No. 2021/00314145

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Sydney Registry

DANIELLE DAVIS
Applicant

BRADLEY RONALD HAZZARD, MINISTER FOR HEALTH, NSW
Respondent

APPLICANT'S SUBMISSIONS

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1. The Applicant appeals the decision of the Tribunal at first instance reported as *Davis v Minister for Health* [2021] NSWCATAD 310 (**Decision**). The Decision addressed the question as to whether the Tribunal has jurisdiction over certain directions contained in the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021 (NSW)* (the PHO) given by the Respondent pursuant to s.7 of the *Public Health Act 2010*, and concluded (at [67]):

   […] that s 7(7) of the PH Act does not confer administrative review jurisdiction on the Tribunal in respect of the making of the PHO by the Minister in the exercise of the powers conferred by s 7 of the PH Act, or the decisions of the NNSWLHD pursuant to the direction given to it by the Minister under cl 5 of the PHO.

2. The question for Appeal is whether the learned Member erred in law in determining that s 7(7) of the PH Act does not confer administrative review jurisdiction on the Tribunal in respect of the making of the directions given by the Minister within the PHO in the exercise of the powers conferred by s 7 of the PH Act.

3. First, the Applicant submits that an appeal[1] lies as of right, because:

   (a) the Decision is an internally appealable decision for the purposes of section 80(1) of the *Civil and Administrative Tribunal Act 2013* (**the Act**), being an "administrative review decision" for the purposes of sections 30(2) and 32 of the Act, and in particular, an "ancillary decision" for the purposes of s.80(2)(b) of the Act;

   (b) decisions concerning whether the Tribunal has jurisdiction are specified to be types of ancillary decisions (s.4, definition of "ancillary decision").

   (c) the resolution of the jurisdictional question was made "preliminary to" the Tribunal's orders for dismissal of the application. (s.4, definition of "ancillary decision");

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[1] An appeal "in the strict sense" as identified in *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at [57].

(d) otherwise, any successful application for summary dismissal on the grounds of absence of jurisdiction would negate the operation of s.4 and thereby render the provision meaningless insofar as it deals with jurisdiction;

(e) the provision "any other interlocutory issue before the Tribunal" (s.4(i), definition of "interlocutory decision"), would otherwise catch any "ancillary decision".

4. Alternatively, if leave is required then it should be granted on the basis that the Decision is sufficiently dubious and an issue of principle, a question of general public importance and a clear injustice arises,[2] considering the following contextual matters:

(a) the Decision affects the lives and livelihoods, personal health and safety of potentially thousands of people;

(b) the Decision affects the operation of the public health system and public health generally in NSW;

(c) the Decision imposes a significant cost on the taxpayer;

(d) the prima facie operation of section 7(7) of the PH Act is to render directions made under a PHO reviewable;

(e) the reasoning for the Decision is unclear to say the least, particularly in respect of the construction and application of section 7(7)(b) to the impugned directions; and

(f) the effect of the Decision is to deprive the right to challenge the merits of a decision that displaces the fundamental right or expectation to personal bodily integrity or voluntary and informed consent to invasive medical procedures.

5. Section 7(7) of the PH Act provides:

> (7) An application may be made to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of any of the following decisions--
> (a) any action taken by the Minister under this section other than the giving of a direction by an order under this section,
> (b) any direction given by any such order.

6. The Tribunal's reasoning may be elicited from the following passages:

> Not all decisions made by the Minister in the exercise of the powers conferred by s 7(2) are reviewable. A decision that is an action taken by the Minister in the form of "the giving of a direction by an order" is excluded by s 7(7)(a) from the range of administratively reviewable decisions. (at [52])

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[2] "Only if the decision is attended with sufficient doubt to warrant its reconsideration on appeal will leave be granted. Ordinarily, it is only appropriate to grant leave where there is an issue of principle, a question of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable. It is well established that it is not sufficient merely to show that the trial judge was arguably wrong." *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206, at [28], cited with approval for application to Tribunal internal appeals in *Bell Solar Pty Limited T/as Sunboost v Anderson* [2021] NSWCATAP 278 at [13].

> The Tribunal is not persuaded that s 7(7) confers administrative review jurisdiction on the Tribunal to review the order itself: rather, any such jurisdiction is conferred by s 7(7) of the PH Act in relation to "action" by the Minister, and "any direction given by" an order made under s 7. (at [61])
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> Ms Davis submits that the Tribunal has jurisdiction to review the actions taken by the Minister and the directions given under the order. However, s 7(7)(a) excludes from the administrative review jurisdiction otherwise conferred in relation to action taken by the Minister "the giving of a direction by an order" under s 7. Under the PHO the Minister has given directions: first, in cl 4, to any person who is "a health care worker" not to work, and to provide vaccination evidence; and secondly, in cl 5, to the "responsible person" for a health care worker to take reasonable steps to ensure that that worker complies with cl 4. The giving of those directions is the primary if not the sole function of the PHO; and administrative review of the giving of any of those directions by order is expressly excluded by s 7(7)(a). (at [62])

7. The Applicant accepts that s.7(7)(a) excludes "the giving of a direction by an order" from "any action taken by the Minister" under s.7 (the **exclusion**).

8. However, the Applicant submits that the learned Member overlooked the operation of s.7(7)(b).

   (a) Section 7(7)(b) must perform work that is not ruled out by the exclusion.

   (b) The exclusion applies to Ministerial actions, rather than to orders.

   (c) The formulation, although somewhat artificial, replicates that of s.7(2), which distinguishes between actions and orders in subclauses (a) and (b) respectively.

   (d) The manifest intention of s.7(7) is to distinguish between actions and orders so that directions under orders may be reviewable;

   (e) The impugned provisions of the PHO are indubitably directions under an order, so fall squarely within the latter subsection.

9. It may be inferred that the legislative intention is to exclude review of the orders by way of judicial review in the Tribunal. The Applicant does not, for instance, seek to rely on s.7(7) to challenge the power to make the PHO, or that section 7(2) did not authorise the Minister to give a direction by a PHO, or that the Minister should have given the order in some other form.

10. Further, the reference in s.7(7) to "administrative review" is not intended to limit the operation to orders by assessment of whether they are legislative or administrative in character, but rather by reference to whether the "enabling legislation" provides for an application to be made to the Tribunal for review.[3] In this case, the answer is clearly in the affirmative.

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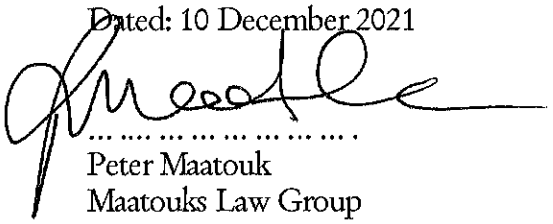
[3] *Kassam v Hazzard; Henry v Hazzard* [2021] NSWCA 299 per Bell P at [76], Leeming JA at [160]

Dated: 10 December 2021



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