This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Commercial & Civil stream for the period 1 July 2009 - 30 September 2009. The full text of decisions and reasons can be found on the Tribunal's website at [www.sat.justice.wa.gov.au](http://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.

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### BUILDERS' REGISTRATION ACT 1939 (WA)

**J-CORP PTY LTD AND LEADBITTER [2009] WASAT 168**

1 SEPTEMBER 2009

MR T CAREY (MEMBER)

Building disputes - Review of decision of Building Disputes Tribunal - Declarations that price increases the subject of signed variations not payable - Delay in commencement of building works - Responsibility for delay - Consequences of finding of responsibility under statutory scheme - Whether signed variations...
satisfy 'otherwise agree' exception - Duress claim - Whether duress made out on facts - Effect of 'under duress' notations - Whether economic duress a common law or equitable principle - Whether lack of consideration

The applicant builder sought review of declarations made by the Building Disputes Tribunal that amounts claimed by it by way of variations to the contract prices for the construction of three units were not payable.

The respondent owners relied on a number of arguments to support the affirmation of the declarations, including that the imposition of the price increases was not permitted under the contracts, nor under the relevant statute, the Home Building Contracts Act 1991 (WA). The applicant disagreed, and contended that in any event the variations providing for the price increases, to which the respondents agreed, were enforceable. The respondents submitted that the variations were invalid for duress or lack of consideration.

The Tribunal analysed the provisions of the Home Building Contracts Act 1991 (WA) impacting upon the respondent's claims before considering those claims. It found against the claim pursued in the Building Disputes Tribunal. However, based on its findings on the evidence that the delays to the commencement of works was attributable to the builder, the Tribunal concluded that, on a proper construction of the statute, the terms of the original contracts, including price, continued to apply. In reaching its conclusion, the Tribunal found the variations entered into by the respondents 'under duress' not to satisfy an exception to that consequence in a case where the parties 'otherwise agree'.

The Tribunal refused the application and affirmed the declarations.

AMPEZZO PTY LTD AND FRANKEN [2009] WASAT 109 (S)
30 SEPTEMBER 2009
MR C RAYMOND (SENIOR MEMBER)

Builders' Registration Act 1939 (WA) - Review of decision of Building Disputes Tribunal dismissed - Application for costs by respondent - State Administrative Tribunal Act 2004 (WA) - Effect of written without prejudice offers to settle - Referral to offer made in mediation - Principles to be applied

The respondent to proceedings for the review of a decision of the Building Disputes Tribunal applied for costs following the publication of the Tribunal’s decision dismissing the application for review.

On an application of the principles set out in Lai and Costa [2006] WASAT 117, the Tribunal determined that it was an appropriate matter in which to order costs. Having regard to the circumstances of the proceeding, the Tribunal concluded that the respondent should be awarded its costs reasonably incurred in respect of the application for leave but that no costs should be awarded in respect of the review.

In arriving at this conclusion, the Tribunal held that it was not obliged under the State Administrative Tribunal Rules 2004 (WA) to take into account two written offers of settlement made by the respondent to the applicant, which were more favourable than the Tribunal's order, because the offers did not comply with the Tribunal Rules. Although not obliged to do so, the Tribunal indicated it was in the public interest that non-complying offers of settlement be given careful consideration by the parties and the Tribunal in exercising a discretion on costs. The Tribunal stated that it was appropriate to determine whether it was reasonable for an offeree to reject an offer, and that, in doing so, regard should ordinarily be had to, at least, the following:

a) the stage of the proceeding at which the offer was received;
b) the time allowed for the offeree to consider the offer;
c) the extent of the compromise offered;
d) the offeree's prospects of success, assessed at the date of the offer;
e) the clarity with which the terms of the offer was expressed; and

f) whether the offer foreshadowed an application for costs in the event that it was rejected.

Further, the Tribunal observed that a discretion was retained even when an offer did comply with the Tribunal Rules and that the above criteria may be relevant, together with the nature of the jurisdiction being exercised and the cost rules normally applied to the particular type of case.

The Tribunal concluded that the applicant had not acted unreasonably by not accepting the offers of settlement.

The Tribunal declined to take into account an offer of settlement which was made by the applicant during the course of a mediation conducted in accordance with the Tribunal's directions. The Tribunal held that evidence of the offer was not permitted by virtue of s 55 of the *State Administrative Tribunal Act 2004* (WA).

The Tribunal assessed that the amount of costs to be paid by the applicant to the respondent should be reduced from the amount of $16,845 claimed to an amount of $7,258.

**COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985 (WA)**

**HEAD AND ZIMMERMANN INVESTMENTS PTY LTD [2009] WASAT 61 (S)**
9 JULY 2009
MR T CAREY (MEMBER)

Landlord and tenant - Retail shops - Costs - Exercise of discretion - Assessment of reasonable costs

The lessee of commercial premises succeeded before the Tribunal in relation to three questions referred for determination. He sought an order for his legal costs.

The Tribunal considered the circumstances in which it might be appropriate to exercise its discretion to award costs, and the correct approach to adopt in arriving at the amount of costs to be awarded in a proper case, by reference to its previous decisions. On considering the relevant factors, the Tribunal concluded that the applicant was entitled to a costs order, limited to costs reasonably incurred in relation to the respondent's claim that there was no valid lease currently operating.

Although no bill of costs referable to the particular scale relied upon by the applicant was filed, the Tribunal made its own assessment based upon an itemised account of actual charges and applying a series of discounts. In the result, the respondent was ordered to pay costs of $9,000.

**KWIK 'N' KLEEN PTY LTD ACN 116 534 019 AND SEARS WAINWRIGHT SUPERANNUATION PTY LTD ACN 093 058 685 [2009] WASAT 148**
5 AUGUST 2009
MR T CAREY (MEMBER)

Landlord and tenant - Retail shops - Preliminary issue - Whether the lease is a 'retail shop lease' - Whether the business conducted at the premises is a 'retail shop' - Car wash business

The applicant referred a number of questions arising under its lease with the respondent to the Tribunal. As a precondition of the Tribunal's jurisdiction to determine the questions, it was necessary that the lease was a 'retail shop lease' under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), which turned upon the question of whether the applicant's business, conducted on the leased premises, was a
'retail shop'. This depended, on the facts, on whether or not the premises were used wholly or predominantly for the carrying on of a business involving the sale of goods by retail. The applicant's business conducted at the premises is a car wash business.

The Tribunal considered the construction of the statutory definition by reference to a number of its own earlier decisions and the acknowledged leading Supreme Court authority, *Sharp v O'Driscoll* (unreported, WASC, Library No 970111A-C&S, 21 March 1997). It highlighted the correct characterisation and true nature of the business as being the critical factor. It noted a divergence on the point of construction between the members of the majority in that case, albeit one of less significance than might have appeared at first glance.

The Tribunal applied what it accepted to be the correctly construed definition to the applicant's business and found that it did not fit within it. Neither the automatic car wash nor the manual car wash bays satisfied the required involvement of the sale of goods by retail, whilst the undoubted complying retail sale via vendor machines at the premises was not an essential part of the business. Lacking the necessary jurisdiction to deal with it, the Tribunal dismissed the application.

**CONSUMER CREDIT (WESTERN AUSTRALIA) ACT 1996 (WA)**

**DEPARTMENT FOR CONSUMER AND EMPLOYMENT PROTECTION AND CHEQUECASH PTY LTD [2008] WASAT 168 (S)**

21 JULY 2009

MR T CAREY (MEMBER)

Consumer credit - Preliminary issue - Whether evidence obtained unlawfully should be excluded

The Tribunal was required to determine, as a preliminary issue, whether certain evidence obtained without legal authority should be excluded. It was common ground that in the event of the exclusion of the evidence, the application, which sought a penalty for the breach of key requirements in relation to consumer credit contracts, would be unsustainable.

The Tribunal, guided by comments made by a judge of the Supreme Court on the successful appeal by the respondent against its earlier decision on the application, applied the leading authority regarding exclusion of illegally obtained evidence in the judicial context, *Bunning v Cross* (1978) 141 CLR 54. It found that each of the four factors identified by that authority bearing upon the preliminary issue tended against exclusion of the material. It also found the framework provided by the *State Administrative Tribunal Act 2004* (WA) for the Tribunal's decision-making task to support the same conclusion. Consequently, the Tribunal determined that the material should not be excluded.

**DOG ACT 1976 (WA)**

**CORRIGAN AND SHIRE OF NORTHAM [2009] WASAT 140**

22 JULY 2009

MR C RAYMOND (SENIOR MEMBER)

Dog Act 1976 (WA) - Application for review of decision refusing exemption from local law limiting number of dogs to be kept - Nature of evidence upon which Local Government and Tribunal may act

The applicant applied under s 26(5) of the *Dog Act 1976 (WA)* to review a decision of the respondent. The respondent had decided to refuse an application for exemption from
the limitation on the number of dogs which could be kept on a property in accordance with a local law.

The respondent's rangers, who had investigated the circumstances in which the dogs were being kept, and who had sought comments from neighbours, recommended that the application be granted. The respondent rejected the application on grounds which were inconsistent with, or entirely unsupported by, the information provided to the Council by its officers. On review, no evidence could be provided to support grounds based on recent dog attacks, nor on the basis that the approval would increase the workload on Ranger Services.

The Tribunal had to determine whether the remaining grounds were justified, namely, in effect that the applicants' residential lot was not suitable for the keeping of three dogs and that the impact of keeping three dogs on the applicants' property would have an adverse effect on the lifestyle and amenity of adjoining landowners.

The Tribunal commented generally upon the standard of evidence on which it would be appropriate for a local government and the Tribunal to act in relation to this type of case.

A proper analysis of the material placed before the Council, and before the Tribunal, demonstrated that there was only one objector, whose objection was based primarily on the extent to which the applicants' dogs barked, whereas 11 other neighbouring landowners had no complaint. There was evidence of relationship difficulties between the objector and the applicants. The Tribunal found that, on a balance of probabilities, the dogs did not bark excessively and that, in any event, arrangements had since been made for them to be contained in a fenced area well removed from the objector's property.

The Tribunal also found that the applicants' lot of some 4,741 square metres was much larger than any of the adjoining properties; it had been inspected by the Shire of Northam's rangers who had recommended approval of the application and there was no evidence to suggest that it was in any way inadequate for the keeping of the dogs.

The Tribunal, accordingly, granted the application for review, set aside the respondent's decision and substituted the Tribunal's own decision granting the approval subject to certain conditions.

**FIREARMS ACT 1973 (WA)**

**PENKETH AND COMMISSIONER OF POLICE [2009] WASAT 174**

9 SEPTEMBER 2009

MR T CAREY (MEMBER)

Firearm and ammunition collectors licences under *Firearms Act 1973 (WA)* - Licenses revoked because of charges upon which applicant subsequently convicted - Whether applicant a fit and proper person - Possession and cultivation of cannabis - Possession of unlicensed firearms - Failure to ensure safekeeping of firearms and ammunition - Ameliorating factors - Multiple offences - Applicant's experience with firearms and as captain of rifle club

The applicant's firearm and ammunition collectors licences were revoked by reason of a number of charges arising from the execution of a search warrant which disclosed the presence of cannabis and a hydroponic system for its cultivation, unlicensed firearms and firearms and ammunition stored otherwise than in accordance with the legal requirements. The applicant was subsequently convicted on all charges.

The applicant sought review of the revocation decision on a number of grounds, including his previous good record, a number of factors relied upon to ameliorate the seriousness of the convictions, and the unlikelihood of re-offending.
The Tribunal referred to the provisions of the *Firearms Act 1973* (WA) of relevance, under which the requisite opinion that a person is not a fit and proper person may be formed where within five years previously, the person has been convicted of any offence under the Act. It observed that a discretion exists even where this is the case.

The Tribunal considered the circumstances of the commission of the offences against the principles applying to the significance of past convictions in a determination of whether or not the applicant should be regarded as a fit and proper person. It found that the offences were not ones which should have been entertained by a licensee under the Firearms Act, and particularly by someone who has held the position that the applicant had of captain of a rifle club for a number of years. Despite his indications of intent to not re-offend in the future, the Tribunal considered that further time needed to elapse before any exercise of the discretion favourable to the applicant could occur.

The application for review was refused and the revocation decision was affirmed.

**MARKETING OF POTATOES ACT 1946 (WA)**

**BRKUSICH AND POTATO MARKETING CORPORATION OF WESTERN AUSTRALIA**

[2009] WASAT 161

21 AUGUST 2009

JUSTICE J A CHANEY (PRESIDENT)

Potato marketing - Refusal to accept delivery of potatoes for domestic market - Whether application required for domestic market entitlement - Grower declining to apply for growing area licence

Mr Stephen Brkusich sought certain declarations concerning a refusal by the Potato Marketing Corporation of Western Australia to accept delivery of 45 tonnes of potatoes for sale within the Western Australian domestic market.

The refusal to accept the potatoes was based upon the Potato Marketing Corporation's contention that Mr Brkusich was not entitled to deliver, and the Potato Marketing Corporation was not obliged to accept, his potatoes because he did not hold a current area licence or a domestic market entitlement in relation to the potatoes. Over a period of some months earlier in 2007, Mr Brkusich had been invited to apply for the necessary area licence and domestic market entitlement, but had refused to do so. His refusal arose from a desire to obtain a better price for his potatoes than the general pool price which the Potato Marketing Corporation was prepared to pay.

Mr Brkusich claimed that the Potato Marketing Corporation had erred by declining delivery of the potatoes either because he was entitled to the domestic market entitlement which had been offered to him, or alternatively entitled to deliver them under area licenses and domestic market entitlements of others which Mr Brkusich had applied to have transferred to himself. Those transfers had not been formally approved by the Potato Marketing Corporation.

The Tribunal examined the circumstances leading up to the attempt to deliver the potatoes on 2 October 2007, and concluded that the Board was not obliged to accept the potatoes for the domestic market, and was justified in refusing to do so. Accordingly, Mr Brkusich's application was dismissed.
ROAD TRAFFIC ACT 1974 (WA)

COSTELLO AND DEPARTMENT FOR PLANNING AND INFRASTRUCTURE
[2009] WASAT 188
24 SEPTEMBER 2009
DR B DE VILLIERS (MEMBER)

Taxi licence - First offender - Seriousness of the offence - Conviction for possession and supply of cannabis - Public interest - Can hardship be taken into account - Decision-maker must have reason to believe that the person is not of good character

Mr Costello’s taxi license was cancelled by the Department for Planning and Infrastructure after his conviction of possession of cannabis with the intention to sell and supply. He received an 18 month term of imprisonment suspended for two years.

Mr Costello sought a review of the decision on grounds of his many years experience as a taxi driver, his good record, the hardship he would face if the decision remained and the medical condition of his wife who allegedly used the cannabis.

The Department for Planning and Infrastructure sought for the decision to be affirmed on grounds of the seriousness of the conviction and the statutory requirement that it only need to ‘have sufficient reason to believe’ that Mr Costello was not of good character for the licence to be cancelled. The possession of such a large amount of cannabis reflects adequately on his character for the licence to be revoked. The Department for Planning and Infrastructure also contended that hardship was not a factor that can be taken into account by the Tribunal.

The Tribunal found that from the perspective of the public, Mr Costello's conviction was serious. If a taxi driver is involved in the use, possession and/or supply of cannabis of such a large quantity, it is even more concerning. Members of the public use public transport in good faith and in the expectation that drivers are properly screened and checked by the State authorities. It is also in the interests of other taxi drivers and the industry at large that the public perception of the industry is positive.

In regard to the plea of hardship, the Tribunal concurred with the Department for Planning and Infrastructure that the Tribunal cannot take into account personal hardship in considering the review. Mr Costello should have taken all the risks into account when he decided to accept and deal with such a large quantity of cannabis.

The Tribunal therefore concluded there was sufficient reason to believe that Mr Costello was, due to the serious conviction, not of good character to be licensed as a taxi driver.

The decision to cancel his 'T' driver licence was affirmed and the application for review dismissed.

STRATA TITLES ACT 1985 (WA)

GAWOR AND THE OWNERS OF DAWESVILLE CARAVAN PARK OLD COAST ROAD MANDURAH, STRATA PLAN NO 14644 [2009] WASAT 170
2 SEPTEMBER 2009
MR P MCNAB (MEMBER)

Strata titles - Strata companies and councils - Jurisdiction of Tribunal to intervene in day-to-day management decisions of strata company - Proper form for the bringing of proceedings in such circumstances - Discretionary aspects of Tribunal's determination of applicant's claims - Applicant brought overlapping proceedings in Tribunal - Applicant's claims wide ranging and poorly drafted - Some claims settled in mediation - Procedural steps taken by Tribunal to ensure proper claims identified and particularised - Common property - Allegations of
fraud - Need for proper particulars and caution in the making of allegations of fraud - Allegations of fraud on the purchase of common property not substantiated - Common property purchase may have had irregularities - Transfer registered - Whether Tribunal prevented from considering questions of title to land - Applicant's claims dismissed with common property issue the subject of further proceedings

The applicant, Ms Maria Gawor, is the proprietor of a lot in the Dawesville Caravan Park, which is a strata development.

She had sought the Tribunal's intervention first in 2008 and then in these proceedings in respect of her many disputes, mainly with the strata company which managed the park. These disputes ranged from the quite trivial to very serious allegations of fraud.

The Tribunal was critical of Ms Gawor's presentation of her case which was often unclear, disjointed and uneven. The Tribunal was also critical of her unnecessary use of pejorative language about third parties in her application to the Tribunal.

Apart from one matter (concerning the purchase of additional common property), the Tribunal dismissed her claims either on the ground that the Tribunal lacked jurisdiction to do what she had applied to the Tribunal for, or otherwise upon discretionary grounds. However, it was possible that in respect of some of her claims the applicant could have brought separate proceedings against other proprietors in respect of specific acts, such as the alleged breach of a particular by-law.

However, much of Ms Gawor's attack was on the strata managers who had been appointed by the owners. The Tribunal noted that 'the scope for intervention by the Tribunal in the day to day internal management decisions of a strata company and its council is ... generally quite specific; usually quite limited; and often only available as a last resort'.

On the remaining question, the Tribunal found that allegations of fraud should not have been made concerning the purchase of certain additional common property. However, certain irregularities appeared to have been disclosed, and the Tribunal adjourned this aspect of the case for the parties to make further submissions to the Tribunal.

In particular, there were restrictions on the ability of the Tribunal to deal with questions of title, and this issue would have to be addressed by the parties.

**COBILIS AND THE OWNERS OF CROSSWAYS SHOPPING CENTRE, STRATA PLAN 24889 [2009] WASAT 179**

18 SEPTEMBER 2009

MR T CAREY (MEMBER)

Strata titles - Lot boundaries - Endorsement on sheet of strata plan - Whether applicable to lot not shown on that sheet - Whether lot area as disclosed by the strata plan determinative of the boundaries

The applicants sought the removal of advertising signage from the external surfaces of two walls forming part of the boundary of their strata lot based on their assertion that the external faces formed part of the lot. An order in the nature of a declaration that the applicants are the owners of the external surfaces was also sought. The respondents opposed the application on the basis that the external surfaces were common property and not part of the lot.

The Tribunal considered the meaning of important defined terms under the *Strata Titles Act 1985* (WA) and also the provisions in that Act dealing with vertical boundaries of lots. It was necessary to apply these terms and provisions having regard to the strata plan itself, one sheet of which contained an endorsement to the effect for which the applicants contended, although no such endorsement appeared on the sheet where the applicants’ lot is identified.
The Tribunal found the applicants’ submission that the endorsement applied to their lot to be contrary to the Strata Titles Act 1985 (WA) and not supported by a provision of the Interpretation Act 1984 (WA) upon which they relied. It also rejected an argument based upon the actual area of the lot when compared with the floor area of the lot as disclosed in the strata plan. The application was consequently dismissed.