application of the Applicants' alternative test for reasonableness does not alter the status of a decision of a body corporate for the purposes of the dispute resolution process under the *BCCM Act*;

(d) as submitted above[67], the Appellants' reliance[68] on passages from *McKinnon v Secretary Department of Treasury 2006 228 CLR 423* is misplaced, because of differences in the legislative provisions; additionally, *McKinnon* raised the question (which has no direct parallel here) whether, if one reasonable ground for the claim of contrariety to the public interest existed, the conclusiveness of the Minister's certificate would be beyond review, even though there may be reasonable grounds pointing the other way[69];

(e) the Appellants erroneously submit[70] that nothing in *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission 1997 150 ALR 1* supports the approach taken by the Adjudicator and the Court of Appeal, and add that, in that decision, the relevance of subjective views as being relevant to the determination of the reasonableness of conduct was approved; however, what Sackville J said was that *"the subjective preferences of the aggrieved persons cannot be determinative of the reasonableness of the impugned condition requirement"* (*150 ALR at 33*), and His

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59 eg *Points North 2004 QBCCMCmr 423* at [44]; *Zenith 2007 QBCCMCmr 115* (p.6/10); *Pandanus Shores Caloundra 2012 QBCCMCmr 495 at [19]-[22]*

60 *Luadaka v Body Corporate for The Cove Emerald Lakes 2013 QCATA 183 at [16]*

61 see eg *Re Drake & Minister for Immigration & Ethnic Affairs (No 2) 1979 2 ALD 634, 639; AAT Case 4589 1988 19 ATR 3824, 3829[14]; Re Ganchov & Comcare 1990 19 ALD 541, 543[43]*

62 AS para 50, fn.33

63 RD(QCATA) [81][82]

64 AS para 50, fn.33

65 see 1990 170 CLR 104, 111-112 (and note the Court's insistence, at 112, on *"strict compliance"* with the statutory conditions governing the issue of search warrants)

66 AS para 55

67 para 19

68 AS paras 66-70

69 see eg at 441-442[50]-[52]; 467-468[129]-[131]

70 AS para 65; and see now paras 26, 27 (above)

Honour otherwise applied the reasoning in *Waters v Public Transport Corporation* and other relevant authority;

(f) the Appellants' reliance[71] on an extract from CA[84] misses a fundamental point; what the Court of Appeal there recognised was that the Adjudicator's decision that the opposition was unreasonable was a decision on a question of fact, which was not subject to review in the appeal to the QCATA; accepting then that the test to be applied to the opposition to the First Respondent's motion was not unreasonableness in the *Wednesbury* sense, it followed that the Adjudicator's decision that the opposition was unreasonable was not necessarily the only decision that could have been reached, but the correctness of it was not subject to merits review by the QCATA.

32. It is notable that the Adjudicator's power to make an order under Item 10 was subject to the pre-condition that she was *"satisfied"* that the motion was not passed *"because of opposition that in the circumstances is unreasonable"*. This highlights that the Adjudicator's decision on that issue was very much a factual matter for her determination, it being well established that, with statutory provisions of this kind, it is not open to a Court to review the correctness of the decision, except on orthodox administrative law grounds and that, even then, where the matter of which the decision-maker is required to be satisfied is a matter of opinion (as here), it may be very difficult to make good such a ground[72]. Many of the Appellants' arguments ignore these principles, and impermissibly seek to reagitate the merits of the Adjudicator's decision.

The onus reversal issue

33. This issue depends upon a particular reading of the Adjudicator's decision – and, subject to the onus issue dealt with in Part VII below, not upon any question of principle.

34. The high point of the Appellants' argument on this issue seems to be that there was *"no persuasive reasoning"*[73] by the Court of Appeal in support of its view of the proper reading of the reasons of the Adjudicator *"read as a whole"*. The Appellants' assertion that there was no *"descending to any particularity of reasoning"*[74] ignores the references to various relevant statements by the Adjudicator which had been referred to earlier by the Court of Appeal[75].

35. In considering the way in which the Adjudicator's reasons should be viewed, it is also relevant to take into account the settled principle 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[76].

36. The Adjudicator did not reverse the onus of proof in discussing any of the bases of opposition. For example, while the Adjudicator did state that she was *"not satisfied that the*

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71 AS[71][72]

72 *Buck v Bavone 1976 135 CLR 110, 118-119; Foley v Padley 1983 154 CLR 349, 352-353; Minister for Immigration & Citizenship v Li 2013 249 CLR 332, 377[111]*

73 AS para 80

74 AS para 77

75 see CA[19][21][22][23]

76 *Minister for Immigration & Ethnic Affairs v Wu Shan Liang 1996 185 CLR 259, 272*

opponents of the proposal have demonstrated that the proposed modification materially offends the integrity of the architectural design of the scheme"[77], she went on to express affirmative views that it was *"very difficult to even discern a difference"* in the before and after images[78], and that she *"simply cannot see the claimed change to the architectural integrity of the scheme"*[79]. These affirmative views supported her ultimate conclusion that opposition on this ground was unreasonable, and her use of the language of non-satisfaction reflected the forensic consideration that the Appellants had gone to some trouble to oppose the First Respondent's application (which included the provision of the opinions of 3 architects). Once the Appellants' positive case fell away, it was only a very short step for the Adjudicator to take to conclude that their opposition was unreasonable.

Part VII: First Respondent's argument on the NOC

The onus issue

37. One of the secondary objects of the *BCCM Act* is to provide an efficient and effective dispute resolution process (s.4(i)), and a department adjudication of the kind that occurred here is one of the established processes (s.248(3)(e)). The range of disputes is confined to disputes between entities closely associated with a community titles scheme (s.227(1)). An adjudicator is required to investigate an application to decide whether it would be appropriate to make an order on the application (s.269(1)). The adjudicator's investigative powers are somewhat inquisitorial (s.271), and they do not contemplate any formal hearing of an adversarial kind. Section 269(3) provides that, when investigating the application, the adjudicator-

> *"(a) must observe natural justice; and*
>
> *(b) must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the application...; and*
>
> *(c) is not bound by the rules of evidence."*

38. Onus of proof is an aspect of the law of evidence[80]. It is a common law concept developed to provide answers to certain practical problems of litigation between parties in a Court of law[81]. Provisions like s.269(3) of the *BCCM Act* are intended to be facultative, not restrictive, and their purpose is to free tribunals or other bodies, at least to some degree, from constraints otherwise applicable to Courts of law, and regarded as inappropriate to such tribunals or other bodies[82]. There is a body of authority in support of the view that where proceedings are administrative in nature, or inquisitorial, there is no onus of proof upon any of the participants[83]. Much of this authority arises out of s.33 of the *Administrative Appeals Tribunal Act 1975* (Cth), which is similar to s.269(3) of the *BCCM Act*.

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77 RD(A) [61]
78 RD(A) [62]
79 RD(A) [63]
80 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd 2003 216 CLR 161, 200-201[122][123]*
81 *McDonald v Director-General of Social Security 1984 1 FCR 354, 356*
82 *Minister for Immigration & Multicultural Affairs v Eshetu 1999 197 CLR 611, 628[49]*
83 see eg *McDonald v Director-General of Social Security 1984 1 FCR 354, 356-357, 365-366; Bushell v Repatriation Commission 1992 175 CLR 408, 425; Minister for Immigration & Multicultural & Indigenous Affairs v QAAH of 2004 2006 231 CLR 1, 17[40]*

39. In these circumstances, the onus reversal issue proceeds on a false footing. There was no legal onus of proof on the First Respondent in the context of the investigation carried out by the Adjudicator, and so there was no basis for any contention or conclusion that the Adjudicator erred in law by reversing an onus of proof.

40. It may be added that the First Respondent's submission on this issue is consistent with the approach taken by the Court of Appeal in *Hablethwaite v Andrijevic 2005 QCA 336* (referred to in paragraph 29(b) above), where the effect of the procedure used by the adjudicator was to put a practical onus on the opponents to the motion (that is, the counterparts to the Appellants here), and the Court of Appeal did not make any adverse comment about that aspect of the process.

The scope of the appeal issue

41. As indicated in paragraph 8 above, one of the issues for the QCATA was as to the orders that should be made. In the result, the QCATA substituted its own decision for that of the Adjudicator[84]. The contention of the First Respondent before the Court of Appeal was that that involved an incorrect exercise of power, and that it followed an impermissible review on the merits of the Adjudicator's decision in the nature of a rehearing.

42. The Court of Appeal apparently took a different approach. The President said[85]:

> *"Once an error of law affecting the adjudicator's decision was correctly identified, QCATA could exercise the adjudicator's powers and substitute its own decision based on the material before the adjudicator, consistent with the adjudicator's undisturbed factual findings. So much is clear from the terms of section 294 BCCM Act and section 146 QCAT Act."*

43. It is true that s.146(b) of the *QCAT Act* conferred a power on the QCATA to set aside the decision of the Adjudicator, and substitute its own decision, and that s.294 of the *BCCM Act* provided that, in deciding an appeal, in addition to its powers under the *QCAT Act*, the QCATA may also exercise all the jurisdiction and powers of an adjudicator under the *BCCM Act*. However, earlier decisions of the Queensland Court of Appeal had taken a more restrictive view of s.146(b) of the *QCAT Act*, and had held that-

> *"Plainly, it is only if the determination on the question of law is capable of resolving the matter as a whole in the appellant's favour that the appeal tribunal will be a position to substitute its own decision."*[86]

44. The First Respondent submits that this is the correct approach to a provision like s.146(b). The power under that provision is only available when the QCATA answers the question, the subject of the appeal, in a manner different to the decision-maker below, and the substituted answer would, as a matter of law, have required the decision-maker below to make a particular order if it had answered the question correctly in the first place; if that cannot be done, the QCATA exercises the power to return the matter to the decision-maker below, with the benefit of its decision on the question of law, but leaving fact-finding for the decision-

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84 see eg RD(QCATA) [146][147]

85 CA[94]

86 *Ericson v Queensland Building Services Authority 2013 QCA 391 at [25]; Ericson v Queensland Building & Construction Commission 2014 QCA 297 at [9][10][13][14]*; see also *Flegg v CMC 2013 QCA 376 at [28][30]*

maker below[87]. If a wider view were taken of the scope of the power, it would mean that the QCATA may exercise a jurisdiction which travels beyond the specific matter which was the subject of the appeal (the question of law), and would create a gateway into a wider review and correction of the decision below[88]. Further, the narrower the scope of the appeal power, the more likely it is that the dispute will be dealt with economically and efficiently, consistently with the objects of the *QCAT Act* and the *BCCM Act*[89].

45. While a judgment about unreasonableness involves a determination of a question of fact[90], it is in the nature of an evaluative judgment, and the powers conferred by a provision like s.146 do not extend to making an evaluative judgment[91].

46. The scope of the powers conferred by s.146 is to be contrasted with the scope of the powers conferred by s.147, which applies to an appeal before the QCATA against a decision on a question of fact only, or a question of mixed law and fact, and which expressly states that the appeal must be decided by way of rehearing[92].

47. The First Respondent maintains the contention that the approach taken by the QCATA involved an impermissible rehearing[93]. However, upon reflection, the First Respondent acknowledges that the principles discussed here in the context of the NOC have greater relevance to the scope of the appeal in this Court, and to the orders sought by the Appellants in the ANOA[94], because:

(a) the scope of the appeal before the Court of Appeal was governed by s.153 of the *QCAT Act*, which[95] is in substantially the same terms as s.146 of the *QCAT Act*[96];

(b) in the ANOA, the Appellants seek orders that the appeal be allowed, that the orders made by the Court of Appeal be set aside, and that in lieu thereof the appeal to that Court be dismissed;

(c) having regard to the factual findings of the Adjudicator (as summarised in paragraph 4 hereof), whether one adopts the approach identified by the Court of Appeal at CA[94], or the more restrictive approach discussed in paragraphs 43 to 45 hereof, it is respectfully submitted that, even were the Appellants to succeed on one or more of their three grounds, there is no scope for the making of the orders sought by the Appellants.

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87 cf *HIA Insurance Services Pty Ltd v Kostas 2009 NSWCA 292 at [19]* (not decided on appeal: *Kostas v HIA Insurance Services Pty Ltd 2010 241 CLR 390*); *Edyp v Brazbuild Pty Ltd 2011 NSWCA 218 at [127]*

88 cf *HIA Insurance Services Pty Ltd v Kostas 2009 NSWCA 292 at [18][116]*

89 cf *HIA Insurance Services Pty Ltd v Kostas 2009 NSWCA 292 at [12]-[14]*

90 cf *Waters v Public Transport Corporation 1991 173 CLR 349, 395*

91 cf *B&L Linings Pty Ltd v Chief Commissioner of State Revenue 2008 74 NSWLR 481, 510[139]; HIA Insurance Services Pty Ltd v Kostas 2009 NSWCA 292 at [14]*

92 if the restrictive approach to s.146 of the *QCAT Act* is correct, the wide language of s.294(1) of the *BCCM Act* would equally be subject to a restrictive approach

93 see eg the approach in RD(QCATA) [99]-[146]

94 also referred to in Part VIII of the AS

95 in s.153(2)

96 similarly, s.154 is in substantially the same terms as s.147

Part VIII: Estimate of time

48. The First Respondent's Counsel estimates that the presentation of the First Respondent's oral argument will take about 2 hours.

Dated: 20 July 2016

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Chapter 6 Dispute resolution

Part 1 Introduction

226 Definitions for ch 6

In this chapter—

dispute see section 227.

occupier, of a lot, means a person in the person's capacity as the occupier of the lot, and not, for example, in the person's capacity as a service contractor or letting agent for the scheme.

owner, of a lot, means a person in the person's capacity as the owner of the lot, and not, for example, in the person's capacity as a service contractor or letting agent for the scheme.

227 Meaning of *dispute*

(1) A ***dispute*** is a dispute between—

(a) the owner or occupier of a lot included in a community titles scheme and the owner or occupier of another lot included in the scheme; or

(b) the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme; or

(c) the body corporate for a community titles scheme and a body corporate manager for the scheme; or

(d) the body corporate for a community titles scheme and a caretaking service contractor for the scheme; or

(e) the body corporate for a community titles scheme and a service contractor for the scheme, if the dispute arises

out of a review carried out, or required to be carried out, under chapter 3, part 2, division 7; or

(f) the body corporate for a community titles scheme and a letting agent for the scheme; or

(g) the body corporate for a community titles scheme and a member of the committee for the body corporate; or

(h) the committee for the body corporate for a community titles scheme and a member of the committee; or

(i) the body corporate for a community titles scheme and a former body corporate manager for the scheme about the return, by the former body corporate manager to the body corporate, of body corporate property.

(2) An application by a person mentioned in subsection (1)(a) to (h) for a declaratory order about the operation of this Act is also a ***dispute*** even if there is no respondent or affected person for the application.

Example for subsection (2)—

an application by a body corporate for an order declaring the financial year for the body corporate

228 Chapter's purpose

(1) This chapter establishes arrangements for resolving, in the context of community titles schemes, disputes about—

(a) contraventions of this Act or community management statements; and

(b) the exercise of rights or powers, or the performance of duties, under this Act or community management statements; and

(c) the adjustment of lot entitlement schedules; and

(d) matters arising under the engagement of persons as body corporate managers, the engagement of certain persons as service contractors, and the authorisation of persons as letting agents.

Part 4 Applications

Division 1 Application

238 Who may make an application

(1) A person, including the body corporate for a community titles scheme, may make an application if the person—

(a) is a party to, and is directly concerned with, a dispute to which this chapter applies; and

(b) has made reasonable attempts to resolve the dispute by internal dispute resolution.

(2) This section is subject to sections 183A and 184 to 186.

239 How to make an application

(1) An application must be—

(a) made in the approved form; and

(b) given to the commissioner; and

(c) accompanied by the fee prescribed under a regulation, to the extent the fee is not waived under subsection (3) or (4).

(2) If the application is for an outcome affecting owners or occupiers of lots included in the scheme generally, or a particular class of the owners or occupiers, the application may identify the affected persons as the owners or occupiers generally, or by reference to the class, instead of stating the persons' names and addresses.

(3) The commissioner may waive payment of the fee mentioned in subsection (1)(c) if the commissioner is satisfied payment of the fee would cause the applicant financial hardship.

(4) Also, the commissioner may waive the fee mentioned in subsection (1)(c)—

Division 2 Initial action on application

Subdivision 1 Conciliation application

242A Referral to department conciliator

If the commissioner accepts a conciliation application, the commissioner must refer the application to a department conciliator for department conciliation under the provisions of this chapter applying to the conciliation.

Subdivision 2 Adjudication application

242B Definition for sdiv 2

In this subdivision—

application means an adjudication application.

243 Notice to particular persons

(1) Subject to section 243A, the commissioner must give written notice (the ***original notice***) of the application to—

(a) the respondent to the application; and

(b) the body corporate; and

(c) each affected person who is not entitled to be given a copy of the notice under subsection (4).

(2) The original notice must—

(a) include a copy of the application; and

(b) invite each person who is given the original notice, or a copy of it under subsection (4), to make written submissions to the commissioner about the application within a stated time.

(3) The commissioner may extend the time for making the submissions by a further notice given in the way the original notice was given, and to the persons to whom the original notice was given.

(4) Unless the commissioner has advised the body corporate otherwise, the body corporate must, within the shortest practicable time after receiving the original notice, give—

(a) a copy of the original notice, including a copy of the application, to each person whose name appears on the roll as the owner of a lot included in the scheme; and

(b) a written notice (***confirmation notice***), as required under this section, to the commissioner.

Maximum penalty—20 penalty units.

(5) The confirmation notice must—

(a) state—

(i) the persons to whom the body corporate gave a copy of the original notice; and

(ii) when the copy was given; and

(b) if requested by the commissioner, be verified by statutory declaration.

243A Referral to dispute resolution officer in emergency

(1) This section applies if the commissioner reasonably considers—

(a) an application should be immediately referred to a dispute resolution officer because it relates to emergency circumstances; and

Example of emergency circumstances—

a burst water pipe the repair or replacement cost of which exceeds the body corporate committee's expenditure limit under the regulation module applying to the scheme

(b) it is not appropriate to deal with the application under section 247.

(2) The commissioner may immediately refer the application to a dispute resolution officer without giving written notice as mentioned in section 243(1).

244 Notice to applicant

(1) This section applies if 1 or more persons are invited under section 243(2)(b) to make submissions in response to the application.

(2) The commissioner must give written notice to the applicant advising that if the applicant wishes to reply to any of the submissions, the applicant must, within the period stated in the notice—

(a) apply to the commissioner to inspect the submissions; and

(b) make a written reply.

(3) The notice must state that the reply must be given to the commissioner and may only relate to issues raised by the submissions.

(4) The commissioner, by written notice given to the applicant, may extend the period for making the reply.

245 Change or withdrawal of application

(1) The applicant may, with the commissioner's permission, change the application at any time before the commissioner makes an initial dispute resolution recommendation under part 5.

(2) The commissioner has a discretion to give or withhold permission and, if the commissioner gives permission, the commissioner may impose conditions.

247 Referral of application for interim order

(1) This section applies if the commissioner reasonably considers that an application for an interim order should be referred to a conciliator or an adjudicator because of the nature or urgency of the circumstances to which the application relates.

(2) The commissioner may refer the application to—

(a) a department conciliator for department conciliation; or

(b) an adjudicator for adjudication under this chapter.

(3) The referral may be made even though—

(a) notice of the application has not been given under section 243; or

(b) all persons entitled, under that section, to make submissions about the application have not had an opportunity to make submissions.

Part 5 Dispute resolution recommendations

248 Dispute resolution recommendation

(1) The commissioner may make 1 or more dispute resolution recommendations for an application after the application is made and before it is resolved by a dispute resolution process.

(2) However, the commissioner must not make a dispute resolution recommendation after the commissioner refers the application to a dispute resolution officer, unless the dispute resolution officer refers the application back to the commissioner.

(3) A dispute resolution recommendation must be for 1 of the following dispute resolution processes—

(a) department conciliation;

(b) dispute resolution centre mediation;

(c) specialist mediation;

(d) specialist conciliation;

(e) department adjudication;

(f) specialist adjudication.

(4) If the commissioner has made a dispute resolution recommendation for the application, a further recommendation may be that the application be the subject of the same type of dispute resolution process or a different type.

(5) If an application for an interim order has been referred back to the commissioner under section 279(4), the commissioner may make a dispute resolution recommendation that the application be the subject of department conciliation without giving written notice as mentioned in section 243(1).

249 Restriction on who may conduct further dispute resolution process

(1) This section applies if—

(a) the initial dispute resolution process for an application was specialist conciliation; and

(b) a further dispute resolution recommendation is that the application be the subject of department or specialist adjudication; and

(c) the person who conducted the conciliation is an adjudicator.

(2) The adjudicator may be the same person who conducted the conciliation, if, at the end of the conciliation, all parties to the application consent to the person being the adjudicator.

250 Dismissing application

(1) Instead of making a dispute resolution recommendation for an application, the commissioner may dismiss the application.

(4) The total amount of costs ordered under subsection (3) must not be more than $2000.

271 Investigative powers of adjudicator

(1) When investigating the application, the adjudicator may do all or any of the following—

(a) require a party to the application, an affected person, the body corporate or someone else the adjudicator considers may be able to help resolve issues raised by the application—

(i) to obtain, and give to the adjudicator, a report or other information; or

Example—

an engineering report

(ii) to be present to be interviewed, after reasonable notice is given of the time and place of interview; or

(iii) to give information in the form of a statutory declaration;

(b) require a body corporate manager, service contractor or letting agent who is a party to the application or an affected person to give to the adjudicator a record held by the person and relating to a dispute about a service provided by the person;

(c) invite persons the adjudicator considers may be able to help resolve issues raised by the application to make written submissions to the adjudicator within a stated time;

(d) inspect, or enter and inspect—

(i) a body corporate asset or record or other document of the body corporate; or

(ii) common property (including common property the subject of an exclusive use by-law); or

(iii) a lot included in the community titles scheme concerned.

(2) If the application is an application referred to the adjudicator for department adjudication, the commissioner must give the adjudicator all reasonable administrative help the adjudicator asks for in investigating the application.

(3) If a place to be entered under subsection (1)(d) is occupied, the adjudicator may enter only with the occupier's consent and, in seeking the consent, must give reasonable notice to the occupier of the time when the adjudicator wishes to enter the place.

(4) If a place to be entered under subsection (1)(d) is unoccupied, the adjudicator may enter only with the owner's consent and, in seeking the consent, must give reasonable notice to the owner of the time when the adjudicator wishes to enter the place.

(5) The body corporate or someone else who has access to the body corporate's records must, as requested by an adjudicator and without payment of a fee, do either or both of the following—

(a) allow the adjudicator access to the records within 24 hours after the request is made;

(b) in accordance with the request, give the adjudicator copies of the records or allow the adjudicator to make the copies.

Maximum penalty—20 penalty units.

(6) A person who fails to comply with a requirement under subsection (1)(a) or (b), or obstructs an adjudicator in the conduct of an investigation under this part, commits an offence unless the person has a reasonable excuse.

Maximum penalty—20 penalty units.

(7) It is a reasonable excuse for a person not to comply with a requirement mentioned in subsection (6) to give information

or a document, if giving the information or document might tend to incriminate the person.

272 Delegation

An adjudicator may delegate a power the adjudicator has under this part, other than under section 270, to an appropriately qualified officer of the department.

273 Representation by agent

For an adjudication, a party to the application, an affected person or the body corporate has the right to be represented by an agent.

Division 3 Adjudicator's orders

274 Notice of order to be given

(1) The adjudicator for an application must give a copy of an order made under this chapter to—

(a) the applicant; and

(b) the respondent to the application; and

(c) the body corporate for the community titles scheme; and

(d) a person who, on an invitation under section 243 or 271(1)(c), made a submission about the application.

(2) The copy of the order must be—

(a) certified by the adjudicator as a true copy of the order; and

(b) accompanied by—

(i) a statement of the adjudicator's reasons for the decision; and

(ii) an outline in the approved form of the appeal rights available under part 11.

(3) If the order is a declaratory or other order affecting the owners or occupiers of the lots included in the scheme generally, or a particular class of the owners or occupiers, the adjudicator need not give a copy of the order to each owner or occupier individually, but may instead give notice in a way that ensures, as far as reasonably practicable, it comes to the attention of all owners or occupiers or all members of the class.

275 Referral back to commissioner

When the adjudicator has completed the adjudicator's duties under this part, the adjudicator must refer the application (including any order the adjudicator has made) back to the commissioner.

276 Orders of adjudicators

(1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—

(a) a claimed or anticipated contravention of this Act or the community management statement; or

(b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or

(c) a claimed or anticipated contractual matter about—

(i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or

(ii) the authorisation of a person as a letting agent for a community titles scheme.

(2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.

(3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.

(4) An order appointing an administrator—

(a) may be the only order the adjudicator makes for an application; or

(b) may be made to assist the enforcement of another order made for the application.

(5) If the adjudicator makes a consent order, the order—

(a) may include only matters that may be dealt with under this Act; and

(b) must not include matters that are inconsistent with this Act or another Act.

277 Order may be made if person fails to attend to be interviewed

If an adjudicator considers it just and equitable in the circumstances, the adjudicator may make an order under this part even if a person fails, without reasonable excuse, to comply with a requirement made by the adjudicator under section 271(1)(a)(ii).

278 Administrator may act for body corporate etc.

If an adjudicator appoints an administrator to perform obligations of the body corporate, the committee for the body corporate or a member of the committee, anything done by the administrator under the authority given under the order is taken to have been done by the body corporate, committee or member.

Queensland Civil and Administrative Tribunal Act 2009

Current as at 1 July 2014

Reprint note
The prospective expiry date for chapter 4 part 4B is incorrect in the List of annotations. The expiry date is now 13 May 2016.

(b) if the tribunal has not been constituted for the appeal—a judicial member.

146 Deciding appeal on question of law only

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision; or

(c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—

(i) with or without the hearing of additional evidence as directed by the appeal tribunal; and

(ii) with the other directions the appeal tribunal considers appropriate; or

(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

147 Deciding appeal on question of fact or mixed law and fact

(1) This section applies to an appeal before the appeal tribunal against a decision on a question of fact only or a question of mixed law and fact.

(2) The appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the appeal tribunal.

(3) In deciding the appeal, the appeal tribunal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision.

153 Deciding appeal on question of law only

(1) This section applies to an appeal before the Court of Appeal against a decision of the tribunal on a question of law only.

(2) In deciding the appeal, the Court of Appeal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision; or

(c) set aside the decision and return the matter to the tribunal for reconsideration—

(i) with or without the hearing of additional evidence as directed by the court; and

(ii) with the other directions the court considers appropriate; or

(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

(3) If the Court of Appeal returns the matter to the tribunal for reconsideration, the court must give directions about whether or not the tribunal reconsidering the matter must be constituted by the same persons who constituted the tribunal when the decision was made.

154 Deciding appeal on question of fact or mixed law and fact

(1) This section applies to an appeal before the Court of Appeal against a decision of the tribunal on a question of fact only or a question of mixed law and fact.

(2) The appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the Court of Appeal.

(3) In deciding the appeal, the Court of Appeal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision.