WESTERN AUSTRALIA

STATE ADMINISTRATIVE TRIBUNAL

DECISIONS BULLETIN

SEPTEMBER 2016

This Bulletin contains summaries of the Tribunal's written reasons for decisions, penalties imposed by consent orders in vocational disciplinary proceedings and Supreme Court appeals. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

BUILDING SERVICES (COMPLAINT RESOLUTION AND ADMINISTRATION) ACT 2011 (WA)

HOLMAN AND W&D MOFFATT PTY LTD [2016] WASAT 105
5 SEPTEMBER 2016
MR C RAYMOND (SENIOR SESSIONAL MEMBER), MR R AFFLECK (SENIOR SESSIONAL MEMBER)

Online Decision: Click Here

***Building Services (Complaint Resolution and Administration) Act 2011* (WA) - Review of decision of Building Commissioner to issue building order for remedial work - House subject to extensive cracking of walls - Onus of proof - Whether necessary to show fault on part of builder or whether sufficient to show the regulated building service is faulty or unsatisfactory**

The applicant applied under s 57(1)(c) of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) for the review of a decision by the Building Commissioner to issue a building remedy order requiring the applicant to remedy the cause and effect of extensive cracking throughout the respondent's house, which had been constructed by the applicant for the original owner.

Various causes of the cracking had been hypothesised by the respondent's expert witness. The cracking had become progressively worse over a number of years. Monitoring over a two year period showed that the slab was warping with significant differential movement being experienced. It had only recently been discovered that the house had been constructed over the sloping bank of an old irrigation dam that had been on the site. The experts for both parties agreed that the principal cause of cracking was as a result of the differential movement of the slab which was effectively sliding in the direction of the dam. It was also agreed that cracking caused by bowing of the internal side of walls on the perimeter of the house was caused also by thermal movement of the roof sheeting.

The Tribunal rejected a submission from the applicant that it did not have jurisdiction to deal with a claim that the cracking was caused by the movement of the slab towards the dam because this was not advanced before the Building Commissioner, as the complaints were the same and the Tribunal was entitled in a de novo review to have regard to new evidence. The Tribunal also rejected a submission that it was necessary to find that the applicant was at fault in the sense of being negligent or incompetent. The applicant was responsible for the design of the foundation system, which had failed as it was not capable of supporting the weight of the house so that the regulated building service was faulty and unsatisfactory. The building service had also not been carried out in a proper and proficient manner because both expert witnesses agreed that a proper investigation of the site should have been carried out. The respondent had discharged the onus on it in these respects but the Tribunal did not uphold its contentions in relation to other alleged causes which were not established on the evidence.

The Tribunal found that the building order under review would need to be varied so that the action required by the applicant was consistent with the Tribunal's findings and that further input was required from the parties before a time could be imposed for the

completion of the necessary remedial work. Consequently, the matter was adjourned to a directions hearing.

CONSTRUCTION CONTRACTS ACT 2004 (WA)

MRCN PTY LTD (TRADING AS WEST FORCE CONSTRUCTION) AND PINDAN CONTRACTING PTY LTD [2016] WASAT 114
20 SEPTEMBER 2016
MR T CAREY (MEMBER)

Online Decision: Click Here

Review of dismissal of adjudication application under *Construction Contracts Act 2004* (WA) - Dismissal on basis application not prepared and served in accordance with the Act - Return of retention - Whether payment dispute arose - Whether retention due to be paid under contract - Whether clause for repayment a 'pay when paid' clause - Relevance of previous adjudication decision

The applicant sought review of a decision of an adjudicator under the *Construction Contracts Act 2004* (WA) to dismiss its application for adjudication of a payment dispute. The applicant had sought to recover retention money held by the respondent to which it considered it was entitled under the contract between the parties. The adjudicator found that the time for release had not yet arisen under the relevant contractual term.

The applicant relied upon a number of alternative arguments in support of the adjudicator's decision being overturned:

a) the contractual term relied upon was ineffective as a 'pay when paid' provision;

b) the term was otherwise inoperative, or was to be construed other than in its literal sense;

c) the adjudicator's decision illegitimately brought into question the decision and reasoning of another adjudicator regarding release of an earlier tranche of the same retention money.

The Tribunal considered and found against each of the applicant's arguments.

It accordingly dismissed the application and affirmed the adjudicator's decision.

GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)

AL [2016] WASAT 113
19 SEPTEMBER 2016
MR J MANSVELD (SENIOR MEMBER)

Online Decision: Click Here

Guardianship and administration - Administration - Mental disability - Mental illness - Psychiatric condition - Involuntary patient under mental health legislation - Community treatment order - Use of illicit drugs increases risk of relapse of mental illness - Unable to make reasonable judgments in respect of matters relating to his estate - Estate at risk - Administration order made

AL, a 39-year-old man, was first hospitalised with a mental illness in 2009.

At the time, the Public Trustee was appointed the administrator of his estate pursuant to the *Guardianship and Administration Act 1990* (WA).

In late 2011, the administration order was revoked on the basis that AL's mental illness was stable, he was compliant with treatment; and he was assessed as having good insight and appropriate judgment.

In May 2016, AL was admitted to hospital after a relapse of his mental illness, likely as a consequence of the use of illicit drugs.

Subsequent to his discharge from hospital under a community treatment order in June 2016, the hospital mental health team made an application for the appointment of an administrator.

AL had significant assets but very limited income. His income did not support the costs of maintaining those assets and his personal financial needs.

AL's assets had increased since the previous administration order because he had received an inheritance. He was therefore exposed to a potentially greater loss than when the administration order was originally made.

The Tribunal found that AL's mental health was precarious; he had only recently suffered a significant relapse of his mental illness and at the time of the hearing, remained an involuntary patient requiring treatment to be given under a community treatment order. He had limited insight into the effects of his mental illness on his cognition and he continued to use illicit drugs which increased the risk of relapse. AL also seemed overly sanguine on the impact on his estate if a further relapse of his mental illness occurred.

The Tribunal decided to appoint the Public Trustee as the administrator of AL's estate.

Given the necessary restrictions placed on AL by the making of the administration order and in expectation that he would continue to receive treatment for his illness, the review of the order was set for 12 months.

BR AND MM [2016] WASAT 112
16 SEPTEMBER 2016
MS H LESLIE (MEMBER)

Online Decision: Click Here

Guardianship and administration - Capacity - Refusal to consider options - Reasoned decision - Presumption of capacity

The proposed represented person is an inpatient in hospital, having suffered a stroke. It is alleged that the proposed represented person lacks insight into the impact that his physical ailments and high care needs have on his ability to complete everyday tasks. Although requiring a high level of assistance in hospital, the proposed represented person appears to believe that he will not require that level of assistance when he returns home. The treating team applied for guardianship and administration so as to enable discharge planning to occur. The Tribunal dismissed the application and made the finding that the presumption of capacity had not been displaced with respect to either personal decision-making or financial decision-making. The applications were therefore dismissed.

EP [2016] WASAT 117
27 SEPTEMBER 2016
MR J MANSVELD (SENIOR MEMBER)

Online Decision: Click Here

Guardianship and administration - Mental illness - Acquired brain injury - High care needs – Carers' stress - National Disability Insurance Scheme - Accommodation needs - Conflict of interest - Beneficial ownership of property - Pooling of income - Reporting to Public Trustee

EP, a 45-year-old woman, was diagnosed with a mental illness and an acquired brain injury. She lived with her mother and two daughters. The property in which they lived was jointly owned by EP and her mother. There was a mortgage on the property.

The mother and one of the daughters had been appointed the administrators of EP's estate in 2014.

EP's living conditions were very difficult and their deficiency had come to the attention of agencies that were providing her with support.

One such agency raised a concern about the circumstances in which EP lived to the Public Advocate who commenced an investigation.

Subsequent to the investigation, the Public Advocate made an application for the making of a guardianship order and an application for review of the administration order pursuant to the *Guardianship and Administration Act 1990*.

Evidence before the Tribunal showed that EP was highly dependent on others for her activities of daily living and that at times her mother and daughters were overwhelmed from carer stress.

The question was raised as to whether EP could continue to live in her home or should be placed in institutional care because of her high needs.

EP's mother and daughters were in an invidious position. They were concerned how EP would cope in institutional care, given unfortunate events that had occurred in the past. In addition, what had developed over time was reliance by the mother and daughters on EP being cared for at home because it was also their home and they depended on EP's income to help meet the property and household costs.

The Tribunal found that EP's mother and daughters were in a conflicted position in the decision-making about EP's future accommodation and care needs.

The Tribunal decided to appoint the Public Advocate as EP's guardian.

The Tribunal also decided to appoint the Public Trustee as administrator of EP's estate in place of the previous order appointing her mother and a daughter.

There were a number of matters of concern regarding the management of EP's estate.

The first of these was the financial interdependence of EP with the financial affairs of her mother and daughters and their incompatible interests should EP need to go into institutional care. The beneficial ownership of the property was another matter, as was the practice of pooling the limited household income without a clear demarcation as to the use of EP's income. The difficulty the administrators had had in producing a set of accounts to the standard required by the Public Trustee was also a concern.

SM [2016] WASAT 109
13 SEPTEMBER 2016
MR J MANSVELD (SENIOR MEMBER)

Online Decision: Click Here

Guardianship and administration - Enduring power of guardianship - Enduring power of attorney - Conflict of interest - Fiduciary - Contact - Violence restraining order - Treatment decisions - Joint ownership of property - Joint mortgage when loan funds belong to one of the joint owners solely - Inherent conflict of interest if the property is sold - Guardian appointed - Administrator appointed - Guardianship appointment conditional - Administration order made with direction - Enduring power of guardianship revoked - Enduring power of attorney revoked

SM, an 80-year-old woman, had been diagnosed with a cognitive impairment the main symptoms of which were short-term memory problems and attendant confusion.

SM had five children: four daughters and one son. SM lived with one of her daughters, MM, and had done so for some time.

MM was SM's guardian under an enduring power of guardianship and the son, PM, was her attorney under an enduring power of attorney.

There was significant conflict between some of SM's children.

One of SM's daughters, HG, made applications under the *Guardianship and Administration Act 1990* (WA). HG sought to have a guardian appointed for SM and an administrator appointed for her estate.

The main concern for HG, which was shared by another daughter, was that she was prevented from having contact with SM by her sister, MM, and in addition, MM was not providing her with any information about SM's medical and care needs. HG also did not trust either MM or her brother, PM, to manage SM's estate.

SM jointly owned the property with MM in which they lived. There was a joint mortgage on the property, however it was accepted that the loan the subject of the mortgage belonged to MM solely.

The Tribunal decided to appoint the Public Advocate as SM's limited guardian to decide her future accommodation. The Tribunal found that the interests of MM in the property potentially were in conflict with the interests of SM should the property need to be sold if SM went into care.

The Tribunal also appointed the Public Advocate as SM's guardian to make decisions about the support services she would need to remain living at home and to decide the contact she should have with her children. The question of contact could not be resolved without the appointment of the Public Advocate because communication had broken down and MM was pursuing a violence restraining order against HG.

The Tribunal appointed MM as limited guardian to make SM's treatment decisions. The Tribunal found that MM was making appropriate medical decisions and that the lack of information to her siblings was not sufficient to warrant removing her from that role. The appointment of MM as guardian was however made conditional upon her advising the Public Advocate of any significant medical event in respect to SM. The Public Advocate would need that information to assist in her decision-making role and would be permitted to pass on medical information to SM's other children.

The enduring power of guardianship was revoked.

The Tribunal decided that PM be appointed the administrator of SM's estate with a direction that he arrange for SM to be released from her liability under the mortgage. The Tribunal was satisfied that PM would act in SM's best interests; he was supported by all his siblings except HG; and his appointment gave effect to a wish of SM expressed through the enduring power of attorney.

The Tribunal revoked the enduring power of attorney because its authority was overtaken by the administration order.

The Tribunal dismissed the application made under s 109(1)(a) of the Act.

VW [2016] WASAT 119
29 SEPTEMBER 2016
MR J MANSVELD (SENIOR MEMBER)

Online Decision: Click Here

Guardianship and administration - Review of guardianship and administration orders - Leave required - Contact decision - Change of circumstances - Leave granted for review of guardianship order - Leave refused for review of administration order

VW, a 78-year-old woman, was diagnosed with Alzheimer's disease. She lived in a nursing home.

VW was the subject of guardianship and administration orders pursuant to the *Guardianship and Administration Act 1990* (WA).

VW had four children: two daughters and two sons. There was a history of conflict and disagreement between some of VW's children. This was reflected in the orders made by

the Tribunal. The Tribunal had appointed different combinations of VW's children as her guardian and administrator since March 2014.

The most recent orders from March 2015 had appointed a son as administrator of VW's estate and he and a daughter of VW as her joint guardians.

The joint guardians had decided not to allow VW to visit any of her children for overnight stays but did permit day outings.

The other son of VW, who had previously been her guardian and administrator, disagreed with that decision and contended that the joint guardians had formed a negative view of him because of a false report of a care provider from 2014.

This son also alleged that the joint guardians and administrator were not providing him and his partner with information about VW's health and the state of her financial affairs.

The son and his partner sought review of the guardianship and administration orders.

The Tribunal decided to grant leave for the guardianship order to be reviewed but not the administration order.

The Tribunal found that the decision of the joint guardians concerning overnight stays was a change in VW's circumstances and that there was insufficient evidence before the Tribunal to determine whether, on medical grounds, she could or could not sustain overnight stays.

The Tribunal decided to refer the matter to the Public Advocate for investigation as to whether the decision of the joint guardians was in VW's best interests.

The Tribunal found that the son and his partner had not presented evidence to suggest that the administrator was acting inappropriately. The Tribunal also found that the joint guardians and administrator provided information to other family members on an ad hoc basis.

PLANNING AND DEVELOPMENT ACT 2005 (WA)

BAKER INVESTMENTS PTY LTD AND CITY OF VINCENT [2016] WASAT 115
22 SEPTEMBER 2016
MR P MCNAB (SENIOR MEMBER), DR B DE VILLIERS (MEMBER)

Online Decision: Click Here

Town planning - Development application - Variation of previous development approval granted by local government - Approval included obligation to provide for obscure glazing - Obligation for obscure glazing shown on approved plans but not expressed as a formal condition - Negotiations and compromise on original planning application - Affected neighbours involved in process - Consent orders of Tribunal part of approvals process - Whether variation application an abuse of process given settlement of matter by way of consent orders - Intervening event since building was the erection of a screen wall between affected neighbours and the development - Screen wall marginally improved privacy - Whether 'material change' in circumstances rebutting allegation of abuse of process - Changes in planning framework and impact of screen wall held to be a material change in circumstances - Review held not to be an abuse of process - Whether 'development of a minor nature' under town planning scheme and local policy and therefore exempt from need for approval - Variation held not to be development of a minor nature - Jurisdiction to consider variation application limited to variation which would 'not substantially change' original development - Application held to substantially change original development - Whether alternatively an application to amend a condition - Tribunal finding obligation in substance a condition of development - Extent of assessment turned on whether 'minor amendment' to original approval - Application held to be a minor amendment - Status of

Residential Design Codes (R-Codes) as State policy - R-Codes incorporated by law into town planning scheme - Relevant deemed-to-comply standard under R-Codes was met - Whether compliance therefore mandated approval - R-Codes held to remain as instruments of policy and therefore did not relevantly bind Tribunal - Factors relevant to exercise of discretion included planning history of site extending to circumstances of previous approval - Importance of reasonable visual privacy as a significant value in planning law - Development would not be approved nowadays under amended R-Codes - Insufficient justification provided to warrant approval of variation - Application refused - Words and phrases: 'abuse of process'; 'condition'; 'development of a minor nature'; 'minor amendment'; 'material change in circumstances'; 'substantially change'

Baker Investments Pty Ltd (Baker) sought a variation on a previous development approval granted by the City of Vincent (City). The original development approval was for a new two-storey apartment complex with 18 multiple dwellings. One aspect of the approval was an obligation placed upon the developer to affix obscure glazing in the form of a durable plastic film applied to certain upstairs windows. The obligation to provide for obscure glazing did not take the form of a condition of development, but appeared on all of the approved development and building plans. The purpose of the film was to substantially diminish the overlooking of some of the neighbours' mainly private outdoor recreational areas. In its application to the City, Baker had sought to remove the obscure glazing on three of the upstairs apartments' windows. The City had refused the variation.

After the film had been affixed, a screen wall was lawfully erected between the neighbours and the development to secure acoustic privacy for the neighbours and to create a visual barrier with respect to the ground floor units. This affected the amount of sunlight received by those units, making their sale more difficult. The final form of the original approval included certain consent orders made in this Tribunal. Certain affected neighbours participated in the mediation and the negotiations leading up to the making of the consent orders. The negotiations produced compromises on all sides, including the obligation to provide for obscure glazing.

Baker contended that the screen wall now enhanced visual privacy. The City conceded that it had a marginal effect. Baker also contended that the development otherwise complied with the *Residential Design Codes* (R-Codes). The R-Codes were amended in October 2015 and one consequence was that nowadays the development would not be approved.

Baker was permitted to apply for a variation following a separate change in the planning law, by way of regulation, in October 2015. This change to the planning framework inserted comprehensive 'deemed provisions' into the City's town planning scheme (TPS). The deemed provisions came into force after Baker had applied for variation approval with the City, but nothing turned upon that fact. However, before the Tribunal could consider the effect of the deemed provisions, a threshold question arose. The City alleged that Baker's application was an attempt to re-litigate matters settled by the Tribunal's consent orders. The City asked, as a matter of practice and procedure, for the matter to be struck out by the Tribunal as an abuse of process. However, assuming that the matter was in fact being re-litigated, that might still be possible if there had been a 'material change in circumstances'.

In Victoria, planning law permitted an amendment of a planning approval if there was a 'material change' in circumstances. Factors considered relevant in Victoria included a relevant change in the planning framework, or the character of the area. Although in Victoria these were non-procedural, substantive matters (and the strike out application here was procedural), the Tribunal considered that the Victorian decisions nevertheless provided useful guidance on the issue of 'material change'. After all, the provisions were in the planning area and were aimed at the same target: the provision of an adequate explanation in order to justify the revisiting of a matter that had been 'settled'. The Tribunal held that here there had been a material change in circumstances because of the effect of the deemed provisions (which included a power to grant a variation);

the changes to the R-Codes; and because of the erection of the screen wall itself. The Tribunal refused to strike out the application to the Tribunal as an abuse of process.

The review therefore proceeded, with Baker asserting that because what was being proposed was development of a minor nature under the TPS, it was exempt from the need to obtain planning approval. The exemption operated by way of local policy made by the City. The Tribunal did not accept that that was the effect or intention of the policy. In any case, such a policy could not operate to cut down the City's powers in relation to consideration of a variation, powers found elsewhere in the planning framework. These had superior or overriding operation given their source in the regulation inserting the deemed provisions into the TPS.

However, in order for the review to proceed, the application for a variation had to either: (a) relate to the amendment or deletion of a condition of the original development; or (b) if approved, the variation could 'not substantially change' the original development. The Tribunal considered the New South Wales planning cases on the question of 'substantial' and concluded that, in the circumstances, the removal of the glazing could not be said to be 'not substantial'. Obscure glazing was imposed here after a merits assessment to make the development more acceptable. That assessment pursued an important value in planning law, namely, minimising overlooking to the extent practicable. However, the application was otherwise saved because the obligation to provide for obscure glazing, whilst not in the form of a condition, was, in substance, the same as a condition. Alternatively, the obligation to build in accordance with the plans (which showed the obscure glazing) amounted to a condition of approval.

The Tribunal having jurisdiction in the matter, the next issue was the extent of assessment. This turned upon whether the variation could be seen as a 'minor amendment' to the original approval. That expression appeared in a different, but related, context in New South Wales planning law. The cases there were applied by the Tribunal in reaching the conclusion that, having regard to the scale of the original development, the proposed variation did not change the cumulative or overall effect of it and, further, that a significant reassessment of the original development was not required. Thus, the proposal was a 'minor amendment' and the Tribunal had a discretion as to the extent of assessment. The Tribunal decided that the factors in that assessment, mainly identified by the City, were to be found in the relevant planning matters enumerated in the deemed provisions as 'matters to be considered by local government'. These provisions included visual privacy principles and consideration of the R-Codes. Visual privacy was a planning value of some importance and relevance, and the Tribunal considered some of the local cases illustrating the same. Having regard to previous cases, the Tribunal took an expansive view of the matters that could be considered in its assessment. This included consideration of the planning history of the site which extended to the circumstances of the original approval.

Baker contended, however, that the R-Codes contained a deemed-to-comply provision which was applicable here. It related to the setbacks between the neighbours' boundary and the original development. These setbacks were required to protect visual privacy. Here, those setbacks had been met, and the language of the R-Codes implied that mandatory approval must then follow. The R-Codes were given elevated status, by operation of law, such that they were incorporated into the TPS. Nevertheless, the Tribunal held that the R-Codes still retained their status as policy, albeit State policy. A discretion remained with the Tribunal to approve or refuse the variation, having regard to the relevant factors identified in the planning framework.

On the merits of the proposal, the Tribunal noted that the original development could not nowadays be approved (having regard to the amended R-Codes); that it was an unusual or atypical form when compared with development in the immediate locality; that there had been a previous plot ratio concession in circumstances of negotiation and agreement; and that there continued to be a line of sight from the apartments to some neighbouring 'sensitive areas' (even if marginally diminished by the screen wall). On balance, the Tribunal concluded that refusal of the variation was the correct decision.

In effect, insufficient justification had been provided warranting approval of the proposed variation. Accordingly, the application for review was dismissed.

MOORE AND CITY OF COTTESLOE [2016] WASAT 118
28 SEPTEMBER 2016
MS L EDDY (MEMBER), MR J JORDAN (SENIOR SESSIONAL MEMBER)

Online Decision: Click Here

Town planning - Development application - Vehicular access to property - No existing access to road - Existing rear laneway access - Where proposal requires significant modification to existing embankment - Pedestrian safety - Impact of proposed subdivision of lot

The applicant sought development approval for a two storey dwelling plus basement on land owned by the applicant in Deane Street, Cottesloe. The applicant's land is currently accessed via a lane to the rear rather than from Deane Street. As part of the proposed development, it was contemplated that the main access to the site would be provided from Deane Street. Because of the existing topography of the land within the verge in this part of Deane Street, the proposed vehicular access required a cutting through an existing embankment as well as alterations to the existing pedestrian footpath and alterations to a neighbour's driveway.

The main issues before the Tribunal were:

1) whether the proposed vehicular access to the site from Deane Street satisfies cl 5.3.5 of the *Residential Design Codes* and requirements of the *Town of Cottesloe Local Planning Scheme No 3*; and

2) whether the proposed vehicular access to the subject property from Deane Street would reduce the amenity, character and streetscape quality of the locality.

The Tribunal determined that, in the context of this case, an increase in risk to the safety of pedestrians, which both experts agreed the proposed development involved, meant that the proposed development did not adequately deal with pedestrian safety. The Tribunal found that the proposed development did not comply with cl 5.3.5 of the *Residential Design Codes*.

The Tribunal considered that the proposed cutting into the existing embankment in the verge adjacent to Deane Street would have a detrimental impact on the streetscape, character and amenity of the locality.

Having regard to these conclusions, as well as to the history of the site, the suitability of the land for the development, and to the submission made by the neighbour who would be directly impacted by the proposed development, the Tribunal determined that the application for development approval should be refused.

SPARTEL PTY LTD AND CITY OF WANNEROO [2016] WASAT 110
15 SEPTEMBER 2016
MS K WHITNEY (MEMBER)

Online Decision: Click Here

Town planning - Development application - Turf farm - Whether storage of fertiliser for on-sale to other primary producers a change of use - Words and phrases: 'storage yard'; 'agriculture'; 'horticulture'; 'primary product'

The applicant produces a product known as Fabfert from raw chicken manure, and applied to the City of Wanneroo for approval to store the product at a turf farm. The turf farm would use about 20% of the product on its own premises and the applicant proposed to on-sell the balance to market gardens in the area. The application was refused on the grounds that the proposed use was 'storage yard' and was not permitted

within the Rural Resource zone. The applicant sought review of the decision by the Tribunal.

Having regard to the nature of the proposed use, its scale and regularity and extent of its activities, the Tribunal found that the use of part of the premises to store Fabfert represented a change of use. There was no connection between this storage and the existing use of the premises as a turf farm other than the barter arrangement between the applicant and the landowner permitting the turf farm to use up to 20% of the fertiliser on site in exchange for use of the land. Furthermore, although the scale of the proposed development in geographic size was small, the regularity and extent of its activities were substantial. The Tribunal was satisfied as a matter of fact and degree that the proposed use was a separate land use.

The Tribunal went on to consider whether 'storage yard' was the proper classification. The Tribunal was satisfied on the evidence that the proposed development could reasonably be determined to fall within that use classification. Furthermore, the Tribunal was not satisfied on the evidence that another use classification was a 'better fit'. As 'storage yard' was not a permitted use class in the Rural Resource zone, the Tribunal was satisfied that the respondent's decision to refuse to approve the development on this basis was the correct and preferable decision and the decision was affirmed.

STARGAZE ASSETS PTY LTD AND CITY OF SWAN [2016] WASAT 106
6 SEPTEMBER 2016
MS L EDDY (MEMBER)

Online Decision: Click Here

Town planning - Application to amend existing development approval - Landscape zone - Existing approval to crush and screen construction and demolition waste for use as fill on same site - Proposed amendment to allow crushed and screened material to be used as fill at other sites - Preliminary issue - Whether proposed amended development capable of approval - Classification of land use - Whether 'industry' use

The application for review concerned the respondent's refusal to approve a requested amendment to an existing development approval in relation to the applicant's land. The existing development approval authorised the bringing of demolition and construction waste materials to the site, the crushing and screening of that material and the use of the resulting end product as fill to rehabilitate an excavated area of the site. The applicant wished to amend that development approval so as to allow it to take the end product from the site and use it as fill to rehabilitate land being operated by entities related to the applicant.

The respondent refused to allow the amendment on the basis that it was the City of Swan's view that the proposed amendment transformed the use of the site into an industrial use, which was not permitted in the relevant zone.

The Tribunal determined that it had to consider the application as if it were a new development application incorporating all of the activities contemplated by the proposed amended development, including those aspects of the development that were currently authorised by the existing development approval. It was determined that the proposed amended development was properly classified as use of the land for industry. As such, the proposed amended development was not capable of being permitted in the relevant zone.

PLANNING AND DEVELOPMENT (LOCAL PLANNING SCHEMES) REGULATIONS 2015 (WA)

GOLDRANGE PTY LTD AND WESTERN AUSTRALIAN PLANNING COMMISSION [2016] WASAT 116
27 SEPTEMBER 2016
JUDGE T SHARP (DEPUTY PRESIDENT), MR P MCNAB (SENIOR MEMBER)

Online Decision: Click Here

Practice and procedure - Injunctive relief - Review proceedings - Town planning - Development application - Respondent taking steps to consider town planning scheme amendment - Practical effect of amendment to render nugatory scheduled review proceedings - Application by applicant for urgent interim injunction pursuant to s 90 of the *State Administrative Tribunal Act 2004* (WA) - Application to enjoin respondent from considering scheme amendment - Applicable principles - Extent to which s 90 reflects doctrines of equity - Injunction refused - Tribunal holding insufficient connection with reviewable decision - Administrative law prima facie permitted the making of scheme amendment even if merits review proceedings affected - Adverse consequences for applicant could not expand Tribunal's jurisdiction - Administrative decision of respondent a step towards legislative decision to amend scheme - Administrative decision of respondent to amend scheme not a reviewable decision - Restrictions on decision-maker not to alter decision under review do not extend to separate administrative decision to amend scheme

The applicant (**Goldrange**) sought urgent interim injunctive relief in the Tribunal. Goldrange had recently learnt that the respondent, the Western Australian Planning Commission (**Commission**), was preparing to meet one day before a scheduled review in the Tribunal to consider a proposal to amend the relevant town planning scheme. The amendment was very likely to be approved, and the effect of it would be in due course to render nugatory the Tribunal proceedings. In particular, one effect of the amendment was to remove any possibility of a 'shop use' being approved; this issue was one of the central, and long-standing, matters before the Tribunal.

There was authority from the highest court in Western Australia (the Court of Appeal) that a proposal to amend a scheme that had the practical effect of, or even intention of, halting proceedings in a tribunal was prima facie lawful. Here, the Tribunal considered that although the statutory injunctive powers conferred upon the Tribunal were very wide and directed to the vindication of the public interest in the maintenance of due administration, they were nevertheless referenced to (but not limited to) equitable principles, and not so wide as to avoid the requirement of a jurisdictional nexus with a 'reviewable decision'.

Although the Tribunal accepted that certain adverse consequences would necessarily follow from the Commission's expected approval of the amendment, the amendment decision before the Commission was not itself a reviewable decision and was not relevantly connected with the reviewable decision before the Tribunal. The decision sought to be enjoined was a quite separate administrative step towards a legislative outcome, namely a change in the law by a gazetted amendment to a town planning scheme.

The Tribunal also reasoned that consequences alone could not, in effect, directly or indirectly expand the jurisdiction of the Tribunal in relation to either the grant of an injunction or as to the limitations imposed upon a decision-maker which prevented amendment of a decision once a review had been commenced. A reviewable decision (or a relevant connection therewith) was still needed to enliven the Tribunal's jurisdiction to restrain the Commission.

As the applicant had not made out its case for injunctive relief, the application was dismissed. Extempore reasons for the dismissal were given by the Tribunal.

RESIDENTIAL PARKS (LONG-STAY TENANTS) ACT 2006 (WA)

DALL AND TYSON [2016] WASAT 111
15 SEPTEMBER 2016
MS K WHITNEY (MEMBER)

Online Decision: Click Here

Residential park - Whether termination of long-stay agreement without grounds was justified - Breakdown in relationship between tenant and park operator and other residents - Balancing the rights of park operator and tenant - Turns on facts

The applicant, the proprietor of the Panorama Caravan Park in Albany, applied to the Tribunal on 23 June 2016 for orders pursuant to s 68(2) of the *Residential Parks (Long-stay Tenants) Act 2006* (WA) terminating a long-stay agreement with the respondent and seeking vacant possession of the premises.

The applicant contended that the respondent's tenancy within the park was intolerable and the issues were unresolvable. This was because the respondent allegedly made excessive noise (by reason of his barking dog, noisy visitors, and shouting), was threatening and abusive to the applicant and other park residents, with such incidents requiring the intervention of police, and bothered the other park residents by the extent of the traffic coming and going from his premises. It was also alleged that he supplied drugs to another park resident on one occasion and that there was 'unusual activity' suggesting that the respondent was dealing drugs.

The respondent contended that he was a quiet man who liked to be left alone, and that he had been 'stalked and harassed' by the applicant and his employees. He maintained that the applicant and his employees exaggerated or fabricated the allegations to provide a basis for the applicant's application. He conceded that the applicant's and his relationship had deteriorated over the years and that there was hostility between them. However, he maintained that this was not a sufficient basis to terminate his tenancy.

The Tribunal was not satisfied on the balance of probabilities that the respondent's noise levels, swearing generally, or his or his visitors' vehicle movements were sufficient to constitute an intolerable situation as alleged. Furthermore, the Tribunal was not satisfied on the balance of probabilities that the respondent's activities involved drug dealing.

Nevertheless, the Tribunal was satisfied on all the evidence that there had been an irreconcilable breakdown of the relationship between the respondent, the applicant and two remaining tenants. The Tribunal found that the conduct demonstrated a level of hostility which went well beyond the conduct described in cases cited by the respondent. For these reasons, the Tribunal was satisfied that terminating the agreement was justified in all the circumstances.

ROAD TRAFFIC (ADMINISTRATION) REGULATIONS 2014

BEKHIT AND DEPARTMENT OF TRANSPORT [2016] WASAT 108
12 SEPTEMBER 2016
MS K WHITNEY (MEMBER)

Online Decision: Click Here

Variation to cancel T extension to motor vehicle driver's licence - Good character of applicant - Conviction for indecent assault on taxi passenger

The applicant held a T extension to his motor vehicle driver's licence entitling him to carry passengers for reward in a taxi. On 4 December 2015, the applicant pleaded guilty to a charge of indecent assault. The offence had been committed against a taxi passenger in the course of the applicant's employment as a taxi driver. The CEO of the Department of Transport cancelled the applicant's T extension on the basis that he was not a person of sufficient good character to hold a T extension. The applicant sought a review of that decision.

The Tribunal was not satisfied on all the evidence (including the evidence of five character witnesses that the applicant was a respected member of his community) that the applicant is of the requisite good character to hold a T extension and affirmed the CEO's decision.

STRATA TITLES ACT 1985 (WA)

CLAY & ORS AND PEARCE & ORS [2016] WASAT 107
20 SEPTEMBER 2016
DR B DE VILLIERS (MEMBER)

Online Decision: Click Here

Strata title - Common property - Delineation of cubic space of a lot - Whether a glass-panel that separates one part-lot from another part-lot is common property - Whether the removal of the glass-panel automatically merged the two part-lots into a single lot

This dispute concerns the proper classification of a glass-panel that comprised an aluminium frame, windows and sliding doors that separated the living area of a lot from the patio-area of the same lot. The respondents had removed the glass-panel without the approval of the strata company. The question was whether the glass-panel was common property or whether it was part of the respective lots. It was conceded by the respondents that if the glass-panel was common property, the approval of the strata company was required for the common property to be destroyed and that no approval had been sought or obtained. The respondents also said that even if it was found that the panel constituted common property, it would be unreasonable for it to be restored.

The Tribunal found that the glass-panel constituted common property, that the applicants had reasonable concerns to lodge the application and to seek the restoration of common property, and that the common property must be restored by the respondents.

PENALTIES IMPOSED BY CONSENT ORDERS IN VOCATIONAL DISCIPLINARY PROCEEDINGS

HEALTH PRACTITIONER REGULATION NATIONAL LAW (WA) ACT 2010

MEDICAL BOARD OF AUSTRALIA AND RAPHAEL GREGORY BLUM (VR 133 of 2016)

Click Here

VETERINARY SURGEON'S ACT 1960

VETERINARY SURGEON'S BOARD OF WESTERN AUSTRALIA AND BEROL GOEDE (VR 79 of 2016)

Click Here

COURT OF APPEAL DECISIONS ON MATTERS APPEALED FROM SAT

GIUDICE -V- LEGAL PROFESSION COMPLAINTS COMMITTEE [2016] WASCA 159

Result: Appeal allowed

Online Decision: Click Here

Decision Appealed:

Jurisdiction: STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA

Coram: JUDGE T SHARP (DEPUTY PRESIDENT), MS S GILLETT (MEMBER), MR C PHILLIPS (SENIOR SESSIONAL MEMBER)

Citation: LEGAL PROFESSION COMPLAINTS COMMITTEE and GIUDICE [2015] WASAT 10

File Number: VR 113 of 2011

NINAN -V- VALUER GENERAL (WA) [NO 2] [2016] WASCA 170

Result: Appeal dismissed

Online Decision: Click Here

Decision Appealed:

Jurisdiction: STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA

Coram: JUSTICE J C CURTHOYS (PRESIDENT)

Citation: NINAN and VALUER GENERAL [2016] WASAT 38

File Number: DR 420 of 2015, DR 421 of 2015

ARISE JOONDALUP PTY LTD -V- LOVEDAY CORP PTY LTD [2016] WASC 286

Result: Leave to appeal refused

Online Decision: Click Here

Decision Appealed:

Jurisdiction: STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA

Coram: MR D AITKEN (MEMBER)

Citation: ARISE JOONDALUP PTY LTD and LOVEDAY CORP PTY LTD [2015] WASAT 92

File Number: CC 1142 of 2014

SAT DECISIONS APPEALED

CIUCU AND VESPECU [2016] WASAT 98

Jurisdiction: STATE ADMINISTRATIVE TRIBUNAL

Coram: MR C RAYMOND (SENIOR SESSIONAL MEMBER)

File Number: CC 1438 of 2015

Online Decision: Click Here

CITY OF WANNEROO AND SCUTTI [2016] WASAT 102

Jurisdiction: STATE ADMINISTRATIVE TRIBUNAL

Coram: MS L EDDY (MEMBER)

File Number: DR 470 of 2015

Online Decision: Click Here

SUPREME COURT APPEAL NOTICES

VIVA ENERGY AUSTRALIA PTY LTD V CONTAMINATED SITES COMMITTEE

Jurisdiction: SUPREME COURT OF WESTERN AUSTRALIA

File Number: GDA 12 of 2016

CIUCU V VESPESCU

Jurisdiction: SUPREME COURT OF WESTERN AUSTRALIA

File Number: GDA 13 of 2016